Docket: 2014-3959(IT)G

BETWEEN:

MADISON PACIFIC PROPERTIES INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on November 10, 12, 13, 16, 17, 18, 19 and 20, 2020,
February 28, 2022 and March 1, 2, 3, 9, 10 and 11, 2022
and November 17, 2023 at Vancouver, British Columbia

Before: The Honourable Justice David E. Graham

Appearances:

Counsel for the Appellant:	David R. Davies S. Natasha Kisilevsky Tyler Berg
Counsel for the Respondent:	Perry Derksen Dominic Bédard-Lapointe (for all but November 17, 2023) Yanick Houle Eric Brown Erin Krawchuk (on November 17, 2023 only)

JUDGMENT

The appeals of the reassessments of the Appellant's taxation years ending December 31, 2009, December 31, 2011 and August 31, 2013 are dismissed.

Costs are awarded to the Respondent. The parties shall have until February 2, 2024 to reach an agreement on costs, failing which the Respondent shall have until March 1, 2024 to serve and file written submissions on costs and the Appellant

shall have until March 28, 2024 to serve and file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the foregoing time limits, costs shall be awarded to the Respondent as set out in the Tariff.

Signed at Ottawa, Canada, this 27th day of December 2023.

"David E. Graham"

Graham J.

Citation: 2023 TCC 180
Date: 20231227
Docket: 2014-3959(IT)G

BETWEEN:

MADISON PACIFIC PROPERTIES INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Graham J.

[1] This is a loss-trading case. The appeal involves the application of the general anti-avoidance rule (the “GAAR”) to the Appellant’s deduction of net capital losses.

I. Overview

[2] The Appellant was an insolvent, publicly traded, mining company with accumulated non-capital and net capital losses.

[3] Madison Venture Corporation (“Madison”) and its affiliates held a portfolio of rental properties. Vanac Development Corp. (“Vanac”) and its affiliates also held a portfolio of rental properties.

[4] Madison and Vanac arranged a series of transactions that allowed them to access the Appellant’s losses from its mining business. In simple terms, the Appellant’s mining business was spun out and the Appellant was reorganized. Madison and Vanac then transferred various real estate assets into the Appellant and the Appellant began carrying on a new real estate business. The profits of that business were offset by the Appellant’s existing losses.

[5] If Madison and Vanac had acquired control of the Appellant, subsections 111(4) and (5) of the *Income Tax Act* would have prevented the

Appellant from using its mining losses to reduce its profits from its new real estate activities. As a result, Madison and Vanac were careful to ensure that they did not acquire control of the Appellant. They achieved this through the use of non-voting shares. At no point during the series of transactions did Madison and Vanac together acquire *de jure* control of the Appellant. While they together held substantially all of the Appellant's non-voting shares, they held just under half of its voting shares.

[6] In the years in question, the Appellant used its net capital loss carryforwards from its mining business to reduce capital gains from the disposition of its real estate investments. The Minister reassessed the Appellant to deny those losses under the GAAR.

[7] Three conditions must be met for the GAAR to apply:[1]

a) there must have been a tax benefit arising from a transaction or series of transactions;

b) the transaction must have been an avoidance transaction; and

c) the avoidance transaction must be abusive.

[8] The parties agree that there was a series of transactions. That series of transactions included steps where Madison and Vanac received non-voting shares in the Appellant instead of voting shares.

[9] The Respondent submits that the use of the losses was a tax benefit and that the creation and use of the non-voting shares which allowed the Appellant to preserve the losses was an avoidance transaction. The Respondent argues that Madison and Vanac avoided the application of subsection 111(4) in a manner that abused the object, spirit and purpose of the provision and, therefore, that the losses should be denied.

[10] The Appellant submits that there was no tax benefit because the losses would have been preserved even if non-voting shares had not been used. If I find that the Appellant is wrong, then the Appellant concedes that the creation and use of the non-

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[1] *Copthorne Holdings Ltd. v. The Queen*, 2011 SCC 63, at para. 33; *Canada Trustco Mortgage Co. v. The Queen*, 2005 SCC 54, at para. 17; *Deans Knight Income Corp. v. The King*, 2023 SCC 16.

voting shares were an avoidance transaction. However, the Appellant argues that subsection 111(4) was not abused.

[11] For the reasons that follow, I find that the use of the non-voting shares resulted in a tax benefit, that those shares were used primarily to obtain that benefit and that the use of those shares abused subsection 111(4). As a result, I conclude that the GAAR applies.

II. Series of Transactions

[12] The parties filed a Partial Agreed Statement of Facts (attached as Schedule "A"), a Second Partial Agreed Statement of Facts (attached as Schedule "B") and an agreed set of transaction diagrams (attached as Schedule "C").

[13] The parties agree that there was a series of transactions. The following is a description of the steps in that series and the key players.

The Players

[14] The following describes the state of the key players in 1997, immediately before the transactions in issue:

a) The Appellant: The Appellant was a publicly traded company known as Princeton Mining Corporation. The Appellant and its subsidiaries were engaged in the business of mining. As of December 31, 1997, the Appellant had $9,688,703 in non-capital losses and $72,718,480 in capital losses. The Appellant was experiencing serious financial difficulties. It needed new funds to continue its operations. Madison held 1.44% of the Appellant's common shares.

b) Madison Venture Corp: Madison was a privately held holding company with a portfolio of rental properties and investments in private companies. It had been involved in the ownership, construction and management of real estate for approximately 20 years.

c) Sam Grippo: Sam Grippo was the largest shareholder of Madison and the chair of its board of directors.

d) Vanac Development Corp: Vanac was a privately held company owned by two related shareholders. It too had a portfolio of rental properties and

had been involved in the ownership, construction and management of real estate for at least 20 years. Vanac did not carry on any significant activities outside of its real estate business. Vanac owned 3.95% of Madison through a wholly owned subsidiary. Madison and Vanac co-owned at least six properties on a 50/50 basis. They had been involved with each other since sometime in the 1980s.

e) Raymond Heung: Raymond Heung was the principal and controlling shareholder of Vanac.

f) R.E.W. Holdings Ltd: REW was a wholly owned subsidiary of Madison.

g) Imperial Metals Corporation: Imperial was a publicly traded mining company that was interested in acquiring the Appellant's mining assets.

h) James O'Rourke: James O'Rourke was the chair of the board of directors of the Appellant.

i) Shanoro Development Ltd: Shanoro was controlled directly or indirectly by Mr. O'Rourke. It owned 6.02% of the shares of the Appellant.[2]

Step 1: Loan to the Appellant

[15] In October 1997, the Appellant was in a difficult financial position. The Appellant owned 60% of Huckleberry Mines Ltd. An investor group from Japan owned the remaining 40%. Huckleberry was trying to bring a mine into production but was having difficulty doing so. It desperately needed $4,500,000. The Japanese investors could be counted on to provide their share of those funds, but the Appellant had few options to raise its $2,700,000 share.

[16] REW, Vanac and Shanoro formed a syndicate to lend the necessary $2,700,000 to the Appellant. REW and Vanac both contributed $1,250,000 to the syndicate. Shanoro contributed the remaining $200,000. The $2,700,000 advanced to the Appellant was, in turn, advanced by the Appellant to Huckleberry. The partial agreed statement of facts refers to this loan as the "REW Loan". I find this term

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[2] After the share exchange described below, Shanoro held 167,500 Class B voting shares of the Appellant. Those shares were obtained on a share exchange at 0.025 Class B voting shares per old common share. Therefore, Shanoro must have held 6,700,000 common shares of the Appellant. Madison held 1,600,000 common shares. The public held the remaining 102,994,839 shares. The percentage is calculated as follows: 6.02% = (6,700,000 / [6,700,000 + 1,600,000 + 102,994,839]).

misleading as it suggests that the Madison subsidiary, REW, was the sole lender. I will instead refer to the loan as the "Syndicate Loan" and to REW, Vanac and Shanoro as the "Syndicate".

[17] The Syndicate Loan was repayable in six months. The repayment date was the same day that the key steps in the series of transactions were to occur. The Syndicate Loan bore interest at prime plus 2%. There was a 3.5% set-up fee.

[18] The Appellant called Mr. Grippo as a witness. Mr. Grippo testified that REW took part in this loan because it offered an excellent rate of return. He testified that he presented the loan opportunity to Vanac and that Vanac got involved for that same reason.

[19] I did not find Mr. Grippo to be credible. He offered very detailed evidence regarding irrelevant matters but his answers were often vague when it came to important questions. He frequently claimed not to know information that I would have expected him to know. His testimony on key points was contradicted by that of Mr. Heung. Most importantly, many of the explanations that Mr. Grippo offered throughout his testimony simply defied belief. I am referring, in particular, to his insistence that Madison did not enter into the series of transactions to obtain a tax benefit, that he did not know about the losses when the series of transactions began, that he did not know how the relevant share prices were determined and that Madison's primary reasons for entering into the series was to increase liquidity for its shareholders and to obtain ready access to capital markets. These explanations, taken collectively, seriously harmed Mr. Grippo's credibility. Overall, I was left with the impression that Mr. Grippo was prepared to say whatever he believed was necessary to win the appeal. Other than as explicitly set out in these reasons, I give no weight to his evidence.

[20] Neither Madison nor REW was in the money-lending business. Despite Mr. Grippo's assertion that he initially thought the loan would be repaid, I find that lending money to the Appellant would have involved significant risk. The Appellant was on the verge of insolvency. The rate of return offered to the syndicate does not appear commensurate with that risk. The initial term sheet for the Syndicate Loan had the Appellant paying 26.8% interest. Mr. Grippo testified that he had talked Mr. Heung into having Vanac invest on the basis that the return would be about 20%. Mr. Grippo could not provide a plausible explanation as to why the Syndicate reduced the rate in the initial term sheet to prime plus 2% before making the loan. He could not recall any change in the risk that would have explained it. Mr. Grippo's attempts to explain the difference in the rate by referring to the 3.5% set-up fee only

harmed his credibility as that fee existed under both the initial term sheet and the final loan. Ultimately, the reduced rate strongly suggests that the Syndicate made the loan for ulterior reasons.

[21] The Appellant also called Mr. Heung as a witness. Mr. Heung was the only witness called by the Appellant that I found to be generally credible.[3] Mr. Heung testified that Vanac had participated in the Syndicate Loan, not because it wanted to earn interest on a risky loan, but simply because he understood that it was the first step in the overall plan. He knew that the Appellant was in dire financial straits. He was not interested in lending it money. He was interested in getting the deal done. Overall, I found Mr. Heung's testimony on this point to be straight forward and logical. I accept his explanation for the Syndicate Loan.

[22] The Appellant also called Mr. O'Rourke as a witness. Mr. O'Rourke had a good recollection of events and details when discussing the Huckleberry mine, the history of the Appellant and the internal political struggles within the Appellant during this period. On the other hand, he had a poor recollection of anything having to do with the series of transactions and his involvement as a director of the Appellant after the series of transactions. He could remember little about how the Syndicate was formed. He had no idea how the Syndicate determined what Shanoro's share of the loan would be. He knew next to nothing of the terms of the Syndicate Loan and testified that he relied entirely on Mr. Grippo to ensure that they were appropriate. He claims not to have known the details of the reorganization that Madison and Vanac were planning. He was evasive when asked any questions relating to tax losses. He defaulted to what appeared to be a rehearsed non-answer. My overall impression was that Mr. O'Rourke was not a credible witness, that he acted throughout the series of transactions in the interests of Madison and that, after the series of transactions was completed, he acted in the interests of Madison and Vanac on the Appellant's board of directors.

[23] Mr. O'Rourke could not specifically recall why Shanoro was asked to be part of the Syndicate Loan. He believes that it was so that Madison and Vanac would be satisfied that he had "some skin in the game".[4] Mr. Grippo used that same phrase in his testimony. When asked why he asked Shanoro to be involved in the Syndicate Loan, he stated it was because he wanted someone from the Appellant (i.e. Mr.

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[3] I had difficulty with parts of Mr. Heung's testimony regarding Vanac's reasons for entering into the series of transactions.

[4] Trial Transcript, page 892, lines 20 to 26 and page 941, lines 7 to 13.

O'Rourke) to "have some skin in the game".[5] Mr. Grippo and Mr. O'Rourke both testified that they had not discussed their evidence in advance. However, the use of this same expression by both of them left me with some concerns. While it is not an uncommon expression, it seems odd that two witnesses would use it to describe the same transaction 22 years after it occurred.

[24] I accept that Mr. Grippo wanted Mr. O'Rourke to have an interest in the Syndicate Loan, but not for the reasons put forward by Mr. Grippo. Mr. Grippo appears to have wanted me to believe that he wanted Mr. O'Rourke to be involved in the loan because he wanted someone on the inside at the Appellant to make sure that the loan was repaid. I find that Mr. Grippo wanted Mr. O'Rourke to be involved in the loan because the loan was the first step in the series of transactions and Mr. Grippo wanted someone on the inside at the Appellant to make sure that those transactions took place as planned. Because of Shanoro's shareholdings in the Appellant, Mr. O'Rourke would have been both financially motivated to ensure that the series of transactions occurred and in a position to cause Shanoro to vote its shares to ensure that it did.

[25] The Appellant also called Bruce Aunger as a witness. Mr. Aunger was a director and CFO of Madison during the series of transactions and became a director of the Appellant as part of the series. While I found Mr. Aunger to be more credible and forthcoming than Mr. Grippo or Mr. O'Rourke, I still struggled with much of his testimony. He conceded a number of key points that other witnesses resisted conceding but, at the same time, stuck firmly to a number of the same illogical and implausible assertions made by Mr. Grippo. This significantly undermined his credibility.

[26] Mr. Aunger testified that Madison and Vanac had made the Syndicate Loan both to ensure that the series of transactions took place and for the purpose of earning interest income. I accept the former but not the latter. Mr. Aunger's insistence that the term of the Syndicate Loan had been based on how long the Appellant anticipated it would need to repay the loan rather than how long Madison and Vanac expected to need to complete the series of transactions did not enchance his credibility.

[27] The loan agreement itself makes it clear that the Syndicate Loan was inextricably linked to the transactions that followed it. The initial term sheet specifically refers to an arrangement to reorganize the Appellant.[6] The letter

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5 Trial Transcript, page 156, lines 15 to 23.
6 Exhibit C-1, Tab 6, page 42.

agreement which followed the term sheet refers to a reorganization through which the Appellant will move all of its mining assets to a new public company and will then buy assets which it will use to operate a different business.[7] The loan agreement requires the Appellant to use all best efforts to effect a plan under which its share capital will be reorganized, its assets will be spun out to a subsidiary and it will acquire new assets. Schedule "A" to the loan agreement specifically outlines the steps that will be taken.[8] Those steps are the same as Steps 2 to 7 of the series of transactions. Mr. Grippo admitted that the Syndicate never tried to negotiate a loan agreement that did not involve a subsequent reorganization.

[28] The agreement also imposes a 5% "redemption fee" on the Appellant if it fails to receive approval for the reorganization from its shareholders or the relevant authorities. Most importantly, it requires the Appellant to complete the series of transactions even if the Appellant prepays the loan.

[29] The security for the Syndicate Loan was a pledge of 45% of the shares of Huckleberry. That security would be reduced to 25% if Huckleberry achieved certain operational targets. Had the Appellant defaulted on the loan, the Syndicate would have ended up holding shares of a company operating a struggling copper mine. Mr. Heung testified that he had no experience with mining companies and had no desire to be in that business. While Mr. Grippo indicated that he had thought that the mine had potential, I do not believe him. His actions show the opposite to be true. The loan agreement itself contemplated a series of transactions whereby all of the Appellant's mining assets (including Huckleberry) were to be spun out. If Madison was truly interested in investing in the mine, it would presumably not have spun these assets out.

[30] The loan agreement contains a number of negative covenants. One of those covenants prevented the Appellant from selling any of its property without the consent of the Syndicate. While this may not have been an unusual term to include in a loan, in the circumstances, it gave the Syndicate significant power to prevent the Appellant from completing transactions with any rival bidders.

[31] Taking all of the evidence into account, I find that, while the Appellant clearly needed the funds that were advanced under the Syndicate Loan, that was not the purpose of the loan. The purpose of the Syndicate Loan was to set the stage for the series of transactions through which Madison and Vanac would gain access to the

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[7] Exhibit C-1, Tab 7, page 45.
[8] Exhibit C-1, Tab 8, page 69.

Appellant's losses and to give Madison and Vanac power and leverage to ensure that those transactions occurred.

Step 2: Spin-Out

[32] Steps 2 to 8 happened on April 30, 1998. The first transaction was the spinning-out of all of the Appellant's mining assets to a subsidiary called 3396061 Canada Inc. ("New Mining Co.") in exchange for shares, a promissory note and New Mining Co. assuming the Appellant's liabilities (including the Syndicate Loan).

[33] Following the spin-out, the Appellant had no assets or liabilities remaining other than its shares in New Mining Co. and a promissory note receivable from New Mining Co. It was an empty shell with tax losses.

Step 3: Share Restructuring

[34] Following the spin-out, the share capital of the Appellant was amended to create three new classes of shares: Class B voting shares; Class C non-voting shares; and Class A Preferred shares. The Class B voting shares and the Class C non-voting shares were both fully participating. They ranked equally as to the payment of dividends and the distribution of assets on liquidation, dissolution or winding-up. The Class C non-voting share rights included what is commonly referred to as a coattail provision.

[35] As set out in more detail below, I find that the sole reason for the creation of the Class C non-voting shares was to avoid the application of subsections 111(4) and (5) and thus preserve the Appellant's net capital and non-capital losses.

Step 4: Share Exchange, Redemption and Set-Off

[36] The existing shareholders of the Appellant then exchanged their old common shares for Class B voting shares and Class A Preferred shares of the Appellant. They then exchanged their Class A Preferred shares for common shares of New Mining Co. The Appellant redeemed the Class A Preferred shares now held by New Mining Co. and offset the redemption proceeds against the promissory note from Step 2 held by New Mining Co.

[37] It was at this point that the Appellant changed its name from Princeton Mining Corporation to Madison Pacific Properties Inc. The directors of the Appellant were

replaced with preordained nominees of Madison and Vanac including Mr. Grippo and Mr. Heung.

Step 5: Amalgamation and Share Exchange

[38] New Mining Co. then amalgamated with a subsidiary of Imperial to form HML Mining Inc. ("Amalco"). The shareholders of the Appellant then exchanged their shares in Amalco for shares of Imperial.

[39] There was some debate about how early in the series of transactions Imperial was identified as the recipient of the mining assets. While I do not think that much turns on this, based on all of the evidence, I find that Imperial was involved from the beginning. I do not accept Mr. Aunger's evidence that, as far as he was concerned, Imperial simply appeared out of the blue several months after the Syndicate Loan. His insistence on that point hurt his credibility.

[40] To summarize, at this point in the series of transactions, Imperial now owned all of the Appellant's mining assets through Amalco. All of the Appellant's original shareholders had a continuing interest in the mining business through their ownership of shares in Imperial. The Appellant was an empty shell containing nothing but unused tax losses. Its original shareholders held all of its issued shares.

Step 6: Syndicate Loan Repayment

[41] At this point in the series of transactions, Amalco repaid the Syndicate Loan.

Step 7: Vend-In of Real Estate

[42] Now that the Appellant was an empty shell, Madison and Vanac began to take steps to utilize its tax losses. Madison and its affiliates (the "Madison Group") and Vanac and its affiliates (the "Vanac Group") sold the Appellant various real estate assets including all of their jointly owned properties. The Appellant paid for these assets by assuming various liabilities and issuing Class B voting and Class C non-voting shares to the Madison Group and the Vanac Group.

[43] The choice of what class of share and how many of each class to receive was entirely Madison's and Vanac's. Despite the fact that only the Class C shares were non-voting shares, both classes of shares were priced the same. Rather than taking back Class B voting shares, the Madison Group and the Vanac Group both chose to take a mix of Class B voting shares and Class C non-voting shares.

[44] I find that the Madison Group and the Vanac Group specifically chose to receive a mix of Class B voting shares and Class C non-voting shares to ensure that they had insufficient voting shares to together acquire control of the Appellant.[9]

[45] As set out in more detail below, I find that the sole reason that the Madison Group and the Vanac Group chose to receive Class C non-voting shares rather than Class B voting shares was to avoid the application of subsections 111(4) and (5) and thus preserve the Appellant's losses. There is simply no non-tax reason that would justify their actions.

Step 8: Exercise of Options

[46] There were certain properties that Vanac could not sell to the Appellant when the rest of the real estate was sold. Mr. Heung could not specifically recall why this was the case but he believes that Vanac or its affiliates may not yet have completed the acquisition of those properties. As a result, Vanac granted the Appellant options to acquire the properties in the future in exchange for Class C non-voting shares. The granting of these options was the last transaction that happened on April 30, 1998.

[47] One month later, the Appellant exercised the first of the options. For some reason that neither Mr. Grippo nor Mr. Heung was able to explain, despite the fact that Vanac alone had granted the first option, the Appellant paid for the first option by issuing Class C non-voting shares to both Madison and Vanac.[10]

[48] Six months after that, the Appellant exercised the second option. This time, shares were only issued to Vanac.[11]

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[9] Following the Appellant's acquisition of the real estate, the Madison Group held only 22.18% of the Class B voting shares despite owing 43.89% of the Appellant's equity. Similarly, the Vanac Group held only 23.61% of the Class B voting shares despite owning 47.89% of the Appellant's equity. Meanwhile, the pre-existing shareholders of the Appellant held 54.21% of the Class B voting shares despite holding only 8.22% of its equity.

[10] Paragraphs 54(d) and (e) of the Partial Agreed Statement of Facts describes the option that was granted. Paragraph 83 describes what happened when it was exercised. Section 2.3.1.2 of the Vend-In Agreement clearly states that the option was granted by Vanac (Exhibit C-1, Tab 40, page 353).

[11] For some reason that was not explained to me, the number of Class C non-voting shares issued when the option was exercised (1,533,075 shares) was different than the exercise

Step 9: Evening-Up

[49] Madison and Vanac always intended that the interests of Madison and its affiliates and of Vanac and its affiliates in the Appellant would be equal. Two transactions took place in the spring of 1999 to ensure that this "evening-up" occurred.[12]

[50] First, Madison sold additional real estate to the Appellant in exchange for a mix of Class B voting shares and Class C non-voting shares. That transaction left Madison and its affiliates and Vanac and its affiliates holding an equal number of Class B voting shares. However, the number of Class C non-voting shares was still unequal. Madison and Vanac solved this problem by having Madison subscribe for additional Class C non-voting shares.

[51] Following these evening-up transactions, the Madison Group and the Vanac Group together held 46.56% of the votes despite owning 92.82% of the equity and the other shareholders held 53.44% of the votes despite owing only 7.18% of the equity.

[52] I find that any transactions that took place after the evening-up transactions were not part of the series.

Conclusion

[53] Based on all of the foregoing, I find there was a series of transactions that began in October 1997 with the Syndicate Loan and ended in April 1999 with the evening-up of shareholdings. I must now consider whether that series of transactions gave rise to a tax benefit.

III. Tax Benefit

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price described in the option (1,521,175 shares). See Partial Agreed Statement of Facts at para. 54(e) and Exhibit C-1, Tab 105, page 1193.

12 The Appellant submits that the evening-up transactions were not part of the series of transactions. I find that they were. They had clearly been contemplated by both parties as the final step from the outset. That said, nothing turns on this point.

[54] Subsection 245(1) defines a "tax benefit" in part as a reduction, avoidance or deferral of tax. The preservation of tax losses does not, in itself, give rise to a tax benefit. The tax benefit arises when the losses are used.[13]

A. Use of Losses

[55] The Appellant used non-capital loss carryforwards and net capital loss carryforwards from its mining activities to reduce its income and capital gains from its real estate business by the following amounts in the following years:

Tax Year Ending	Non-Capital Loss Carryforwards Claimed	Net Capital Loss Carryforwards Claimed
December 31, 1998	$418,016	
December 31, 1999	$1,082,910	
December 31, 2000	$2,256,375	$347,133
December 31, 2001	$2,976,801	$1,705,743
December 31, 2002	$1,199,429	$4,151,138
December 31, 2003		$254,594
December 31, 2004	$2,437,465	$1,341,068
December 31, 2005	$2,540,311[14]	$546,877
December 31, 2006		$9,478,309
December 31, 2007		$13,200,287
December 31, 2009		$7,539,680
December 31, 2011		$1,156,686
August 31, 2013		$3,773,141

[56] Only the last three taxation years are before me. I mention the losses that the Appellant used in other years because those losses play an important part in the avoidance transaction analysis.

B. Comparison to Alternative Arrangement

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13 *OSFC Holdings Ltd. v. The Queen*, 2001 FCA 260, at para. 42 and *1245989 Alberta Ltd. v. The Queen*, 2018 FCA 114, at para 40.

14 Only part of this loss was carried forward from the mining operations. The balance of the loss arose from the real estate operations in the Appellant's taxation year ending December 31, 2003.

[57] The Respondent submits that the Appellant's use of the losses in the years in question establishes that there was a tax benefit. It is not that simple.

[58] In most situations, the existence of a tax benefit is obvious. However, in some instances, the Court can only determine the existence of a tax benefit by comparing the transactions that took place to an alternative series of transactions that would have been carried out but for the desire to obtain the tax benefit.[15] This is one of those instances.[16]

[59] As they read at the time of the series of transactions, subsections 111(4) and (5) denied the deduction of net capital losses and non-capital losses if there had been an acquisition of control by a person or group of persons. An acquisition of control means an acquisition of *de jure* control. *De jure* control is "the ability, through the ownership of shares, to elect the majority of the board of directors".[17]

[60] The Respondent's position is that the creation and use of the Class C non-voting shares preserved the losses by avoiding an acquisition of control. Following the series of transactions, neither the Madison Group nor the Vanac Group held *de jure* control of the Appellant. They each held only 23.28% of the Class B voting shares. Even if they were viewed as a group, they still did not hold enough shares to have *de jure* control. Therefore, subsections 111(4) and (5) did not apply and the losses continued to be available to the Appellant.

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15 *Canada Trustco Mortgage Co. v. The Queen*, 2005 SCC 54, at para. 20 and *Copthorne Holdings Ltd. v. The Queen*, 2011 SCC 63, at para. 35.

16 With respect, in my view, the analysis of comparator transactions should occur as the first step of the avoidance transaction analysis. This approach was described by Justice Rothstein at para. 17 of *OSFC Holdings Ltd. v. The Queen* (2001 FCA 260). The possibility of a comparator transaction springs from the reference in the definition of "avoidance transaction" to any transaction "that, but for this section, would result, directly or indirectly, in a tax benefit". To determine whether a transaction would or would not result in a tax benefit, the judge first has to have determined what the tax benefit was and what the transaction or series of transactions was. Only then can the judge determine whether a given transaction or transactions resulted in the benefit by analyzing what would have happened had an alternative transaction occurred. All that said, since the Supreme Court has clearly stated that any comparator analysis is to be done as part of the tax benefit analysis, I will consider alternative transactions as part of my tax benefit analysis. This is the same approach that I took in *Bank of Montreal v. The Queen* (2018 TCC 187 [upheld on appeal, 2020 FCA 82]).

17 *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795, 159 D.L.R. (4th) 457.

[61] The Appellant submits that the losses would have been preserved even if the Class C non-voting shares had never been created or issued and thus that the creation and use of the Class C non-voting shares did not result in a tax benefit. The Appellant asserts that, if only Class B voting shares had been issued, there would still not have been an acquisition of control. The Madison Group and the Vanac Group would each have owned 46.41% of the voting shares. Neither of them would have acquired *de jure* control. This is the alternative arrangement that the Appellant argues I should consider. I agree.

[62] The Appellant's argument hinges on its view that the Madison Group and the Vanac Group were not a group of persons that together acquired control of the Appellant. Acquisition of control need not be by a single person. Subsections 111(4) and (5) contemplate acquisition by a group of persons. If the Madison Group and the Vanac Group were a group of persons and they had only received Class B voting shares, they would collectively have acquired 92.82% of the voting shares of the Appellant. There would have been an acquisition of control and the losses would not have been preserved. In that case, it would be clear that the creation and use of the Class C shares resulted in a tax benefit.

[63] Therefore, in order to determine whether there was a tax benefit, I must first determine whether the Madison Group and the Vanac Group were a group of persons.

C. <u>Group of Persons</u>

[64] A group of persons collectively has *de jure* control of a corporation if there is a "sufficient common connection" between them. Examples of a common connection might include "a voting agreement, an agreement to act in concert, or business or family relationships".[18] A simple common identifying feature without a common connection is not enough.

[65] For the purposes of this analysis, it does not matter when the Madison Group and the Vanac Group had the common connection. It is sufficient if they had that connection at some time between the moment that they acquired shares in the Appellant (Step 7) and the end of 2008 (i.e. prior to the first tax year in issue). An

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18 *Silicon Graphics Ltd. v. The Queen*, 2002 FCA 260, at para 36, cited with approval in the context of subsection 111(5) in *Deans Knight* v. *The Queen*, 2021 FCA 160 at para 45.

acquisition of control at any point in that period would have resulted in the losses in question being denied.

[66] I find that the Madison Group and the Vanac Group had a sufficient common connection for me to conclude that they were a group of persons. Their actions before and during the above period support this conclusion.

D. Pre-Existing Business Relationship

[67] Madison and Vanac had a pre-existing business relationship. Vanac had become involved in a newspaper business run by a subsidiary of Madison in the early 1980s. Vanac owned 3.95% of the shares of Madison. My understanding is that it acquired those shares approximately a decade before the series of transactions in exchange for its interest in the newspaper business.

[68] At the time of the series of transactions, Madison and Vanac operated numerous properties as joint ventures. Madison had provided the financing for some of those properties. Those properties were ultimately sold to the Appellant as part of the series of transactions. A big part of the appeal of the series of transactions to Madison and Vanac was that they would merge their real estate businesses. They saw opportunities from working together.

[69] The foregoing is not enough for me to conclude that Madison and Vanac had a common connection. It does, however, illustrate that, coming into the series of transactions, the companies had a history of working together on business ventures and a clear desire to do so in the future.

E. Acting in Concert

[70] The Appellant submits that the Madison Group and the Vanac Group did not act in concert. It characterizes them as having acted in parallel but in their own interests. I disagree.

[71] The Appellant's arguments focus largely on how the Madison Group and the Vanac Group interacted with each other. I accept that the Madison Group and the Vanac Group negotiated the value of the properties that they and their affiliates sold to the Appellant in an arm's length manner. They ensured that each of them received

appropriate value vis-à-vis the other in respect of the properties transferred in.[19] However, the question is not whether the Madison Group and the Vanac Group acted in an arm's length manner when dealing with each other. The question is whether, in dealing with the Appellant and the other shareholders of the Appellant, they acted in concert. I find that they did so in every respect. The following facts support that conclusion.

F. Acting in Concert to Effect the Series of Transactions

[72] The Madison Group and the Vanac Group were not simply two groups of shareholders who happened to own shares in the Appellant. They were two groups with a common business goal who came together to plan and execute a sophisticated series of transactions whereby they would together gain access to the Appellant's losses and effectively control the company.

Negotiations

[73] The series of transactions was negotiated between the Madison Group and the Vanac Group on one side and the Appellant on the other.

[74] Vanac did not hire its own counsel to review the transactions. It relied entirely on Madison's counsel.

Syndicate Loan

[75] As set out above, neither Madison nor Vanac had any desire to lend money to the Appellant. They together made the uneconomic choice to make the Syndicate Loan in order to further their goal of obtaining access to the Appellant's losses.

Share pricing and allocation

[76] One of the most telling examples of the two groups acting in concert is how the share price and allocation were determined.

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[19] Mr. Grippo testified that he and Mr. Heung had a disagreement over the value of certain property. Mr. Heung testified that no such disagreement existed. I prefer the evidence of Mr. Heung, but this does not change the fact that the negotiations occurred at arm's length.

[77] The Madison Group and the Vanac Group agreed to sell assets to the Appellant in exchange for a combination of Class B voting shares and Class C non-voting shares. Those shares were issued at the same price per share despite the fact that the Class B voting shares were clearly more valuable since they were both publicly traded and voting.[20] Despite this difference in value, both the Madison Group and the Vanac Group chose to receive Class C non-voting shares in Steps 7, 8 and 9. If either of the groups had chosen to receive only Class B non-voting shares, the tax benefits would have been lost by both groups. In order for the deal to work, both groups had to agree that they would both receive the lesser class of shares. At the same time, they had to ensure that they received sufficient Class B voting shares that they could, from a practical point of view (as opposed to a *de jure* point of view), elect the board of directors.

[78] It is therefore unsurprising that, as Mr. Heung testified, the Madison Group and the Vanac Group collectively decided how the share consideration they received from the Appellant would be allocated between Class B voting shares and Class C non-voting shares. As he said, they did this because they "were on the same side of the equation".[21] This is exactly the point. They were working in concert on one side of the deal and the Appellant was on the other side.

Evening-Up

[79] Another example of the Madison Group and the Vanac Group acting in concert occurred in the evening-up transactions (Step 9).

[80] The Madison Group and the Vanac Group had agreed from the beginning that they would end up holding equal interests in the Appellant at the end of the series of transactions. The Appellant would not have cared whether this happened. It was Madison and Vanac that wanted the ownership of Class B voting and Class C non-voting shares to be equal. The only way to do that was for them to jointly cause the Appellant to allow Madison to subscribe for additional Class C non-voting shares.

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[20] When the Class C non-voting shares were ultimately listed on the TSX, they traded at a significant discount to the Class B voting shares (Exhibit R-1, Tab 46, pages 900 and 991).

[21] Trial Transcript, page 615, lines 2 to 18.

[81] Buying shares on the open market would have equalized their shareholdings but would not have equalized their contributions to the Appellant since buying shares on the open market would result in money going to the seller not the Appellant.

[82] Madison did not just need to subscribe for additional shares. For the evening-up to work, Madison and Vanac had to cause the Appellant to issue shares to Madison at the same price per share that they had caused it to use one year earlier during the vend-in (Step 7). Subscribing for shares at a different price would not have made Madison's and Vanac's contributions equal. In particular, buying shares at the market price would not have equalized the amount of money that they had each invested in the Appellant as the market price for shares at the time was less than half the price at which the vend-in had occurred.[22] The fact that Madison and Vanac together caused the Appellant to issue shares at a price well above the market price is strong evidence that they were acting in concert.

[83] In addition, as part of the evening-up, Madison paid Vanac interest to account for the fact that Vanac had had more money invested in the Appellant than Madison between the vend-in and the evening-up. This payment shows that Madison and Vanac viewed investing in the Appellant as something that they were doing jointly. Madison owed Vanac for the fact that it had not initially put enough into their common venture.

Summary

[84] In summary, I find that the Madison Group and the Vanac Group acted in concert to effect the series of transactions. These were not two isolated groups of shareholders. They acted together to plan, negotiate and execute the series of transactions. They negotiated with the Appellant as a single unit. They both made an uneconomic loan in order to allow them to control the series of transactions. They both agreed to receive lesser consideration for their real estate. Finally, to even things up, they transacted with the Appellant at prices far in excess of current market prices.

G. Acting in Concert After the Series of Transactions

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22 Madison purchased the shares for $1.006336 per share. Mr. Grippo testified that the Class B voting shares were trading for between $0.40 to $0.50 per share on the open market at the time.

[85] I find that the Madison Group and the Vanac Group continued acting in concert after the series of transactions in order to ensure that they ran the Appellant without ever acquiring *de jure* control of it.

[86] It was clear to me from the overall testimony of all of the witnesses that the Madison Group and the Vanac Group essentially took over the Appellant and ran it for their own purposes. The other shareholders were, for all practical purposes, in the background.

Management

[87] The Appellant moved its offices to Vanac's offices. The Appellant hired Vanac to manage its real estate and provide corporate management services. In other words, the board selected by the Madison Group and the Vanac Group ensured that Vanac would handle all of the Appellant's day-to-day activities. The Appellant paid Vanac a fee for these services. This arrangement continued for two or three years after the series of transactions. I do not doubt that Vanac was well qualified for this role. I am simply highlighting that it could not have taken on this role without the Madison Group's agreement.

Board of directors

[88] Following the series of transactions, the Appellant's board of directors continued to consist of people loyal to Madison and Vanac. Everyone that Madison and Vanac put forward for election to the board was elected.

[89] Mr. O'Rourke had resigned as a director of the Appellant in January 1998 (between Step 1 and Step 2). He was subsequently re-appointed to the board in August 1998, purportedly to satisfy a requirement of the Toronto Stock Exchange that the Appellant have an "independent" director. Mr. Grippo and Mr. Aunger testified that Mr. O'Rourke was selected because he might have been able to offer useful history about the Appellant and its shareholders. I do not believe them. Mr. O'Rourke had no discernable real estate experience. What he brought to the table was loyalty. I find that Mr. O'Rourke was appointed because he was loyal to Madison. He had a long history of working with both Mr. Grippo and Mr. Aunger in a number of different ventures and had specifically worked with them on the series of transactions. I found it particularly telling that, when Mr. O'Rourke resigned as a director of the Appellant in the middle of the series of transactions, he asked Mr. Aunger for input on his letter of resignation.

Delcor transactions

[90] In January 2000, the Appellant purchased a portfolio of real estate from a company called Delcor Holdings Ltd. and some of its affiliates. The series of transactions that allowed this to happen are the strongest example of how the Madison Group and the Vanac Group worked in concert in respect of the Appellant after the series of transactions.

[91] The Appellant paid for Delcor's real estate by assuming liabilities, issuing Class C non-voting shares and issuing a promissory note. The Appellant did not issue any Class B voting shares to Delcor as part of the sale. Yet Madison and Vanac worked together to ensure that Delcor still ended up owning 11.76% of the Class B voting shares.

[92] Mr. Heung testified that the transaction was structured in such a way as to ensure that Delcor received the same proportion of votes to equity that the Madison Group and the Vanac Group had.

[93] The Appellant called Michael Delesalle as a witness. Mr. Delesalle is the controlling shareholder of Delcor. I did not find Mr. Delesalle to be credible. His testimony, particularly on cross-examination, was full of vague generalities to the point of being evasive. He went to lengths to say nothing while appearing to do the opposite. His explanations were both illogical and implausible when he testified regarding two subsequent loss-trading transactions that the Appellant entered into.

[94] Mr. Grippo testified that Delcor insisted on receiving at least 10% of the Class B voting shares of the Appellant in order to ensure that it could receive preferable treatment on any inter-corporate dividends received from the Appellant.

[95] Mr. Delesalle made no mention of having insisted on receiving at least 10% of the Class B voting shares. While I generally did not find Mr. Grippo to be credible, I believe his testimony on this specific point as it closely reflects the percentage of shares that Delcor received and is a logical tax position that a party in Delcor's position would have taken. I accordingly find that Delcor insisted on receiving at least 10% of the Class B voting shares.

[96] Had the Appellant issued Class B voting shares to Delcor to pay for the real estate that Delcor sold to it, then the Class B voting shares held by the Madison Group, the Vanac Group and Delcor would have exceeded 50% of the Appellant's

voting shares.[23] Mr. Heung conceded that neither Delcor, the Madison Group nor the Vanac Group wanted that to happen.

[97] In what was a clear move to avoid an acquisition of control, Delcor entered into a side deal with Madison and Vanac. Pursuant to this side deal, Madison and Vanac sold Delcor enough of their Class B voting shares for Delcor to own 11.8% of the Class B voting shares. As described in more detail below, this sale occurred at a price well above the price at which Class B voting shares were then trading on the open market.

[98] The transactions were structured as follows. Delcor received a promissory note from the Appellant as partial consideration for its sale of real estate. The Appellant repaid part of that promissory note. Delcor used that money to buy Class B voting shares from Madison and Vanac. Madison and Vanac then took the money that they received from Delcor and used it to subscribe for new Class C non-voting shares in the Appellant.

[99] The end result of these transactions was that the money flowed in a circle from the Appellant to Delcor, from Delcor to Madison and Vanac, and then from Madison and Vanac back to the Appellant. Delcor received the voting shares that it wanted. There was no acquisition of control. The number of issued Class B voting shares did not change.

[100] Outside of their tax interests, there would have been no reason for either Madison or Vanac to give up voting shares in this manner. These transactions only made sense if Madison and Vanac were working together to preserve the Appellant's tax losses and they anticipated that, in the future, Delcor would work with them to ensure that, despite having less than *de jure* control, they nonetheless continued to be able to run the Appellant as if they did.

[101] Similarly, there would also have been no reason for Delcor to accept only 11.8% of the Class B voting shares when it owned 25% of Appellant's equity unless

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[23] There were 5,131,627 Class B shares outstanding prior to the Delcor deal (Partial Agreed Statement of Facts, para. 93). To give Delcor 10% of the voting shares, the Appellant would have had to issue an additional 570,181 Class B voting shares to Delcor. That would have left 5,701,808 shares outstanding. The Madison Group would have continued to hold 1,194,628 Class B voting shares as would the Vanac Group. Combined with Delcor's shares, that would have amounted to 52% of the voting shares.

it anticipated that it would work in concert with Madison and Vanac to run the Appellant.

[102] There were four ways that Delcor could have obtained the Class B voting shares that it wanted. It could have received Class B voting shares directly from the Appellant as consideration for the real estate it sold to the Appellant. It could have subscribed for Class B shares. It could have purchased them on the open market. Finally, it could have purchased them from Madison and Vanac.

[103] The first three options would all have resulted in an acquisition of control if the Madison Group, the Vanac Group and Delcor were considered a group of persons. Only the last option avoided this. By structuring the transactions in this manner, Delcor obtained the votes that it wanted, no acquisition of control occurred, the Madison-Vanac-Delcor group retained the same level of voting power that the Madison-Vanac group had previously enjoyed and the Appellant's capital remained the same.

[104] As set out above, the transaction would only have made sense if Madison and Vanac were comfortable that Delcor would work with them going forward. If Delcor would not, then Madison and Vanac would not logically have been willing to give up such a significant share of their collective votes.

[105] However, Madison and Vanac did not even risk the level of control that they had. Their agreement with Delcor contained a provision that would have effectively allowed Madison and Vanac to push Delcor out in 2003 if they did not get along.[24] While the provision gave each party the right to put its shares to the other parties, Mr. Delesalle was clearly not in a financial position to acquire the interests of Madison and Vanac. From a practical point of view, the suggestion that Madison and Vanac were going to put their shares to Delcor would effectively have forced Delcor to instead put its shares to them.

[106] The prices at which the Delcor transactions took place also suggest that the parties were acting in concert. Delcor purchased the Class B shares from Madison and Vanac for a price well in excess of the price at which those shares were trading on the open market. Delcor paid $1.097262 per share. Mr. Delesalle testified that the market price at the time was somewhere between $0.40 and $0.59 per share. Madison and Vanac subscribed for additional Class C non-voting shares at that same inflated price. Unlike the Class B voting shares, the Class C non-voting shares were

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[24] Exhibit R-5, section 4.

not publicly traded. Clearly, non-voting shares that are not publicly traded should be worth less than voting shares. One has to ask why, if they were not working in concert, both Madison and Vanac would make the same uneconomic choice not only to subscribe for non-voting shares instead of buying voting shares on the market, but also to pay more than double the market price for those shares.

[107] Mr. Delesalle explained that the share prices were determined using the same formula that the Madison Group and the Vanac Group had used to determine the share prices when Madison and Vanac sold their real estate to the Appellant. He was unable to describe the formula. His explanations for why Delcor was prepared to pay the price that it did for the Class B voting shares were evasive. Considering that, at the time, this investment represented in excess of 90% of Mr. Delesalle's net worth, I would have expected him to be able to better articulate how the share price was determined. To the extent that a formula existed, I draw an adverse inference from the Appellant's failure to produce it. I find that the Appellant did not produce it because it would have shown that Delcor paid an inflated price in order to gain access to the Appellant's losses.

[108] In summary, the Delcor transactions did not simply involve Madison, Vanac and Delcor. They involved the Appellant. The transactions could not have happened in the manner that the Madison Group and the Vanac Group wanted if they had not worked in concert to cause the Appellant to act in a way that most benefited them.

Summary

[109] On the basis of all of the foregoing, I find that the Madison Group and the Vanac Group continued to act in concert after the series of transactions to manage the Appellant, to control its board of directors, to structure transactions to their benefit and to ensure that there was no acquisition of control.

H. Voting Agreements

[110] I find that there were both formal voting agreements and unwritten understandings in place before and after the series of transactions.

Before the series of transactions

[111] The Madison Group and the Vanac Group structured the series of transactions in such a way that ensured that, although they did not collectively have *de jure* control, following the series of transactions, the entire board of directors nonetheless

would consist of the following individuals nominated by the two groups: Mr. Grippo, Mr. Heung, Mr. Aunger, Richard Benmore and Richard Ilich.

[112] Mr. Grippo's and Mr. Heung's connections to Madison and Vanac are obvious. The following is a summary of the connections of the other three nominees.

[113] Mr. Aunger had strong connections to Madison. Mr. Grippo met Mr. Aunger during the years that they both worked at the accounting firm Arthur Anderson. Mr. Aunger was a tax partner at that firm. He joined Madison in 1988 and immediately purchased shares in the company. During the periods in question, Mr. Aunger was the CFO of Madison and one of its directors. He was in charge of tax and finance matters at Madison and was heavily involved in the series of transactions. Mr. Heung testified that it would be fair to say that Mr. Grippo selected Mr. Aunger to act as a director of the Appellant, although he does not have a specific recollection of that happening.

[114] Mr. Benmore was well known to all of the players. He was a former partner at Arthur Anderson where he had worked with Mr. Grippo and Mr. Aunger. He specialized in tax, finance and mergers and acquisitions. After his time at Arthur Anderson, Mr. Benmore worked for a time at a large real estate company called Daon Development. Mr. Heung worked for the same company from approximately 1978 to 1981. During that period, Mr. Benmore was Mr. Heung's supervisor. At some point before the series of transactions, Mr. O'Rourke hired Mr. Benmore to work for the Appellant.

[115] It was clear from the evidence that Mr. Benmore was heavily involved in the series of transactions but no one seemed to know who he was working for or how he was paid. Mr. Heung testified that Mr. Benmore did not represent Vanac and that Vanac did not pay him for his work on the transactions. He stated that Mr. Aunger would better understand Mr. Benmore's role in the transactions. However, Mr. Aunger contradicted Mr. Heung's testimony. Mr. Aunger said that Mr. Benmore provided financial advice to Vanac and that Vanac paid Mr. Benmore. Mr. Grippo had a different view of Mr. Benmore's involvement. He suggested that Mr. Benmore was working for the Appellant. Mr. O'Rourke confirmed that Mr. Benmore did some consulting for the Appellant around the time of the series of transactions but stated that he was unsure what Mr. Benmore's mandate was.

[116] Mr. Heung was evasive when asked whether he had designated Mr. Benmore as a Vanac representative on the board.

[117] On the basis of all of the evidence, I find that Mr. Benmore was working for Vanac and was Vanac's nominee as a director of the Appellant. Mr. Benmore had closer ties to Vanac than to Madison. Mr. Aunger testified that Mr. Benmore explained the transactions to Mr. Heung. Mr. Heung testified that he deferred to Mr. Benmore's expertise on how the transactions should be structured. Mr. Benmore worked on the series of transactions from Vanac's offices. At some point after April 1998, Mr. Benmore became an employee of Vanac. Mr. Benmore now works for a charitable foundation established by Mr. Heung which holds some of Vanac's former investment in the Appellant.

[118] Mr. Ilich was a real estate developer. Mr. Ilich's father had been a shareholder of Madison since 1991 and had an ongoing business relationship with the company. Mr. Aunger was evasive when asked about this relationship. Mr. Ilich's company had previously borrowed money from a Madison affiliate and had entered into a joint venture with Madison concerning certain property. Madison transferred its interest in that property to the Appellant as part of the evening-up.

[119] Mr. Grippo testified that he could not recall how Mr. Aunger, Mr. Benmore and Mr. Ilich were selected as directors. He described their real estate experience and suggested that that made them suitable for their roles. I do not believe Mr. Grippo. While I do not doubt that these individuals had real estate experience that qualified them for the positions, it is clear to me that they were appointed, not for their real estate experience, but rather because of their loyalty to Madison and Vanac and their involvement in and knowledge of the series of transactions.

Following the series of transactions

[120] Following the series of transactions, the Madison Group and the Vanac Group and parties loyal to them continued to make up the board.[25] The Appellant's witnesses all testified that this was not the result of a voting agreement but, given my general findings regarding those witnesses' credibility, I give little weight to those statements. I prefer to look at the parties' actions. There was no time between the completion of the series of transactions and the years in question where the Appellant's board was not made up entirely of a slate of directors approved by the Madison-Vanac Group or the Madison-Vanac-Delcor Group. No director put forward by those groups was ever rejected.

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[25] I do not accept that Mr. O'Rourke was an "independent" director.

<u>During the Delcor transactions</u>

[121] Mr. Delesalle was particularly evasive when asked whether there was any understanding that Madison, Vanac and Delcor would work together to ensure that the Appellant's board of directors consisted only of nominees acceptable to the group. He agreed that the Madison Group and the Vanac Group agreed to together vote their shares to have him elected to the board as part of the Delcor deal.[26] He also agreed that he was always elected to the board thereafter but said that there was no agreement to do so. I do not believe him. I find that a clear understanding must have existed. In fact, Mr. Aunger testified that Mr. Grippo and Mr. Heung agreed that the Madison Group and the Vanac Group would vote their shares to ensure that Mr. Delesalle continued to be elected as a director.

[122] In addition, as part of the Delcor transaction, the Madison Group and the Vanac Group explicitly agreed that they would vote their shares to cause the Appellant to implement a dividend policy that Delcor wanted.[27]

<u>Summary</u>

[123] In summary, I find that, both before and after the series of transactions, an arrangement was in place that the Madison Group and the Vanac Group (and later Delcor) would collectively determine the makeup of the board of directors and vote in a certain manner.

I. <u>Conclusion</u>

[124] On the basis of all of the foregoing, I find that the Madison Group and the Vanac Group had a sufficient common connection for me to consider them to be a group of persons in respect of the Appellant. For the balance of these reasons for judgment, I will refer to that group of persons as the "Madison-Vanac Group".

[125] Had the Madison-Vanac Group received Class B voting shares instead of Class C non-voting shares, it would have acquired control of the Appellant. By choosing to receive Class C non-voting shares, the Madison-Vanac Group caused the Appellant to obtain a tax benefit. The Appellant was able to deduct net capital

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26 The side deal among the parties specifically contemplates that happening. See Exhibit R-5, section 2.

27 Exhibit R-5, section 3.

losses in the years in question that would have been eliminated had the Class C non-voting shares not been used.

[126] Having concluded that there was a tax benefit, I will now move on to consider whether there was an avoidance transaction.

IV. Avoidance Transaction

[127] A transaction or series of transactions that results in a tax benefit is an avoidance transaction unless it may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.

[128] During oral argument, counsel for the Appellant conceded that, if I find that the Madison Group and the Vanac Group were a group of persons, then the creation and use of the Class C non-voting shares would have been avoidance transactions as the sole purpose for those steps was to preserve the losses.

[129] This is a logical and appropriate concession. After hearing all of the evidence, there is no doubt in my mind that the creation and issuance of the Class C non-voting shares was an avoidance transaction. These steps were undertaken solely for the purpose of preserving the losses.

[130] The Madison-Vanac Group could have received Class B voting shares in exchange for the real estate it sold to the Appellant. It chose instead to receive the bulk of its share consideration in the form of Class C non-voting shares. By the end of the series of transactions, the Madison-Vanac Group owned 92.82% of the equity of the Appellant but held only 46.56% of the votes. A vendor who was not interested in preserving the losses would not have structured the transactions in this manner. Such a vendor would have expected to receive voting shares in proportion to the equity that it had contributed. It certainly would not have expected to own fewer than 50% of the voting shares of the previously empty corporate shell into which it had just transferred tens of millions of dollars in net assets.

[131] As a result of the Appellant's concession, it is unnecessary for me to review the evidence on this issue. I would note, however, that many of my conclusions as to the credibility of the Appellant's witnesses were significantly influenced by the testimony that they gave regarding Madison's and Vanac's intentions in entering into the series of transactions, their claims that they did not know about some or all of the losses when the series of transactions began, their inability to explain how the

prices for the Class B voting and Class C non-voting shares were determined and their explanations of two subsequent transactions in which the Appellant acquired loss companies.[28]

[132] I also think that it is appropriate that I make an explicit finding that Madison and Vanac valued the Appellant's losses at $2,800,000 and that they and the Appellant structured the series of transactions in a way that ensured that the shares of the Appellant held by the existing shareholders would be worth that amount after the series was completed. In other words, the existing shareholders were indirectly compensated for allowing Madison and Vanac to access the Appellant's losses.

[133] Finally, I feel I should state that, despite the testimony of many of the witnesses to the contrary, I find that the series of transactions had nothing to do with giving Madison and Vanac the ability to raise additional capital through a future public offering. Nor did the transactions have anything to do with creating either liquidity (Mr. Grippo's testimony) or illiquidity (Mr. Heung's testimony). The entire purpose of the series of transactions was to get access to the Appellant's losses. When those losses were used up, the Appellant moved on to acquire more losses through other transactions.

V. <u>Abuse</u>

[134] In order to determine whether the creation and issuance of the Class C non-voting shares was an abuse of the Act, I must first determine the object, spirit and purpose of the relevant provisions. Then I must consider whether the transactions abuse that purpose.[29]

A. <u>Object, Spirit and Purpose</u>

[135] The Appellant avoided the application of both subsections 111(4) and (5). However, the years in question involve only subsection 111(4).

[136] In its recent decision in *Deans Knight Income Corporation v. The King*, the Supreme Court of Canada held that the object, spirit and purpose of

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[28] These subsequent transactions have many similarities to the series of transactions including the use of non-voting shares to avoid an acquisition of control. The Minister reassessed the Appellant in respect of these transactions under the GAAR. Those reassessments have been appealed to this Court (appeal numbers 2013-3885(IT)G, 2013-3888([IT)G and 2018-540(IT)G). The appeals have not yet been heard.

[29] *Copthorne Holdings*, at paras. 69 and 71; *Deans Knight* (SCC) at paras. 56 and 57.

subsection 111(5) is to prevent corporations from being acquired by unrelated parties in order to deduct their unused losses against income from another business for the benefit of new shareholders.[30]

[137] The parties agree that there is only one difference between the object, spirit and purpose of subsections 111(4) and (5). Subsection 111(5) permits the deduction of losses if the taxpayer continues to carry on the same or similar business. Subsection 111(4) does not have the same permissive exception. Accordingly, the object, spirit and purpose of subsection 111(4) is somewhat narrower.

[138] Based on the foregoing, I conclude that the object, spirit and purpose of subsection 111(4) is to prevent a corporation from being acquired by unrelated parties in order to deduct its unused net capital losses against new capital gains for the benefit of its new shareholders.

B. <u>The Abuse Analysis is Comparative</u>

[139] Abusive tax avoidance exists "(1) where the transaction achieves an outcome the statutory provision was intended to prevent; (2) where the transaction defeats the underlying rationale of the provision; or (3) where the transaction circumvents the provisions in a manner that frustrates or defeats its object, spirit or purpose."[31]

[140] In *Deans Knight*, after determining the object, spirit and purpose of subsection 111(5), the majority considered whether the company had been fundamentally transformed and what rights and benefits had been obtained by the company who effected the series of transactions.[32]

[141] The Appellant has focused its arguments on comparing its series of transactions to the series of transactions in *Deans Knight*. That is the wrong comparison. The Appellant should have focused on comparing the results of its series of transactions against the rationale of subsection 111(4) and explaining why there was no abuse.

[142] However, the series of transactions in *Deans Knight* is not the only way that loss trading can be abusive.

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30 2023 SCC 16, at paras. 6 and 78.
31 *Copthorne Holdings*, at para. 72.
32 *Deans Knight* at para 123.

[143] *Deans Knight* instructs that the "analysis is comparative: for a provision to be abused under a GAAR analysis, the result that the transactions achieved—transactions which have already been shown to have the primary purpose of avoiding taxes—is assessed against the provision's rationale to determine whether this rationale is frustrated".[33]

[144] The Federal Court of Appeal confirmed this approach in its recent decision in *MMV Capital Partners Inc. v. The King*.[34] It is the approach that I will apply.

C. <u>The Appellant Was Fundamentally Transformed</u>

[145] The series of transactions fundamentally transformed the Appellant and, in doing so, frustrated the rationale of subsection 111(4).

<u>All new assets</u>

[146] The Appellant spun out its existing mining business, leaving an empty corporate shell.

[147] The only thing of value that the Appellant had was its losses. That is what the Madison-Vanac Group bought. By undervaluing the consideration that they received in return for their real estate, the Madison-Vanac Group indirectly paid the Appellant's existing shareholders $2,800,000 for giving them access to those losses.

[148] The Madison-Vanac Group then transferred capital assets to the Appellant. They chose which assets to transfer. They selected assets that would generate income that could be absorbed by the Appellant's non-capital losses and capital gains that could be absorbed by the Appellant's net capital losses.

<u>No more employees</u>

[149] As part of the series of transactions, the Appellant's former employees ceased to be employed by the Appellant. Vanac was hired to manage the business until new employees could be hired.

<u>Entirely new share structure</u>

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33 *Deans Knight* (SCC) at para. 117.
34 2023 FCA 234.

[150] The Appellant's share structure underwent significant changes. It moved from a single class of publicly traded shares to one class of publicly traded voting shares and another class of non-voting shares that were not publicly traded.

Completely new business

[151] The Appellant changed from a financially distressed mining company into a profitable real estate company.

[152] Subsection 111(5) contains an exemption that allows the use of losses in the same or similar business. There is no such exemption in subsection 111(4). The losses are denied whether they are used in the same business or a completely different business. That does not, however, mean that I should not consider the nature of the Appellant's business when considering whether it was fundamentally transformed.

New name

[153] The Appellant changed its name from Princeton Mining Corporation to Madison Pacific Properties Inc.—a name reflecting that of one of its new shareholders.

Fundamentally new shareholders

[154] The shareholders of the Appellant fundamentally changed. After the series of transactions, the Appellant's previous shareholders held only a fraction of its equity. By contrast, the Madison-Vanac Group had acquired 92.82% of the Appellant's equity.

[155] This change goes to the heart of the abuse. As a result of the change in shareholders, substantially all of the benefit of the losses of the mining business were enjoyed by new shareholders.[35] This is completely contrary to the object, spirit and purpose of subsection 111(4).

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35 I acknowledge that Madison was a pre-existing shareholder, having held 1.44% of the shares of the Appellant prior to the series of transactions. This insignificant prior shareholding in no way means that there was any meaningful continuity in the shareholder base. Outside of the GAAR context, subsection 111(4) would deny losses if a 49% shareholder became a 51% shareholder. To find that, within the GAAR context, a

[156] The Appellant argues that its case can be distinguished from *Deans Knight* because in *Deans Knight* the entire shareholder base changed whereas, in the Appellant's case, the existing shareholders continued to hold a small number of shares.

[157] This same argument was made by the taxpayer in *MMV Capital*. In rejecting that argument, the Federal Court of Appeal explained that nothing in *Deans Knight* suggests that a completely new shareholder base is required to find an abuse.[36]

Totally new board

[158] The Appellant's existing board of directors was completely replaced by nominees of the Madison-Vanac Group.

Significant shift in control

[159] The series of transactions resulted in a significant shift in control of the Appellant. Prior to the series of transactions, the Appellant was a widely held public company. No one controlled it. After the series of transactions, for all intents and purposes, the Madison-Vanac group controlled the Appellant. While they did not have *de jure* control, they were able to control the company and they acted as if they controlled the company.

[160] The ownership of the Appellant was structured in a manner that ensured that, unless virtually all of the disparate public shareholders worked together, so long as the Madison-Vanac Group voted their Class B voting shares as a block, they could dictate the makeup of the board and control the company.

[161] When the series of transactions ended, the Madison-Vanac Group held 46.56% of the Class B voting shares. In order for the Madison-Vanac Group not to have almost unfettered control of the Appellant, 93.56% of the remaining shareholders would not only have had to exercise their votes, but would also have had to do so collectively.[37]

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change from a group of shareholders holding 1.44% to 92.82% of the equity did not constitute a fundamental change in shareholdings would be absurd.

36 *MMV Capital* at para. 42.

37 The Madison Group and the Vanac Group together held 2,389,256 of the 5,131,627 issued Class B voting shares. To elect the board, they either needed an additional 176,558 votes (2,565,814 shares were needed for 50% + 1) or needed the shareholders holding

[162] Mr. Aunger admitted that the appeal of having a broad base of shareholders was that it made it easier to avoid an acquisition of control. I think it would be more accurate to say that it made it easier to exercise control over the Appellant without triggering an acquisition of control.

[163] The 1999 annual general meeting is a good demonstration of the practical power that the Madison-Vanac Group held. Shareholders representing 2,959,264 of the 5,131,627 Class B voting shares outstanding attended the meeting. The Madison-Vanac Group represented 2,316,500 of those shares. In other words, they represented 81% of the shares voted at the meeting.[38]

[164] In the unlikely event that other shareholders revolted, the Madison-Vanac Group could simply buy sufficient Class B voting shares on the open market to take *de jure* control.

[165] Share acquisitions made by friendly parties further enhanced the Madison Group's and Vanac Group's power. Mr. Aunger purchased 20,000 Class B voting shares in June 1998. He purchased these shares on the market for approximately $0.55 per share, almost half the price at which Madison and Vanac had acquired their shares just months earlier. Mr. Benmore also purchased 20,000 Class B voting shares on the open market. It is telling that Madison's nominee to the board (Mr. Aunger) and Vanac's nominee to the board (Mr. Benmore) would have each purchased exactly the same number of shares, effectively increasing the indirect power of the two companies while still keeping that power equally divided.

[166] Shanoro acquired an additional 34,179 Class B voting shares on the open market for $0.40 per share in November 1998. Mr. O'Rourke testified that he did not have any agreement as to how Shanoro would vote its shares and that Shanoro may not even have voted. I do not believe him. He was a director of the Appellant. He attended the Appellant's annual general meetings, meetings at which his name was put forward as part of a slate of directors. I do not believe that he did not cause Shanoro to vote its shares at those meetings in favour of that slate.

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those shares not to vote. For the other shareholders to elect the board, 93.56% of them not only needed to vote, but also needed to vote for the same slate of directors (2,565,814 / 2,742,371 shares held by others).

[38] Exhibit C-1, Tab 118, page 1247.

[167] As a result of the above purchases, by the end of the series of transactions, the Madison-Vanac Group and people loyal to them collectively held 51.27% of the Class B voting shares of the Appellant.

[168] In the unlikely event that a third party attempted a hostile takeover of the Appellant which the Madison-Vanac Group and those shareholders loyal to them could not defeat, the Madison-Vanac Group was still protected. The Class C non-voting shares contained a coattail provision which, in the event of a hostile takeover, allowed the Class C non-voting shareholders to convert their shares to Class B shares and put those converted shares to the offeror at the same price.

[169] Based on all of the foregoing, I find that the series of transactions resulted in a fundamental shift in control of the Appellant.

[170] In its abuse analysis, the majority in *Deans Knight* highlighted that, while there had been no acquisition of control, there had been “the functional equivalent of such an acquisition of control” by the company who effected the series of transactions (Matco).[39]

[171] The Appellant argues that subsection 111(4) cannot have been abused because the Madison-Vanac Group did not achieve the same level of control that Matco had in *Deans Knight* — there was no functional equivalent of an acquisition of control.

[172] In *Deans Knight*, the rough equivalent of the Syndicate Loan was an agreement called the Investment Agreement. The Appellant further argues that the contractual rights that Matco had under the Investment Agreement are different than the type of control that the Madison-Vanac Group obtained by owning almost enough shares to have *de jure* control in an otherwise widely held company.

[173] While I accept that Matco had a higher level of control than the Madison-Vanac Group and that that control came from a different source, the majority in *Deans Knight* did not simply replace the Tax Court’s “effective control” test or the Federal Court of Appeal’s “actual control” test with a “functional equivalence” test that must be met for there to have been abuse. The majority highlighted the fact that the functional equivalent of an acquisition of control had occurred. However, they did so, not because it was a new test that had to be met, but rather because it was a

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[39] *Deans Knight* (SCC) at para. 128.

factor that showed how subsection 111(5) had been abused. That is the approach that I have taken above.

Control of the series of transactions

[174] Both parties placed a great deal of emphasis on the control that the Madison-Vanac Group had over the Appellant during the series of transactions as a result of the Syndicate Loan. Neither party was able to satisfactorily explain to me why they viewed this factor as being so important. To me, while the level of control that the Madison-Vanac Group had over the series of transactions is a factor to be considered, it is far less important than the level of control that the Madison-Vanac Group obtained as a result of the series of transactions.

[175] There is no doubt that the Investment Agreement was an important factor in *Deans Knight*. It was both the means by which Matco obtained a high level of control and, through the failure of a minor shareholder to sign it, the means by which Matco avoided an acquisition of control. However, I think it would be a mistake to conclude that such agreements are the key to determining whether there has been an abuse of subsection 111(4).

[176] In the Appellant's case, the Syndicate Loan was the means by which the Madison-Vanac Group controlled the series of transactions, but it was neither the means by which it obtained a significant level of control following the series nor the means by which it avoided an acquisition of control. Both of those things occurred as a result of the creation and use of the Class B voting and Class C non-voting shares.

[177] In my view, *Deans Knight* focused on the Investment Agreement because the shares of *Deans Knight* were widely held following the series of transactions. There was nothing equivalent to the type of control obtained by the Madison-Vanac Group for the Court to consider.

[178] Despite the foregoing, the control that the Madison-Vanac Group had over the series of transactions through the Syndicate Loan is certainly a factor to be considered.

[179] Prior to the series of transactions, the Appellant was in a very difficult financial position. As described in my analysis of Step 1 of the series of transactions, the Syndicate Loan was made for the purpose of laying the groundwork for the series

of transactions and ensuring that Madison and Vanac had a means of causing the Appellant to complete the proposed transactions despite not having *de jure* control.

[180] The Appellant argues that most of the restrictions placed on the Appellant under the Syndicate Loan were the type of restrictions that commercial lenders would regularly impose on a borrower. The problem with this argument is that the members of the Syndicate were not commercial lenders. They had no interest in lending money to the Appellant. Rather, their goal was to ensure that the series of transactions happened. While certain restrictions may have been similar to commercial lending restrictions, they were imposed for an entirely different reason.

[181] In addition, the Syndicate Loan also contained provisions that no commercial lender would ever impose—most notably, terms ensuring that the Appellant and its existing shareholders would complete the series of transactions and that the nominees of the Madison-Vanac Group would be appointed as directors.

[182] Ultimately, the terms of the Syndicate Loan and the financial position of the Appellant ensured that, once the Syndicate made the Syndicate Loan, the Appellant and its existing shareholders had little choice but to see the series of transactions through.

[183] The Syndicate Loan ensured that the Madison-Vanac Group controlled the series of transactions. They chose the Appellant's new share structure. They chose who the Appellant's new directors would be. They chose what new assets the Appellant would buy and what shares they would receive in consideration. They chose whether they would have *de jure* control or not. The Appellant's existing shareholders were essentially along for the ride.

Conclusion

[184] In conclusion, I find that the Madison-Vanac Group fundamentally transformed the Appellant. They caused the company to be stripped of all but its tax losses. They indirectly paid the existing shareholders for access to those losses. They ensured the Appellant had an entirely new capital structure. They structured the series of transactions in a way that ensured they would receive substantially all of the benefit from the application of those losses to a completely new business. Finally, they selected the share compensation that they received in a way that ensured that, absent very unlikely circumstances, they could control the Appellant as if they had *de jure* control without actually taking that control. In summary, they

achieved a result completely contrary to the object, spirit and purpose of subsection 111(4).

D. <u>Subsection 111(4) Was Abused</u>

[185] Subsection 111(4) is supposed to prevent a corporation from being acquired by unrelated parties in order to deduct its unused net capital losses against new capital gains for the benefit of its new shareholders. The series of transactions completely frustrated that purpose. Madison-Vanac Group achieved the exact result that the subsection is supposed to prevent. Therefore, the GAAR must apply.

VI. <u>Reasonable Tax Consequence</u>

[186] The parties agree that, having found that the GAAR applies, the only reasonable tax consequence is to deny the deduction of the net capital losses claimed by the Appellant in the years in question.

[187] Neither party wants me to determine whether the Appellant had a deemed year end on April 30, 1998, so I will not do so.

VII. <u>Conclusion</u>

[188] On the basis of all of the foregoing, the appeals are dismissed.

VIII. <u>Costs</u>

[189] Costs are awarded to the Respondent. The parties shall have until February 2, 2024 to reach an agreement on costs, failing which the Respondent shall have until March 1, 2024 to serve and file written submissions on costs and the Appellant shall have until March 28, 2024 to serve and file a written response.

Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received within the foregoing time limits, costs shall be awarded to the Respondent as set out in the Tariff.

Signed at Ottawa, Canada, this 27th day of December 2023.

"David E. Graham"

Graham J.

Schedule "A"—Partial Agreed Statement of Facts

2014-3959(IT)G

TAX COURT OF CANADA

BETWEEN:

MADISON PACIFIC PROPERTIES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

PARTIAL AGREED STATEMENT OF FACTS

The parties admit the following facts, as well as the relevance and the authenticity of the documents in support thereof, for the purpose of this appeal only. Either party may adduce such further and other evidence relevant to the appeal and not inconsistent with this Statement.

The Appellant – then named Princeton Mining Corporation

1. Rafuse Motors Limited was incorporated on April 30, 1963 under the *Company Act* of Nova Scotia, continued into British Columbia on November 7, 1988 and changed its name to Princeton Mining Corporation (**Princeton**) on November 16, 1988.

2. On February 26, 1990, Princeton was continued under the *Canada Business Corporations Act* and its common shares were listed for trading on the Toronto

Stock Exchange. At all material times, the Appellant was a publicly-traded company.

3. In 1997, Princeton's president was William H. Myckatyn and the chairman of Princeton's board of directors was James C. O'Rourke. The remaining members of Princeton's board of directors were Terence S. Ortslan, Paul B. Sweeney and Robert A. Watts.

Madison Venture Corp.

4. Madison Venture Corp. (**Madison Venture**) was founded by Sam Grippo, along with other shareholders, in or about 1976 with a portfolio of real estate investments and the acquisition of Armature Electric Limited.

5. Sam Grippo and other investors built Madison Venture into a diversified management holding company with a portfolio of rental properties and investments in private companies. Madison Venture controlled and indirectly operated the private companies in which it owned shares.

6. At all material times, Sam Grippo was the president and chief executive officer of Madison Venture.

7. Bruce Aunger was the vice president finance of Madison Venture.

8. At all material times, Madison Venture controlled R.E.W. Holdings Ltd. (**REW**) and Madison Development Corporation (**Madison Development**). Madison Venture had other subsidiaries along with REW and Madison Development.

9. REW was a holding company. REW did not have a history of making loans to unrelated parties but did have a history of making loans to companies within the Madison Venture group of companies.

10. Madison Venture acquired 1,600,000 common shares in Princeton in or about June 1996.

Vanac Development Corp.

11. In 1997, Vanac Development Corp. (**Vanac**) was a private company carrying on a real estate business.

12. At all material times, Raymond Heung was principal and controlling shareholder of Vanac.

13. In particular, in 1998, Raymond Heung held 75% of the voting shares and 40% of the share equity of Vanac. Raymond Heung's mother, Y.C. Hung, held the remaining 25% of the voting shares and 60% of the share equity of Vanac.

14. Raymond Heung was the president and chief executive officer of Vanac.

15. At all material times, Vanac (indirectly through Vanac Equities Ltd.) held 3.95% of the common shares of Madison Venture.

Madison Venture and Vanac Co-Ownership of Certain Properties

16. By February 1998, Madison Venture and Vanac had each been involved in the ownership, construction, and management of real estate properties in the Vancouver area for approximately 20 years.

17. Madison Venture and Vanac co-owned at least six properties on a 50-50 basis prior to April 30, 1998: (i) the Rupert Square I, (ii) the Rupert Square II, (iii) the Cannell Building, (iv) the Nippon Express Building, (v) the Bayview Chateau and (vi) the White Rock Gardens (the **Jointly Owned Real Estate Assets**).

Princeton's Mining Business

18. Princeton and its subsidiaries carried on mining related businesses until April 30, 1998.

19. During 1997, Princeton began to experience financial difficulties. In brief, these difficulties arose as a result of a number of factors, including but not limited to: historically low prices of copper, the collapse of mining equity markets as a

source of funding and the high debt load of its 60% owned subsidiary, Huckleberry Mines Ltd., which owned the Huckleberry mine near Houston, British Columbia.

20. The Japan Group (comprised of Mitsubishi Materials Corporation, Marubeni Corporation, Dowa Mining Co., Ltd. and Furukawa Co., Ltd.) owned the other 40% of Huckleberry Mines Ltd.

21. In October 1997, additional equity of $4.5 million was needed for the ongoing operation of the Huckleberry mine. Princeton's 60% share of the required additional equity was $2.7 million and the Japan Group's share was $1.8 million.

22. In brief, Princeton investigated a number of options during 1997 to solve its impending financial problems. Discussions were held with a significant number of mining companies and a number of current and potentially new investors. These were unsuccessful.

Imperial Metals Corporation

23. In 1997, Imperial Metals Corporation (**Imperial**) was an explorer and developer of natural resource properties and a natural resource producer and its common shares were listed on the Toronto Stock Exchange.

24. In 1997 and 1998, Imperial's president was Pierre Lebel.

25. Imperial had a wholly owned subsidiary, 109781 Canada Ltd. (**Imperial Subco**).

REW Loan to Princeton

26. By letter dated October 1, 1997 (together with a term sheet dated October 2, 1997), Madison Venture wrote to Princeton with respect to a proposed loan to Princeton of $2.7 million, repayable six months from the date of advance. A copy of the letter and term sheet is at Tab 6 of the Common Book.

27. On or about October 14, 1997, Madison Venture and Princeton executed a letter of intent and terms and conditions by which Madison Venture and nominees would advance funds to Princeton. A copy of the letter of intent is at Tab 7 of the Common Book.

28. On October 30, 1997, REW and Princeton entered into a convertible loan in the principal amount of $2.7 million **(REW Loan)**. A copy of the loan agreement is at Tab 8 of the Common Book.

29. Princeton, REW and Huckleberry Mines Ltd. entered into a share pledge agreement dated October 30, 1997. In brief, Princeton pledged certain shares of Huckleberry Mines Ltd. to REW as security for the REW Loan. A copy of the share pledge agreement is at Tab 9 of the Common Book.

30. By consent dated October 30, 1997, the Japan Group consented to Princeton entering into the loan agreement with REW and the pledge by Princeton of its shares in Huckleberry Mines Ltd. A copy of the consent is at Tab 10 of the Common Book.

31. Princeton issued REW a promissory note on October 31, 1997 in respect of the REW Loan. A copy of the promissory note follows the loan agreement copy at Tab 8 of the Common Book.

32. REW, Vanac and Shanoro Development Ltd. (**Shanoro**) entered into a syndication agreement dated October 31, 1997 in respect of the REW Loan. REW contributed $1.250 million, Vanac contributed $1.250 million and Shanoro contributed $200,000 in respect of the REW Loan. A copy of the agreement is at Tab 11 of the Common Book.

33. Shanoro was controlled, directly or indirectly, by James O'Rourke.

34. The REW Loan was finalized on November 4, 1997 and the proceeds were used by Princeton to provide the additional $2.7 million of equity for Princeton's 60%

owned subsidiary, Huckleberry Mines Ltd. An additional $1.8 million of equity was to be provided to Huckleberry Mines Ltd. by the Japan Group, owners of the remaining 40% interest.

35. Prior to entering into the REW Loan, Madison Venture undertook due diligence, including in respect of Princeton's tax account balances.

New Princeton

36. 3396061 Canada Inc. (**New Princeton**) was incorporated on July 25, 1997 under the *Canada Business Corporations Act*. After its incorporation, New Princeton had no business assets or operations until the completion of the transactions described below.

37. As at December 31, 1997, New Princeton was a wholly-owned subsidiary of Princeton, with 15 common shares issued and outstanding.

38. Princeton and New Princeton entered into a memorandum of understanding dated December 31, 1997, whereby Princeton agreed to sell and New Princeton agreed to buy all of Princeton's mining assets. A copy of the memorandum of understanding is at Tab 16 of the Common Book. The agreement was superseded by subsequent agreements and transactions, as described below.

39. Princeton and New Princeton entered into another memorandum of understanding dated December 31, 1997, whereby they agreed to effect an arrangement under the *Canada Business Corporations Act*. A copy of the memorandum is attached at Tab 17 of the Common Book. The agreement was superseded by subsequent agreements and transactions, as described below.

Princeton's Non-Capital Losses and Net Capital Losses

40. At the end of its taxation year ending December 31, 1997, Princeton had a non-capital losses closing balance of $9,688,703 and a capital loss closing balance of $72,718,480.

Additional Steps re REW Loan to Princeton and Other Matters

41. On or about January 8, 1998, an additional 18 million shares of Princeton were approved for listing on the Toronto Stock Exchange (but not issued) in connection with the conversion feature of the REW Loan.

42. By late January 1998, Huckleberry Mines Ltd. needed up to US$5 million of working capital in February 1998 and Princeton did not have the funds to satisfy the debt to REW.

43. On January 31, 1998, James O'Rourke resigned from his position as director and chairman of Princeton's board.

Imperial's Offer of Merger and Reorganization of Princeton

44. As at February 9, 1998, Hamblin Watsa Investment Counsel (**Hamblin Watsa**) managed about 27,288,212 of Princeton's outstanding common shares and $5 million of Princeton's 7% unsecured subordinated convertible debentures. In its capacity as investment counsel, Hamblin Watsa had discretion to vote the Princeton shares that it managed, however, the Princeton shareholders were entitled to terminate the discretion at any time and vote the shares in any manner they saw fit.

45. On February 9, 1998, Imperial obtained Hamblin Watsa's agreement to support Imperial's draft offer of merger with Princeton by voting the Princeton shares over which it had discretion in favour of the merger.

46. On February 11, 1998, Imperial delivered an offer of merger to Princeton. A copy of the offer of merger is at Tab 27 of the Common Book.

47. On February 11, 1998, Imperial obtained the agreement of Madison Venture, REW and Princeton to work together to structure a mutually-acceptable plan of arrangement. A copy of the letter agreement is at Tab 28 of the Common Book.

48. Also on February 11, 1998, Imperial obtained Madison Venture and REW's agreement to use best efforts to structure the transactions without any tax grind or cash tax exposure to Madison, in priority, and to Imperial in relation to the discounting of Princeton debentures. A copy of the letter agreement is at Tab 29 of the Common Book.

49. On February 12, 1998, Imperial and Princeton issued a news release, announcing the merger by way of plan of arrangement. A copy of the news release is at Tab 31 of the Common Book.

50. On March 6, 1998, REW wrote to both Princeton and Imperial to confirm REW's understanding with respect to the repayment of the $2.7 million loan. On the same day, REW wrote to Princeton to respond to Princeton's request that REW return certain Huckleberry Mines Ltd. share certificates held by REW (as security for the REW Loan). Copies of the letters are included at Tab 35 of the Common Book.

Arrangement Agreement & Vend-in Agreement

51. On March 13, 1998, Imperial, Princeton, Imperial Subco and New Princeton entered into an arrangement agreement to effect a plan of arrangement as set out in Exhibit I of the arrangement agreement. A copy of the arrangement agreement is at Tab 37 of the Common Book.

52. In brief, the arrangement transactions were as follows:

a. The assets of Princeton (other than its rights under the vend-in agreement referred to below) would be transferred to New Princeton at fair market value in exchange for New Princeton assuming Princeton's liabilities, the issuance of certain shares of New Princeton and a promissory note;

b. The share capital of Princeton would be reorganized to redesignate the common shares of Princeton as Old Common Shares, cancel the existing Class

A preferred shares and to create new classes of Class B (voting) shares, Class C (non-voting) shares and Class A Preferred shares, each with the rights and restrictions as set out in Schedules I, II and III to Exhibit I;

c. The holders of Old Common shares of Princeton would exchange each of their shares for 0.025 Class B (voting) share (i.e., 1 Class B share for 40 Old Common Shares) and one Class A Preferred share, and the Old Common Shares of Princeton would be cancelled;

d. The holders of Class A Preferred shares of Princeton would exchange their shares for common shares of New Princeton, Princeton would redeem the Class A Preferred shares (then) held by New Princeton and would offset the redemption by returning the promissory note, such that the Class A Preferred shares of Princeton and the promissory note would be cancelled by way of set-off;

e. The name of Princeton would be changed to "Madison Pacific Properties Inc.";

f. The directors of Madison Pacific would be Sam Grippo, Raymond Y.K. Heung, Bruce W. Aunger, Richard C. Benmore and Richard Ilich;

g. New Princeton and Imperial Subco would amalgamate to form "HML Mining Inc." and the holders of New Princeton shares would receive 0.073 Imperial shares for each share of New Princeton;

h. The directors of HML Mining Inc. would be Lany G.J. Moeller, J. Brian Kynoch and Pierre Lebel;

i. Stock options and warrants issued by Princeton would be cancelled and the holders thereof would receive certain options and warrants in Imperial;

j. HML Mining Inc. would repay the REW Loan in full; and

k. Debentures issued by Princeton would be satisfied by repayment in Imperial shares.

53. On March 13, 1998, Princeton, New Princeton, Madison Development and Vanac entered into a vend-in agreement. A copy of the vend-in agreement is at Tab 40 of the Common Book.

54. In brief, under the vend-in agreement, inter alia,

a. Princeton agreed to purchase and Madison Development, as nominee and bare trustee for Madison Venture, and Vanac agreed to sell or cause their respective affiliates to sell, conditional upon and immediately following completion of the arrangement, certain real estate assets as defined in the agreement (the **Real Estate Assets**), including the Jointly Owned Real Estate Assets, for the fair market values thereof as appraised (as set out in Schedule A to the vend-in agreement);

b. Princeton agreed to satisfy the purchase price for the Real Estate Assets by:

    i. assuming the liabilities associated with the Real Estate Assets; and

    ii. issuing to the vendors such number of Class B and Class C shares, at the price of $1.006336 per share, as necessary to satisfy the remainder of the adjusted purchase price;

c. Princeton agreed to effect the transfer of the Real Estate Assets pursuant to s. 85(1) of the *Income Tax Act* (the **Act**);

d. Vanac agreed to grant Princeton options to purchase two additional properties;

e. Princeton agreed to satisfy the purchase price for the two options by issuing 462,072 and 1,533,705 Class C shares, respectively, to Vanac at the price of $1.006336 per share in each case; and

f. Madison Development (for Madison Venture) and Vanac agreed to make a cash injection into Princeton of up to $2.7 million within 60 days of the closing of the vend-in agreement in consideration of which Princeton would issue such number of Class C shares at the price of $1.006336 per share.

55. In the course of the negotiation between Princeton and Madison Development/Vanac, it was agreed that the deemed value to Princeton of the vend-in transaction, and in conjunction with the plan of arrangement, was $2.8 million. Thus, the shareholders of Princeton would end up holding $2.8 million worth of voting shares in Princeton, a corporation owning income producing real estate properties.

56. On March 17, 1998, the board of directors of Princeton approved the arrangement agreement and vend-in agreement. A copy of the minutes of the meeting of the board of directors of Princeton held on March 17, 1998 is at Tab 41 of the Common Book.

57. As at March 19, 1998:

a. Princeton was unable to pay the loan amount of $2.7 million due on April 30, 1998 to REW nor to fund its ongoing working capital needs;

b. Lock-up agreements had been obtained to vote in favour of the arrangement, including the vend-in, from holders of 43 million of Princeton's shares and $6.2 million of debentures;

c. Princeton had 111,294,839 common shares issued and outstanding;

d. Madison Venture owned 1,600,000 common shares of Princeton;

e. Princeton had $9 million principal amount debentures issued and outstanding;

f. The Real Estate Assets to be purchased by Princeton under the vend-in had an appraised value of approximately $70 million and were subject to mortgages of approximately $39 million; and

g. Hamblin Watsa managed 27,255,083 or 24.5% of the common shares of Princeton, on behalf of its clients.

58. On or about March 26, 1998, Princeton filed a notice of annual and special meeting of shareholders and management proxy circular (dated as at March 19, 1998) in respect of the arrangement and vend-in agreements (the **Circular**). A copy of the Circular is at Tab 42 of the Common Book.

59. The March 19, 1998 letter to Princeton security holders, included in the Circular, stated as follows:

> As a result of the Arrangement and the Vend-In transactions, securityholders of Princeton will receive the following:
>
> a) Shareholders
>
> For each Princeton common share, a shareholder will receive 0.073 of one Imperial common share and 0.025 of one Class B Common Share of Princeton (to be renamed Madison Pacific Properties Inc.). The Class B Common Shares received by Princeton shareholders will constitute approximately 8% of the outstanding equity of Madison Pacific Properties Inc. (55% of the voting rights), after giving effect to the transactions contemplated which include the acquisition of real estate assets.
>
> b) Debentureholders
>
> For each $1,000 principal amount of Debentures outstanding, Debentureholders will receive 486.1641 Imperial common shares.
>
> Imperial also has committed to repay the $2.7 million loan due on April 30, 1998 and to provide working capital to fund the merged company.

60. On April 17, 1998, the annual and special meeting of the shareholders of Princeton was convened for the purposes of considering a special resolution to approve the arrangement of Princeton, New Princeton, Imperial and Imperial Subco as set out in the plan of arrangement (the **arrangement resolution**). The arrangement resolution was approved with sufficient votes.

61. The shareholders of Princeton, at the April 17, 1998 meeting of the shareholders, were also asked to consider a resolution for the issuance of shares by Princeton to Madison Development and Vanac, and affiliated companies thereto, who were vending the Real Estate Assets to Princeton as described in the vend-in agreement dated March 13, 1998 (the **vend-in resolution**). The vend-in resolution was approved with sufficient votes.

62. The debenture holders meeting was also convened on April 17, 1998 for the purpose of considering a resolution of the debenture holders approving the arrangement (the **debentureholders resolution**). The debentureholders resolution was approved with sufficient votes.

63. On April 21, 1998, the Supreme Court of British Columbia issued an order approving the arrangement as set out in the Circular. A copy of the Order is at Tab 49 of the Common Book.

64. On April 30, 1998, a certificate of arrangement was issued under the *Canada Business Corporations Act* in respect of the arrangement with the result that the plan of arrangement became effective on April 30, 1998 and the transactions and events set in section 3.1 of the plan of arrangement were deemed to occur. For ease of reference, a copy of the plan of arrangement is at Tab 38 of the Common Book. A copy of the certificate and articles of arrangement is at Tab 55 of the Common Book.

65. As a consequence of the plan of arrangement, Princeton was renamed Madison Pacific Properties Inc.

66. As a result of the plan of arrangement, Princeton's former business was continued through HML Mining Inc. and Madison Pacific commenced to carry on a new unrelated business.

Rights and Restrictions relating to Madison Pacific Shares

67. In accordance with the plan of arrangement, the articles of Madison Pacific were amended to provide for special rights and restrictions to be attached to each of its shares.

68. The special rights and restrictions attaching to Madison Pacific's Class B voting common shares and Class C non-voting shares were set out in Schedule I of the plan of arrangement (**Schedule I**). A copy of Schedule I is at Tab 39 of the Common Book.

69. The Class B voting common shares entitle a holder thereof to one vote for each share held at all meetings of shareholders, other than meetings at which only holders of a specified class or series are entitled to vote.

70. The Class C non-voting shares entitle a holder thereof to receive notice of, attend and be heard at all meetings of shareholders, other than meetings at which only holders of a specified class or series are entitled to vote, but are not entitled to vote at such meetings. The Class C non-voting shares carried "coattail" provisions. A copy of those "coattail" provisions is at Schedule I of Tab 39 of the Common Book.

71. The Class B voting common shares and Class C non-voting shares rank equally with one another as to payment of dividends and the participation in the distribution of assets in the event of liquidation, dissolution and winding-up, subject to the rights, restrictions and conditions attaching to the Class A Preferred Shares.

Madison Pacific and Vend-in Transactions

72. On April 30, 1998, the board of directors of Madison Pacific (formerly known as Princeton before the plan of arrangement)—consisting of Sam Grippo, Raymond Heung, Bruce Aunger, Richard Benmore and Richard Ilich—appointed:

  a. Raymond Heung as Princeton's president and chief executive officer;

  b. Richard Benmore as Princeton's chief financial officer and secretary; and

  c. Thor Olsen as Princeton's vice-president and assistant secretary.

73. At the April 30, 1998 board of directors meeting, the board of directors also:

  a. ratified and confirmed the entering into and execution of the vend-in agreement dated as of March 13, 1998 and approved the purchase of the Real Estate Assets (consisting of 24 commercial industrial properties and two residential properties comprising 93 units), assumption of liabilities by Madison Pacific and the issuance of demand promissory notes to the vendors; and

  b. resolved to enter into a management agreement with Vanac Development for the provision of real estate and corporate management services to Madison Pacific.

74. As at April 30, 1998, MMC Properties Inc. (**MMC**) and Armature Electric Ltd. (**AEL**) were affiliates of Madison Venture (referred to collectively as the **Madison Group**) in the sense that MMC and AEL were directly, or indirectly through one or more intermediaries, controlled by Madison Venture, or by its directors or principals, or were under common control with Madison Venture.

75. As at April 30, 1998, Vanac Properties Ltd. (**VPL**) and 376522 B.C. Ltd. (**376BC**) were wholly owned subsidiaries of Vanac (referred to collectively as the **Vanac Group**).

76. Madison Pacific paid for the Real Estate Assets by issuing, in part, shares based on the net value of the property transferred, after the assumption of certain liabilities. The particulars of the shares issued are as follows:

Vendor	**Net Value**	**Class B voting common shares**	**Class C non-voting shares**
Madison Venture	$12,330,162.03	907,228	11,345,302
MMC	$1,469,817.00	108,391	1,352,172
AEL	$898,409.00	66,253	826,500
Subtotal Madison Group	$14,698,388.03	1,081,872	13,523,974
Vanac	$13,726,676.00	1,194,628	12,445,623
VPL	$1,157,243.50	0	1,149,957
376BC	$1,197,193.00	0	1,189,655
Subtotal Vanac Group	$16,081,112.50	1,194,628	14,785,235
Grand Total:	$30,779,500.53	2,276,500	28,309,209

77. Madison Venture also held 40,000 Class B voting common shares of Madison Pacific as a result of the exchange of its 1,600,000 Old Common Shares of Princeton on a 40 to 1 basis under the plan of arrangement.

78. As a consequence of the plan of arrangement and vend-in agreement, the shareholding of Madison Pacific was as follows:

	Class B voting common shares	**Class C non-voting shares**
Former holders of Old Common Shares (excluding 40,000 held by Madison Venture)	2,742,371 (54.21%)	
Madison Group	1,121,872 (22.18%)	13,523,974 (47.77%)
Vanac Group	1,194,628 (23.61%)	14,785,235 (52.23%)
Total Shares	5,058,871 (100%)	28,309,209 (100%)

79. Following completion of the plan of arrangement and vend-in transaction, Madison Pacific's sole line of business was that of a real estate company, primarily interested in the acquisition, development and management of income producing properties.

80. Following the arrangement, Madison Pacific had no income in any subsequent taxation year from any business formerly carried on by Princeton prior to the arrangement.

81. Prior to the arrangement, the common shares of Princeton were listed on the Toronto Stock Exchange. Concurrent with the completion of the arrangement, on or about April 30, 1998, Madison Pacific filed a listing application with the Toronto Stock Exchange to list the Class B voting common shares.

82. On or about May 12, 1998, the Class B voting common shares were listed for trading under the symbol "MPC". The Class C non-voting shares were not listed at that time. The Class C non-voting shares of Madison Pacific were listed for trading on the Toronto Stock Exchange on September 13, 2007.

83. In May 1998, Madison Pacific exercised one of the options under the vend-in agreement. The purchase price was satisfied by issuance of 462,072 Class C non-voting shares. The transaction closed on May 29, 1998. A total of 231,036 Class C non-voting shares were issued to Vanac and 231,036 Class C non-voting shares were issued to Madison Development in connection with the exercise of the option. A copy of the resolution of directors approving the exercise of the option is at Tab 100 of the Common Book.

84. On October 1, 1998, Vanac, VPL and 376BC amalgamated under the name, Vanac Development Corp. (referred hereinafter as **Vanac**).

85. On or about November 30, 1998, Madison Pacific exercised the second option under the vend-in agreement. The purchase price was satisfied by the issuance

to Vanac of 1,521,175 Class C non-voting shares. A copy of the resolution of directors approving the exercise of the option is at Tab 105 of the Common Book. A copy of the option agreement is at Tab 61 of the Common Book.

86. As at December 31, 1998, Madison Pacific had 5,058,871 issued and outstanding Class B voting common shares and 30,292,456 issued and outstanding Class C non-voting shares as follows:

	Class B voting common shares	Class C non-voting shares
Old Common Shares converted to Class B common shares (excluding 40,000 held by Madison Venture)	2,742,371 (54.21%)	
Madison Group	1,121,872 (22.18%)	13,755,010 (45.41%)
Vanac	1,194,628 (23.61%)	16,537,446 (54.59%)
Total Shares	5,058,871	30,292,456

87. After the plan of arrangement, Vanac managed the business of Madison Pacific under a fee for services contract. Vanac received a property management fee equal to 3% of the gross rental income collected from all tenants. Vanac hired, for its own account, the employees necessary to manage Madison Pacific's properties.

88. Vanac also provided corporate management services to Madison Pacific under a contract whereby Vanac was paid a fee equal to ¾% per annum of the book cost of the properties held by Madison Pacific.

1999

89. In or about February 1999, Madison Venture and Vanac took steps to even up their respective interests in Madison Pacific.

90. In furtherance of the "evening up", pursuant to an agreement dated as of March 1, 1999 Madison Pacific acquired from Madison Venture the remaining 50% interest in a property held as to 50% by Madison Pacific. The transaction was undertaken utilizing s. 85 of the Act. Madison Pacific paid for the additional 50% interest by issuing to Madison Venture 72,756 Class B voting common shares and 696,806 Class C non-voting shares for consideration of $1.006336 per share.

91. On or about April 14, 1999, Madison Venture subscribed for an additional 2,085,629 Class C non-voting shares of Madison Pacific at $1.006336 per share.

92. The funds relating to the issuance of the additional 2,085,629 Class C non-voting shares were used by Madison Pacific to provide interim financing to a joint venture for the acquisition of development properties.

93. As at December 31, 1999, Madison Pacific had 5,131,627 issued and outstanding Class B voting common shares and 33,074,891 issued and outstanding Class C non-voting shares, as follows:

	Class B voting common shares	**Class C non-voting shares**
Old Common Shares converted to Class B common shares (excluding 40,000 held by Madison Venture)	2,742,371 (53.44%)	
Madison Group	1,194,628 (23.28%)	16,537,445 (50.00%)
Vanac	1,194,628 (23.28%)	16,537,446 (50.00%)
Total Shares	5,131,627 (100%)	33,074,891 (100%)

2000

94. In January 2000, Madison Pacific completed the acquisition of a portfolio of income producing properties from Delcor Holdings Ltd. and affiliated companies (**Delcor**). The real estate had an aggregate value of $14.9 million and net equity of $14.2 million, after taking into consideration debt assumed. Madison Pacific

issued 12,303,950 Class C non-voting shares (at $1.097262 per share) as partial consideration for the properties acquired from Delcor.

95. Michael Delesalle, a principal of Delcor, was appointed a director of Madison Pacific in February 2000.

96. Also, in February 2000, Madison Pacific issued 301,644 Class C non-voting shares to an affiliate of Madison Venture and to Vanac (for a total of 603,288 Class C non-voting shares) for cash at a price of $1.097262 per share.

97. As at April 26, 2000, Madison Pacific had issued and outstanding shares that were held as follows:

	Class B voting common shares	**Class C non-voting shares**
Other Class B shareholders	2,621,723 (51.1%)	
Madison Group	1,013,632 (19.7%)	16,839,089 (36.6%)
Vanac	892,984 (17.4%)	16,839,089 (36.6%)
Delcor	603,288 (11.8%)	12,303,950 (26.8%)
Total Shares	5,131,627 (100%)	45,982,129 (100%)

2009 Losses

98. For its taxation year ending December 31, 1998, Madison Pacific had a current year capital loss of $26,802,667 in respect of the disposition of assets under the plan of arrangement and, when combined with Princeton's prior year capital losses, a capital loss closing balance of $99,521,147.

99. Madison Pacific reported net income of $9,225,146 for the taxation year ending December 31, 2009.

100. In computing its taxable income for the taxation year ending December 31, 2009, Madison Pacific deducted a net capital loss of $7,539,680 (capital losses of $15,079,359) carried forward from prior to the completion of the plan of

arrangement, resulting in a capital loss closing balance of $22,565,055 from prior to the completion of the plan of arrangement.

101. A "client copy" of the income tax return filed by Madison Pacific for the 2009 taxation year is at Tab 123 of the Common Book.

2011 Losses

102. Madison Pacific reported net income of $1,344,527 for the taxation year ending December 31, 2011.

103. In computing its taxable income for the taxation year ending December 31, 2011, Madison Pacific deducted a net capital loss of $1,156,686 (capital losses of $2,313,371) carried forward from prior to the completion of the plan of arrangement, resulting in a capital loss closing balance of $20,251,688 from prior to the completion of the plan of arrangement.

104. A "client copy" of the income tax return filed by Madison Pacific for the 2011 taxation year is at Tab 127 of the Common Book.

Change of Fiscal Period

105. On or about August 9, 2012, Madison Pacific changed its fiscal period from December 31 to August 31.

2013 Losses

106. Madison Pacific reported net income of $6,615,944 for the taxation year ending August 31, 2013.

107. In computing its taxable income for the taxation year ending August 31, 2013, Madison Pacific deducted a net capital loss of $3,773,141 (capital losses of $7,546,281) carried forward from prior to the completion of the plan of arrangement, resulting in a capital loss closing balance of $12,705,407 or a net

capital loss closing balance of $6,352,703.50 from prior to the completion of the plan of arrangement.

108. A "client copy" of the income tax return filed by Madison Pacific for the 2013 taxation year is at Tab 135 of the Common Book.

Reassessments

109. By notices of reassessment dated July 16, 2014, the Minister of National Revenue reassessed Madison Pacific for the taxation years ending December 31, 2009, December 31, 2011 and August 13, 2013 to disallow the net capital losses claimed in the amounts of $7,539,680, $1,156,686 and $3,773,141, respectively (the **reassessments**).

110. Madison Pacific objected to the reassessments by notices of objection dated August 1, 2014.

DATED at the City of Vancouver, the Province of British Columbia, this 28th day of October, 2020.

Thorsteinssons LLP

27th Floor, Three Bentall Centre
595 Burrard Street
Vancouver, British Columbia
V7X 1J2

Per : David Davies, Natasha Reid & Tyler Berg

Tel: (604) 397-3045
Fax: (604) 397-3410

Solicitor for the Appellant

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
National Litigation Sector
British Columbia Regional Office
900 – 840 Howe Street
Vancouver, British Columbia
V6Z 2S9

Per: Perry Derksen, Yanick Houle, Dominic Bédard-Lapointe & Eric Brown

Tel: (604) 775-6017
Fax: (604) 666-2214

Solicitor for the Respondent

Schedule "B"—Second Partial Agreed Statement of Facts

C4

TAX COURT OF CANADA
COUR CANADIENNE DE L'IMPÔT
NAME / NOM: Madison Pacific Properties Inc.
EXHIBIT / PIÈCE: C4
DATE: November 13, 2020
Allister Flojo
COURT REGISTRAR - GREFFIER DE LA COUR
N° 2014-3959(IT)G

2014-3959(IT)G

TAX COURT OF CANADA

BETWEEN:

MADISON PACIFIC PROPERTIES INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

SECOND PARTIAL AGREED STATEMENT OF FACTS

The parties admit the following facts, as well as the relevance and the authenticity of the documents listed in paragraph 22 hereof, for the purpose of this appeal only. Except with respect to the subject-matter of paragraphs 11-21 herein, either party may adduce such further and other evidence relevant to the appeal and not inconsistent with this Statement. For greater certainty, nothing precludes the parties from examining witnesses with respect to the matters at paragraphs 11-21.

The Appellant – Tax Attributes Claimed

1. For its taxation year ending December 31, 1998, the Appellant deducted a non-capital loss of $418,016 carried forward from prior to the Princeton Mining Corporation plan of arrangement and vend-in completed on April 30, 1998 (**Princeton Arrangement**), per its Schedule 4, a printout of which is attached as **Tab 1**, filed with the Appellant's T2 income tax return for the year.

2. For its taxation year ending December 31, 1999, the Appellant deducted a non-capital loss of $1,082,910 carried forward from prior to the Princeton Arrangement per its Schedule 4, a printout of which is attached as **Tab 2**, filed with the Appellant's T2 income tax return for the year.

3. For its taxation year ending December 31, 2000, the Appellant:

   a. deducted a non-capital loss of $2,256,375 carried forward from prior to the Princeton Arrangement per its Schedule 4, a printout of which is attached as **Tab 3**, filed with the Appellant's T2 income tax return for the year; and

   b. deducted a net capital loss of $347,133 carried forward from prior to the Princeton Arrangement to offset the taxable capital gain from the disposition of the property listed in its Schedule 6, a printout of which is attached as **Tab 4**, filed with the Appellant's T2 income tax return for the year.

4. For its taxation year ending December 31, 2001, the Appellant:

   a. deducted a non-capital loss of $2,976,801 carried forward from prior to the Princeton Arrangement per its Schedule 4, a printout of which is attached as **Tab 5**, filed with the Appellant's T2 income tax return for the year; and

   b. deducted a net capital loss of $1,705,743 carried forward from prior to the Princeton Arrangement to offset the taxable capital gains from the disposition of the properties listed in its Schedule 6, a printout of which is attached as **Tab 6**, filed with the Appellant's T2 income tax return for the year.

5. For its taxation year ending December 31, 2002, the Appellant:

   a. deducted a non-capital loss of $1,199,429 carried forward from prior to the Princeton Arrangement per its Schedule 4, a printout of which is attached as **Tab 7**, filed with the Appellant's T2 income tax return for the year; and

b. deducted a net capital loss of $4,151,138 carried from prior to the Princeton Arrangement to offset the taxable capital gains from the disposition of the properties listed in its Schedule 6, a printout of which is attached as **Tab 8,** filed with the Appellant's T2 income tax return for the year.

6. For its taxation year ending December 31, 2003, the Appellant deducted a net capital loss of $254,594 carried forward from prior to the Princeton Arrangement, per its Schedule 4, to offset the taxable capital gains from the disposition of the properties listed in its Schedule 6, printouts of which are attached respectively as **Tab 9** and **Tab 10**, filed with the Appellant's T2 income tax return for the year.

7. For its taxation year ending December 31, 2004, the Appellant:

a. deducted a non-capital loss of $2,437,465 part of which was carried forward from prior to the Princeton Arrangement per its Schedule 4, a printout of which is attached as **Tab 11**, filed with the Appellant's T2 income tax return for the year; and

b. deducted a net capital loss of $1,341,068 carried forward from prior to the Princeton Arrangement to offset the taxable capital gains from the disposition of the properties listed in its Schedule 6, a printout of which is attached as **Tab 12**, filed with the Appellant's T2 income tax return for the year.

8. For its taxation year ending December 31, 2005, the Appellant:

a. deducted a non-capital loss of $2,540,311 and had thereafter a non-capital loss balance of nil, per its Schedule 4, a printout of which is attached as **Tab 13**, filed with the Appellant's T2 income tax return for the year; and

b. deducted a net capital loss of $546,877 carried forward from prior to the Princeton Arrangement to offset the taxable capital gains from the disposition

of the properties listed in its Schedule 6, a printout of which is attached as **Tab 14**, filed with the Appellant's T2 income tax return for the year.

9. For its taxation year ending December 31, 2006, the Appellant deducted a net capital loss of $9,478,309 carried forward from prior to the Princeton Arrangement, per its Schedule 4, to offset the taxable capital gains from the disposition of the properties listed in its Schedule 6, printouts of which are attached respectively as **Tab 15** and **Tab 16**, filed with the Appellant's T2 income tax return for the year.

10. For its taxation year ending December 31, 2007, the Appellant deducted a net capital loss of $13,200,287 carried forward from prior to the Princeton Arrangement, per its Schedule 4, to offset the taxable capital gains from the disposition of the properties listed in its Schedule 6, printouts of which are attached respectively as **Tab 17** and **Tab 18**, filed with the Appellant's T2 income tax return for the year.

MP Western Properties Inc. – Tax Attributes Claimed

11. For its taxation year ending December 31, 2006, MP Western Properties Inc. (**MP Western**) deducted a non-capital loss of $6,122,620 carried forward from prior to the Fuel Cell Technologies Corporation plan of arrangement and vend-in completed on April 1, 2006 (**Fuel Cell Arrangement**), per its Schedule 4, a printout of which is attached as **Tab 19**, filed with MP Western's T2 income tax return for the year.

12. For its taxation year ending December 31, 2007, MP Western deducted a non-capital loss of $2,492,299, SR&ED expenditures of $452,085 and investment tax credits of $65,587 from prior to the Fuel Cell Arrangement, per its Schedules 4, T661 and 31, printouts of which are attached respectively as **Tab 20**, **Tab 21** and **Tab 22**, filed with the MP Western's T2 income tax return for the year. MP Western had thereafter a SRED expenditure closing balance of nil.

13. For its taxation year ending December 31, 2008, MP Western deducted a non-capital loss of $9,509 and had thereafter a non-capital loss closing balance of nil and an investment tax credit closing balance of $111,395, per its Schedules 4 and 31, printouts of which are attached respectively as **Tab 23** and **Tab 24**, filed with the MP Western's T2 income tax return for the year.

1073774 Properties Inc. – Tax Attributes Claimed

14. For its taxation year ending December 31, 2007, 1073774 Properties Inc. (**1073774**) deducted a non-capital loss of $1,026,741 from prior to the Fuel Cell Arrangement per its Schedule 4, a printout of which is attached as **Tab 25**, filed with 1073774's T2 income tax return for the year.

15. For its taxation year ending December 31, 2008, 1073774 deducted a non-capital loss of $3,764,794 from prior to the Fuel Cell Arrangement per its Schedule 4, a printout of which is attached as **Tab 26**, filed with 1073774's T2 income tax return for the year.

16. For its taxation year ending December 31, 2009, 1073774 deducted a non-capital loss of $12,729,332 and SR&ED expenditures of $3,610,779 from prior to the Fuel Cell Arrangement per its Schedules 4 and T661, printouts of which are attached respectively as **Tab 27** and **Tab 28**, filed with 1073774's T2 income tax return for the year.

17. For its taxation year ending December 31, 2010, 1073774 deducted a non-capital loss of $1 and SR&ED expenditures of $4,234,033, and had thereafter a non-capital loss closing balance of $621 and a SR&ED expenditure closing balance of nil, per its Schedules 4 and T661, printouts of which are attached respectively as **Tab 29** and **Tab 30**, filed with 1073774's T2 income tax return for the year.

Metro Vancouver Properties Corp. – Tax Attributes Claimed

18. For its taxation year ended April 30, 2010, Metro Vancouver Properties Corp. (**Metro Vancouver**) deducted a non-capital loss of $5,875,242 from prior to the BioWest Therapeutics Inc. plan of arrangement and vend-in completed on March 19, 2010 (**BioWest Arrangement**), per its Non-Capital Loss Continuity Workchart, a printout of which is attached as **Tab 31**, filed with Metro Vancouver's T2 income tax return for the year.

19. For its taxation year ending December 31, 2011, Metro Vancouver deducted a non-capital loss of $6,340,523 from prior to the BioWest Arrangement, per its Schedule 4, a printout of which is attached as **Tab 32**, filed with Metro Vancouver's T2 income tax return for the year.

20. For its taxation year ending August 31, 2012, Metro Vancouver deducted a non-capital loss of $1,919,952 from prior to the BioWest Arrangement per its Schedule 4, a printout of which is attached as **Tab 33**, filed with Metro Vancouver's T2 income tax return for the year.

21. For its taxation year ending August 31, 2013, Metro Vancouver deducted a non-capital loss of $3,295,918 from prior to the BioWest Arrangement per its Schedule 4, a printout of which is attached as **Tab 34**, filed with Metro Vancouver's T2 income tax return for the year.

Documents By Consent – Subsequent Transactions

22. The parties agree that the following documents may be admitted into evidence from Exhibit R-1: Tabs 23, 25, 31, 35, 39, 44, 55, 56, 60, 61, 75, 76, 77 and 78. The parties also agree to the relevance and authenticity of five additional documents: (i) a T2057 election by the Appellant and MP Western; (ii) a T2059 election by MP Western and MPW Properties Partnership; (iii) and a T2059 election by MP Western and MPW Properties Partnership; (iv) a T2057 election

by the Appellant and Metro Vancouver; (v) a T2057 election by 1073774 and Metro Vancouver.

DATED at the City of Vancouver, the Province of British Columbia, this 13th day of November, 2020.

Thorsteinssons LLP

27th Floor, Three Bentall Centre
595 Burrard Street
Vancouver, British Columbia
V7X 1J2

Per : David Davies,
Natasha Kisilevsky & Tyler Berg

Tel: (604) 397-3045
Fax: (604) 397-3410

Solicitor for the Appellant

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
National Litigation Sector
British Columbia Regional Office
900 – 840 Howe Street
Vancouver, British Columbia
V6Z 2S9

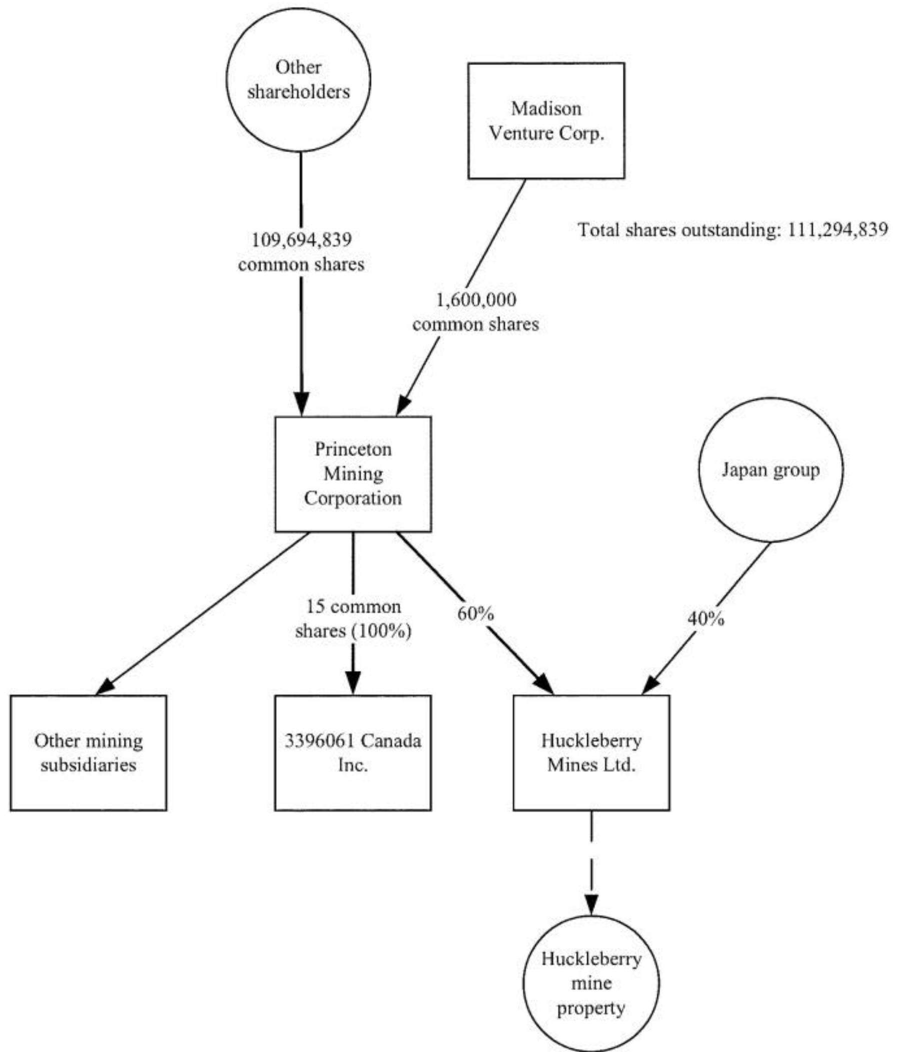
Per: Perry Derksen, Yanick Houle,
Dominic Bédard-Lapointe & Eric Brown

Tel: (604) 775-6017
Fax: (604) 666-2214

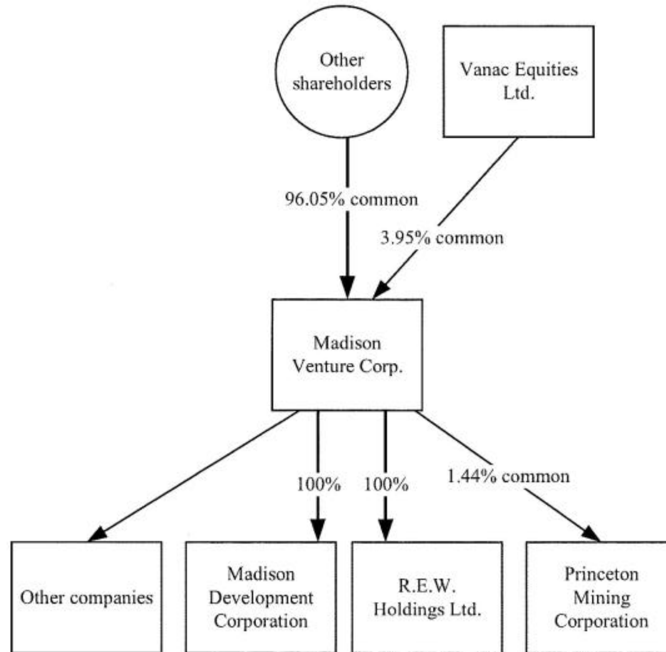
Solicitor for the Respondent

Appendix “C”—Agreed Set of Transaction Diagrams

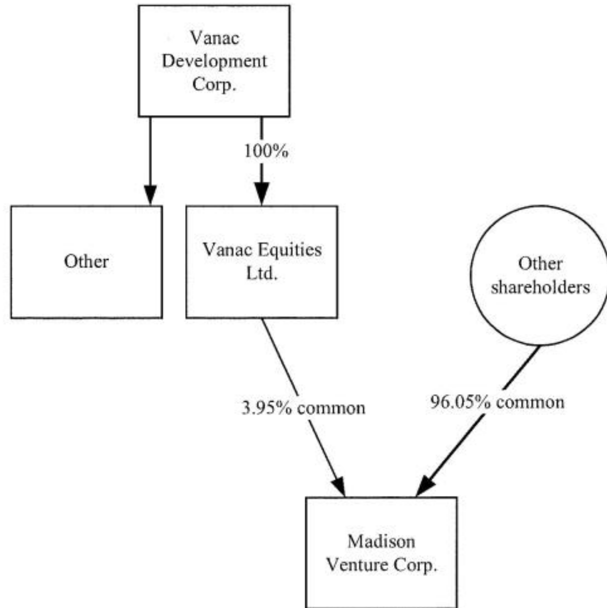
Princeton
pre-April 30, 1998



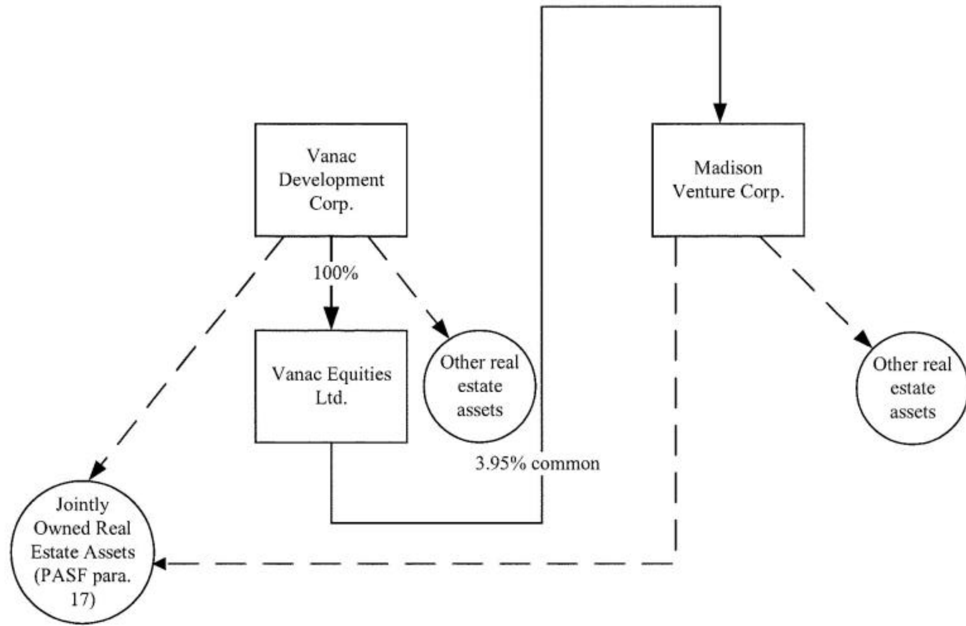
Madison Venture
pre-April 30, 1998



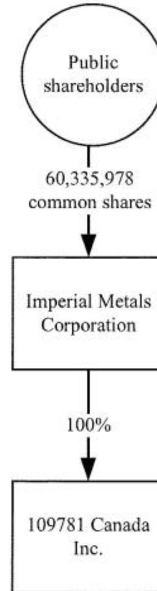
Vanac
pre-April 30, 1998



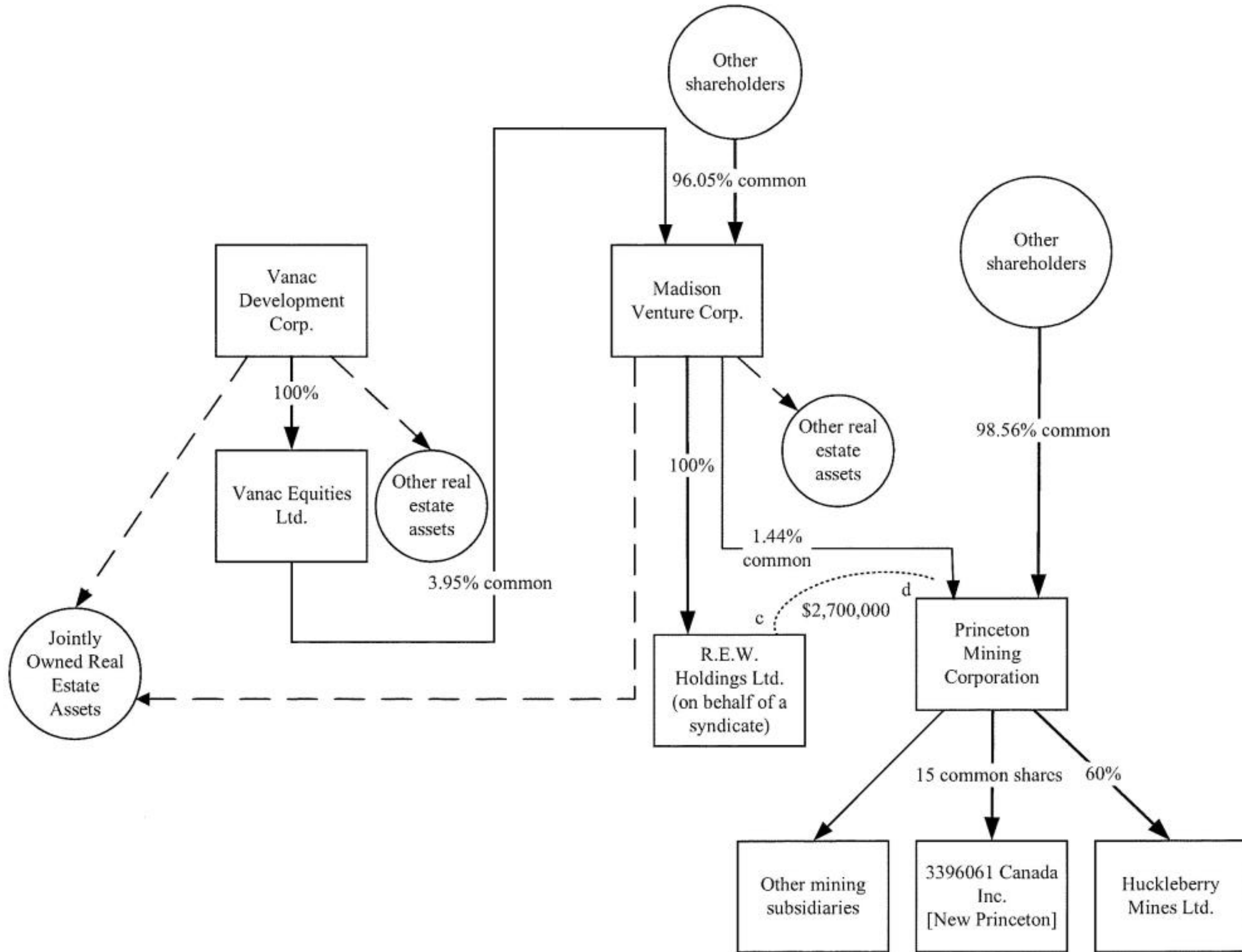
Real Estate
pre-April 30, 1998



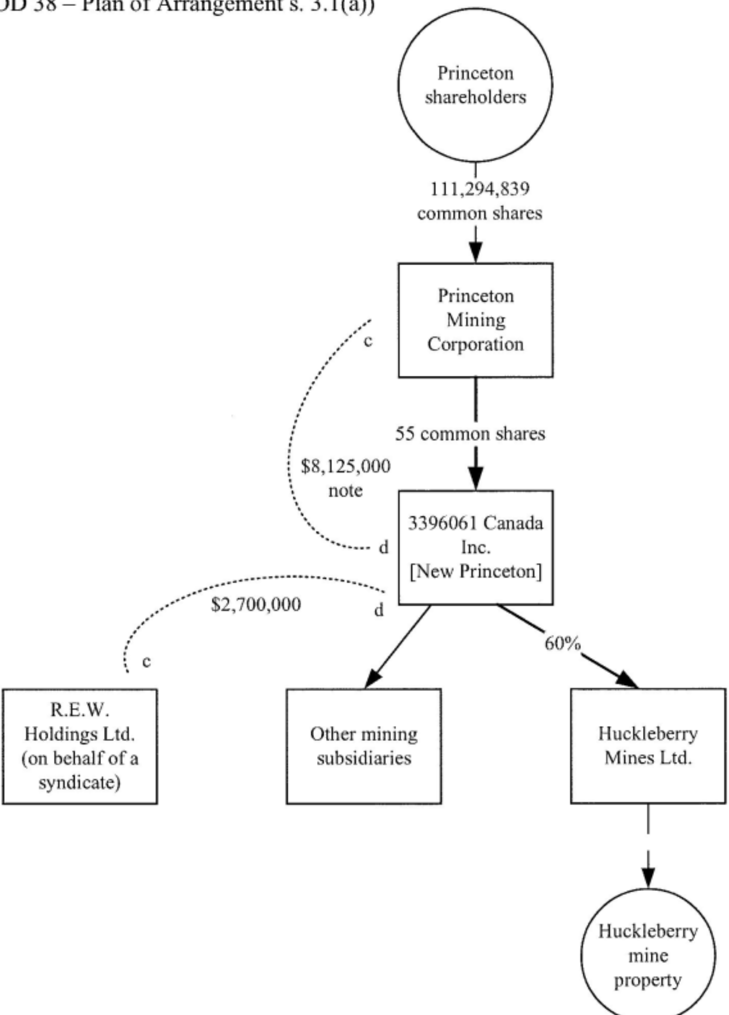
Imperial
pre-April 30, 1998



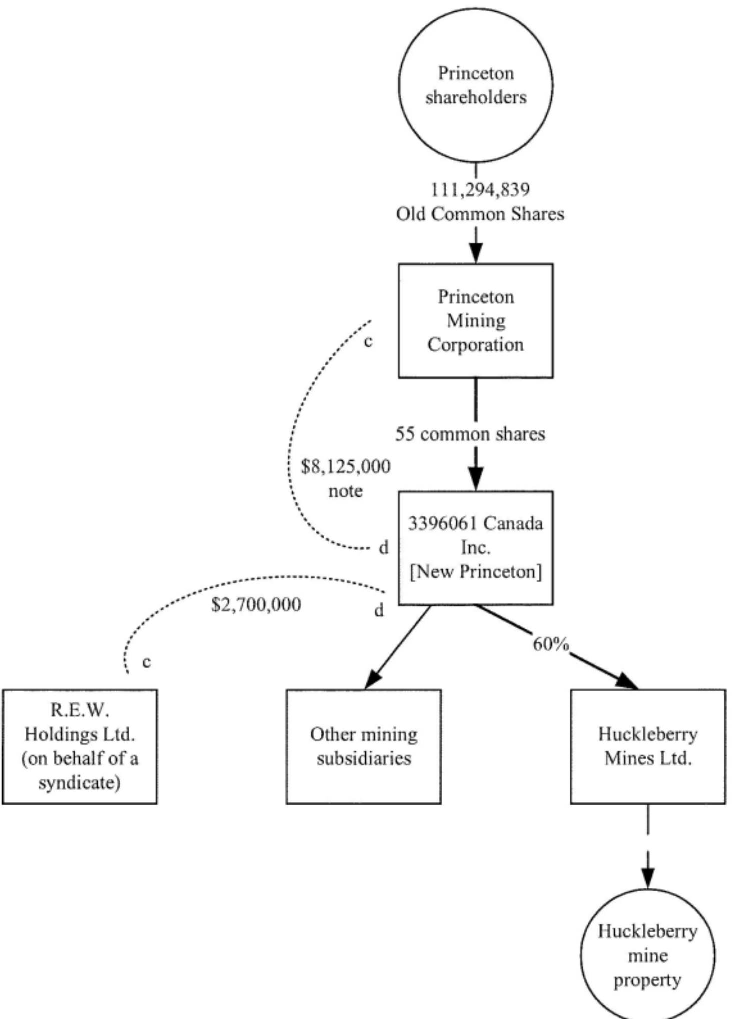
REW Loan
October 31, 1997



April 30, 1998
- transfer of Princeton assets to New Princeton in exchange for 40 New Princeton shares, promissory note, and assumption of liabilities by New Princeton (including REW Loan) (see details at CBOD 38 – Plan of Arrangement s. 3.1(a))

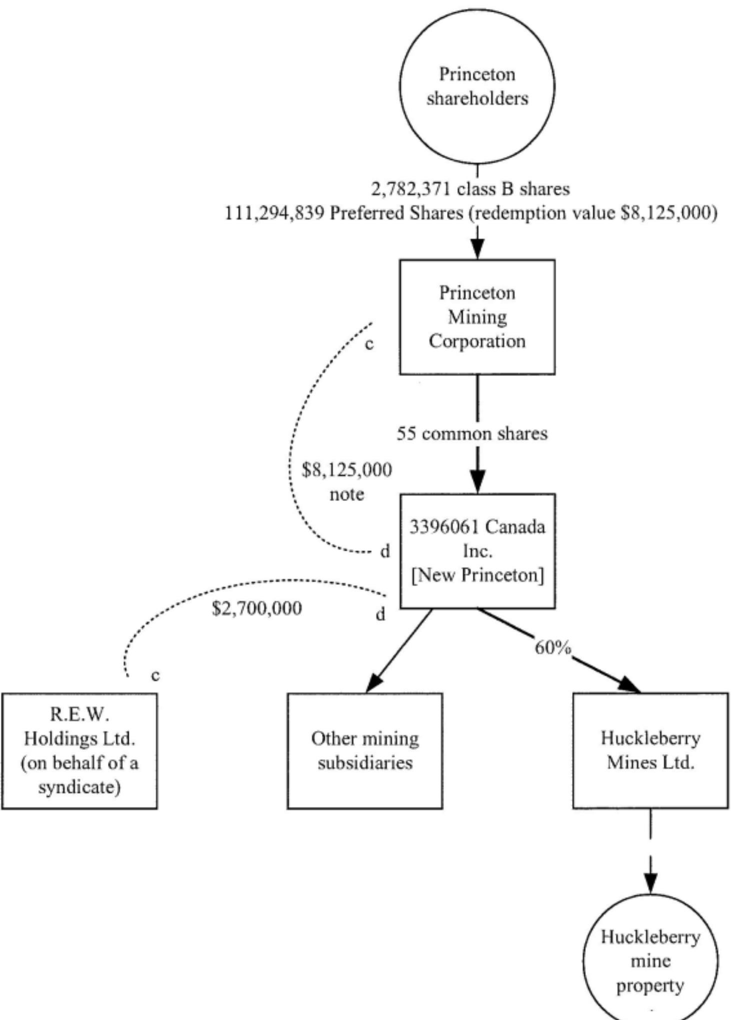


- reorganization of Princeton share capital to redesignate Princeton Shares as Old Common Shares; cancel authorized but unissued Class A preferred shares; and create unlimited Class A preferred shares, Class B voting common shares, and Class C non-voting common shares (see details at CBOD 38 – Plan of Arrangement s. 3.1(b))

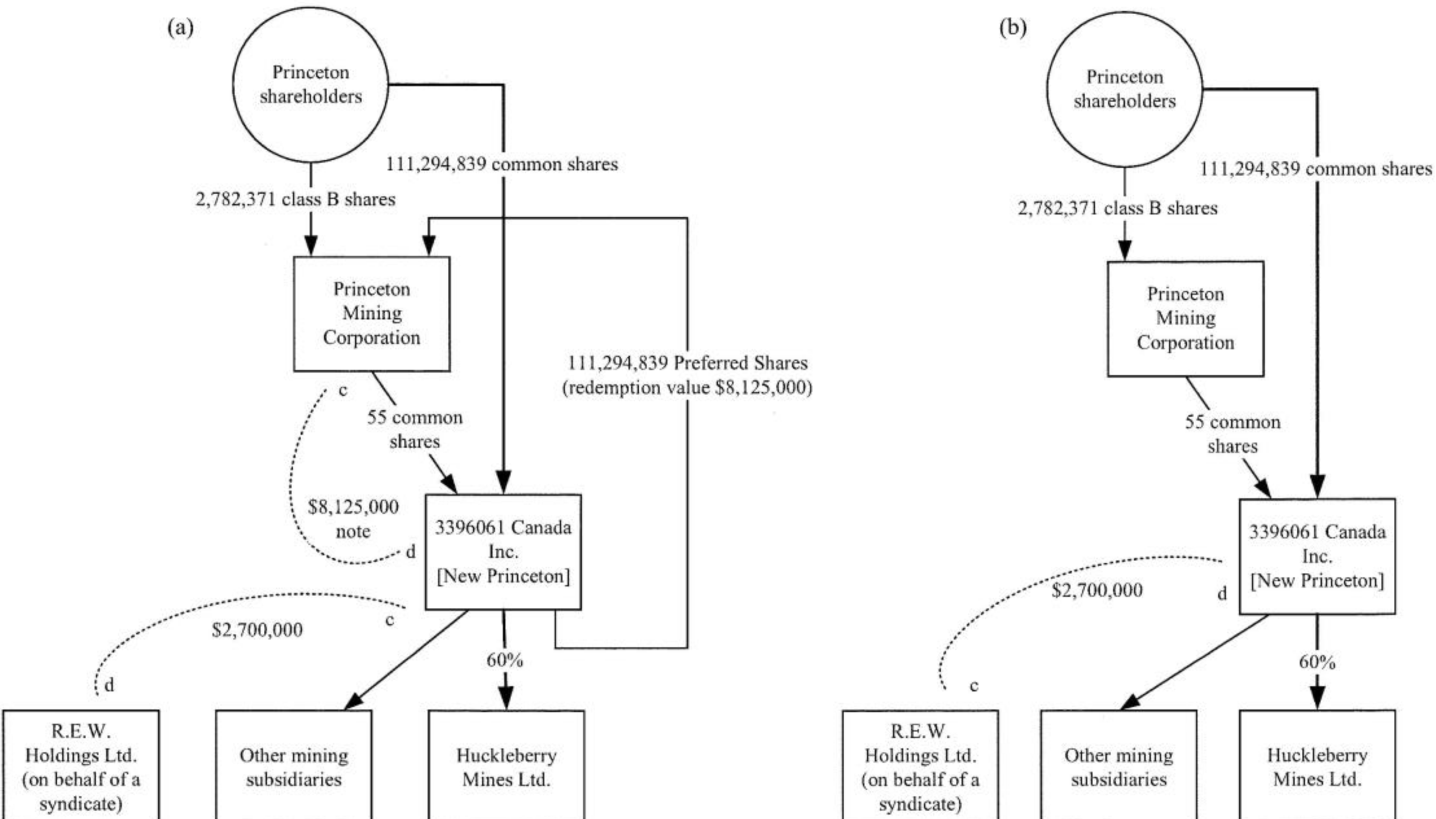


April 30, 1998

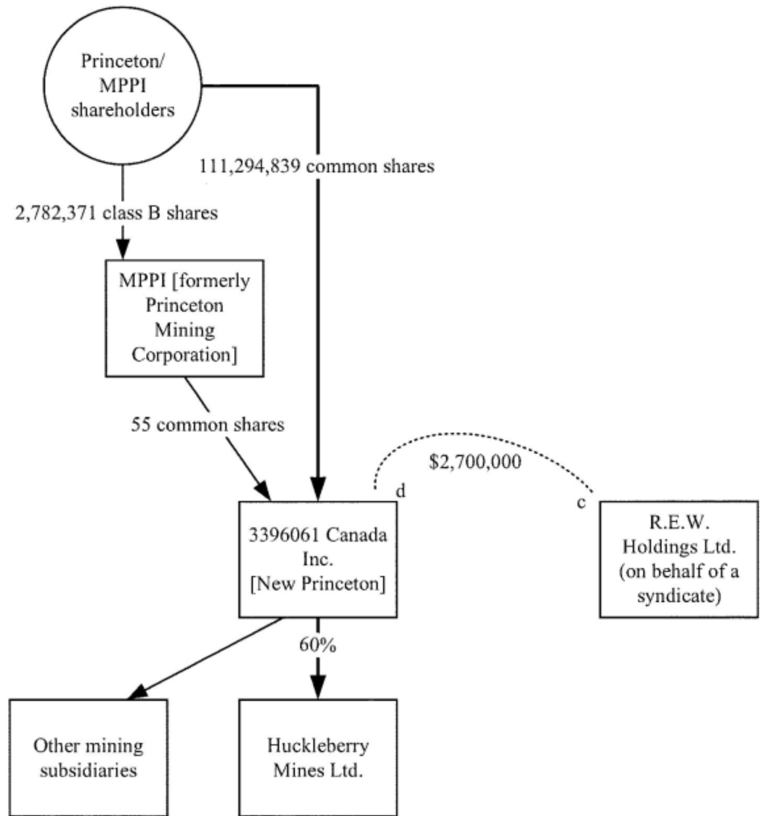
- Princeton shareholders exchange each Old Common Share for 0.025 Class B voting common shares and 1 Class A preferred share (see details at CBOD 38 – Plan of Arrangement s. 3.1(c))



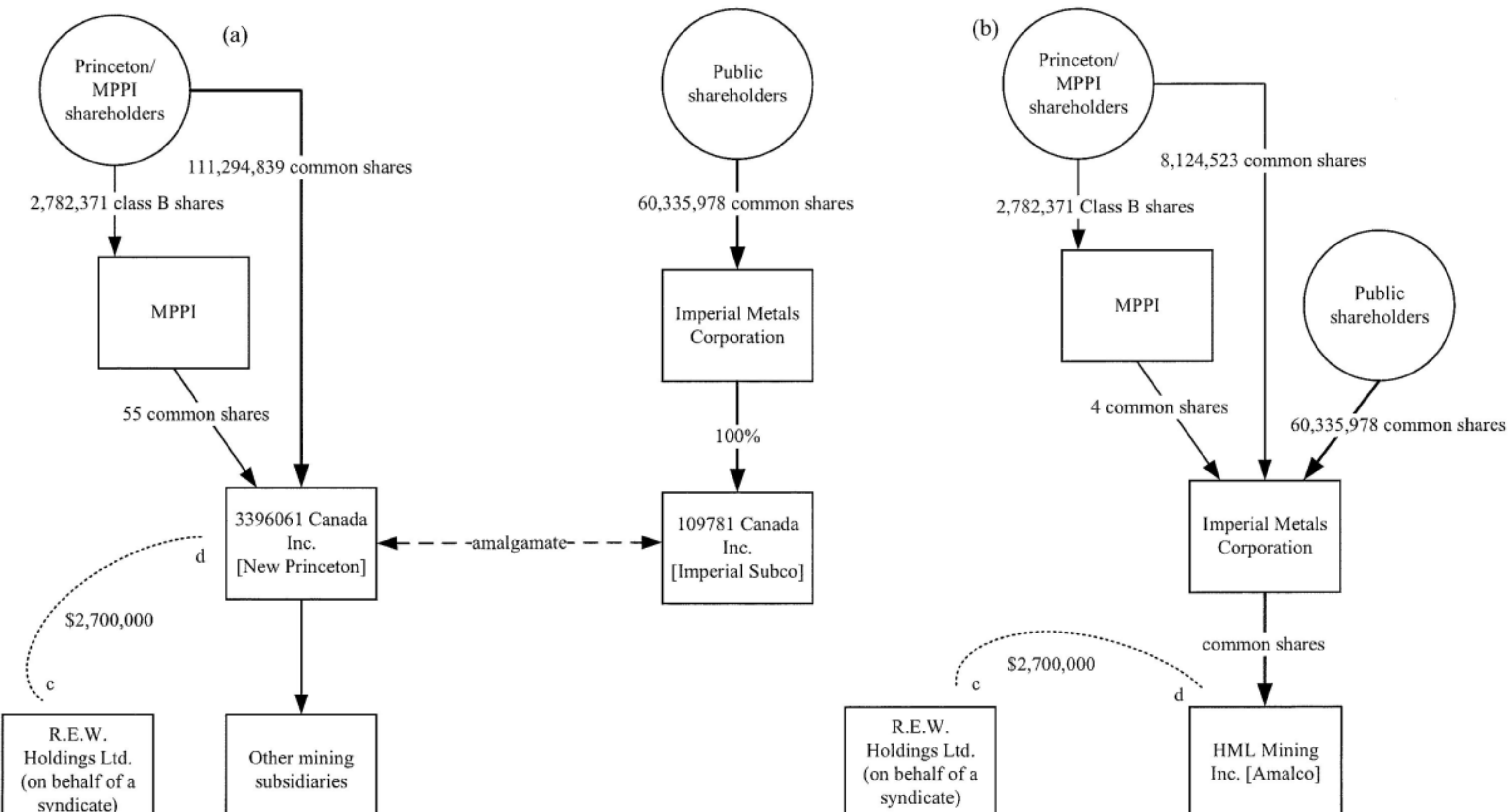
April 30, 1998
- (a) Princeton shareholders exchange Class A Preferred Shares of Princeton for New Princeton common shares
- (b) Princeton redeems its preferred shares held by New Princeton for $8,125,000 and sets off redemption proceeds against promissory note
- see details at CBOD 38 – Plan of Arrangement s. 3.1(d) and (e)



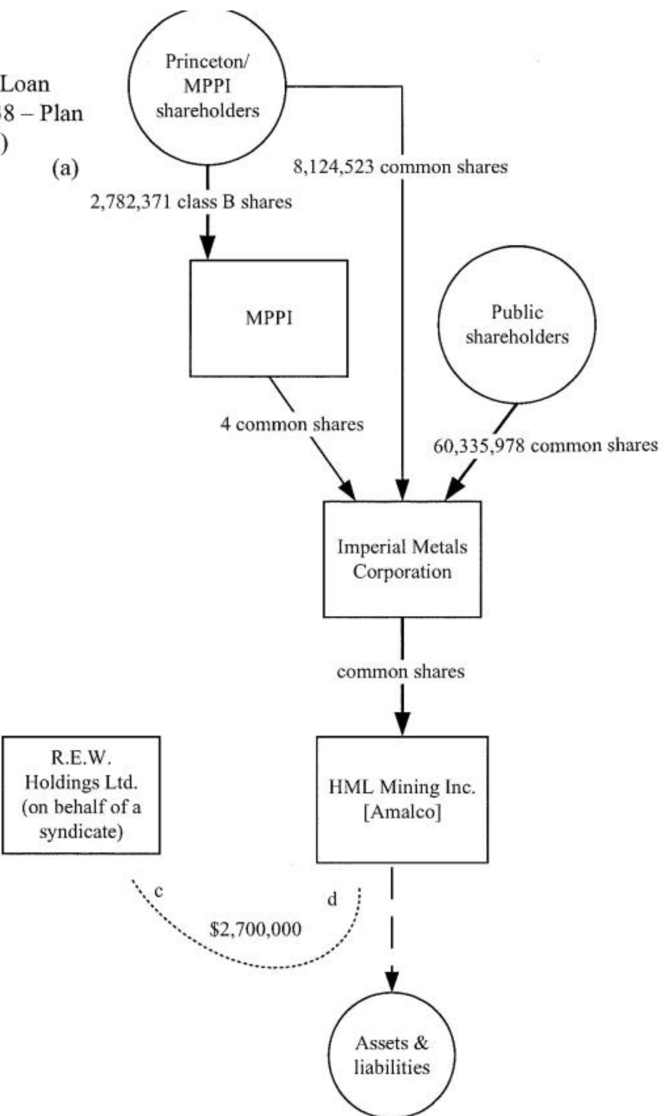
April 30, 1998
- Princeton renamed as Madison Pacific Properties Inc. (MPPI) (see details at CBOD 38 – Plan of Arrangement s. 3.1(f))

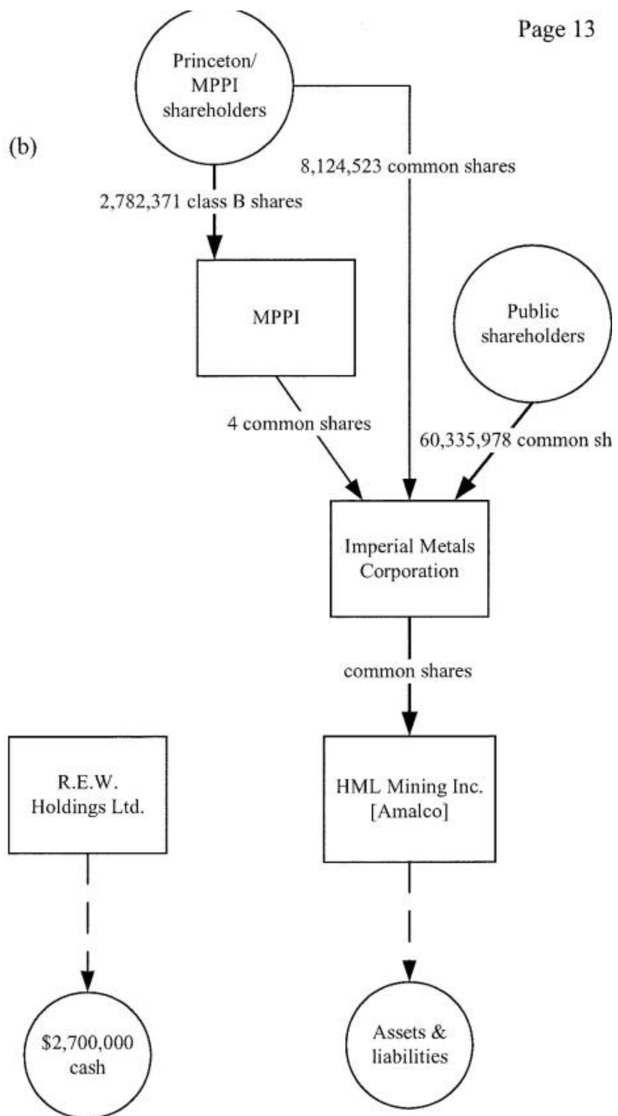


April 30, 1998
- (a) New Princeton and Imperial Subco are amalgamated to form HML Mining Inc. (Amalco)
- (b) Princeton/MPPI shareholders exchange each New Princeton Shares for 0.073 Imperial Shares on the amalgamation
- see details at CBOD 38 – Plan of Arrangement s. 3.1(i))

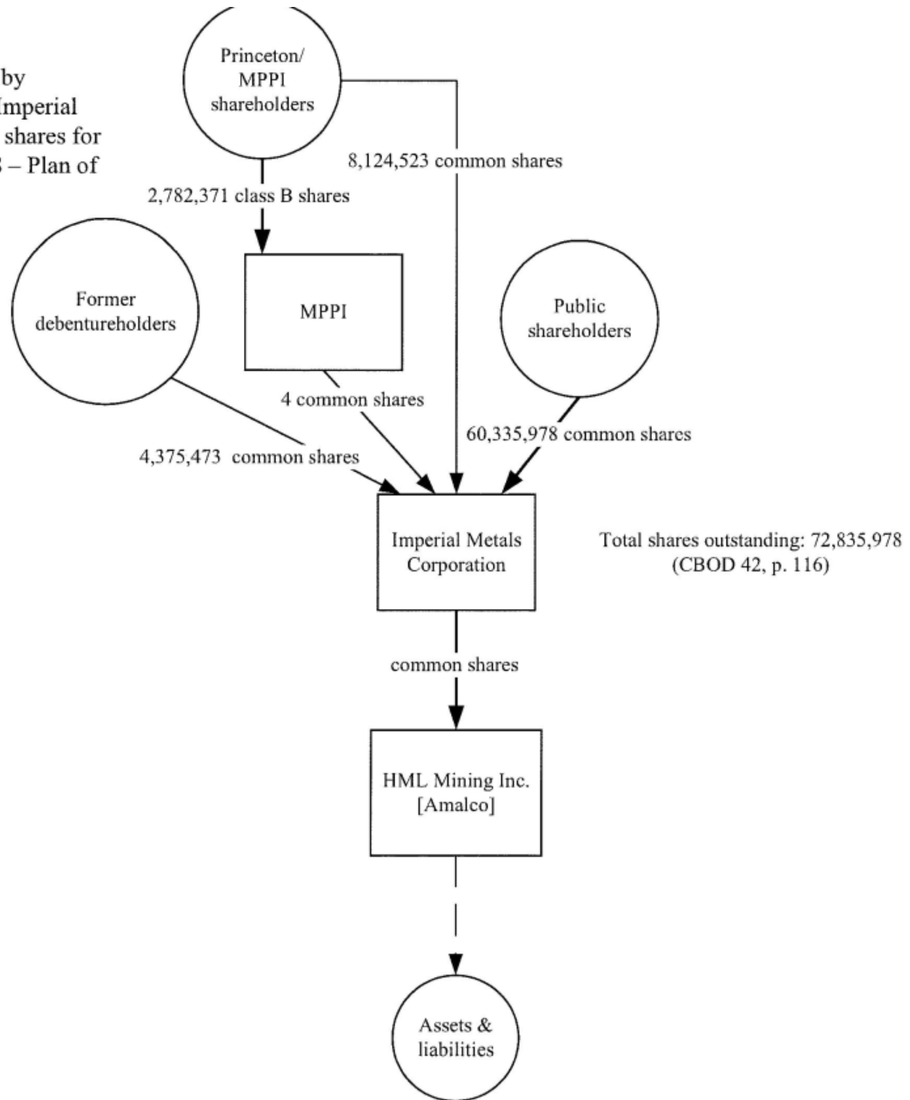


April 30, 1998
- Amalco repays REW Loan
- see details at CBOD 38 – Plan of Arrangement s. 3.1(l)



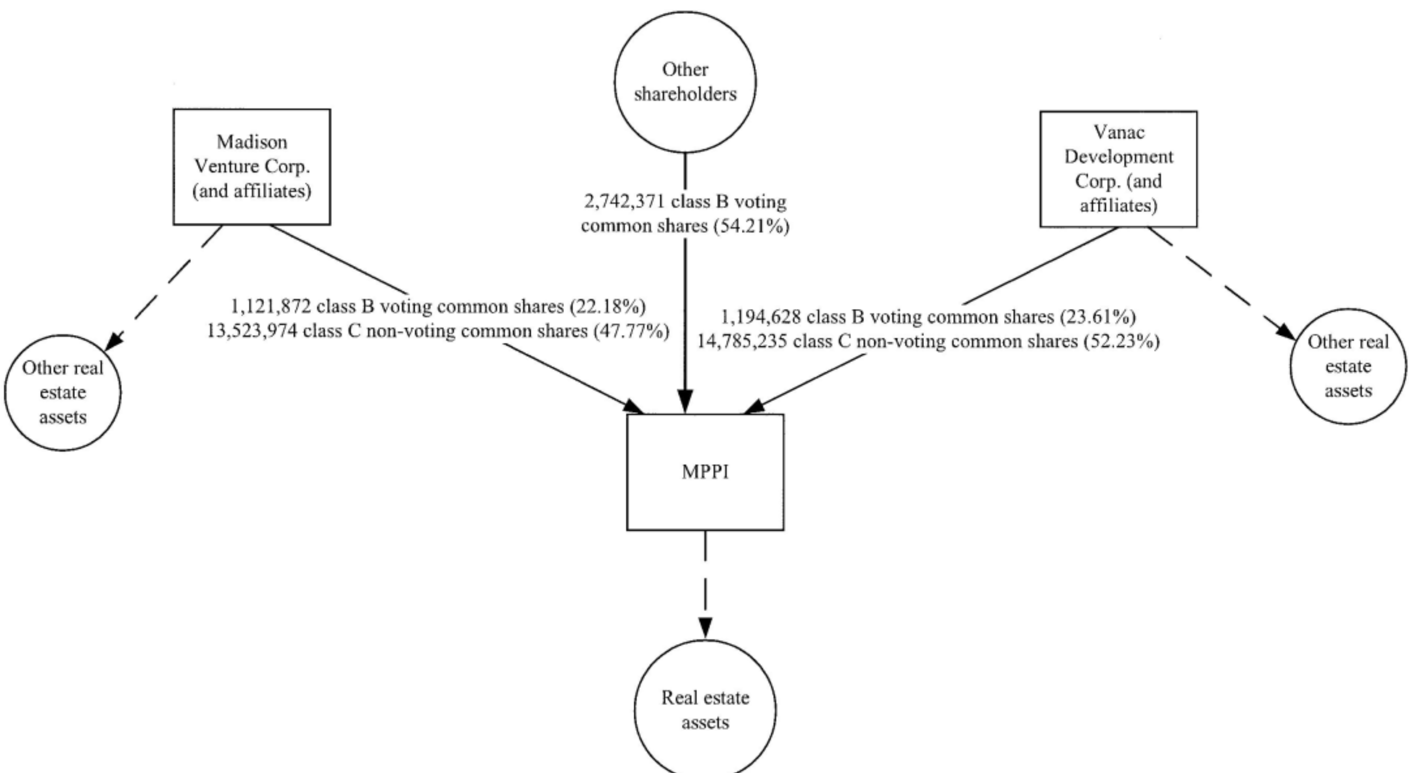


April 30, 1998
- conversion of all debentures, originally issued by Princeton and assumed by New Princeton, into Imperial common shares (at a ratio of 486.1641 common shares for each $1,000 debenture) (see details at CBOD 38 – Plan of Arrangement s. 3.1(m))

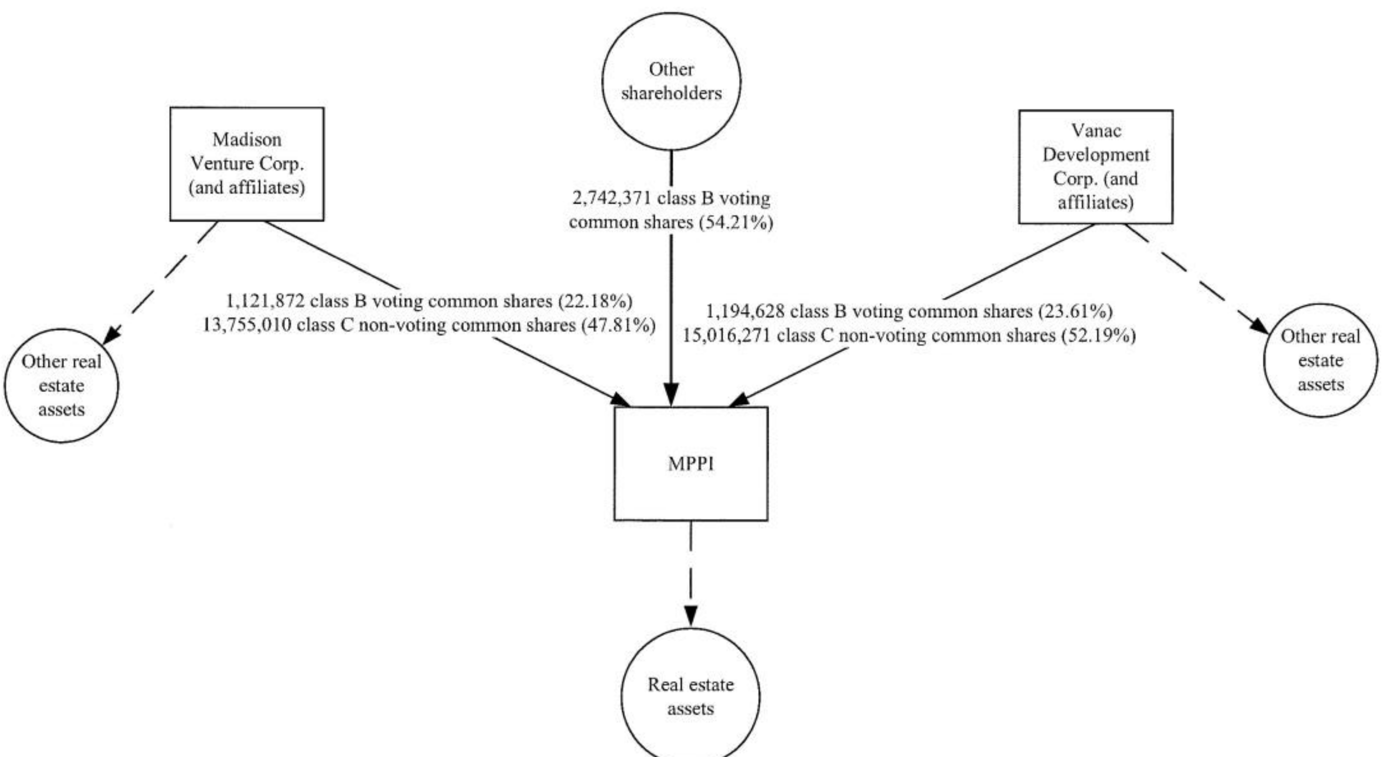


April 30, 1998

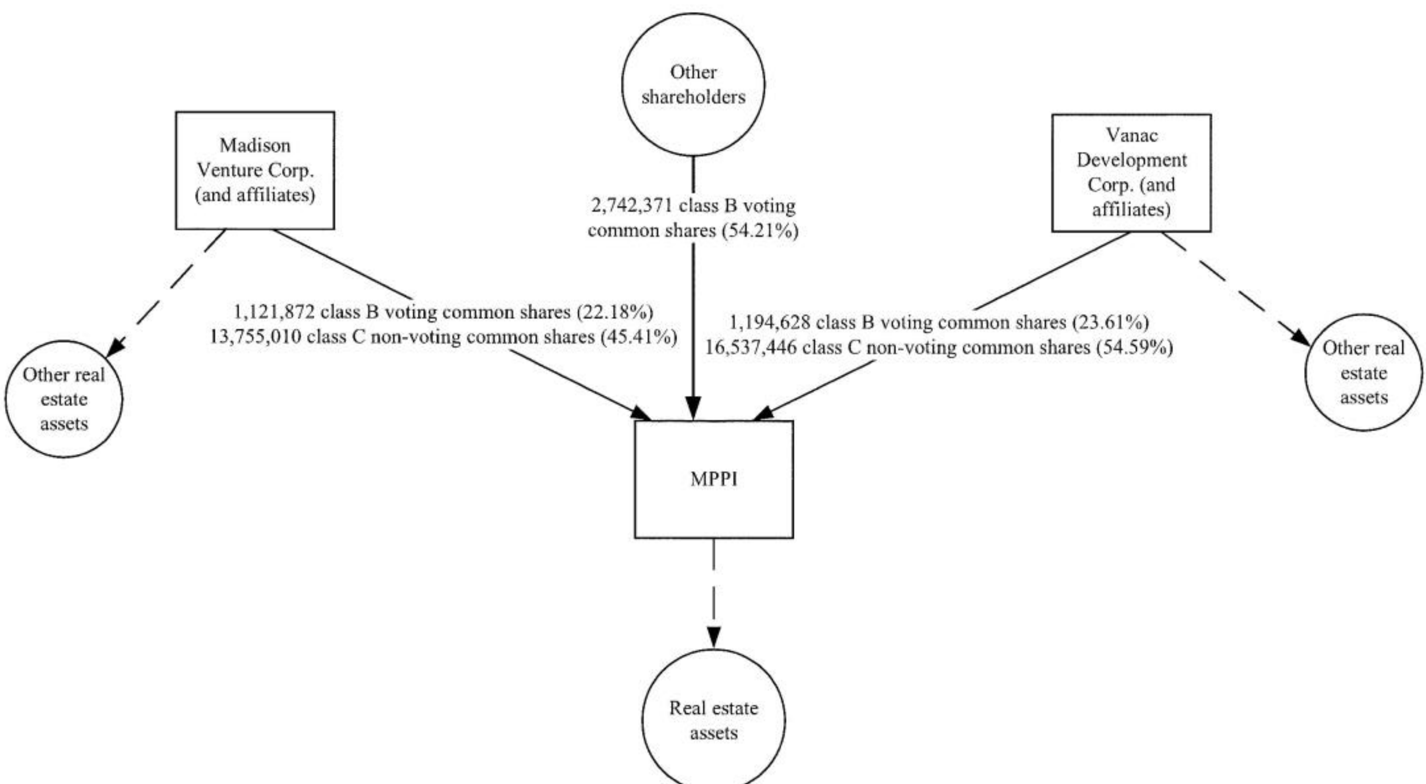
- Madison Venture, Vanac, and their affiliates vend-in real estate assets to MPPI in exchange for:
    - Madison Venture & affiliates: 1,081,872 class B voting common shares & 13,523,974 class C non-voting common shares
    - Vanac & affiliates: 1,194,628 class B voting common shares & 14,785,235 class C non-voting common shares
    - see details at CBOD 40 and PASF paras 77-78
- all shares under vend-in agreement are issued at a price of $1.006336 per share (see CBOD 42, p. 44)



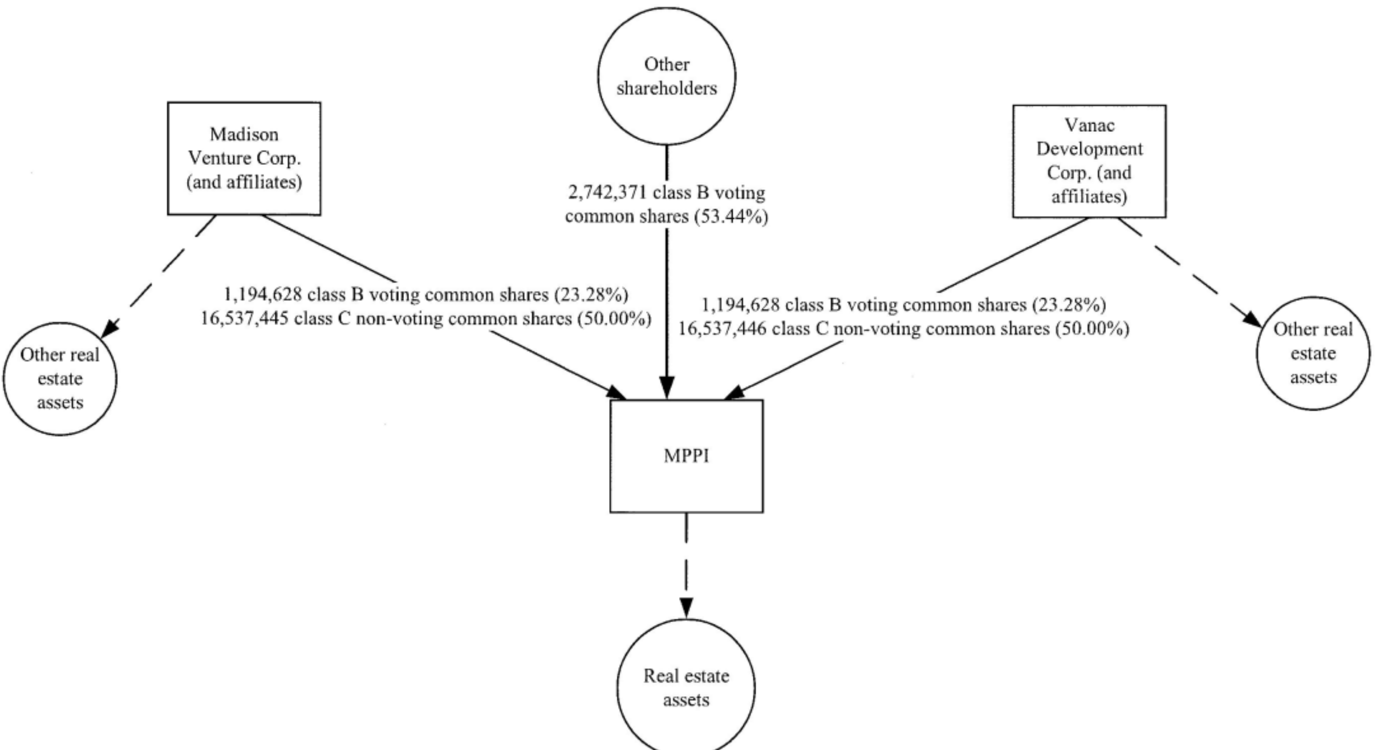
May 29, 1998
- additional vend-in of real estate assets to MPPI in exchange for:
  - Madison Venture & affiliates: 231,036 class C non-voting common shares
  - Vanac: 231,036 class C non-voting common shares
  - see details at CBOD 40 and PASF para. 83



November 30, 1998
- additional vend-in of real estate assets to MPPI in exchange for 1,521,175 class C non-voting common shares issued to Vanac (see details at CBOD 40 and PASF paras. 85-86)



As of December 31, 1999
- even up transactions:
  - March 1, 1999: MPPI acquires interest in property from Madison Venture in exchange for 72,756 class B voting common shares and 696,806 class C non-voting common shares
  - April 14, 1999: Madison Venture subscribes for 2,085,629 class C non-voting common shares for cash
  - see details at CBOD 40 and PASF paras. 90-91, 93



As of April 26, 2000
- January 2000: MPPI acquires portfolio of properties from Delcor in exchange for 12,303,950 class C non-voting common shares
- February 2000: Madison Venture and Vanac each subscribe for 301,644 class C non-voting common shares for cash
- see details at CBOD 40 and PASF paras. 94, 96-97

Delcor Holdings Ltd.

603,288 class B voting common shares (11.8%)
12,303,950 class C non-voting common (26.8%)

Other shareholders

2,621,723 class B voting common shares (51.1%)

Madison Venture Corp. (and affiliates)

1,013,632 class B voting common shares (19.7%)
16,839,089 class C non-voting common shares (36.6%)

Vanac Development Corp. (and affiliates)

892,984 class B voting common shares (17.4%)
16,839,089 class C non-voting common shares (36.6%)

Other real estate assets

Other real estate assets

MPPI

Real estate assets

CITATION:	2023 TCC 180
COURT FILE NO.:	2014-3959(IT)G
STYLE OF CAUSE:	MADISON PACIFIC PROPERTIES INC. v. HIS MAJESTY THE KING
PLACE OF HEARING:	Vancouver, British Columbia
DATES OF HEARING:	November 10, 12, 13, 16, 17, 18, 19, and 20, 2020, February 28, 2022, and March 1, 2, 3, 9, 10 and 11, 2022
REASONS FOR JUDGMENT BY:	The Honourable Justice David E. Graham
DATE OF JUDGMENT:	December 27, 2023

APPEARANCES:

Counsel for the Appellant:	David R. Davies S. Natasha Kisilevsky Tyler Berg
Counsel for the Respondent:	Perry Derksen Dominic Bédard-Lapointe (for all but November 17, 2023) Yanick Houle Eric Brown Erin Krawchuk (on November 17, 2023, only)

COUNSEL OF RECORD:

For the Appellant:

Name:	David R. Davies
Firm:	Thorsteinssons LLP

For the Respondent: Shalene Curtis-Micallef
Deputy Attorney General of Canada
Ottawa, Canada