Date: 20090430

Docket: A-8-08

Citation: 2009 FCA 135

CORAM: **NADON J.A.**
BLAIS J.A.
PELLETIER J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CASCADES INC.

Respondent

Hearing held at Montréal, Quebec, on November 19, 2008.

Judgment delivered at Ottawa, Ontario, on April 30, 2009.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: BLAIS J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal of a decision of Justice Lucie Lamarre of the Tax Court of Canada, 2007 TCC 730, dated December 6, 2007, allowing the respondent's appeal from a determination of loss made under subsections 40(3.3), 40(3.4) and 40(3.5) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (the "Act") for the 2000 taxation year. The judge held that the respondent Cascades Inc. ("Cascades") was entitled to claim a capital loss of $15,941,608 during its 2000 taxation year, as this loss was not deemed to be nil pursuant to subsection 40(3.4) of the Act.

[2] The only issue raised by the appeal is the interpretation of subsections 40(3.3), 40(3.4) and 40(3.5) of the Act. We must consider whether paragraph 40(3.5)(*c*) applies if one of the conditions set out at paragraphs 40(3.3)(*a*), 40(3.3)(*b*) and 40(3.3)(*c*) has not been met. More specifically, the issue is to determine the meaning of "apply" at paragraph 40(3.5)(*c*).

[3] Since those provisions are at the heart of the matter, I reproduce them immediately for convenience:

40. (3.3) Subsection 40(3.4) applies when	**40. (3.3)** Le paragraphe (3.4) s'applique lorsque les conditions suivantes sont réunies:
(*a*) a corporation, trust or partnership (in this subsection and subsection 40(3.4) referred to as the "transferor") disposes of a particular capital property (other than depreciable property of a prescribed class) otherwise than in a disposition described in any of paragraphs (*c*) to (*g*) of the definition "superficial loss" in section 54;	*a*) une société, une fiducie ou une société de personnes (appelées « cédant » au présent paragraphe et au paragraphe (3.4)) dispose d'une immobilisation, sauf un bien amortissable d'une catégorie prescrite, en dehors du cadre d'une disposition visée à l'un des alinéas *c*) à *g*) de la définition de «perte apparente » à l'article 54;
(*b*) during the period that begins 30 days before and ends 30 days after the disposition, the transferor or a person affiliated with the transferor acquires a property (in this subsection and subsection 40(3.4) referred to as the "substituted property") that is, or is identical to, the particular property; and	*b*) au cours de la période qui commence 30 jours avant la disposition et se termine 30 jours après cette disposition, le cédant ou une personne affiliée à celui-ci acquiert le même bien ou un bien identique (appelés « bien de remplacement » au présent paragraphe et au paragraphe (3.4));
(*c*) at the end of the period, the transferor or a person affiliated with the transferor owns the substituted property.	*c*) à la fin de cette période, le cédant ou une personne affiliée à celui-ci est propriétaire du bien de remplacement.
[Emphasis added]	[Je souligne]
(3.4) If this subsection applies because of subsection 40(3.3) to a disposition of a	**(3.4)** Lorsque le présent paragraphe s'applique par l'effet du paragraphe (3.3) à la disposition d'un bien, les présomptions

particular property,

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

. . .

[Emphasis added]

suivantes s'appliquent:

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

[…]

[Je souligne]

(3.5) For the purposes of subsections 40(3.3) and 40(3.4),

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

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

(*c*) where subsections 40(3.3) and 40(3.4) apply to the disposition by a transferor of a share of the capital stock of a corporation, and after the disposition the corporation is merged with one or more other corporations, otherwise than in a transaction in respect of which paragraph 40(3.5)(*b*) applies to the share, or is wound up in a winding-up to which subsection 88(1) applies, the corporation formed on the merger or the parent (within the meaning assigned by subsection 88(1)), as the case may be, is deemed to own the share while it is affiliated with the transferor; and

(*d*) where subsections 40(3.3) and 40(3.4) apply to the disposition by a transferor of a share of the capital stock of a corporation, and after the disposition the share is

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

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

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

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

d) lorsque les paragraphes (3.3) et (3.4) s'appliquent à la disposition par un cédant d'une action du capital-actions d'une société et que, après cette disposition,

redeemed, acquired or cancelled by the corporation, otherwise than in a transaction in respect of which paragraph 40(3.5)(*b*) or 40(3.5)(*c*) applies to the share, the transferor is deemed to own the share while the corporation is affiliated with the transferor.	l'action est rachetée, acquise ou annulée par la société en dehors du cadre d'une opération relativement à laquelle les alinéas *b*) ou *c*) s'appliquent à l'action, le cédant est réputé être propriétaire de l'action tant que la société lui est affiliée.
[Emphasis added]	[Je souligne]

Facts

[4] The facts in this case are not disputed. They may be briefly summarized as follows.

[5] At the end of May 2000, Cascades held 71.1% of the common shares of Les Industries Paperboard International Inc. ("PII"). The adjusted cost base of the 33,025,966 PII shares held by Cascades was at that time $68,783,154, and their fair market value was $52,841,546.

[6] On September 8, 2000, 3715965 Canada Inc. (the "corporation") was incorporated, and Cascades became the sole shareholder. The corporation is a corporation affiliated with Cascades within the meaning of section 251.1 of the Act.

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

[8] On December 31, 2000, that is, 26 days later, PII and the corporation merged, and the corporation formed on the merger was 384894-9 Canada Inc. (“PII Fusionco”). At the time of the merger, each of the common shares of the corporation held by Cascades was converted into a common share of PII Fusionco. PII Fusionco is a corporation affiliated with Cascades within the meaning of section 251.1 of the Act. In computing its taxable income for the 2000 taxation year, Cascades claimed a capital loss of $15,941,608 realized on the sale of the common shares in PII.

[9] On January 23, 2004, the Minister of National Revenue (the “Minister”) deemed Cascades’ loss to be nil under subsections 40(3.4), 40(3.4) and 40(3.5) of the Act. Cascades appealed that decision of the Tax Court of Canada, and that appeal was allowed and is at issue here.

Tax Court of Canada decision

[10] Justice Lamarre began her analysis by reviewing the principles governing the interpretation of tax statutes, as developed by the Supreme Court of Canada. Those principles involve, among other things, the relevance of a textual interpretation of such statutes and the importance of reading their provisions in context, that is, within the overall scheme of the legislation. The Supreme Court also explained that, where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.

[11] Having considered those principles of interpretation, Justice Lamarre concluded that it is obvious that the conditions of subsection 40(3.3) must all be met for subsection 40(3.4), which

provides that a loss is deemed to be nil, to apply. However, paragraph 40(3.3)(*c*) stipulates that, at the end of the period referred to in the subsection, the transferor (in this case, Cascades) or a person affiliated with the transferor must own the substituted property (in this case, the PII shares). Consequently, when considering only subsections 40(3.3) and 40(3.4), Cascades' loss cannot be deemed to be nil, since, at the end of the period in question, no entity owned the PII shares, given that PII had been merged with the corporation and no longer existed.

[12] The Minister had nevertheless claimed that subsection 40(3.5), and in particular paragraph 40(3.5)(*c*), specifically allowed him to deem the loss to be nil, since that paragraph provides that the corporation formed on the merger (in this case, PII Fusionco) is deemed to own the share while it is affiliated with the transferor. However, on analyzing the application of subsection 40(3.5), the judge determined that this subsection applied only if subsections 40(3.3) and 40(3.4) already applied, since paragraph 40(3.5)(*c*) states that "where subsections 40(3.3) and 40(3.4) apply to the disposition by a transferor of a share of the capital stock of a corporation, and after the disposition the corporation is merged with one or more other corporations, . . . the corporation formed on the merger . . . is deemed to own the share while it is affiliated with the transferor" [emphasis added]. Consequently, since the conditions of subsection 40(3.3) had not all been met, and as subsection 40(3.4) therefore did not apply either, paragraph 40(3.5)(*c*) did not apply in this case and could not provide a basis for the Minister to deem the loss to be nil.

[13] In her analysis of subsection 40(3.5), the judge explained that, if Parliament had meant to say what was argued by the Minister, it could have expressed it more explicitly, for example by

using terms such as the following at paragraph 40(3.5)(*c*): “where subsections (3.3) and (3.4) [relate to or concern] the disposition by a transferor of a share of the capital stock of a corporation . . .”. Rather, the judge interpreted paragraph 40(3.5)(*c*) as stating that the transferor may claim its loss if a merger occurred after the 61-day period (which is the period mentioned in subsection 40(3.3)), otherwise the entitlement to claim the loss would be lost.

[14] Moreover, in the judge’s opinion, the stop-loss rule in subsection 40(3.4) does not necessarily apply to the present case. That rule is a specific anti-avoidance measure to prevent taxpayers from immediately recognizing a latent capital loss on non-depreciable capital property, whereas the restructuring proposed by Cascades was not done for this purpose, according to the judge.

The appellant’s submissions

[15] The appellant submits that the judge erred in law in her interpretation of subsections 40(3.3), 40(3.4) and 40(3.5) of the Act, in finding that the presumption in paragraph 40(3.5)(*c*) was established to allow for the eventual recognition of the loss in the case of a merger after the period referred to in paragraph 40(3.3)(*b*), in considering Cascades’ intent in her analysis of the provisions at issue, and in concluding that the presumption in paragraph 40(3.5)(*c*) cannot be used to determine whether subsections 40(3.3) and 40(3.4) apply.

[16] The appellant explains that subsection 40(3.4) is one of the stop-loss rules in the Act, the primary purpose of those rules being to limit the capital losses that affiliated persons may realize.

The appellant submits that paragraph 40(3.5)(*c*) ensures that the loss deferral rule in subsection 40(3.4) applies even if the share disposed of is eliminated following a merger. Without the presumption in paragraph 40(3.5)(*c*), the merger would allow the transferor to recognize the loss even if that loss remains within the group of affiliated corporations. According to the appellant, it is obvious that subsections 40(3.3) and 40(3.4) need not apply first before the presumption in paragraph 40(3.5)(*c*) may be relied on. In fact, the word "apply" in paragraph 40(3.5)(*c*) refers to the scope of subsections 40(3.3) and 40(3.4) rather than to their implementation; that word therefore has its ordinary and plain meaning of "are applicable to", "concern" or "relate to". That interpretation is also the one most consistent with the introductory part of subsection 40(3.5), which states that the following presumptions apply "[f]or the purposes of subsections 40(3.3) and 40(3.4)".

Respondent's submissions

[17] The respondent submits that the text in paragraph 40(3.5)(*c*) is clear: it states that the presumption in paragraph 40(3.5)(*c*) is implemented only once the conditions set out at subsection 40(3.3) have been met. The context and purpose of paragraph 40(3.5)(*c*) must therefore be interpreted in relation to the "30 days before, 30 days after" rule that is set out at subsection 40(3.3) and that creates a distinction in tax treatments between the events or transactions occurring within that period and those occurring afterwards. The respondent also claims that the Technical Notes published by the Department of Finance clearly indicate that, for the provisions in subsection 40(3.4) to apply and for a loss to be deemed nil, the three conditions in subsection 40(3.3) must be present.

Issue

[18] The issue here is whether Justice Lamarre erred in finding that the respondent was entitled to claim the loss and, more specifically, whether she erred in her interpretation of subsections 40(3.3), 40(3.4) and 40(3.5) of the Act.

Analysis

A. Applicable standard of review

[19] Even though the parties did not submit any arguments on the standard of review, I am satisfied, in light of the decision of the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, that the applicable standard of review in this case is that of correctness, since the only issue here is a one of law, that is, the interpretation of subsections 40(3.3), 40(3.4) and 40(3.5) of the Act.

B. Principles of interpretation

[20] The principles governing the interpretation of tax statutes are now well known because of several recent decisions of the Supreme Court of Canada.

[21] In *Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada*, [2006] 2 S.C.R. 447 at paragraph 27, the Supreme Court pointed to the continuing relevance of a textual interpretation of tax statutes while also emphasizing the importance of reading their provisions in context, that is, within the overall scheme of the legislation, as required by the modern approach to statutory interpretation.

More specifically, in *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, the Supreme Court stated the following at paragraph 10 of the reasons of the Chief Justice and Justice Major:

> **10.** It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, 1999 CanLII 639 (S.C.C.), [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> [Emphasis added]

[22] In *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] 1 S.C.R. 715, the Supreme Court approved the comments of Justices McLachlin and Major in *Trustco Mortgage Co. v. Canada*, above, as follows at paragraphs 22 and 23 of the reasons of Justice LeBel:

> **22.** On the other hand, where the words of a statute give rise to more than one reasonable interpretation, the ordinary meaning of words will play a lesser role, and greater recourse to the context and purpose of the Act may be necessary: *Canada Trustco*, at para. 10. Moreover, as McLachlin C.J. noted at para. 47, "[e]ven where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities." The Chief Justice went on to explain that in order to resolve explicit and latent ambiguities in taxation legislation, "the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation".
>
> **23.** The interpretive approach is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. Reference to the purpose of the provision "cannot be used to create an unexpressed exception to clear language": see P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (5th ed. 2005), at p. 569; *Shell Canada Ltd. v. Canada*, 1999 CanLII 647 (S.C.C.), [1999] 3 S.C.R. 622. Where, as in this case, the provision admits of more than one reasonable interpretation,

> greater emphasis must be placed on the context, scheme and purpose of the Act. Thus, legislative purpose may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision.
>
> [Emphasis added]

[23] Consequently, as I stated in *Scott Paper Limited v. Canada*, 2006 FCA 372; (2006), 355 N.R. 387 at paragraph 45, regarding section 68 of the *Excise Tax Act*, R.S.C. 1985, c. E-15:

> [45] . . . although the textual, contextual and purposive analysis is the correct approach to interpreting section 68, if the words of the provision are "precise and unequivocal", the plain meaning of the words will carry much weight in interpreting the meaning of the provision. However, if the words of section 68 are capable of supporting more than one reasonable meaning, the plain meaning of the words will carry less weight.

C. Did Justice Lamarre err in finding that the respondent was entitled to claim the loss?

[24] With those principles in mind, I now turn to the interpretation of subsections 40(3.3), 40(3.4) and 40(3.5) of the Act.

[25] Subsection 40(3.4) provides that the transferor's loss, if any, from a disposition is deemed to be nil if the three conditions of subsection 40(3.3) are met, that is: the corporation (the transferor) disposes of a particular non-depreciable capital property, in this case, shares (paragraph 40(3.3)(*a*)); the transferor or a person affiliated with the transferor acquires a property that is, or is identical to, the particular property during the period that begins 30 days before and ends 30 days after the disposition (paragraph 40(3.3)(*b*)); and the transferor or a person affiliated with the transferor owns the substituted property at the end of the period (paragraph 40(3.3)(*c*)). The parties agree that the

first two conditions set out at paragraph 40(3.3)(*a*) and (*b*) have been met. As for the third condition, set out at paragraph 40(3.3)(*c*), at first blush, it has not been met because neither the transferor nor the person affiliated with the transferor owned the shares at issue at the end of the period in question. This is so since those shares, i.e. those of PII, no longer exist because PII has been merged with another company and thus no longer exists.

[26] Were the analysis to end there, Cascades could therefore claim its capital loss, as the three conditions of subsection 40(3.3) have not been met to allow the Minister to deem the loss to be nil, under subsection 40(3.4). However, subsections 40(3.3) and (3.4) must be interpreted in relation to subsection 40(3.5), which, in its preamble, states that the following presumptions apply "[f]or the purposes of subsections 40(3.3) and 40(3.4)". Subsection 40(3.5) provides four presumptions at paragraphs 40(3.5)(*a*) to (*d*). Here, it is paragraph 40(3.5)(*c*) that is at issue; it provides as follows, and I reproduce it again for convenience:

40. (3.5) For the purposes of subsections 40(3.3) and 40(3.4), . . . (*c*) where subsections 40(3.3) and 40(3.4) apply to the disposition by a transferor of a share of the capital stock of a corporation, and after the disposition the corporation is merged with one or more other corporations, otherwise than in a transaction in respect of which paragraph 40(3.5)(*b*) applies to the share, or is wound up in a winding-up to which subsection 88(1) applies, the corporation formed on the merger or the parent (within the meaning assigned by subsection 88(1)), as the case may be, is deemed to own the share while it is affiliated with the transferor;	**40.** (3.5) Les présomptions suivantes s'appliquent dans le cadre des paragraphes (3.3) et (3.4): […] *c)* lorsque les paragraphes (3.3) et (3.4) s'appliquent à la disposition par un cédant d'une action du capital-actions d'une société et que, après cette disposition, la société est fusionnée avec une ou plusieurs autres sociétés en dehors du cadre d'une opération relativement à laquelle l'alinéa b) s'applique à l'action ou fait l'objet d'une liquidation à laquelle s'applique le paragraphe 88(1), la société issue de la fusion ou la société mère, au sens de ce paragraphe, est réputée être propriétaire de l'action tant qu'elle est affiliée au cédant.

[27] On the basis of the phrase "where subsections 40(3.3) and 40(3.4) apply" in paragraph 40(3.5)(*c*), Justice Lamarre concluded that the three conditions of subsection 40(3.3) had to be met before paragraph 40(3.5)(*c*) could apply. With respect, I am of the opinion that the judge misinterpreted the text of paragraph 40(3.5)(*c*). In my view, that paragraph does not require that the three conditions of subsection 40(3.3) be met before the presumption within may apply. If Parliament had intended to give paragraph 40(3.5)(*c*) the meaning the judge attributes to it, the paragraph could have been written as follows, with a comma, in particular: "where subsections 40(3.3) and 40(3.4) apply, and where there is a disposition by a transferor of a share . . .".

[28] My interpretation of paragraph 40(3.5)(*c*) is consistent with the preamble of subsection 40(3.5), which states that the following presumptions apply "[f]or the purposes of subsections 40(3.3) and 40(3.4)". Following this preamble, only paragraphs 40(3.5)(*c*) and (*d*) begin with the words "where subsections 40(3.3) and 40(3.4) apply". Consequently, it must be understood that the four paragraphs of subsection 40(3.5) contain presumptions that apply, as stated in the preamble, for the purposes of subsections 40(3.3) and 40(3.4), but that paragraphs 40(3.5)(*c*) and (*d*) provide additional clarifications: these paragraphs apply only where subsections 40(3.3) and 40(3.4) "apply to" a particular situation, that is, the disposition of shares of the capital stock of a corporation, and after the disposition (in the case of paragraph 40(3.5)(*c*)), the corporation is merged with one or more other corporations.

[29] In my opinion, the words "s'appliquer à" have the meaning given by *Le Nouveau Petit Robert*, 2004 to the verb "s'appliquer": "[être] applicable à", "concerner", or "viser". Consequently, the presumption stated at paragraph 40(3.5)(*c*) applies where subsections 40(3.3) and 40(3.4) "visent", "concernent", or "sont applicables à" the situation described in paragraph 40(3.5)(*c*).

[30] A reading of the English wording of paragraph 40(3.5)(*c*) leads me to the same conclusion. According to the *Oxford Compact Thesaurus*, 2005, the word "apply" means "pertain", "relate", "concern", "deal with". Therefore, it must be understood that the presumption in paragraph 40(3.5)(*c*) applies where subsections 40(3.3) and 40(3.4) "pertain to", "relate to", "concern", or "deal with" the case described at paragraph 40(3.5)(*c*).

[31] Without that interpretation of “apply to”, the introductory part of paragraphs 40(3.5)(*c*) and (*d*) would be redundant, given the preamble of subsection 40(3.5). As regards paragraph 40(3.5)(*c*), it therefore provides a presumption that applies not only for the purposes of subsections 40(3.3) and 40(3.4), but specifically for the purposes of those subsections where there is a disposition by a transferor of a share of the capital stock of a corporation, and after the disposition the corporation is merged.

[32] A reading of the other paragraphs of subsection 40(3.5), and in particular paragraphs (*a*) and (*b*), further confirms my opinion that it is not necessary that subsections (3.3) and (3.4) already apply before the presumptions of subsection (3.5) may be relied on. In fact, paragraphs 40(3.5)(*a*) and (*b*) must be consulted to understand the meaning of a “property that is identical”, a phrase that is mentioned but not defined at paragraph 40(3.3)(*b*). Paragraphs 40(3.5)(*a*) and (*b*) indicate, first, that a right to acquire a property is deemed to be a property that is identical to the property itself and, second, that a share of a corporation that is acquired in exchange for another share is deemed to be a property that is identical to the other share.

[33] Accordingly, it is clear that subsection 40(3.5) contributes to a better interpretation of the scope of subsections 40(3.3) and (3.4). The conditions that must be met for paragraph 40(3.5)(*c*) to apply are the disposition by a transferor of a share of the capital stock of a corporation and, after the disposition, the merger of the corporation with one or more other corporations. If these conditions are met, the presumption applies: in analyzing subsections 40(3.3) and (3.4), one must bear in mind that the corporation formed on the merger is deemed to own the share while it is affiliated with the transferor.

[34] In this case, a textual interpretation of subsections 40(3.3), (3.4) and (3.5) therefore leads to the conclusion that it is not necessary that the conditions set out at paragraphs 40(3.3)(*a*) and (*b*) all be met and, consequently, that subsections 40(3.3) and (3.4) apply before subsection (3.5) may apply. Moreover, in light of the overall scheme of the legislation and of the provisions in question, they should be seen as establishing a stop-loss rule. As Gerald D. Courage points out in his article *Utilization of Tax Losses and Debt Restructuring*, 2006 Ontario Tax Conference, (Toronto; Canadian Tax Foundation, 2006), 9:1-86, at page 2:

> . . . the Act contains a number of so called "stop-loss rules" where there has been a transfer of property with an accrued loss within a statutorily defined closely held group. While the transfer might otherwise be treated as a sufficient realization so as to permit recognition of the loss, nevertheless the loss is denied until the property (or, in some cases, property received in exchange on the transfer) is transferred out of the group, at which point there is effectively a "true" realization by the group of the loss for tax purposes.

[35] As the appellant suggests in her memorandum of fact and law, the judge's decision leads to an illogical result: where there is, such as in this case, a disposition of shares followed by a merger during the period ending 30 days after the disposition, the rule would not apply, and taxpayers could deduct their loss for the year of disposition, even if that loss was not actually realized by the group of affiliated corporations. However, where a merger occurs after the period ending 30 days after the disposition, subsection 40(3.4) would apply, and the loss would be deemed to be nil until it was actually realized by the group of affiliated corporations.

[36] For these reasons, I therefore conclude that the presumption set out at subsection 40(3.5)(*c*) applies and, consequently, that the third condition of subsection 40(3.3), that is, the one stated at

paragraph 40(3.3)(*c*), has been met: at the end of the period referred to in paragraph 40(3.3)(*b*), PII Fusionco, which is a corporation affiliated with Cascades, is deemed to own the shares of PII, despite the fact that PII has been merged and no longer exists. Subsection 40(3.4) therefore applies, by virtue of subsection 40(3.3), and Cascades' loss from the disposition of the shares in PII is deemed to be nil.

[37] Lastly, I can only conclude that the judged erred in considering Cascades' intent in her analysis of the provisions at issue. In fact, the judge indicated at paragraph 36 of her reasons that the restructuring proposed by Cascades was not done with the intent to prematurely realize a loss. The judge explains at paragraph 34 of her reasons that the aim of the restructuring was to improve Cascades' worth on the financial markets and to support its future growth. However, as the appellant points out, Cascades' intent is not relevant to an analysis of subsections 40(3.3), (3.4) and (3.5). The stop-loss rule in those subsections contains no test of intent. If the conditions of subsection 40(3.3) are met, the rule must apply, regardless of the taxpayer's intent.

Disposition

[38] For these reasons, I would allow the appeal with costs, set aside the decision of the Tax Court of Canada and, rendering the judgment that should have been rendered, dismiss with costs the respondent's appeal from a determination of loss made by the Minister reducing the capital loss claimed by the respondent for the 2000 taxation year by $15,941,608.

"M. Nadon"
J.A.

"I agree.
Pierre Blais J.A."

"I agree.
J.D. Denis Pelletier J.A."

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-8-08
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. CASCADES INC.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 19, 2008
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	BLAIS J.A. PELLETIER J.A.
DATED:	April 30, 2009

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