Docket: 2006-722(IT)G

BETWEEN:

COLLINS & AIKMAN PRODUCTS CO.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of *Collins & Aikman Canada Inc.* (2006-723(IT)G) and *Collins & Aikman Holdings Canada Inc.* (2006-724(IT)G) on October 7 and 8, 2008, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the appellant:	Clifford L. Rand Susan Thomson
Counsel for the respondent:	Franco Calabrese Jenny Mboutsiadis Sandra K.S. Tsui

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JUDGMENT

The appeal from the assessments made under the *Income Tax Act* for the 1994 and 1995 taxation years and the determination for the taxation year ending January 31, 1994, is allowed in full, with costs, and the assessments and determination are referred back to the Minister of National Revenue for

reconsideration, reassessment and redetermination in accordance with the reasons herein.

Signed at Ottawa, Canada, this 3rd day of June 2009.

"Patrick Boyle"

Boyle J.

Docket: 2006-723(IT)G

BETWEEN:

COLLINS & AIKMAN CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of *Collins & Aikman Products Co.* (2006-722(IT)G) and *Collins & Aikman Holdings Canada Inc.* (2006-724(IT)G) on October 7 and 8, 2008, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the appellant:	Clifford L. Rand Susan Thomson
Counsel for the respondent:	Franco Calabrese Jenny Mboutsiadis Sandra K.S. Tsui

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JUDGMENT

The appeal from the assessments made under the *Income Tax Act* for the 1994 and 1995 taxation years is allowed in full, with costs, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the reasons herein.

Signed at Ottawa, Canada, this 3rd day of June 2009.

"Patrick Boyle"

Boyle J.

Docket: 2006-724(IT)G

BETWEEN:

COLLINS & AIKMAN HOLDINGS CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of *Collins & Aikman Products Co.* (2006-722(IT)G) and *Collins & Aikman Canada Inc.* (2006-723(IT)G) on October 7 and 8, 2008, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the appellant:	Clifford L. Rand Susan Thomson
Counsel for the respondent:	Franco Calabrese Jenny Mboutsiadis Sandra K.S. Tsui

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JUDGMENT

The appeal from the assessments made under the *Income Tax Act* for the 1994 and 1995 taxation years and the determination for the taxation year ending January 28, 1995, is allowed in full, with costs, and the assessments and determination are referred back to the Minister of National Revenue for

reconsideration, reassessment and determination in accordance with the reasons herein.

Signed at Ottawa, Canada, this 3rd day of June 2009.

"Patrick Boyle"

Boyle J.

Citation: 2009 TCC 299
Date: 20090603
Dockets: 2006-722(IT)G
2006-723(IT)G
2006-724(IT)G

BETWEEN:

COLLINS & AIKMAN PRODUCTS CO.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

AND BETWEEN:

COLLINS & AIKMAN CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

AND BETWEEN:

COLLINS & AIKMAN HOLDINGS CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The sole issue in these cases is whether the general anti-avoidance rule ("GAAR") applies to a reorganization of the corporate structure of the Canadian holdings of the Collins & Aikman group described below, followed by dividends from the Canadian operating companies through to the top Canadian holding

company and returns of capital from the top Canadian holding company to its non-resident shareholder. Implicitly, this means the impugned transactions were otherwise accounted for in accordance with the requirements of the *Income Tax Act* (the "*Act*") read without section 245 and the GAAR.

[2] The hearing of this case was very straightforward. Neither side called any witnesses. The parties had agreed on a Partial Agreed Statement of Facts, a copy of which is appended to these reasons. The parties filed a Joint Book of Documents comprising some 134 documents, however I was only referred to a handful of documents. The Crown also read in excerpts from the transcripts of the examinations for discovery of the taxpayers' representative.

[3] The taxpayers conceded that the impugned transactions resulted in a "tax benefit" for purposes of subsection 245(1). The taxpayers further conceded that, given the decision of the Federal Court of Appeal in *The Queen v. MacKay et al.*, 2008 FCA 105, 2008 DTC 6238, the impugned transactions were all part of a series of transactions which satisfied the definition of "avoidance transaction" in subsection 245(3).

[4] Thus, the only issue in this appeal is whether the corporate reorganization and subsequent recapitalization of the Collins & Aikman companies result directly or indirectly in a misuse or abuse of the provisions of the *Act* for purposes of subsection 245(4).

I. Facts

[5] The Collins & Aikman group is a foreign multinational car parts manufacturer with significant Canadian operations. The recapitalization of the Collins & Aikman group which followed the reorganization of the Canadian interests of the group provided distributions in the form of returns of capital from the Canadian members of the group through to its non-resident shareholders.

A. *Prior to the Reorganization*

[6] Prior to the reorganization the group's Canadian corporations were WCA Canada Inc. ("WCA") and Borg Textiles Inc. ("Borg"). WCA was owned by Collins & Aikman Holdings Ltd. ("CAHL"). CAHL was a corporation incorporated in Canada in 1929 which had been a Canadian operating company until 1961. In 1961 CAHL ceased to be a Canadian resident and the Canadian operations were transferred to WCA. Borg was acquired somewhat later and was wholly owned by

WCA. All of the shares of CAHL were owned by Collins & Aikman Products Co. (“Products”), a U.S. corporation.

[7] The relevant parts of the corporate organisational chart showed Products, a U.S. corporation, as the sole shareholder of CAHL, a corporation incorporated in Canada but not resident in Canada nor in the United States. CAHL in turn owned all of the shares of WCA, a Canadian corporation, which in turn owned all of the shares of Borg, another Canadian corporation.

[8] Prior to the reorganization the stated capital and paid-up capital (or PUC) of the CAHL shares, and their adjusted cost base to Products, was approximately $475,000.

B. *The Reorganization*

[9] In late 1993 and early 1994, the following corporate reorganization was undertaken.

[10] A new Canadian corporation, Collins & Aikman Holdings Canada Inc. (“Holdings”) was incorporated. About a month later, Products transferred its CAHL shares to Holdings and received the one and only common share of Holdings as consideration therefor. The fair market value of the CAHL shares at that time was $167 million. This amount was added to the stated capital account maintained for the Holdings share. This same amount, $167 million, also represented the cost of the Holdings share to Products and the cost of the CAHL shares to Holdings. This was not a rollover or other non-recognition transaction, however, Products was not taxed in Canada on the gain it realized because the CAHL shares were not taxable Canadian property as CAHL was not a Canadian resident corporation.

[11] The following month CAHL, which had originally been incorporated under the *Canada Companies Act* and continued in 1980 under the *Canada Business Corporations Act* (“CBCA”), was continued under the *Business Corporations Act* (Ontario) (“OBCA”). Several days later CAHL, WCA and Borg were all amalgamated together under the name Collins & Aikman Canada Inc. (“C&A”).

[12] Following this reorganization, Products, the U.S. parent[1], owned all of the shares of Holdings, the new Canadian holding company, which in turn owned all of the shares of C&A, the amalgamated Canadian operating company.

[13] I do not know what the U.S. tax consequences were to Products of its transfer of the CAHL shares to Holdings nor do I know if there were any tax consequences to CAHL or to Products resulting from this reorganization imposed by the country of residence of CAHL. However, neither of these foreign tax consequences would be directly relevant to an analysis of whether there has been a misuse or an abuse of the provisions of the Canadian Act in this case.

[14] At some point in the reorganization, CAHL became a Canadian resident. This may have occurred upon Products transferring the CAHL shares to Holdings since it appears the unanimous shareholder agreement, which precluded the majority Canadian directors of CAHL from exercising control, terminated. If not then, CAHL became a Canadian resident corporation upon its amalgamation into C&A the following month.

[15] As I mentioned above, long before the reorganization, in 1961, CAHL had sold its Canadian operating assets to WCA. WCA paid the purchase price, at least in part, by way of an interest-bearing promissory note. While the note was outstanding, WCA deducted the interest payments thereon when computing its income for Canadian tax purposes and CAHL paid Canadian non-resident withholding tax under Part XIII on that interest at the statutory rate of 25% without any entitlement to treaty reduction. Thus, the WCA interest payments to CAHL reduced WCA's Canadian tax bill at its effective rate and subjected CAHL to Canadian non-resident withholding tax at the lesser rate of 25% thereon. Assuming any tax payable by CAHL to its country of residence on the interest income, net of any expenses associated therewith, was less than the difference between WCA's effective Canadian rate and the 25% Canadian withholding rate on the gross amount of interest, the continued interposition of CAHL as shareholder of the Canadian operating companies was tax effective to the Collins & Aikman group.

[16] In September 1991 CAHL had reorganized its capital, part of which involved it paying a dividend to Products satisfied in part by assigning the WCA note to Products. This 1991 CAHL reorganization of capital was neither assumed nor pleaded to be part of the series of transactions. Once the WCA note ceased to be held

[1] Products was in turn held by Wickes Companies Inc., which is now known as Collins & Aikman Corporation. Since Wickes is a U.S. corporation that owned Products throughout, it is not relevant to the reorganization transactions.

by CAHL and became held by Products, the tax effectiveness of having WCA owned by a non-treaty country resident such as CAHL lost its tax effectiveness but left a significant tax cost. This is because dividends payable by a Canadian corporation to a non-resident non-treaty country shareholder would be subject to a 25% Canadian non-resident withholding tax on the dividends whereas, if the Canadian companies of the Collins & Aikman group of companies were owned by a U.S. resident such as Products directly, that rate would be reduced to 5% under the Canada-U.S. tax treaty.

[17] Only after the WCA note became owing to Products instead of CAHL, did the Collins & Aikman group ask its outside professional advisors to consider ways in which its corporate structure as it related to the group's Canadian holdings could be reorganized. The removal of the remaining tax costs of having WCA owned by a company not resident in a treaty country was at least one of the objectives of the reorganization.

C. *The Recapitalization Distributions*

[18] The recapitalization distributions occurred as follows.

[19] There was a significant overall refinancing of the Collins & Aikman group's U.S. and Canadian operations. The Canadian component basically had C&A pay $104 million of dividends to Holdings and had Holdings reduce its paid-up capital from $167 million to $63 million when it distributed $104 million to its parent, Products, as a return of capital. This occurred in two tranches. Approximately six months after the reorganization, C&A declared a $58 million dividend to Holdings and Holdings reduced the corporate stated capital and the tax paid-up capital of the Holdings share owned by Products by $58 million. C&A had borrowed the money to pay this dividend under a new Collins & Aikman group bank facility. Another six months later, C&A paid a $46 million dividend to Holdings which Holdings promptly used to again reduce the stated capital and paid-up capital of the Holdings share owned by Products by a like amount. C&A had funded this dividend from the repayments by Products and a Products subsidiary of amounts owing to C&A.

[20] It was the taxpayers' position that while the reorganization was done to permit tax-free returns of capital in the future, at the time of the reorganization there was no present intention to make distributions of particular amounts or at specific times in the future. The evidence I was referred to is consistent with this and I so find. I note that the January 1993 one-page internal memo from Treasury Department regarding the Canadian reorganization evidences an intention to pay a dividend, asks what is the maximum amount of dividend or loan that could be paid on February 1, 1993,

and raises the possibility of an intercorporate loan in the event the Canadian reorganization is not completed by February 1.

[21] Since Holdings did not have a bank account, in each case the amount of Holdings' return of capital to Products was distributed electronically from C&A's bank account directly to Products' bank account. There was no dispute that C&A was acting as Holdings' agent in this regard with satisfactory directions and financial reporting. Thus, this is only relevant to the issue of whether C&A will be liable under the paying agent liability provisions of subsection 215(6) for failure to withhold in the event GAAR applies to recharacterize the returns of capital as dividends.

II. The GAAR Assessments

[22] In this case, the Minister of National Revenue (the "Minister") did not directly recharacterize the tax consequences of the impugned transactions in reliance upon subsection 245(2) of the GAAR. Instead of recharacterization, the Minister made determinations under subsection 152(1.11), and reduced the paid-up capital of the Holdings share owned by Products, and Products' adjusted cost base (or ACB) in that share, from $167 million to approximately $475,000, being the PUC and the ACB to Products prior to the reorganization of the CAHL shares owned by it. A similar determination under subsection 152(1.11) was issued by the Minister to Holdings which reduced the PUC of the Holdings share and reduced the cost to Holdings of its C&A shares from $167 million to approximately $475,000. About ten days later, the Minister assessed Products for Canadian non-resident withholding tax under Part XIII on deemed dividends aggregating the difference between the $104 million distributed to it and the $475,000 determined to be the paid-up capital of its CAHL share. At the same time the Minister assessed Holdings under subsections 215(1) and 215(6) for not withholding and remitting Part XIII tax in respect of the deemed dividends together with penalties for failing to withhold. Similarly, the Minister also assessed C&A for its failure to withhold under subsections 215(2) and 215(6) from the deemed dividends when it acted as Holdings' paying agent in making the payment, together with penalties for failing to withhold.

[23] Prior to the hearing of these appeals the Minister agreed to vacate the penalties assessed against Holdings and C&A for their failure to withhold and remit Part XIII tax.

[24] I do not understand why the Minister proceeded with subsection 152(1.11) GAAR determinations in this case, followed by ordinary Part XIII assessments of Products, Holdings and C&A relying upon the retroactive effect of the Minister's

determinations. It appears the Minister could have proceeded in the straightforward manner of assessing Products for non-resident withholding tax in reliance upon a section 245 GAAR recharacterization of the distributions as being primarily dividends without first making such a determination. Thereafter the liabilities of Holdings and C&A for Products' Part XIII tax would flow from subsections 215(1), 215(2) and 215(6). If GAAR applies to recharacterize the amount paid to a non-resident as something which gives rise to a Part XIII tax payable by the non-resident, a Canadian payor and paying agent can be assessed under section 215 seemingly without the need to rely on the GAAR.

[25] The Minister's decision to proceed with the determinations under 152(1.11) has given rise to some uncertainty. This is because there are express restrictions in section 152 upon determinations having a retroactive effect. Specifically, subsection 152(1.12) provides that a determination under subsection (1.11) cannot be made if the determined amount is relevant only for the purposes of computing the income, tax or other amount payable by the taxpayer under the *Act* for an earlier taxation year. This section clearly provides that amounts cannot be determined if they are only relevant to retroactively impose a tax consequence upon the taxpayer. In those circumstances ordinary assessments relying upon section 245 can be made directly by the Minister.

[26] It is the Minister's position in this case that its determination of the paid-up capital amount of the Holdings share is not relevant only for purposes of computing taxes payable in years prior to that determination. The Minister's position is that the $475,000 amount it determined to be the PUC of the Holdings share is not only relevant to the 1994 capital distributions since, prior to the determination of the PUC amount, the PUC of the Holdings share was $167 million following the reorganization and was only reduced to $63 million upon payment of the $104 million returns of capital. Immediately prior to these determinations the PUC was therefore $63 million which, absent the determinations, could have been returned otherwise than as a dividend on the Holdings share to Products. The Minister's position is that by determining the PUC amount to be $475,000 that PUC determination was also relevant on a going forward basis prospectively because its effect was to preclude the return of capital of another $62.5 million of PUC.

[27] The contrary argument is that the determined amount, being $475,000, was relevant only for the prior years since the entire $475,000 determined PUC amount had been fully returned in prior years.

[28] I have my doubts as to the correctness of the Minister's position. If the Minister's position is not correct, the subsection 152(1.11) GAAR determinations are invalid as a result of subsection 152(1.12). Since the assessments themselves do not rely upon GAAR, but rely upon the subsection 152(1.11) determinations made days prior to the assessments, it appears the assessments would have to be vacated in this appeal. However, since I find in this case, as detailed below, that the reorganization and capital distributions do not result in a misuse or abuse of the provisions of the *Act*, I do not need to decide this preliminary but vexing subsection 152(1.11) question. Instinctively, it seems that retroactive determinations, like retroactive tax legislation, should be avoided except in cases where the legislator has clearly and unambiguously set out its intent to impose or permit the tax to be imposed retroactively.

III. The Pleadings

[29] Very shortly before the hearing of this appeal, the Crown moved to file amended replies. That motion was heard at the opening of trial. The taxpayers ended up consenting to the filing of the amended replies.

[30] Among other things, the amended replies (i) expanded the transactions forming part of the series of transactions, (ii) changed the provision of the *Act* which was alleged to have been misused, and (iii) added a large number of provisions relating to corporate distributions that it alleged formed part of the scheme of the *Act* read as a whole.

[31] The Minister's initial assumption, which rightly remained unamended, was that subsection 128.2(1) dealing with cross-border amalgamations had been misused as a result of the transactions and that the transactions constituted abuse having regard to the provisions of the *Act* read as a whole. At the hearing, the Minister acknowledged that subsection 128.2(1) was entirely the wrong provision and would not or should not have applied in any event regardless of how the corporate reorganization had been structured or undertaken. The amended pleadings take the position that subsection 84(4) is the provision which the transactions misused. Further, the amended replies plead that the transactions are an abuse of the provisions of the *Act* read as a whole including sections 54 "adjusted cost base", 84, 84.1, 87, 89 "paid-up capital", 128.1 and 212.1, subsections 15(1), 39(1), 51(3), 52(8), 85(2.1), 85.1(2.1), 86(2.1), 87(1), 112, 115(1), 215(2), 215(6) and 250(4) as well as paragraphs 3(*b*) and 38(*a*).

[32] The transactions occurred in 1994, the determinations and the assessments were made in 2000, the notices of objections were filed in 2001 and the Minister's confirmation of the assessments and the determinations were done in 2005. The notices of appeal and original replies were filed in 2006. Only in September 2008, and very shortly before the early October trial did the Minister notify the taxpayers that the provision alleged to have been misused until then was entirely the wrong provision and an entirely new provision is the one that had been misused.

[33] The taxpayers' consent to the Crown's motion to file the amended replies was granted on the condition that certain documents produced on the motion would also form part of the evidence in the hearing and, provided that the Minister acknowledged that for purposes of the trial record, the Crown did not consult with the Canada Revenue Agency's GAAR Committee regarding the amended replies' position that an entirely different provision of the *Act* had been misused. In these circumstances, I accord little or no weight, relevance or significance to the fact that the Crown did not go back to the GAAR Committee on this most important aspect of the determinations, assessments and appeals. I assume this was put forward by way of adding colour to the facts surrounding the assessment and the strength of the Minister's position. If that is so, it is perhaps gilding the lily since in any event the Minister finds itself changing horses far past the middle of the stream by filing amended replies. In the circumstances, this fact does not in any way affect my analysis of whether the corporate reorganization and capital distributions constitute a misuse or abuse of any provision of the *Act* or the *Act* read as a whole. It is however perhaps fair of taxpayers generally, and taxpayers who have been reassessed under GAAR and their professional advisors, to question how the Government of Canada effectively prepares its case if its counsel is not working together with the GAAR Committee's members from the Department of Finance, or other members of the Department of Finance's Tax Policy Branch, which is as a practical matter the group truly responsible for the scheme of the *Act*. The taxpayers of Canada generally might be concerned that absent such lines of communication being fully open and systematically taken advantage of, the government may be losing GAAR cases it should win. Similarly, taxpayers who are the subject of GAAR assessments and their counsel may be concerned that the government is pursuing GAAR cases to trial and losing in circumstances where the Crown should have folded before trial. These comments are in no way a reflection of the particular Crown counsel in this case. Lawyers must work with the facts and history of the case they are given and are constrained as a practical matter, notwithstanding the *Department of Justice Act*, to work within their clients' instructions and operating methods.

IV. Law

[34] The GAAR is set out in section 245 of the *Act*. Since the taxpayers have conceded the tax benefit and avoidance transaction aspects of section 245, the issue in this case is whether the impugned transactions are spared the application of GAAR because they do not constitute a misuse or abuse described in subsection 245(4). Subsection 245(4) reads as follows:

> 245(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction
>
> (*a*) would, if this *Act* were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of
>
> (i) this *Act*,
>
> (ii) the *Income Tax Regulations*,
>
> (iii) the *Income Tax Application Rules*,
>
> (iv) a tax treaty, or
>
> (v) any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this *Act* or in determining any amount that is relevant for the purposes of that computation; or
>
> (*b*) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.

[35] Only if the impugned transactions are subject to the application of GAAR because they constitute the type of misuse or abuse described in subsection 245(4), would it remain to determine if the Minister's determination of the appropriate tax consequences and amounts for purposes of subsections 245(2) and (5) and subsection 152(1.11) are appropriate. Given my determination that the impugned transactions are saved by subsection 245(4) because they do not constitute the type of misuse or abuse described therein as that subsection has been interpreted by the Supreme Court of Canada in *Canada Trustco Mortgage Company v. Canada*, 2005 SCC 54, 2005 DTC 5523, and in *Lipson v. Canada*, 2009 SCC 1, 2009 DTC 5015, I am not reproducing the recharacterization provisions.

[36] Notwithstanding the wording of subsection 245(4) relating to misuse and abuse, the Supreme Court of Canada has mandated a unified interpretive approach to be applied by the Court in finding whether or not abusive tax avoidance resulted from a series of transactions. This approach was set out in *Canada Trustco* as follows:

44 The heart of the analysis under s. 245(4) lies in a contextual and purposive interpretation of the provisions of the *Act* that are relied on by the taxpayer, and the application of the properly interpreted provisions to the facts of a given case. The first task is to interpret the provisions giving rise to the tax benefit to determine their object, spirit and purpose. The next task is to determine whether the transaction falls within or frustrates that purpose. The overall inquiry thus involves a mixed question of fact and law. The textual, contextual and purposive interpretation of specific provisions of the *Income Tax Act* is essentially a question of law but the application of these provisions to the facts of a case is necessarily fact-intensive.

45 This analysis will lead to a finding of abusive tax avoidance when a taxpayer relies on specific provisions of the *Income Tax Act* in order to achieve an outcome that those provisions seek to prevent. As well, abusive tax avoidance will occur when a transaction defeats the underlying rationale of the provisions that are relied upon. An abuse may also result from an arrangement that circumvents the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or defeats the object, spirit or purpose of those provisions. By contrast, abuse is not established where it is reasonable to conclude that an avoidance transaction under s. 245(3) was within the object, spirit or purpose of the provisions that confer the tax benefit.

46 Once the provisions of the *Income Tax Act* are properly interpreted, it is a question of fact for the Tax Court judge whether the Minister, in denying the tax benefit, has established abusive tax avoidance under s. 245(4). Provided the Tax Court judge has proceeded on a proper construction of the provisions of the *Act* and on findings supported by the evidence, appellate tribunals should not interfere, absent a palpable and overriding error.

47 The first part of the inquiry under s. 245(4) requires the court to look beyond the mere text of the provisions and undertake a contextual and purposive approach to interpretation in order to find meaning that harmonizes the wording, object, spirit and purpose of the provisions of the *Income Tax Act*. There is nothing novel in this. Even 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. "After all, language can never be interpreted independently of its context, and legislative purpose is part of the context. It would seem to follow that consideration of legislative purpose may not only resolve patent ambiguity, but may, on occasion, reveal ambiguity in apparently plain language." See P.W. Hogg and J.E. Magee, *Principles of Canadian Income Tax Law* (4th ed. 2002), at p. 563. In order to reveal and resolve any latent ambiguities in the meaning of provisions of the *Income Tax Act*, the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation.

. . .

49 In all cases where the applicability of s. 245(4) is at issue, the central question is, having regard to the text, context and purpose of the provisions on which the taxpayer relies, whether the transaction frustrates or defeats the object, spirit or purpose of those provisions. The following points are noteworthy:

(1) While the Explanatory Notes use the phrase "exploit, misuse or frustrate", we understand these three terms to be synonymous, with their sense most adequately captured by the word "frustrate".

(2) The Explanatory Notes elaborate that the GAAR is intended to apply where under a literal interpretation of the provisions of the *Income Tax Act*, the object and purpose of those provisions would be defeated.

(3) The Explanatory Notes specify that the application of the GAAR must be determined by reference to the facts of a particular case in the context of the scheme of the *Income Tax Act*.

(4) The Explanatory Notes also elaborate that the provisions of the *Income Tax Act* are intended to apply to transactions with real economic substance.

50 As previously discussed, Parliament sought to address abusive tax avoidance while preserving consistency, predictability and fairness in tax law and the GAAR can only be applied to deny a tax benefit when the abusive nature of the transaction is clear.

51 The interpretation of the provisions giving rise to the tax benefit must, in the words of s. 245(4) of the *Act*, have regard to the *Act* "read as a whole". This means that the specific provisions at issue must be interpreted in their legislative context, together with other related and relevant provisions, in light of the purposes that are promoted by those provisions and their statutory schemes. In this respect, it should not be forgotten that the GAAR itself is part of the *Act*.

. . .

55 In summary, s. 245(4) imposes a two-part inquiry. The first step is to determine the object, spirit or purpose of the provisions of the *Income Tax Act* that are relied on for the tax benefit, having regard to the scheme of the *Act*, the relevant provisions and permissible extrinsic aids. The second step is to examine the factual context of a case in order to determine whether the avoidance transaction defeated or frustrated the object, spirit or purpose of the provisions in issue.

56 The Explanatory Notes elaborate that the provisions of the Income Tax Act are intended to apply to transactions with real economic substance. Although the expression "economic substance" may be open to different interpretations, this statement recognizes that the provisions of the *Act* were intended to apply to

transactions that were executed within the object, spirit and purpose of the provisions that are relied upon for the tax benefit. The courts should not turn a blind eye to the underlying facts of a case, and become fixated on compliance with the literal meaning of the wording of the provisions of the *Income Tax Act*. Rather, the courts should in all cases interpret the provisions in their proper context in light of the purposes they intend to promote.

57 Courts have to be careful not to conclude too hastily that simply because a non-tax purpose is not evident, the avoidance transaction is the result of abusive tax avoidance. Although the Explanatory Notes make reference to the expression "economic substance", s. 245(4) does not consider a transaction to result in abusive tax avoidance merely because an economic or commercial purpose is not evident. As previously stated, the GAAR was not intended to outlaw all tax benefits; Parliament intended for many to endure. The central inquiry is focussed on whether the transaction was consistent with the purpose of the provisions of the *Income Tax Act* that are relied upon by the taxpayer, when those provisions are properly interpreted in light of their context. Abusive tax avoidance will be established if the transactions frustrate or defeat those purposes.

. . .

59 Similarly, courts have on occasion discussed transactions in terms of their “lack of substance” or requiring “recharacterization”. However, such terms have no meaning in isolation from the proper interpretation of specific provisions of the *Income Tax Act*. The analysis under s. 245(4) requires a close examination of the facts in order to determine whether allowing a tax benefit would be within the object, spirit or purpose of the provisions relied upon by the taxpayer, when those provisions are interpreted textually, contextually and purposively. Only after first, properly construing the provisions to determine their scope and second, examining all of the relevant facts, can a proper conclusion regarding abusive tax avoidance under s. 245(4) be reached.

. . .

61 <u>A proper approach to the wording of the provisions of the *Income Tax Act* together with the relevant factual context of a given case achieve balance between the need to address abusive tax avoidance while preserving certainty, predictability and fairness in tax law so that taxpayers may manage their affairs accordingly</u>. Parliament intends taxpayers to take full advantage of the provisions of the *Act* that confer tax benefits. Parliament did not intend the GAAR to undermine this basic tenet of tax law.

62 The GAAR may be applied to deny a tax benefit only after it is determined that it was not reasonable to consider the tax benefit to be within the object, spirit or purpose of the provisions relied upon by the taxpayer. <u>The negative language in which s. 245(4) is cast indicates that the starting point for the analysis is the</u>

> assumption that a tax benefit that would be conferred by the plain words of the *Act* is not abusive. This means that a finding of abuse is only warranted where the opposite conclusion -- that the avoidance transaction was consistent with the object, spirit or purpose of the provisions of the Act that are relied on by the taxpayer -- cannot be reasonably entertained. In other words, the abusive nature of the transaction must be clear. The GAAR will not apply to deny a tax benefit where it may reasonably be considered that the transactions were carried out in a manner consistent with the object, spirit or purpose of the provisions of the *Act*, as interpreted textually, contextually and purposively.

[Emphasis added.]

[37] In *Lipson*, the majority of the Supreme Court describes paragraphs 44 and 45 as the key portion of the Court's approach to GAAR in *Canada Trustco*. The majority summarized paragraph 44 as follows:

> 40 According to the framework set out in *Canada Trustco*, a transaction can result in an abuse and misuse of the *Act* in one of three ways: where the result of the avoidance transaction (a) is an outcome that the provisions relied on seek to prevent; (b) defeats the underlying rationale of the provisions relied on; or (c) circumvents certain provisions in a manner that frustrates the object, spirit or purpose of those provisions (*Canada Trustco*, at para. 45).

[38] In *Lipson*, at paragraph 27, the majority of the Court adds the word "essential" in front of "object, spirit and purpose" in summarizing paragraph 44 of *Canada Trustco*.

[39] In this case, the burden to persuade the Court of the correctness of its position is entirely on the Minister. As set out by the Supreme Court in *Canada Trustco*, a taxpayer in a GAAR appeal will shoulder the initial burden of establishing what the facts are by refuting or challenging the Minister's factual assumptions, challenging the existence of a tax benefit, or showing that a *bona fide* non-tax purpose primarily drove the transaction. In this case, the facts have been agreed to and the taxpayers have conceded the tax benefit and avoidance transaction aspects of GAAR. In this case the only issue is whether or not the taxpayers' tax benefit enjoyed from the avoidance transactions was or was not abusive tax avoidance.

[40] On the topic of burden of proof or persuasion, the Supreme Court of Canada in *Canada Trustco* first quoted from paragraph 68 of the reasons of the Federal Court of Appeal in *OSFC Holdings Ltd. v. Canada*, 2001 FCA 260, 2001 DTC 5471, that:

> [F]rom a practical perspective, . . . [t]he Minister should set out the policy with reference to the provisions of the *Act* or extrinsic aids upon which he relies.

The Supreme Court went on in paragraph 65:

> For practical purposes, the last statement is the important one. The taxpayer, once he or she has shown compliance with the wording of a provision, should not be required to disprove that he or she has thereby violated the object, spirit or purpose of the provision. It is for the Minister who seeks to rely on the GAAR to identify the object, spirit or purpose of the provisions that are claimed to have been frustrated or defeated, when the provisions of the *Act* are interpreted in a textual, contextual and purposive manner. The Minister is in a better position than the taxpayer to make submissions on legislative intent with a view to interpreting the provisions harmoniously within the broader statutory scheme that is relevant to the transaction at issue.

[41] It is important to note that the test for abusive tax avoidance is not whether in a taxpayer's particular circumstances a sense of apparent equity or arguable common sense suggests transactions like these should be taxed no differently than some other transaction that would achieve most or all of the same results but for the taxpayer's further objective of minimizing taxes in completing the transactions. That is not what section 245 provides nor how it has been interpreted. Nor is the test whether the *Act* should have been drafted to catch particular transactions.

[42] The preconditions for a determination of abusive tax avoidance in subsection 245(4) from paragraph 45 of *Canada Trustco* and from paragraph 40 of *Lipson* require the Crown to demonstrate a provision or provisions detailing or forming part of the scheme of the *Act* with respect to the taxation of amounts or transactions similar to those in question which have been misused by the taxpayers in their series of transactions. Such misuse must be shown to result (i) from the provision or provisions being relied on or applied by the taxpayers in order to achieve an outcome that the provisions seek to prevent, or (ii) from the provisions being applied or relied upon to defeat the underlining rationale of the provisions, or (iii) by circumventing the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or defeats the object, spirit or purpose of those provisions.

V. <u>Positions of the Parties</u>

A. *The Minister*

[43] Since the onus is on the Crown, I will set forth the Crown's position first.

[44] In effect, it is the Crown's position that the taxpayers have misused or abused subsection 84(4) which specifies that amounts paid by a corporation to a shareholder upon a return of capital in excess of the paid-up capital of the shares in question is deemed to be a dividend for purposes of the *Act* including Part XIII non-resident withholding tax.

[45] Subsection 84(4) is found in Subdivision h of Part I, Division B headed "Corporations Resident in Canada and their Shareholders" and provides as follows:

> 84(4) Where at any time after March 31, 1977 a corporation resident in Canada has reduced the paid-up capital in respect of any class of shares of its capital stock otherwise than by way of a redemption, acquisition or cancellation of any shares of that class or a transaction described in subsection 84(2) or (4.1),
>
> > (a) the corporation shall be deemed to have paid at that time a dividend on shares of that class equal to the amount, if any, by which the amount paid by it on the reduction of the paid-up capital, exceeds the amount by which the paid-up capital in respect of that class of shares of the corporation has been so reduced; and
> >
> > (b) a dividend shall be deemed to have been received at that time by each person who held any of the issued shares at that time equal to that proportion of the amount of the excess referred to in paragraph 84(4)(a) that the number of the shares of that class held by the person immediately before that time is of the number of the issued shares of that class outstanding immediately before that time.

[46] It is the Crown's position that there is an evident scheme of the *Act* with respect to corporate distributions of which subsection 84(4) forms part which begins from the premise that distributions from corporations to shareholders are to be included in income in the case of residents or subject to withholding tax in the case of non-residents.

[47] The Minister points to the numerous provisions referred to in paragraph 31 above that it believes evidences this scheme that corporate distributions are to be taxed except where provisions specifically provide otherwise.

[48] The respondent goes on to explain that subsection 84(4) does specifically provide otherwise for returns of capital by excluding from income distributions upon a return of capital that do not exceed the shares' tax paid-up capital. However, it is

the respondent's position that this should not extend to inappropriate or artificial increases of PUC. The respondent maintains that, in this case, subsection 84(4) was circumvented by abusive dividend stripping.

[49] The Crown did not put in evidence any extrinsic aids dealing with legislative intent in support of its proffered scheme of the *Act*.

B. *The Taxpayers*

[50] In effect the taxpayers' position, paraphrased by me and perhaps somewhat recast, is as follows.

[51] A clear and straightforward application of the specific provisions of the *Act* dealing with the determination of the paid-up capital of the Holdings share and the cost of that share to Products, as well as the cost to Holdings of its CAHL shares, has the clear and unambiguous result of setting those tax attributes and accounts at $167 million.

[52] Similarly, subsection 84(4) is clear and unambiguous that Holdings was entitled to make a tax-free return of capital to its shareholders in an amount up to $167 million.

[53] Essentially, corporate distributions can be in two forms, dividends and returns of capital. (Dividends in fact break down further between taxable dividends and capital dividends. Section 83 generally provides that capital dividends from private corporations are tax-free. Beyond this general principle, capital dividends are beyond the needed scope of this analysis.)

[54] The scheme of the *Act* with respect to the taxation of corporate distributions under Part I of the *Act* applicable to Canadian residents is that taxable dividends are to be included in income under section 82 as a starting point from which flows thereafter numerous deductions and adjustments, most notably the section 112 intercorporate dividends deduction for corporate shareholders and the dividend tax credit and gross-up provisions in paragraph 82(1)(*b*) and section 121 applicable to individual shareholders. The language of paragraphs 12(1)(*i*), (*j*) and (*k*) also make it clear that it is the amounts specified in the particular provision of the *Act* that are to be included in income as dividends from a corporation.

[55] With respect to corporate distributions by way of returns of capital, the scheme of the *Act* begins in section 84 which provides that only distributions in excess of the

share's paid-up capital are included in income. This initial approach is subject to further adjustments, primarily by way of adjustments to paid-up capital amounts in certain circumstances, including specific anti-avoidance provisions such as section 84.1 in the case of residents and section 212.1 in the case of non-residents.

[56] Such an approach is grounded and begins from a specific provision of the *Act* with respect to dividends and a specific provision of the *Act* with respect to returns of paid-up capital. The Minister's scheme of the *Act* begins from what the Crown maintains is an unstated implicit beginning premise that all corporate distributions are to be taxed. Effectively, the Crown's starting point is not anchored in the *Act* but in an unstated and unsupported premise that corporate distributions are to be taxed unless they are exceptions. The Crown's position treats the statutory régimes applicable to dividends in sections 82 and 112, etc. and that applicable to distributions of capital set out in section 84, etc. as exceptions to its unstated general rule.

[57] In the case of non-residents, Part XIII of the *Act* does not evidence any scheme with respect to the approach to the taxation of corporate distributions beyond (i) subsection 212(2) which provides that dividends, including deemed dividends which may result from returns of capital under subsection 84(4), are to be subject to non-resident withholding tax, and (ii) there is a specific anti-avoidance rule in section 212.1 applicable to dividend surplus strips described therein that is much the same as the approach taken in section 84.1 with respect to dividend surplus strips by Canadian resident taxpayers.

[58] Once the WCA note ceased to be owing to CAHL by WCA, some form of corporate reorganization was required to remove the remaining tax inefficiency described above. In deciding how to proceed with the necessary restructuring, the Collins & Aikman group legitimately considered tax minimization in deciding how best to remove the interposition of a non-resident, non-treaty jurisdiction corporation between the Canadian corporations in the Collins & Aikman group and their ultimate U.S. parent (Products and Collins & Aikman Corporation). To do so was entirely legitimate, consistent with the principles of *Inland Revenue Commissioner v. Duke of Westminster*, [1936] A.C. 1 (H.L.), and is similar to the situation in which the taxpayer in *Geransky v. The Queen,* 2001 DTC 243, found himself.

VI. Analysis

A. *The scheme of the Act Applicable to Corporate Distributions*

[59] In essence, the most significant part of this analysis is the determination of what is the scheme of the *Act* applicable to corporate distributions. Is the scheme of the *Act*, as maintained by the Crown, that corporate distributions are to be included in income except where specific provisions of the *Act* provide otherwise in particular circumstances or to a particular extent? Or does the scheme of the *Act*, of which subsection 84(4) forms part, provide that (i) dividends distributed by corporations are included in income except in circumstances where, or to the extent that, the *Act* provides otherwise, and that (ii) distributions to shareholders by corporations other than by way of dividend are included in income to the extent only that they exceed the shareholders' paid-up capital in those shares, subject to specific rules which provide otherwise in certain circumstances or to a certain extent?

[60] The difference between these two competing schemes is that in the Crown's mind this scheme begins from an unstated premise not vocalized in the language of the *Act* that corporate distributions are income. The Crown then goes on to treat the opposing theory, which is grounded or anchored in specific starting point provisions of the *Act*, as exceptions to its generalized starting point. In either case, subsection 84(4) forms part of the scheme of the *Act* relating to the taxation of corporate distributions.

[61] I begin this analysis mindful of the following comments of the Supreme Court of Canada in *Canada Trustco*:

> 41 The courts cannot search for an overriding policy of the *Act* that is not based on a unified, textual, contextual and purposive interpretation of the specific provisions in issue. First, such a search is incompatible with the roles of reviewing judges. The *Income Tax Act* is a compendium of highly detailed and often complex provisions. To send the courts on the search for some overarching policy and then to use such a policy to override the wording of the provisions of the *Income Tax Act* would inappropriately place the formulation of taxation policy in the hands of the judiciary, requiring judges to perform a task to which they are unaccustomed and for which they are not equipped. Did Parliament intend judges to formulate taxation policies that are not grounded in the provisions of the *Act* and to apply them to override the specific provisions of the *Act*? Notwithstanding the interpretative challenges that the GAAR presents, we cannot find a basis for concluding that such a marked departure from judicial and interpretative norms was Parliament's intent.
>
> 42 Second, to search for an overriding policy of the *Income Tax Act* that is not anchored in a textual, contextual and purposive interpretation of the specific provisions that are relied upon for the tax benefit would run counter to the overall policy of Parliament that tax law be certain, predictable and fair, so that taxpayers can intelligently order their affairs. Although Parliament's general purpose in enacting the GAAR was to preserve legitimate tax minimization schemes while

> prohibiting abusive tax avoidance, Parliament must also be taken to seek consistency, predictability and fairness in tax law. These three latter purposes would be frustrated if the Minister and/or the courts overrode the provisions of the *Income Tax Act* without any basis in a textual, contextual and purposive interpretation of those provisions.

[62] I do not accept the Crown's view. When considering the statutory provisions dealing with corporate distributions there is no clear need to step back from the *Act* altogether, begin from an unstated premise, and then treat the *Act* as only setting out the exceptions. Sections 82, 112 and 121, and subsection 84(4) are drafted as the starting points for determining how corporate dividends and other corporate distributions respectively are to be included in income. Subdivision h of the *Act* is drafted as a régime, not as a series of exceptions.

[63] It is principally the Crown's beginning point of its scheme of the *Act* that differs from the opposing scheme of the *Act*. I am particularly not inclined to favour such a stepping out from the provisions of the *Act* approach when the Crown is relying entirely upon the provisions of the *Act* and does not refer to any extrinsic aids to the contextual consideration of the *Act*'s régime on taxing corporate distributions or of subsection 84(4).

[64] It is with this understanding of the scheme of the *Act* that I will begin my textual, contextual and purposive interpretation and analysis of the role of subsection 84(4) before determining whether the impugned transactions constitute abusive tax avoidance.

B. *Subsection 84(4) Considered Contextually*

[65] The contextual scheme of the *Act* applicable to corporate distributions that are not dividends begins in section 84 with the premise that distributions in excess of tax paid-up capital computed in accordance with the specific provisions of the *Act* are deemed to be dividends and will be taxed as such to Canadian residents and to non-residents. I reject the Crown's contextual scheme that provides that subsection 84(4) must be read in the context of a scheme of the *Act* that distributions are income and that subsection 84(4) excludes paid-up capital from that premise. That beginning premise is not evidenced in the legislation; I was referred to no extrinsic support for it outside the provisions of the *Act*, and it is an unnecessary and somewhat redundant beginning point. A contextual analysis should to the greatest extent possible follow the architecture of the *Income Tax Act* itself unless extrinsic aids, *stare decisis* or other considerations suggest otherwise.

C. *Textual Considerations*

[66] Subsection 84(4) provides only that distributions by corporations in excess of their shares' paid-up capital will be treated as income to the distributee shareholders. In other words, distributions are tax-free up to the amount of available tax PUC and are taxed as dividends to the extent they exceed tax PUC. Having regard to the other relevant provisions of the *Act* forming part of its approach to the taxation of corporate distributions, this general rule is subject to specific anti-avoidance provisions none of which provisions were avoided in this case. These specific anti-avoidance provisions frequently take the form of targeted reductions or grinds to paid-up capital or specific increases or bumps to paid-up capital which specifically increase or reduce paid-up capital by an appropriate amount. This is commonly done in order to grind improper or artificial increases to paid-up capital or the multiplication of the recognition of paid-up capital by more than one corporation.

[67] Consistent with the balance of the *Act*, subsection 84(4) looks to the individual corporations in a corporate group as distinct legal entities and separate taxpayers.

D. *Purposive Considerations*

[68] The purpose of subsection 84(4) is clear and straightforward: just as Canada wants to tax dividends distributed out of a corporation's net after-tax profits, Canada wants to tax other distributions by corporations to their shareholders as income to the extent those distributions are in excess of the shares' paid-up capital.

[69] Paid-up capital is a necessary and important part of the *Act*'s approach to the taxation of distributions by corporations and it is specifically and extensively defined in the *Act*.

[70] In simple terms, paid-up capital represents the amount shareholders have invested in the corporation. In circumstances where a shareholder purchases shares from another shareholder, the purchase price is relevant only to the buyer's cost and the seller's proceeds but does not increase or affect the shares' paid-up capital since the sale transaction did not result in an investment in the corporation itself. As already mentioned, the computation of tax PUC is subject to bumps or grinds where appropriate as determined by Canadian tax policy and the legislature.

[71] Thus, stated simply, the purpose of subsection 84(4) is to tax distributions, other than dividends, paid by a particular corporation to its shareholders to the extent

the distribution exceeds the amount of capital invested in that corporation by that corporation's shareholders.

[72] Determining the purpose of the relevant provisions or portions of the *Act* is not to be confused with abstract views of what is right and what is wrong nor with arbitrary theories about what the law ought to be or ought to do. These latter views and theories are unhelpful in purposive and contextual statutory analysis and may even create mischief unless they are grounded in the realities of the codified legislation. The purpose of the legislated scheme should be demonstrably evident from the provisions of the *Act*, aided by any relevant, permissible extrinsic aids. One's sense of right and wrong or what good tax policy should provide for or should not allow is not, for these purposes, a permissible extrinsic aid.

E. *Is There a Scheme of the Act Relating to Surplus Stripping?*

[73] A further scheme of the *Act* that could be put forward as part of a contextual analysis to support the GAAR determinations is whether there is a scheme of the *Act* that dividend or surplus stripping should not be allowed and the stripped dividends should be taxed as income.

[74] The first GAAR case under the *Act*, *McNichol et al. v. The Queen*, 97 DTC 111 (TCC), found there to be such a scheme of the *Act*. The second GAAR case also involved a dividend strip and was decided by the former Chief Justice Bowman. *RMM Canadian Enterprises Inc. et al. v. The Queen*, 97 DTC 302 (TCC), similarly recognized, in *obiter*, such a scheme of the *Act*.

[75] In *RMM Canadian Entreprises* Bowman C.J. wrote (at 313):

> To what Bonner, J. has said [in *McNichol*] I would add only this: the *Income Tax Act*, read as a whole, envisages that a distribution of corporate surplus to shareholders is to be taxed as a payment of dividends. A form of transaction that is otherwise devoid of any commercial objective, and that has as its real purpose the extraction of corporate surplus and the avoidance of the ordinary consequences of such a distribution, is an abuse of the *Act* as a whole.

[76] Despite those initial early successes, subsequent decisions have been unable to so clearly recognize such a scheme of the *Act*. Indeed, Chief Justice Bowman in his post-Trustco decision in *Evans v. The Queen*, 2005 TCC 684, 2005 DTC 1762, significantly discounted his earlier decision in *RMM Canadian Entreprises* when he wrote:

> 30 The only basis upon which I could uphold the Minister's application of section 245 would be to find that there is some overarching principle of Canadian tax law that requires that corporate distributions to shareholders must be taxed as dividends, and where they are not the Minister is permitted to ignore half a dozen specific sections of the *Act*. This is precisely what the Supreme Court of Canada has said we cannot do.
>
> . . .
>
> 34 Counsel argues that this case is similar to Justice Bonner's decision in *McNichol v. The Queen*, 97 DTC 111 and mine in *RMM Canadian Enterprises Inc. et al., v. The Queen,* 97 DTC 302. These cases were early general anti-avoidance rule cases and we did not have the benefit of the Supreme Court of Canada's guidance that we have today. If we had had the benefit of the Supreme Court of Canada's views, our analysis might have been quite different. The principal basis of my decision in *RMM Canadian Enterprises Inc.* was subsection 84(2) of the *Income Tax Act*. One must bear in mind that what the appellants were attempting to circumvent in *RMM* and *McNichol* was subsection 84(2). That is not the situation here. 117679 continued to carry on business and it in fact paid dividends. The situation here is not analogous to the RMM and McNichol cases. In any event, reference to these two early cases does not in my view satisfy the onus that the Supreme Court of Canada has placed on the Crown.

[Emphasis added.]

[77] Similarly, Campbell J. in *Copthorne Holdings Ltd. v. The Queen*, 2007 DTC 1230, wrote, at paragraph 73:

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

[78] Also to like effect, Lamarre J. in *McMullen v. The Queen*, 2007 DTC 286, wrote at paragraph 56:

> In conclusion, the respondent has not persuaded me, or has not presented any evidence establishing, that there was any abuse of the *Act* read as a whole, or that the policy of the *Act* read as a whole is designed so as to necessarily tax corporate distributions as dividends in the hands of shareholders. In any event, as the Supreme Court of Canada has said, "[i]f the existence of abusive tax avoidance is unclear, the benefit of the doubt goes to the taxpayer". . .

[79] The words of Bowman C.J., Campbell J. and Lamarre J. apply equally in this case.

F. *Did the Transactions Defeat or Frustrate the Object, Spirit or Purpose of Subsection 84(4) and the Other Provisions in Issue?*

[80] I now turn to the second step of determining whether the Collins & Aikman reorganization and distributions constituted abusive tax avoidance.

[81] The transactions did not rely on any specific provision of the *Act* to accomplish what the provision sought to restrict.

[82] The transactions did not defeat the underlying rationale or purpose of any of the specific provisions applicable or relied upon.

[83] The real question in this case is whether any abuse resulted from the impugned transactions circumventing the application of subsection 84(4) in a manner that frustrates or defeats the object, spirit or purpose of subsection 84(4) and the greater scheme of the *Act* applicable to the taxation of corporate distributions.

[84] Prior to the series of transactions, CAHL was a non-resident outside the Canadian tax régime except, like all non-residents, subject to non-resident withholding tax on any Canadian-sourced property income such as dividends or interest received from Canadians. That is, prior to the reorganization, CAHL was worth $167 million and its shareholder, Products, could have sold CAHL in order to realize on its Canadian investments without any Canadian tax being payable. This is because the shares of CAHL did not constitute taxable Canadian property which is the specific definition in the *Act* which identifies assets with a sufficient nexus to Canada to be regarded as giving rise to gains that should be taxed in Canada when those gains are realized by a non-resident on the sale of those assets.

[85] The potential realization of tax-free gains on the sale of CAHL by Products was not dependent upon CAHL's residence in a non-treaty country; Canada would not have taxed the gain if CAHL had been resident in the United States. This was not dependent upon the existence or not of a treaty; the *Act* itself does not generally seek to tax gains upon shares of companies not resident in Canada even though historically they may have been incorporated in Canada and even though their operating subsidiaries are Canadian residents. If Products had realized on its CAHL shares for $167 million, there would have been no Canadian tax payable and it could have invested the amount in a Canadian holding company which in turn could

acquire any number of Canadian operating companies with any imaginable tax characteristics and accounts such as PUC. The *Act* would not seek to redetermine those tax accounts nor deny them $167 million of cross-border PUC or cost base.

[86] The real reason the Collins & Aikman reorganization plan worked under the *Act* (but for the possible application of GAAR) is that CAHL was a non-Canadian holding company for the Canadian operating companies and CAHL could be disposed of, whether for cash or in a reorganization, and whether to a third party or to a related party, without triggering Canadian tax. Such gain would only be taxable in accordance with the tax laws of CAHL's country of residence and that of its shareholder(s). That is entirely in keeping with the scheme of the *Act*. As written by the Federal Court of Appeal in *Canada v. MIL (Investments) S.A.*, 2007 FCA 236, 2007 DTC 5437, "the issue raised by GAAR is the incidence of Canadian taxation, not the foregoing of revenues by [another country's] fiscal authorities".

[87] Removing the tax inefficiency remaining with respect to the WCA note could be done in several ways. CAHL could transfer its operating companies to a Canadian holding company and distribute the shares of that company to Products. Since CAHL is a holding company itself, another option was that Products could drop CAHL to a Canadian holding company and have CAHL wound up or become a Canadian resident. Given the particular circumstances of CAHL's non-resident status, and given CAHL was already the holding company for the Canadian Collins & Aikman companies, a third option was that CAHL could itself become a Canadian resident. There would undoubtedly be other ways as well.

[88] Non-residents holding their Canadian operating companies through a Canadian holding company is pretty much standard operating procedure. It is fair to say that not to do so is the exception. This is Tax 101.

[89] The Collins & Aikman group took professional advice on how to accomplish their reorganization and, as part of that, considered the most appropriate structure to ensure that Canadian taxes were not inadvertently or unnecessarily triggered and were minimized on a going forward basis. The taxpayers acknowledge that the primary purpose of choosing to accomplish this by transferring CAHL from Products to Holdings was to get the benefit of high cross-border PUC that could be used to return funds to Products as tax-free capital.

[90] The transfer of CAHL to Holdings subjected CAHL to Canadian tax on its income which it had not been previously. It also caused CAHL's shareholders to be subject to Canadian tax on future capital gains realized on their Canadian investment

(unless a tax treaty Canada chose to enter into as part of its approach to the taxation of non-residents on Canadian-sourced income provided otherwise).

[91] The *Act* has rules for becoming a Canadian resident corporation and subjecting oneself to Canadian tax. For example, section 128.1 deals specifically with non-resident corporations becoming Canadian residents, and subsections 128.1(1), (2) and (3) provide for specific PUC adjustments. Similarly, the *Act* has rules for non-residents owning Canadian corporations. These rules are subject to intentional change in Canada's international treaty network. There has been no suggestion that those rules were not fully complied with. The Crown has not taken the position that those provisions were in any way abused or misused. (In its amended replies, the Crown dropped its specific position that section 128.2 was misused.) With respect to section 128.1 the Crown argued it evidences an intention to restrict the importation of pre-existing foreign PUC. It does this by grinding the PUC otherwise determined historically for the immigrating foreign corporation. However, in this case the respondent is not challenging the pre-existing PUC of the immigrating corporation, CAHL, nor of any other corporation.

[92] Nothing seems to turn on CAHL having been a Canadian incorporated company that was not resident in Canada. It appears that the same transaction could have been implemented had CAHL been an ordinary non-resident company incorporated outside Canada. Presumably, being a Canadian incorporated company may have facilitated its continuance under the OBCA or CBCA.

[93] Similarly, nothing appears to turn upon the amalgamation of CAHL with WCA and Borg. The money distributed could have flowed tax-free up the chain of Canadian companies to the top Canadian company, Holdings, and then distributed in the same manner to its non-resident parent, Products, and subject to the same Canadian tax consequences under the *Act*. The PUC of each of the Canadian corporations would not have been particularly relevant. This amalgamation appears to have simply been a housekeeping tidying up of the Canadian companies into a single holding company instead of Holdings and CAHL, and a single operating company instead of WCA and Borg.

[94] When Products transferred its CAHL shares to Holdings as part of the reorganization, the CAHL shares had a fair market value of $167 million. As result of this transfer:

(i) Products' proceeds of disposition for its CAHL shares was $167 million;

(ii) Products' cost of the Holdings share it received was $167 million;
(iii) Holdings added $167 million to its stated capital account;
(iv) the paid-up capital of the Holdings share was $167 million; and
(v) Holdings' cost of the CAHL shares was $167 million.

[95] Each of these results is appropriate and I do not find any of these results to be abusive. Each of the steps of the reorganization was appropriate and I do not find any of the steps to be abusive. None of the steps in the reorganization transaction were vacuous or artificial. No specific policy or provision was frustrated, defeated or circumvented by the transactions.

[96] In this respect the transactions in this case differ from those considered by this Court and the Federal Court of Appeal in *Copthorne Holdings Ltd v. Canada*, 2009 FCA 163, affirming 2007 DTC 1230. In that case the courts could identify a specific provision of the *Act* – the definition of "paid-up capital" – which, together with its interaction with the stated capital provisions of the *Business Corporations Act* (Alberta), was designed to eliminate the double-counting of PUC upon an amalgamation and which had been intentionally circumvented or avoided by the addition of one step in a series of transactions undertaken by the taxpayer which included an amalgamation. In this case, the transfer of CAHL to Holdings by Products was not done to avoid a provision of the *Act* which would otherwise deny the recognition as PUC of the amount paid by a non-resident to a corporation as consideration for its shares.

[97] In argument, the Crown emphasized that there was no new money invested in the Collins & Aikman group's Canadian companies that would justify the cross-border paid-up capital being increased from $475 thousand to $167 million. The answer to this observation is simple. The *Act* clearly never limits itself to money transactions. Consistently and throughout, the *Act* considers money's worth or value the equivalent to money whether in the context of employee and shareholder benefits, shareholder appropriations, share-for-share exchanges or the rollover of assets into corporations. Money's worth and value are not just incorporated into the income computation in the *Act*, but are also to be accounted for in other tax accounts such as cost and paid-up capital. The definition of "amount" in subsection 248(1) makes this abundantly clear.

[98] This is not to say that mere paper transactions will necessarily survive a GAAR challenge. In this case however, there were real Canadian tax consequences to the reorganization. As noted already, CAHL became a Canadian taxpayer subject to income tax under the *Act* like any other Canadian resident. Previously it had not

been. Similarly, CAHL's shareholder, Products a U.S. company, became the holder of taxable Canadian property subject to the Canadian capital gains régime in respect of its indirectly held CAHL shares in the future. Dividends received by Products from Holdings (and indirectly CAHL) would now be subject to Canadian Part XIII non-resident withholding tax. The régime in the *Act* setting out the taxation of taxable Canadian property gains of non-residents, as amended by the tax treaty Canada entered into with the United States, was also previously not relevant to Products' holdings of its CAHL shares.

[99] The Canadian *Act* sets out the régime for the taxation of Canadian residents. That régime includes specific provisions that apply in a case of a non-resident corporation becoming a resident corporation such as section 128.1 discussed briefly above. Those provisions were drafted when Canadian tax policy makers specifically turned their mind to the very issue of what should happen to Canadian tax accounts of a corporation upon becoming resident in Canada. None of those specific provisions apply or there would be no need to be considering GAAR.

[100] I could repeat these last comments as regard the Canadian taxation régime applicable to non-residents who acquire taxable Canadian property and the taxation of their gains, regardless of how the taxable Canadian property was acquired including if property becomes taxable Canadian property as a result of something the investee corporation does such as purchasing Canadian real estate or resource properties or becoming a Canadian resident.

[101] I could also restate the same as regards the amendment to these Canadian tax régimes negotiated and agreed to by Canada in its tax treaties, perhaps with even greater force.

[102] Finally, I could also restate the same as regards the provisions in the *Act* dealing with non-arm's length transactions including those dealing with valuations, proceeds of disposition, adjusted cost base, computation of paid-up capital, and the recognition or deferral of gains.

[103] The most important considerations of consistency, fairness and predictability would be significantly eroded if GAAR were to be lightly applied and upheld relying on the fact that there was no new money in circumstances where it is clear there was real value and money's worth.

[104] The Collins & Aikman group reorganization (which is only one part of the impugned series of transactions, the second being the distributions) is, of itself, a

clear example of when it would be inappropriate to regard transactions as abusive tax avoidance. Canada has internally adopted a régime that says: if you become a Canadian resident, these specific things will affect your Canadian tax accounts. Similarly, our domestic legislation provides that if you hold taxable Canadian property your cost of that property will be determined in a specific manner. Canada has agreed with its treaty partners that, if a resident of one of those countries becomes subject to the Canadian tax régime, further specific Canadian tax considerations will apply. Those specific Canadian legislative provisions or treaty provisions do not make any distinction between new money and value. I simply cannot see any merit in the Crown's position that this contributes to the corporate reorganization being part of a series of transactions that constitutes abusive Canadian tax avoidance.

[105] While not specifically argued, one might wonder if the specific dividend stripping rule in section 212.1 was avoided in this case and whether that avoidance could be considered to be abusive. Section 212.1, like its counterpart section 84.1 applicable to residents, only applies to transfers of Canadian corporations. The tax consequences of the Collins & Aikman reorganization would have been significantly different if section 212.1 applied to the transfer of the CAHL shares from Products to Holdings. Indeed, in all likelihood such a step would never have been undertaken if CAHL was a Canadian corporation immediately prior to the reorganization. In other words, the chosen plan's success depended upon section 212.1 not applying. However, I am unable to conclude that its application was avoided as part of the series of transactions for two reasons. First, the technical reason is that the 1961 loss of Canadian residence by CAHL was not pleaded to be part of the series of transactions, nor in all likelihood could it be concluded to be part of the series in any event. More importantly, from a common sense, predictability, consistency and fairness point of view, CAHL ceased to be a Canadian corporation in 1961 long before section 212.1 had ever been drafted – even well before the 1960's Carter Commission Report which gave rise to a complete revision of Canadian corporate taxation in the early 1970s.

[106] One of the taxpayers' more technical arguments is that they could not have misused subsection 84(4) since they did not use it or rely on it. The taxpayers maintain, in effect, that subsection 84(4) did not apply because Holdings did not distribute an amount in excess of its paid-up capital. In support of the proposition that a provision of the *Act* cannot be misused if it is not used the taxpayers rely upon the decision of this Court upheld by the Federal Court of Appeal in *Canada v. Jabin Investments Ltd.*, 2002 FCA 520, 2003 DTC 5027.

[107] It is not clear to me that such an argument, which treats misuse of a provision and abuse of the *Act* read as a whole separately, survives the Supreme Court of Canada's decision in *Trustco*. In *Trustco* the Supreme Court mandates a unified approach that somewhat melds the statutory language in subsection 245(4) together to require me to determine whether the impugned series of transactions in this case results in an abuse of subsection 84(4) read in the context of the greater scheme of the *Act* of which subsection 84(4) is part.

[108] In any event, I do not agree with the taxpayers' premise that subsection 84(4) did not by its terms apply. This may be a matter of semantics, but in particular in taxing legislation the chosen words are important. Subsection 84(4) applies every time a corporation returns capital. Its opening words are "[w]here at any time . . . a corporation resident in Canada has reduced the paid-up capital in respect of any class of shares of its capital stock. . .". These words make it clear that subsection 84(4) is triggered and must be applied. I agree that (absent the GAAR determinations) the effect of the application of subsection 84(4) is not to deem any amount to be a dividend in the circumstances. That is not to say it did not apply to the transactions. Even if the taxpayers' *Jabin Investments* argument does survive the *Trustco*-mandated approach to the interpretation of subsection 245(4), I would equate the fact that subsection 84(4) was applicable to any step in the series to it being used and therefore capable of having been misused.

[109] By way of concluding summary, the reasons that Collins & Aikman group's reorganization and recapitalization transactions permitted, absent GAAR, tax-free returns of capital by Holdings to Products are (i) section 212.1 only applies to non-residents in respect of their Canadian corporations and CAHL was not a Canadian corporation, (ii) Products could dispose of its CAHL shares without attracting Canadian capital gains tax because the CAHL shares were not taxable Canadian property because CAHL was not a Canadian resident, and (iii) little or no tax may have been payable in CAHL's country of residence because it is a no-tax or low-tax country. While these may be reasons that the chosen plan worked as tax-effectively as it did, none of these involved the degree of artificiality, boldness, vacuity or audacity to rise to the level of being a loophole or gimmick in common parlance, nor abusive tax avoidance using the language of the *Act* and the GAAR. In the words of Paris J. in *Landrus v. The Queen*, 2008 TCC 274, 2008 DTC 3583, the Minister has tried to use the GAAR to fill in what he perceives to be a possible gap left by Parliament; that would be an inappropriate use of the GAAR.

[110] For the foregoing reasons, the taxpayers' appeals are allowed in full, with costs, and the assessments and determinations are referred back to the Minister of

National Revenue for reconsideration, reassessment and redetermination on the basis that the general anti-avoidance rule in section 245 does not apply to the reorganization or the recapitalization.

Signed at Ottawa, Canada, this 3rd day of June 2009.

"Patrick Boyle"

Boyle J.

APPENDIX

TAX COURT OF CANADA

Court File No.: 2006-723(IT)

BETWEEN:

COLLINS & AIKMAN CANADA INC.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Court File No.: 2006-724(IT)G

BETWEEN:

COLLINS & AIKMAN HOLDINGS CANADA INC.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Court File No.: 2006-722(IT)G

BETWEEN:

COLLINS & AIKMAN PRODUCTS CO.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

PARTIAL AGREED STATEMENT OF FACTS

The parties hereto, by their respective solicitors, admit, for the purposes of these appeals only, the truth of the following facts, provided that the parties may adduce further evidence at trial that is not inconsistent with this agreement.

A. THE ENTITIES

1. These appeals concern a number of transactions involving the following corporations, all of which are part of the same multinational group of corporations (the "Group"):

a) Wickes Companies Inc., which subsequently became Collins & Aikman Corporation ("Wickes");

b) Collins & Aikman Products Co., formerly Collins & Aikman Corporation ("Products");

c) Collins & Aikman Holdings Ltd. ("CAHL");

d) Collins & Aikman Holdings Canada Inc. ("Holdings");

e) WCA Canada Inc. ("WCA");

f) Borg Textiles Inc. ("Borg"); and

g) Collins & Aikman Canada Inc. ("C&A").

2. Immediately before the reorganization described in paragraph 14 below, the status and relationship of these corporations was as follows:

a) Wickes was a non-resident of Canada within the meaning of the *Income Tax Act* (Canada) (the "Act") and was the sole shareholder of Products.

b) Products was a non-resident of Canada within the meaning of the Act and was the sole shareholder of CAHL.

c) CAHL was incorporated in Canada in 1929, but was a not a resident of Canada for the purposes of the Act after 1961. CAHL was the sole shareholder of WCA.

d) WCA was resident in Canada for the purposes of the Act and was the sole shareholder of Borg.

e) Borg was resident in Canada for the purposes of the Act.

a) Holdings and C&A did not yet exist.

B. THE APPELLANTS

3. The Appellants are C&A, Holdings, and Products.

4. C&A and Holdings are corporations incorporated or amalgamated in Canada and resident in Canada for the purposes of the Income Tax Act (Canada) (the "Act"). Holdings is not a public corporation for the purposes of the Act. Products is a corporation incorporated in the United States and is not resident in Canada for the purposes of the Act.

C. CAHL

5. CAHL was incorporated under the *Companies Act (Canada)* in 1929.

6. From February 27, 1961 until late 1993 or early 1994, CAHL was a corporation not resident in Canada for the purposes of the Act. From December 11, 1980 until its amalgamation with WCA and Borg on January 30, 1994 (described in paragraph 14 below), the majority or all of CAHL's directors were Canadian residents. Until December 3, 1993, the powers of the directors of CAHL to manage the business and affairs of the corporation were restricted by way of a unanimous shareholder agreement and until that date the business and affairs of CAHL were managed by non-resident members of the Group.

7. From 1929 to 1961, CAHL carried on business in Canada. On February 27, 1961, CAHL sold all of its assets to its wholly-owned subsidiary, WCA, and received an interest-bearing note receivable (the "Note") as consideration. Thereafter, CAHL did not conduct any business in Canada, and its only assets were the shares of WCA and the Note. On December 11, 1980, CAHL was continued under the *Canada Business Corporations Act* (the "CBCA").

8. WCA deducted the interest payments made on the Note in computing its income for tax purposes. CAHL paid Part XIII withholding tax on the interest payments it received or was deemed to receive from WCA at the statutory rate of 25% since it was not entitled to the benefit of any of Canada's bilateral income tax treaties.

9. In September 1991, CAHL redeemed its outstanding preferred shares for approximately $4,300,000, reduced the stated capital of its common shares by approximately $291,000 and paid a dividend on its common shares in the amount of approximately $8,500,000, by assigning the Note to Products which, with accrued interest, totalled $13,091,000. Following these transaction (i) the only remaining asset of CAHL was the shares of WCA, (ii) the stated capital and paid-up capital of the CAHL shares was $475,176, and (iii) Product's adjusted cost base in the CAHL shares was approximately $475,176.

D. THE CORPORATE REORGANIZATION

10. After the transactions described in the preceding paragraph, the tax advantages that had previously resulted from CAHL's non-resident status were eliminated, but the disadvantages of that status remained, including the high rate of Canadian withholding tax applicable to dividends paid from WCA to CAHL.

11. In late 1991 or early 1992, the Group asked its advisers to consider ways in which the Group's corporate structure could be reorganized as it related to the Group's Canadian holdings.

12. In early 1992, senior management of the Group reviewed and approved a proposed plan that would reorganize the Group's corporate structure as it related to its Canadian holdings.

13. Implementation of the reorganization was delayed for a number of reasons related to the operations of Wickes and valuation issues. The reorganization was ultimately implemented as follows:

   a) On November 1, 1993, Holdings was incorporated under the CBCA. Holdings was resident in Canada for the purposes of the Act.

   b) On December 3, 1993, Products transferred all of its shares of CAHL to Holdings in consideration for one common share of Holdings (the "Holdings Share"). Products was not subject to tax in Canada on the capital gain arising on this

disposition, because the shares of CAHL were not shares of a corporation resident in Canada.

c) An amount equal to the fair market value of the CAHL shares, being $167 million, was added to the stated capital account maintained for the Holdings Share. The cost of the Holdings Share to Products for the purposes of the Act was also $167 million, being the fair market value of the CAHL shares that Products transferred to Holdings for the Holdings Share.

d) Similarly, the cost to Holdings of the CAHL shares acquired by it from Products was $167 million, being the fair market value of the Holdings Share issued by Holdings for the CAHL shares.

e) On January 26, 1994, CAHL was continued under the *Business Corporations Act* (Ontario).

f) On January 30, 1994, CAHL amalgamated with WCA and Borg to form C&A.

E. THE GROUP'S CORPORATE STRUCTURE AFTER THE REORGANIZATION

14. Following the reorganization, the Group's corporate structure was as set out below:

a) Wickes was unaffected by the reorganization and remained the parent company of Products;

b) Products was the sole shareholder of the new Canadian resident holding company Holdings. The stated capital and paid-up capital of the Holdings Share was $167 million, and Products had an adjusted cost base in such share of $167 million; and

c) Holdings was the sole shareholder of the new Canadian resident operating company, C&A, which resulted from the amalgamation of CAHL, Borg and WCA. Holdings' adjusted cost base in the shares of C&A was $167 million.

F. DIVIDENDS AND RETURNS OF CAPITAL

15. The Group undertook a refinancing of its Canadian and U.S. operations. In that regard, the following transactions occurred in 1994 and 1995 as part of the Canadian component of the Group refinancing:

    a) On or about July 12, 1994, C&A borrowed U.S.$45 million (then equivalent to approximately Cdn. $58 million) under a credit agreement dated June 22, 1994 among C&A, Products, Wickes, Continental Bank, N.A., Nationsbank, N.A., Chemical Bank, and the lenders named therein.

    b) Also on July 12, 1994, C&A declared a dividend of $58,002,000 in favour of Holdings, and Holdings reduced the stated capital (and paid-up capital) of the Holdings Share held by Products by $58,002,000. The funds were distributed electronically from C&A's bank account directly to Products' bank account (as Holdings did not have a bank account) and Holdings recorded this transaction in its general ledger.

    c) On or about January 25, 1995, C&A received repayments of amounts owing from Products and a subsidiary of U.S.$23,324,310 and U.S.$9,176,943, respectively, for a total of U.S.$32,501,253.

    d) On or about January 26, 1995, C&A declared a dividend of $46,267,230 (then equivalent to approximately U.S. $32,700,000) to Holdings.

    e) On or about January 27, 1995, Holdings reduced the stated capital (and paid-up capital) of the Holdings Share held by Products by $46,267,230. Again, the funds were distributed electronically from C&A's bank account directly to Products' bank account (as Holdings did not have a bank account) and Holdings recorded this transaction in its general ledger.

16. No taxes were paid or withheld and remitted to the Receiver General on the approximately $104.3 million distributed to Products as returns of capital.

17. The remaining stated capital and paid-up capital of the Holdings Share after the capital reductions referred to above was $62,730,770

G. THE MINISTER'S DETERMINATIONS AND ASSESSMENTS

18. The Minister of National Revenue (the "Minister") applied the General Anti-Avoidance Rule (the "GAAR") found in section 245 of the Act and:

a) made a determination under subsection 152(1.11) of the Act, with notice thereof dated November 15, 2000, reducing the paid-up capital and Products' adjusted cost base of the Holdings Share owned by Products from $167,000,000 to $475,176

b) made a determination under subsection 152(1.11) of the Act, with notice thereof dated November 15, 2000, reducing Holdings' adjusted cost base of the C&A shares owned by Holdings from $167,000,000 to $475,715; and

c) assessed each of Products, Holdings and C&A, with notices thereof dated November 24, 2000, for Part XIII tax on the amounts paid to Products in excess of $475,176, as follows:

i) Products was assessed pursuant to subsection 212(2) of the Act in respect of the reduction of capital by Holdings in excess of $475,176;

ii) Holdings was assessed pursuant to subsections 215(1) and 215(6) of the Act for not withholding and remitting Part XIII tax in respect of its distribution of funds to Products. Penalties were also assessed against Holdings in respect of the Part XIII tax pursuant to subsection 227(8) of the Act: and

iii) C&A was assessed pursuant to subsections 215(2) and 215(6) of the Act for not withholding and remitting Part XIII tax in respect of its distribution of funds to Products on behalf of Holdings. Penalties were also assessed against C&A in respect of the Part XIII tax pursuant to subsection 227(8) of the Act.

19. The Minister has since agreed to vacate the assessment of penalties under subsection 227(8) against Holdings and C&A.

20. In February 2001, the Appellants objected to the assessments and determinations, and in December 2005, the Minister confirmed the assessments and determinations.

CITATION:	2009 TCC 299
COURT FILE NOS.:	2006-722(IT)G, 2006-723(IT)G, 2006-724(IT)G
STYLE OF CAUSE:	COLLINS & AIKMAN PRODUCTS CO. v. HER MAJESTY THE QUEEN, COLLINS & AIKMAN CANADA INC. v. HER MAJESTY THE QUEEN, AND COLLINS & AIKMAN HOLDINGS CANADA INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 7 and 8, 2008
REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF JUDGMENT:	June 3, 2009

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