A-399-16, 2018 FCA 30, 2018 CAF 30 -- Noël C.J., Dawson, Rennie JJ.A. – 18/02/01 — Tax – Income tax -- General anti-avoidance rule (GAAR) -- Tax benefit -- Taxpayer engaged in series of transactions involving rolling three real estate properties through tiered partnership structure, increasing adjusted cost base and selling interests to tax-exempt entities without tax being paid on latent recapture and accrued gains -- Minister's reassessment applied s. 100(1) on resulting capital gain giving rise to taxable capital gain of $148,187,562.00 reflecting recapture of $116,591,744.00 and taxable capital gain of $32,203,408.00; $21,285,500.00 being attributable to depreciable property and $10,917,908.00 attributable to non-depreciable property -- Tax Court judge held that transaction did not to amount to abusive tax avoidance – Minister appealed – APPEAL ALLOWED in part -- Inquiry as to whether abuse was question of mixed fact and law and subject to standard of palpable and overriding error -- Tax Court judge focused attention on three year holding period in s. 69(11) of Income Tax Act, and concluded that s. 97(2) not frustrated when deferred recapture went untaxed, so long as holding period met -- No basis for Tax Court judge's conclusion that certainty, predictability and fairness in tax law required that three year limitation found in s. 69(11) be applied to s. 97(2) -- Allowing property taxed at 50 per cent rate to augment value of property taxed at 100 per cent would result in obvious revenue loss which is why depreciable property that gave rise to 100 per cent rate cannot be bumped -- Bump pertaining to depreciable property on which CCA has been claimed would increase UCC and decrease latent recapture which is subject to 100 per cent rate of inclusion -- Practical effect was that GAAR need no longer be resorted to prevent result achieved -- Result which allowed taxpayer to avoid paying tax on latent recapture in the amount of $116,591,744.00 frustrated s. 100(1)(b) -- Minister could not reassess taxpayer on basis that overall result achieved by circumscribed use of bump provisions was abusive -- Amounts included under s. 100(1)(a) and 100(1)(b) did not reflect reasonable consequences as no abuse resulted from avoidance of taxable capital gain in of $10,917,900.00 under former and only abuse of latter pertained to avoidance of tax on recapture, agreed to be $116,591,744.00 – Re-assessment referred back to Minister for reassessment on basis that s. 100(1) gave rise to taxable capital gain of $116,591,744.00 rather than $148,187,562.00.

Canada v. Oxford Properties Group Inc.

HER MAJESTY THE QUEEN (Appellant) and OXFORD PROPERTIES GROUP INC. (Respondent)

Citation: 2018 CarswellNat 173, 2018 FCA 30, 2018 CAF 30, [2018] 6 C.T.C. 1, 2018 D.T.C. 5017 (note), [2018] 4 F.C.R. 3
Federal Court of Appeal
Marc Noël C.J., Eleanor R. Dawson, Donald J. Rennie JJ.A.
Heard: December 11, 2017
Judgment: February 1, 2018
Year: 2018
Docket: A-399-16

Proceedings: reversing in part *Oxford Properties Group Inc. v. R.* (2016), [2017] 2 C.T.C. 2147, 2016 CarswellNat 4541, 2016 TCC 204, 2016 D.T.C. 1172 (T.C.C. [General Procedure])

Counsel: Robert Carvalho, Perry Derksen, for Appellant
Al Meghji, Jack Silverson, Pooja Mihailovich, for Respondent

Subject:
Income Tax (Federal)

Table of Authorities

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Generally — referred to
s. 13(21) “depreciable property” — considered
s. 54 “capital property” (a) — considered
s. 69(11) — considered
s. 69(11)(b) — considered
s. 85(1) — referred to
s. 88 — referred to
s. 88(1) — considered
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s. 88(1)(a)(iii) — considered
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s. 88(1)(c)(iii) — considered

s. 88(1)(d) — considered
s. 88(1)(d)(ii.1) [en. 2012, c. 31, s. 18(1)] — considered
s. 96(1)(a) — considered
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s. 100(1) — considered
s. 100(1)(a) — considered
s. 100(1)(b) — considered
s. 245 — considered
s. 245(5) — considered

Can. *Interpretation Act*, R.S.C. 1985, c. I-21
Generally — referred to
s. 45(2) — referred to
s. 45(3) — referred to

Regulations considered:

Can. *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)
Income Tax Regulations, C.R.C. 1978, c. 945
s. 6204(1)(b) — considered

APPEAL by Minister of a decision reported at *Oxford Properties Group Inc. v. R.* (2016), 2016 TCC 204, 2016 CarswellNat 4541, 2016 D.T.C. 1172, [2017] 2 C.T.C. 2147 (T.C.C. [General Procedure]) reversing Minister's re-assessments.
***Marc Noël C.J.*:**

1 This is an appeal by Her Majesty the Queen (the Crown or the appellant) from a decision of the Tax Court of Canada in which D'Arcy J. (the Tax Court judge) allowed Oxford Properties Group Inc.'s (Oxford or the respondent) appeal from a reassessment issued by the Minister of National Revenue (the Minister) with respect to its 2006 taxation year. The reassessment was issued pursuant to the General Anti-Avoidance Rule (GAAR) found in section 245 of the *Income Tax Act*, R.S.C., 1985, c.1 (5th Supp.) (the Act).

2 The Tax Court judge held that the series of transactions undertaken by Oxford, which involved rolling three real estate properties through a tiered partnership structure, increasing the adjusted cost base of the partnership interests and selling these interests to tax-exempt entities without tax being paid on the latent recapture and accrued gains in the property held by the partnerships, not to amount to abusive tax avoidance.

3 In support of the appeal, the Crown contends that the Tax Court judge in coming to this conclusion misconstrued the provisions of the Act which were relied upon to obtain this beneficial tax treatment. The Crown invites us to construe these provisions with a focus on their object, spirit and purpose as the GAAR commands, and to come to the opposite conclusion.

4 For the following reasons, I am of the view that a proper construction of the provisions in issue supports the Crown's contention and that the Tax Court judge's conclusion of non-abuse cannot stand. However, I also agree with the respondent's alternative argument that the consequential adjustments made by the Minister pursuant to subsection 245(5) are not reasonable as they overshoot the abuse that was made of the provisions in issue. I therefore propose to allow the appeal in part only and refer the reassessment back to the Minister for reconsideration and reassessment in accordance with these reasons.

5 The provisions of the Act that are relevant to the analysis which follows are set out in the annex to the reasons.

FACTS

6 The series of transactions unfolded over some five years and are complex. The details are fully set out in the Statement of Agreed Facts which is reproduced at Appendix A of the judgment under appeal (*Oxford Properties Group Inc. v. R.*, 2016 TCC 204 (T.C.C. [General Procedure])). The following is an outline of the transactions as they unfolded with a focus on the statutory provisions that were used to achieve the tax benefit.

7 The respondent's predecessor, Old Oxford, was a publicly traded Canadian corporation and one of the largest real estate firms in North America. In 2001, BPC Properties Inc. made a proposal to takeover a substantial portion of the common shares of Old Oxford. The parties agreed that, prior to the takeover, Old Oxford would undertake a pre-closing arrangement and divest itself of certain real estate properties. The properties in question, the Atria Complex, the Richmond Adelaide Center (RAC) and the Calgary Eaton Center (CEC) (collectively the real estate properties), had high fair market values and low adjusted cost bases (ACB) and undepreciated capital costs (UCC).

8 In pursuance of this agreement, a first set of limited partnerships was created, namely OPGI Office LP and MRC Office LP (OPGI Office LP and MRC office LP are collectively referred to as the first tier partnerships). Using the rollover provided for under subsection 97(2), the RAC and CEC were transferred to OPGI Office LP whereas the Atria Complex was transferred to MRC Office LP. The elected amounts corresponded to the ACB and UCC of the properties. As such, the partnerships had hig h fair market values but the interests held by the partners in the partnerships had a low ACB. Pursuant to section 97, the properties held by the partnerships maintained their tax attributes, that is their low ACB and UCC.

9 Further restructuring resulted in the amalgamation of OPGI Amalco and MRC Amalco, the limited partners in each of the first tier partnerships. This newly formed entity was subsequently amalgamated with its sole shareholder. The result of the latter amalgamation was the formation of the respondent, Oxford. Following the amalgamations, the partnership interests in the first tier partnerships formerly held by OPGI Amalco and MRC Amalco were held by Oxford.

10 Because Oxford was formed by way of a vertical amalgamation, it became eligible for a bump pursuant to subsection 88(1), which allows a parent corporation to increase the tax cost of the non-depreciable capital property held by its subsidiary at the time of the amalgamation. Oxford was therefore able to increase, or bump, the ACB of the partnership interests it held in the first tier partnerships formerly held by OPGI Amalco and MRC Amalco. As a result, the first tier partnerships now had high fair market values and the partnership interests held by the partners had a high ACB while the properties held by the partnerships retained their low ACB and UCC.

11 The following step in the series was the formation of a second tier of partnerships in which the first tier partnerships became partners: MRC Office LP became a partner in Atria limited partnership (Atria LP) while OPGI Office LP became a partner in RAC limited partnership (RAC LP) as well as Calgary Eaton Center partnership (CEC LP). Oxford was therefore a partner in the first tier partnerships, which in turn held partnership interests in three newly formed partnerships (Atria LP, RAC LP and CEC LP are collectively referred to as the second tier partnerships).

12 On February 1, 2004, the first tier partnerships transferred the real estate properties to the second tier partnerships by way of rollovers pursuant to subsection 97(2). In exchange for debt and further partnership interests, MRC Office LP transferred the Atria Complex to Atria LP and OPGI Office LP transferred the RAC to RAC LP and its interest in the CEC to CEC LP. The elected amounts again corresponded to the tax cost of the property transferred, that is their ACB and UCC subject to a

slight variation with respect to the land portion of the CEC and the Atria Complex. As a result, the second tier partnerships had high fair market values and their partnership interests had low ACB. As was the case following the first rollovers, the real estate properties retained their low ACB and UCC.

13 The first tier partnerships were then dissolved. The property of the first tier partnerships, including the partnership interests which they held in the second tier partnerships, were distributed to their partners. This resulted in Oxford acquiring partnership interests in the second tier partnerships. As well, an election was made pursuant to subsection 98(3). This allowed Oxford to avail itself of a second bump and increase the ACB of the partnership interests it held in the second tier partnerships. As a result, the partnership interests held by Oxford in the second tier partnerships had high fair market values and ACB while the real estate properties retained their low ACB and UCC. This was the situation when, between September 2005 and July 2006, Oxford disposed of its partnership interests in the second tier partnerships to the tax-exempt entities.

14 Given the high ACB of the partnership interests sold by Oxford, little or no taxable capital gain was generated by the sale and, in one case, a capital loss resulted. The outcome is that even though the sale was made to tax-exempt entities, subsection 100(1) had no application. As a result, tax on the latent recapture and accrued gains inherent in the underlying real estate properties which had been deferred by reason of the rollovers was avoided altogether.

- The reassessment

15 The Minister canvassed several assessing positions before ultimately deciding to rely on the GAAR (Appeal Book, Vol. 3, p. 342). The Minister came to the view that, although the series of transactions complied with the letter of the law, the overall result was abusive. Specifically, the rollovers and bumps were used to increase the ACB of the partnership interests in the first and second tier partnerships in a manner which allowed Oxford to circumvent the application of subsection 100(1).

16 The reassessment denies the bumps in their entirety and applies subsection 100(1) on the resulting capital gain. This gives rise to a taxable capital gain of $148,187,562.00. It is common ground that this taxable capital gain reflects recapture in the amount of $116,591,744.00 and a taxable capital gain in the amount of $32,203,408.00; $21,285,500.00 being attributable to the depreciable property and $10,917,908.00 being attributable to the non-depreciable property (Summary of relevant income inclusions under alternative methods; GAAR consequences; Appeal Book, Vol. 2, pp. 206, 422, 426, 430).

DECISION OF THE TAX COURT OF CANADA

17 After dismissing Oxford's contention that the tax benefit which it achieved did not result from a series of avoidance transactions (Reasons, para. 76), the Tax Court judge devoted the remainder of his analysis to the issue of abuse. He did so by focussing on each of the steps undertaken by Oxford in order to circumvent the application of subsection 100(1).

18 With respect to the rollovers, the Tax Court judge concluded that subsection 97(2) permits tax to be “fully or partially avoided” upon the transfer of property to a partnership and that subsection 97(4) preserves recapture when the property so transferred is depreciable property (Reasons, paras. 107, 111). The Tax Court judge also found that when a partnership interest is purchased by a tax-exempt entity, subsection 97(2) must be considered in light of paragraph 69(11)(*b*) (Reasons, para. 121). Because the three year holding period set out in subsection 69(11) had been met in this case, the Tax Court judge concluded that subsection 97(2) had not been abused. He also found that, although the purpose of subsection 97(2) was to preserve the cost base and potential recapture in the real estate properties, the fact that little or no tax was paid on the sale of the partnership interests did not offend subsection 97(2) as its purpose is not to tax the partners when they dispose of their partnership interests on the accrued gain and latent recapture relating to property held by the partnership (Reasons, paras. 181, 186, 188).

19 As to the object, spirit and purpose of the bump provisions, the Tax Court judge held that subsection 88(1) prevents double taxation by allowing the disappearing ACB of a parent's shares in its subsidiary to be pushed down to other non-depreciable capital property while simultaneously preserving the tax attributes of depreciable property (Reasons, paras. 143-145). Subsection 98(3) functions in a similar manner and with a similar purpose, but with the view of preserving ACB in the disappearing partnership interests (Reasons, paras. 160-167).

20 The Tax Court judge also found that amendments made to section 88 in 2012 were relevant in construing the object, spirit and purpose of the bump provisions (Reasons, para. 153). He then proceeded to conclude that the purpose of sections 88 and 98, as they read before the amendments, was not to prohibit an "indirect" bump, preserve recapture or deny a bump based on the nature of the assets held by the partnerships (Reasons, para. 205). The Tax Court judge also held that the addition of subparagraph 88(1)(*d*)(ii.1), which would have prevented the result achieved by Oxford, reflects a change in the law rather than a clarification (Reasons, para. 211). As a result, Oxford's use of the bumps did not frustrate the object, spirit or purpose of the provisions which were relied upon.

21 The Tax Court judge then turned to subsection 100(1). He observed that the purpose of that provision was straightforward: to tax at a rate of 50% the portion of the capital gain realized on the sale of a partnership interest attributable to an increase in the value of non-depreciable property and to tax at a rate of 100% any portion of the gain that is attributable to depreciable property (Reasons, paras. 172-173). Taxing the portion of the gain attributable to an increase in the value of depreciable property at the rate of 100% ensures that "recaptured depreciation" is taxed at the same rate as it would have been, had the property been sold to a tax-exempt entity directly (Reasons, para. 174).

22 However, the operation of subsection 100(1) is based on the gain otherwise determined under the Act (Reasons, para. 217). Given that the ACB of the partnership interests and the resulting gain were properly computed when regard is had to the bumps, subsection 100(1) was not abused. Moreover, had Parliament intended subsection 100(1) to operate as a "look through", it would have drafted subsection 100(1) in a manner similar to subparagraph 88(1)(*d*)(ii.1) (Reasons, para. 216).

23 Having found that no abuse had been demonstrated, the Tax Court judge allowed the respondent's appeal insisting that it had engaged in a proper exercise of tax minimization (Reasons, para. 219).

POSITION OF THE PARTIES

- The Crown

24 The appellant argues that Oxford used subsection 97(2), paragraph 88(1)(*d*) and subsection 98(3) in order to avoid recapture that would normally arise pursuant to subsection 100(1) (Memorandum of the appellant, para. 43). In concluding that this did not give rise to an abuse, the Tax Court judge erred in his analysis of these provisions and failed to consider the overall result achieved by Oxford (Memorandum of the appellant, para. 36).

25 The Crown argues that the Tax Court judge's analysis of subsection 100(1) was confined to the words or the text (Memorandum of the appellant, para. 51). The Tax Court judge further ignored that subsection 100(1) is located in Subdivision j, which deals with partnerships, and contemplates the tax consequences of the sale of a partnership interest (*ibidem*). Equally ignored was the reason why subsection 100(1) modifies the computation of the capital gain in the way that it does (Memorandum of the appellant, para. 52). According to the Crown, subsection 100(1) ensures that recapture is realized and taxed on the sale of a partnership interest to a tax-exempt entity as otherwise it will escape taxation altogether (Memorandum of the appellant, para. 56).

26 The Crown further argues that the Tax Court judge committed two errors in his analysis of subsection 97(2). First, he conflated the deferral and avoidance of tax. While subsection 97(2) allows for the deferral of capital gains which would otherwise arise because there has been no change in the transferor's economic position, it was not designed to avoid the taxation of the deferred gain (Memorandum of the appellant, para. 63). Second, the Tax Court judge's understanding of this provision was clouded by his misunderstanding of subsection 69(11). The reason why subsection 69(11) did not apply was not because the three year holding period was respected, but because there was no subsequent sale of the real estate properties. Even if the partnership interests qualified as "substituted property", no exemption was available because Oxford, the vendor, was a taxable corporation (Memorandum of the appellant, para. 71). The Crown also submits that subsection 69(11) deals with a different factual situation and has its own rationale; the Tax Court judge ought to have focused his analysis on subsection 100(1) (Memorandum of the appellant, para. 72).

27 The Crown further argues that the purpose of the bump under section 88 is to preserve a tax basis embedded in non-depreciable capital property which would otherwise disappear. The bump allows this tax basis to be transferred to other non-depreciable capital property with similar tax attributes. Depreciable property is ineligible for the bump as it is taxed differently. Subsection 98(3) also excludes depreciable property again because it is “an asset of a different nature” (Memorandum of the appellant, paras.73-80).

28 Nothing under the legislative scheme as it stood at the time suggests that the bump in the value of depreciable property through the interposition of a partnership was permissible. The 2012 amendments therefore merely confirm that one cannot do indirectly what is not permitted to be done directly. Indeed, the Budgetary Supplementary Information released at the time of its enactment indicates that this amendment was intended to “clarify” the law rather than modify it (Memorandum of the appellant, para. 85).

29 The Crown also argues that the Tax Court judge erred in considering the Minister's treatment of the Dufferin Mall and the René Lévesque transactions in order to determine whether paragraphs 88(1)(*c*) and (*d*) and subsection 98(3) were abused. A GAAR analysis is not a comparative analysis and the Minister's treatment of these properties is irrelevant. In any event, the reason why the Minister did not invoke the GAAR on the Dufferin Mall transaction is because the partnership interests were sold to a taxable entity so that the deferred taxes will eventually be paid whereas the transfer of the property to the partnerships in the René Lévesque transaction was not part of the series of transactions (Memorandum of the appellant, paras. 99-103).

30 The overall result of the series was the circumvention of subsection 100(1). A reasonable consequence would therefore be the denial of the bumps in order for subsection 100(1) to have its intended effect. Subsection 100(1) “exacts a price” to the extent that capital gains realized on depreciable property are taxed at a rate of 100%. However, this is the price that Parliament has imposed for trying to avoid recapture (Memorandum of the appellant, para. 106).

- Oxford

31 The respondent supports the conclusion reached by the Tax Court judge and essentially adopts the reasons that he gave. It adds that he purposively construed the provisions in issue and considered the overall result of the series of transactions (Memorandum of the respondent, para. 70). In the event that the GAAR applies, Oxford argues that the tax adjustments brought about by the reassessment overshoot the abuse which they seek to correct and are as such unreasonable (Memorandum of the respondent, para. 122).

32 The Tax Court judge correctly understood that subsection 97(2) must be construed in light of subsection 69(11). This latter provision indicates that Parliament made the conscious decision that latent recapture and accrued capital gains could go unpaid in the context of transactions involving a tax-exempt purchaser, where the three year holding period is met (Memorandum of the respondent, para. 96). Oxford argues that paragraph 69(11)(*b*) deals “exclusively with tax-deferred transfers to partnerships under 97(2)” and prescribes the limited circumstances in which the benefit of a rollover can be denied (Memorandum of the respondent, para. 56).

33 The Tax Court judge also correctly concluded that any rule against “indirect bumping” would have to be based on a broad policy that is not grounded in the Act (Memorandum of the respondent, para. 107). He also correctly discerned that the 2012 amendments implement a change in this policy (Memorandum of the respondent, para. 119). Oxford argues that section 88 sets out explicitly and exhaustively the circumstances in which a bump can be denied. Nowhere do these rules deny the bump where property is pre-packaged and sold to a tax-exempt entity (Memorandum of the respondent, para. 51).

34 Oxford further argues that, as the Tax Court judge correctly concluded, the purpose of subsection 100(1) is not to tax accrued gains on the property held by a partnership. The starting point is the actual gain calculated under the usual rules (Memorandum of the respondent, paras. 115-116).

35 In the event that the GAAR applies, Oxford argues that the Crown's assessment is punitive because the disallowance of the bumps affects the computation of the entire capital gain, not just recapture (Memorandum of the respondent, para. 124).

The adjustment should be limited to the latent recapture which, based on the Crown's own theory, reflects the only income which was avoided. It adds that in any event the adjustment should be corrected so as not to tax 100 percent of the capital gain portion of the adjustment pertaining to the depreciable property (Memorandum of the respondent, paras. 121-126).

ANALYSIS AND DISPOSITION

36 In a GAAR analysis, three questions must be addressed: was there a tax benefit? If so, were the transactions which gave rise to this benefit avoidance transactions? If so, were the avoidance transactions abusive? (*Copthorne Holdings Ltd. v. R.*, [2011] 3 S.C.R. 721 (S.C.C.) [*Copthorne*] at para. 33, citing *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.) at paras. 18, 21, 36).

37 In the present case, the respondent conceded that: the deferred tax on the accrued gains and recapture pursuant to subsection 97(2); the bumps in the ACB of the partnership interests in the first and second tier partnerships by virtue of subsections 88(1) and 98(3); and the reduction of tax payable on the sale of the partnership interests to the exempt entities, all give rise to a tax benefit (Reasons, para. 58). As to the second question, the Tax Court judge found that the sale of the partnership interests to the exempt entities was part of a series of transactions that contained one or more avoidance transactions (Reasons, para. 76). The respondent does not challenge this finding in this appeal.

38 The only question which arises in this appeal turns on the abuse analysis. Specifically, does the elimination of the capital gain on the sale of the partnership interests to the exempt entities by the use of the bumps and the consequential avoidance of recapture under subsection 100(1) frustrate this provision and the other provisions relied upon in order to achieve this result?

- Standard of review

39 The inquiry as to whether there has been an abuse gives rise to a question of mixed fact and law and is therefore subject to the standard of palpable and overriding error (*Trustco* at para. 44; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) at para. 37 [*Housen*]). However, the abuse analysis proceeds in two stages. The first stage requires the determination of the object, spirit and purpose of the provisions giving rise to the tax benefit while the second turns on whether the provisions, so construed, were frustrated by the tax benefit achieved (*Trustco* at para. 44). The object, spirit and purpose of a provision is discerned by way of statutory interpretation (*Copthorne* at para. 70). This gives rise to a question of law and is an extricable part of the analysis. It is therefore subject to the standard of correctness (*Trustco* at para. 44; *Housen* at paras. 8, 37).

- Construction under the GAAR

40 In order to situate the discussion which follows, it is useful to first consider the approach to statutory construction called for under the GAAR at the abuse stage of the analysis.

41 The distinction between a word-based construction and an object, spirit and purpose interpretation in a GAAR context was carefully delineated by the Supreme Court in *Copthorne*:

> [66] The GAAR is a legal mechanism whereby Parliament has conferred on the court the unusual duty of going behind the words of the legislation to determine the object, spirit or purpose of the provision or provisions relied upon by the taxpayer. While the taxpayer's transactions will be in strict compliance with the text of the relevant provisions relied upon, they may not necessarily be in accord with their object, spirit or purpose. [...]

42 The Court went on to explain:

> [70] The object, spirit or purpose can be identified by applying the same interpretive approach employed by this court in all questions of statutory interpretation—a “unified textual, contextual and purposive approach” (*Trustco*, at para. 47; *Lipson v. Canada*, 2009 SCC 1 (CanLII), [2009] 1 S.C.R. 3, at para. 26). <u>While the approach is the same as in all statutory interpretation, the analysis seeks to determine a different aspect of the statute than in other cases. In a traditional statutory interpretation approach the court applies the textual, contextual and purposive analysis to determine what the words of the statute</u>

> mean. In a GAAR analysis thetextual, contextual and purposive analysis is employed to determine the object, spirit or purpose of a provision. Here the meaning of the words of the statute may be clear enough. The search is for the rationale that underlies the words that may not be captured by the bare meaning of the words themselves. However, determining the rationale of the relevant provisions of the Act should not be conflated with a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought to do.
>
> (My emphasis)

A GAAR analysis can therefore lead to a result that is different from that obtained by a traditional, textual, contextual and purposive interpretation focused on the meaning of the words of the relevant provisions.

43 The Supreme Court further explained that by invoking the GAAR, the Minister necessarily concedes that based on a traditional approach, the tax benefit is properly attained:

> [109] [...] When the Minister invokes the GAAR, he is conceding that the words of the statute do not cover the series of transactions at issue. Rather, he argues that although he cannot rely on the text of the statute, he may rely on the underlying rationale or object, spirit and purpose of the legislation to support his position.

44 Although the GAAR is based on the premise that the construction which it commands will lead to a different result than that obtained on the basis of a word-based analysis, the Court was quick to point out that this will not always be the case:

> [110] I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.
>
> [111] However, the implied exclusion argument is misplaced where it relies exclusively on the text of the PUC provisions without regard to their underlying rationale. If such an approach were accepted, it would be a full response in all GAAR cases, because the actions of a taxpayer will always be permitted by the text of the Act.As noted in OSFC, if the Court is confined to a consideration of the language of the provisions in question, without regard to their underlying rationale, it would seem inevitable that the GAAR would be rendered meaningless (para. 63).
>
> (My emphasis)

45 It is clear from the above that in all cases, the GAAR requires the Court to look into the underlying rationale of the provisions relied upon in order to obtain the tax benefit. This goes to the heart of the Crown's contention that rather than giving the relevant provisions a meaning which accords with their object, spirit and purpose, the Tax Court judge confined the effect of these provisions to their wording. According to the Crown, this narrow construction of the relevant provisions cannot stand as it is based on an erroneous assessment of the impact of subsequent amendments brought to the Act in 2012, many years after the series of transactions unfolded.

46 I will come back to this later but I note for now that subsequent amendments cannot be assumed to alter or confirm the prior state of the law (see subsections 45(2) and (3) of the *Interpretation Act*, R.S.C., 1985, c. I-21 (the *Interpretation Act*)). The recent decision of this Court in *Univar Holdco Canada ULC v. The Queen*, 2017 FCA 207 (F.C.A.) at paragraphs 23 to 27 illustrates the point that in a GAAR context, the provisions used to obtain the tax benefit must first be construed on their own. Only then can one say whether a subsequent amendment that touches upon the same subject matter confirms or alters the prior state of the law.

- Statutory context

47 Before turning to the analysis, it is useful to say a few words about the tax treatment of partnerships, the distinction between capital property and depreciable capital property and the context in which subsection 100(1) was enacted in 1972.

48 Partnerships have a hybrid status under the Act. Although partnership income is allocated to the partners, it is computed "as if the partnership were a separate person" (paragraph 96(1)(*a*)). Because partnerships are distinct from the partners at the income computation stage—Division B—computation of income—they, much like corporations, can hold assets, in which case the interest of the partners in those assets is reflected by their partnership interests. Partnership interests are distinct from the underlying property held by the partnership and can be subject to a different treatment under the Act.

49 Depreciable property is by definition capital property (subsection 54(*a*)) and the disposition of capital property for proceeds which exceed its ACB—essentially the capital cost in the case of depreciable capital property (see paragraph 54(*a*)(i))—gives rise to a capital gain, 50% of which is taxable. To this extent, the tax treatment of depreciable and non-depreciable capital property is identical.

50 However, only capital property that comes within the definition of "depreciable property" in subsection 13(21)—essentially capital property that is used in the income making process and with respect to which capital cost allowance (CCA) may be claimed—can give rise to recapture. In simplified terms, CCA allows for a 100% deduction of the annual rate of depreciation authorized by regulation and recapture essentially brings back into income the excess CCA claimed, as revealed by the difference between the selling price of a depreciable property and its UCC as it stood when sold. In contrast with a capital gain derived from the disposition of depreciable property, recapture gives rise to a 100% inclusion given that it recuperates a 100% deduction (For a more detailed explanation of the workings of the capital cost allowance system see *Duncan v. R.*, 2002 FCA 291, [2003] 2 F.C.R. 25 (Fed. C.A.) [*Water's Edge*] at paragraphs 37 to 41).

51 Subsection 100(1) was enacted at the time when the capital gains system was introduced in 1972. The concern which it addresses is the sale of partnership interests to tax-exempt entities in circumstances where the underlying assets comprise property, the disposition of which can give rise to a 100% rate of inclusion—*i.e.*: depreciable capital property, resource property and other types of property that are subject to a 100% rate of inclusion. A partnership interest, being capital property, will be subject to capital gain treatment when sold—unless held on a trading account—and the purchaser will eventually be subject to tax on any latent recapture in the underlying depreciable property when it is disposed of.

52 However, where the purchaser of the partnership interest is a non-taxable entity, the recapture of excessive depreciation will never take place. Subsection 100(1) prevents this potential revenue loss by making the disposing partners liable for tax on 100% of any portion of the gain resulting from the sale of their partnership interests which can be attributed to depreciable capital property held by the partnership based on its pro-rated value.

53 I now turn to the object, spirit and purpose analysis of the provisions that were used in order to avoid the application of subsection 100(1).

- Subsection 97(2)

54 In implementing the first step of the series, Old Oxford used the subsection 97(2) rollover on the transfer of the real estate properties to the first tier partnerships. Subsection 97(2) was also used when these properties were later transferred to the second tier partnerships.

55 Subsection 97(2) allows for the transfer of property—including non-depreciable capital property, depreciable capital property and inventory—to a partnership on a tax deferred basis subject to a joint election being filed by the partners. In this case, where the ACB was elected with respect to the land portion of the property—*i.e.*: the non-depreciable capital property—and the UCC was elected with respect to the buildings erected thereon—*i.e.*: the depreciable capital property—the accrued capital gain and the recapture which would otherwise have resulted from the transfer by virtue of subsection 97(1) were deferred. This last provision provides that the partners, upon contributing property to a partnership, are deemed to receive proceeds equal to the fair market value of the transferred property.

56 Rollovers, including the one provided for in subsection 97(2), defer the tax consequences of transfers which take place amongst selected groups such as shareholders and their corporations (subsection 85(1)) and partners and their partnerships (subsection 97(2)), the premise being that no tax consequences should be recognized given that there is no fundamental change in ownership—*i.e.*: rather than holding the transferred property, the transferor holds a partnership interest or shares having the same value (Vern Krishna, *The Fundamentals of Canadian Income Tax*, 9th ed. (Toronto: Thomson/Carswell, 2006) at p. 1112).

57 The logic behind rollovers as revealed by the mechanism used to give effect to them—*i.e.*: the fact that a transferor's deemed proceeds become the transferee's deemed cost—ACB or UCC as the case may be—makes it clear that any tax thereby deferred will be paid on a subsequent disposition giving rise to a change in the transferor's economic position. As was said in direct reference to subsection 97(2): “tax is not avoided; it is deferred [...]” (*Continental Bank of Canada v. R.* (1994), 94 D.T.C. 1858 (T.C.C.) at 1872, aff'd (1996), 96 D.T.C. 6355 at 6368 (Fed. C.A.). This flows from both the wording and the object, spirit and purpose of subsection 97(2).

58 Indeed, subsection 97(4) ensures this result in express terms with respect to recapture by providing that where depreciable property is transferred to a partnership for proceeds which exceed the transferor's capital cost, this cost becomes the partnership capital cost and the difference is deemed to have been taken as CCA by the partnership.

59 Against this background, it must be acknowledged that the object, spirit and purpose of subsections 97(2) and 97(4) is to track the tax attributes of depreciable property in order to ensure that deferred recapture and gains are subsequently taxed.

60 The respondent argues that this treatment does not apply to all situations where a tax-exempt entity is involved. It points to the fact that a tax-exempt entity is permitted to be a member of a partnership. As such, a partnership could sell property that was rolled into it at its tax cost pursuant to subsection 97(2) with the result that any excess recapture shown to have been claimed on the subsequent sale of the property would go untaxed to the extent that it is allocated to the tax-exempt partner.

61 That is so. Parliament has not provided for every situation where the interposition of a tax-exempt entity can give rise to revenue losses but it can be seen, when regard is had to subsection 100(1), that when partnership interests are sold to exempt entities, latent recapture was not intended to go untaxed. This treatment is consistent with the object, spirit and purpose of subsection 97(2).

62 The Tax Court judge did not construe subsection 97(2) this way. He focussed his attention on the three year holding period set out in subsection 69(11) of the Act, and concluded that subsection 97(2) is not frustrated when deferred recapture goes untaxed, so long as this holding period is met.

63 All are agreed that subsection 69(11) can have no application in this case because even if it were otherwise applicable, the three year holding period was respected. This provision, specifically paragraph 69(11)(*b*), envisages an initial disposition of property for an amount below its fair market value in circumstances where planning steps have been taken in order to allow the taxpayer to “benefit” (“profiter” in the French text) from a tax exemption available to any person on “any income arising on a subsequent disposition” of the property. Where this can be shown, the provision deems the initial disposition to have taken place at fair market value. However, subsection 69(11) ceases to apply if the property originally transferred is kept by the transferee for a minimum period of three years and no arrangements can be shown to have been made for a subsequent distribution within this period.

64 The Tax Court judge's reasoning for holding that this three year limitation is part of the object, spirit and purpose of subsection 97(2) is as follows (Reasons, para. 193):

> I agree with counsel for the [respondent] that Parliament is presumed to know the law and to take the law into account when making amendments.[Footnote omitted] Parliament was aware of the three-year limitation at the time it extended the application of subsection 69(11) to tax-exempt entities. Thus, when it amended subsection 69(11) it made the positive decision to limit the application of subsection 69(11)

> to transfers to tax-exempt entities that occur within the three-year period. In my view, it is reasonable to conclude that Parliament was of the view that transfers after this three-year period did not abuse subsection 97(2). Such a conclusion must be drawn in order to, in the words of the Supreme Court of Canada, preserve some "certainty, predictability and fairness in tax law so that taxpayers may manage their affairs accordingly."[55] [*Canada Trustco*, para. 61]

65 I first note that subsection 69(11) is found in subdivision f, "Rules Relating to Computation of Income" whereas 97(2) is found in subdivision j which deals with "Partnerships and Their Members". This shows that the application of subsection 69(11) is not restricted to partnerships. It therefore cannot be said that subsection 69(11) was introduced in order to target subsection 97(2) rollovers (Reasons, para. 189). It has a much broader application. Although it could apply to a series of transactions initiated by a subsection 97(2) rollover, subsection 69(11) applies to any series where the initial disposition takes place below fair market value, whether a rollover under subsection 97(2) or any other provision is involved or not. As such, there is no "plausible and coherent plan" which could justify reading the three year time limitation set out in subsection 69(11) into subsection 97(2) (*Copthorne* at para. 91).

66 I note as well that it is not unusual for Parliament to place a time limit on anti-avoidance provisions whose application depends on a transaction which may take place sometime in the future (Compare paragraph 6204(1)(*b*) of the *Income Tax Regulations*, C.R.C., c. 945 as construed by this Court in *Montminy c. Canada*, 2017 FCA 156 (F.C.A.) at para. 59; see also the holding period set out in section 54 relating to superficial losses). The obvious intent is to put a cap on the paralysing effect brought about by this type of provision which would otherwise be perpetual. This provides certainty and finality. No such concern arises with respect to subsection 97(2) or any of the other provisions in issue in this appeal as none are subject to a condition subsequent for their application.

67 Beyond this, I could follow the connection which the Tax Court judge saw between the present situation and the one contemplated by paragraph 69(11)(*b*) if the tax benefit in issue here had been obtained by reason of the tax-exempt status of the purchasers. However, there is no evidence to this effect. The reason why Oxford achieved the tax benefit that it did is because it rolled over the three real estate properties into partnerships, made a clever use of the bumps and successfully avoided the application of subsection 100(1). If anything, the tax benefit was obtained despite the exempt status of the purchaser, not because of it.

68 There is therefore no basis for the Tax Court judge's conclusion that "certainty, predictability and fairness in tax law" require that the three year limitation found in subsection 69(11) be applied to subsection 97(2).

69 The following passage could be read as advancing further and independent grounds for holding that subsection 97(2) was not frustrated by the result achieved in this case (Reasons, paras. 186, 187, 188):

> I agree with the [Crown] that another purpose of subsection 97(2) is to preserve in the partnership the tax attributes of the Three Real Estate Properties, including their adjusted cost base and potential recapture. This is why the rollover is commonly referred to as a deferral of tax. However, the object of the provision is to only determine the amount of tax payable on the accrued gains when the First Level LP and Second Level LP subsequently sell the transferred asset. The amount of such tax is based upon the attributes, including the adjusted cost base, of the property at the time of such sale.
>
> In my view, on a textual, contextual and purposive analysis of subsection 97(2) it is not the purpose of subsection 97(2) to tax the partners, when they dispose of their partnership interest, on the potential recapture or capital gain relating to the property of the partnerships, including the Three Real Estate Properties. The Act treats the sale of the partnership interest as a sale of non-depreciable property. The partnership's assets are taxed at the partnership level on the basis of their attributes at the time of the sale.
>
> In short, it is not one of the purposes of subsection 97(2) to tax the subsequent sale of an interest in a partnership on the basis of the nature of the property held by the partnership.

70 The question being discussed in this passage is whether subsection 97(2)'s reason for being or underlying rationale was frustrated. As the Tax Court judge recognizes in the initial paragraph, the rollovers placed the real estate properties into the first and then the second tier partnerships on a tax deferred basis in circumstances where the tax attributes of these properties had been preserved. The question which he had to answer is whether the fact that these deferred gains and recapture will never be taxed frustrates subsection 97(2).

71 Rather than confronting this question, the Tax Court judge asked another one—*i.e.*: whether "it is [...] one of the purposes of subsection 97(2) to tax the subsequent sale of an interest in a partnership on the basis of the nature of the property held by the partnership" (Reasons, para. 188).

72 I first note that subsection 97(2) defers tax; it does not purport to tax anyone. Furthermore, the question whether deferred gains and recapture should be taxed in the hands of the partners when they sell their partnership interests to the exempt entities turns on the object, spirit and purpose of subsection 100(1), not subsection 97(2).

73 The question which the Tax Court judge had to address at this stage of the analysis is whether the fact that deferred gains and recapture will never be taxed frustrates the object, spirit and purpose of subsection 97(2). Given that the only reason why Parliament would preserve the tax attributes of property that is rolled into a partnership is to allow for the eventual taxation of the deferred gains and latent recapture, the answer must be in the affirmative.

- Paragraphs 88(1)(c), 88(1)(d) and 98(3)(b)

74 The two bumps were essential in allowing the respondent to circumvent the application of subsection 100(1). Beyond deferring the accrued gains and latent recapture, Oxford also had to bring up the ACB of its partnership interests up to an amount approximating their fair market value in order to achieve this goal.

75 The transactions which allowed for the bumps are complex, but for present purposes it is sufficient to remember that after the properties were rolled into the first tier partnerships, the rules pertaining to vertical amalgamations were brought into play thereby allowing the amalgamated entity to bump the ACB of its interests in the first tier partnerships pursuant to paragraph 88(1)(*d*).

76 In a vertical amalgamation, paragraph 88(1)(*a*) deems the parent corporation to have acquired the property of its subsidiary at the subsidiary's tax cost. Prior to the windup, however, it is possible that the parent's tax cost of the shares in its subsidiary (the ACB of the shares) will exceed the tax cost of the subsidiary's underlying property. Upon a vertical amalgamation, these shares will disappear. Without further adjustment, the tax cost in those shares would also disappear, thereby giving rise to potential double taxation in the event that the underlying property is subsequently sold. This is because the deemed cost of the underlying property in the hands of the parent, being equal to the subsidiary's tax cost, would not reflect any appreciation in value up to the time of the wind-up.

77 The bump provided for in paragraphs 88(1)(*c*) and (*d*) rectifies this situation by first calculating the difference between the ACB of the parent's shares and the tax cost of the subsidiary's property. This amount is then allowed to be added to the tax cost of the non-depreciable capital property which the parent inherited from its subsidiary. In other words, the tax cost of this property is bumped. The bump essentially allows any ACB that would otherwise be lost on a vertical amalgamation to be preserved and transferred to different property that is taxed the same way.

78 Subparagraph 88(1)(*c*)(iii) prohibits the parent from bumping the cost of "ineligible property" which includes depreciable property. The issue the bump seeks to address is the disappearance of the shares and the tax cost (the share's ACB) embedded therein. Preserving and transferring ACB that would otherwise be lost to an asset that is taxed with the same rate of inclusion is the way in which this is accommodated. Allowing property that is taxed on the basis of a 50% rate of inclusion to augment the value of property that is taxed on the basis of a 100% rate of inclusion would result in an obvious revenue loss. That explains why depreciable property or other types of property that give rise to a 100% rate of inclusion cannot be bumped.

79 Subsection 98(3) operates essentially the same way. It applies in the context of the dissolution of partnerships and seeks to preserve the tax basis in partnership interests rather than shares. The rationale is the same as that under paragraph 88(1)(*d*). Subparagraph 98(3)(*b*)(ii) and paragraph 98(3)(*c*) also exclude "ineligible property", including depreciable property for the same reasons as those already explained. As well, both subparagraph 88(1)(*a*)(iii) and paragraph 98(3)(*e*) deem the parent corporations or the partners to have acquired the inherited property at the subsidiary's or the dissolving partnership's UCC, which evidences an intent to maintain continuity in the application of the CCA scheme.

80 Given the rationale of the bump provisions, one can see why depreciable property is excluded. A bump pertaining to depreciable property on which CCA has been claimed will increase the UCC and decrease the latent recapture which is subject to a 100% rate of inclusion. However, the same logic does not extend to a gain realized from the disposition of depreciable property, which, like any other capital gain, is subject to a 50% rate of inclusion. When regard is had to the underlying rationale for the bump provisions, a bump which can be shown to increase the capital cost rather than the UCC of depreciable property would not be objectionable. I will come back to this in assessing the overall result of the series of transactions.

81 The Tax Court judge understood the distinct treatment of depreciable and non-depreciable property and the reasons for it. It can be seen from his reasoning (Reasons, paras. 143-146, 167, 168) that the bumps are available to increase the ACB of non-depreciable capital property in order to compensate for the loss of the tax basis in non-depreciable property—*i.e.*: the shares—in the context of a vertical amalgamation and the partnership interests in the context of a partnership dissolution. He explained that this eliminates the potential double taxation which would arise upon a subsequent sale of the assets. He also noted that another purpose of subsection 88(1) is to preserve the tax attributes of depreciable property and the "potential recapture" (Reasons, para. 146).

82 Had the Tax Court judge stopped here and moved to the abuse analysis, he would have had to conclude that the object, spirit and purpose of the relevant provisions was frustrated because the bumps were used to effectively increase the UCC of depreciable property. As well, he would have had to conclude the tax attributes of the underlying depreciable property were "preserved" to no avail.

83 However, this played no role in the conclusion which the Tax Court judge reached. After noting that paragraph 88(1)(*d*) was amended in 2012 by the addition of subparagraph 88(1)(*d*)(ii.1) (Reasons, para. 147) and that this amendment is relevant when determining the object, spirit and purpose of the relevant provisions (Reasons, para. 153), the Tax Court judge went on to hold (Reasons, para. 205):

> I cannot find, on a textual, contextual and purposive analysis, that one of the objects or purposes of paragraphs 88(1)(c) and (d), subsection 98(3) [...]is to establish an "indirect" bumping rule or, for that matter, a latent recapture rule that, as envisaged by the Respondent, applied when the partnership interests in the First Level LPs and Second Level LPs were bumped. Nor do I accept that one of the objects or purposes of paragraph 88(1)(c) and subsection 98(3), <u>as they read during the relevant periods</u>, was to reduce or deny the bump on the basis of the nature of the assets held by the partnerships.
>
> (My emphasis)

84 He added after pointing to the complexity of the bump rules and emphasizing Parliament's extreme care in the choice of words to give effect to them (Reasons, para. 206):

> [...] <u>Section 88, as drafted at the time</u>, did not require the Appellant to look at the nature of the assets of the First Level LPs to determine the amount by which it could bump its interest in the limited partnerships.
>
> (My emphasis)

85 The Tax Court judge's insistence on the relevant provisions "as they read" is explained by the contrast which he draws between the law as it stood when the series of transactions unfolded and the law as it stood after the addition of subparagraph 88(1)(*d*)(ii.1) and related amendments in 2012 (Reasons, paras. 210-212). He explained earlier on how this change operates and what it achieves (Reasons, paras. 147-153). In his view, new subparagraph 88(1)(*d*)(ii.1) addresses the very issue which arises here but on a prospective basis only. This led the Tax Court judge to conclude that (Reasons, para. 210):

> The legislative scheme that the [Crown] is looking for exists in the current version of section 88, in particular as a consequence of the addition of subparagraph 88(1)(d)(ii.1) in 2012. However, in my view, the amendment reflects the adoption of a new policy by Parliament.

To be clear, he added that "[...] it is not a clarification of the old provisions" (Reasons, para. 212).

86 Whether an amendment clarifies the prior law or alters it turns on the construction of the prior law and the amendment itself. As explained, the *Interpretation Act* prevents any conclusion from being drawn as to the legal effect of a new enactment on the prior law on the sole basis that Parliament adopted it. Keeping this limitation in mind, the only way to assess the impact of a subsequent amendment on the prior law is to first determine the legal effect of the law as it stood beforehand and then determine whether the subsequent amendment alters it or clarifies it.

87 The Tax Court judge concluded that new subparagraph 88(1)(*d*)(ii.1) operates as new law by comparing it to subsection 88(1), as it read before the amendment. He explained that whereas subsection 88(1) provided that the bump is based "on the fair market value of each qualifying non-depreciable asset of the subsidiary, including the fair market value of a partnership interest held by the partner", this ceased to be the case after the amendment, "which restricted the amount by which a partnership interest may be bumped to the amount of the fair market value of the partnership that is not attributable to depreciable property" (Reasons, para. 211). In short, the amendment is novel because the limit now imposed with respect to depreciable property was not there before.

88 The difficulty with this reasoning is that it is based on the wording of the former provisions rather than on their object, spirit and purpose. As was stated in *Copthorne*, the GAAR contemplates that the meaning and legal effect of the provisions of the Act can vary depending on whether they are construed according to a traditional, textual, contextual and purposive construction focused on the meaning of the words of the Act, or on the basis of an analysis focused on discerning their underlying rationale or reason for being (*Copthorne* at para. 70). While one cannot rule out the possibility that the underlying rationale for a provision will be fully captured by the words, this must still be demonstrated by inquiring into the provision's reason for being (*Copthorne* at paras. 110-111).

89 There is no doubt that new subparagraph 88(1)(*d*)(ii.1) operates as new law if one construes the prior provisions with a focus on the words or the text as the Tax Court judge did. By invoking the GAAR, the Minister conceded, and all are agreed that paragraphs 88(1)(*c*) and (*d*) and subsection 98(3) do not impose a limit that would prevent the bumps achieved here (Compare *Copthorne* at para. 109). As new subparagraph 88(1)(*d*)(ii.1) imposes such a limit prospectively, it will operate as new law whenever the Act requires that the former provisions be given a traditional construction focused on the meaning of the words—*i.e.*: in cases where the GAAR is not in play.

90 However, the question whether new subparagraph 88(1)(*d*)(ii.1) operates as new law in a GAAR context must be assessed having regard to the meaning of the prior provisions, when construed with a focus on their underlying rationale or reason for being. In this respect, it can be seen from the Tax Court judge's own analysis of the provisions as they stood before the amendment (Reasons, paras. 142-146 and 164-168), that new subparagraph 88(1)(*d*)(ii.1) conveys in express terms a rationale which was already present in these provisions. Notably, these provisions already drew the distinction between depreciable and non-depreciable property and the only reason for making this distinction is to take into account the distinctive tax treatment afforded to each type of property under the Act in determining which is eligible for a bump and which is not. The use of tiered partnerships to bypass this distinctive treatment frustrates the reason for the distinction which these provisions already drew.

91 When the prior law is construed with a focus on its object, spirit and purpose as it must be, the amendment does not operate as new law. Its practical effect is simply that the GAAR will no longer have to be resorted to in order to prevent the result achieved in this case (Compare *Water's Edge* at para. 47).

92 I want to make clear that I reach this conclusion without placing any reliance on the Budget Supplementary Information document that was issued by the Department of Finance in conjunction with the enactment of subparagraph 88(1)(*d*)(ii.1) and related amendments in 2012. The Crown relies on the distinction drawn in this publication between remedial amendments and clarifying amendments and emphasizes the assertion that in this case the amendments “clarify” the prior law (Memorandum of the appellant, paras. 84, 85; Economic Action Plan 2012, pp. 414-415; Joint Book of Authorities, Vol. 2, Tab 49).

93 While publications of this type, including Explanatory Notes, are considered as permissible extrinsic aids (*Copthorne* at para. 69, citing *Trustco* at para. 55), I do not believe that this particular publication, which the Crown urges upon us, should be given any weight in this case. This is because, as acknowledged at p. 415 of this publication, it was issued at a time when officials of the Department of Finance were aware that structures like the one here in issue were being challenged by the Minister. This raises the obvious concern that the publication may be self-serving, particularly in a GAAR context, where the object, spirit and purpose of the pre-amendment law is the matter in issue. As such, the opinion expressed in this publication must be disregarded.

94 Before closing the analysis on the bumps, I must address the Tax Court judge's further conclusion that the Minister's position should be rejected because it is based on a broad policy that is not anchored in the Act itself (Reasons, para. 204). He came to this conclusion by reason of the distinct treatment which was given to the Dufferin Mall and the René Lévesque property (Reasons, paras. 201-203).

95 I cannot share that view. First, that the Minister did not see fit to apply the GAAR to limit the bumps achieved with respect to these other properties does not detract from the fact that the Minister's position in this case is firmly grounded in the object, spirit and purpose of paragraphs 88(1)(*c*) and (*d*) as well as subsection 98(3). As such, the treatment which the Minister gave to these other properties is irrelevant.

96 Nevertheless, in order to diffuse any suggestion of ambivalence on the part of the Minister, the decision not to apply the GAAR in respect to these properties is fully explained by the fact that the ultimate sale, insofar as the Dufferin Mall is concerned, was to a taxable entity with the result that tax on the latent recapture and accrued gains will eventually be paid. As to the René Lévesque property, the GAAR was not applied because the property was not contributed to the partnership as part of the series of transactions.

97 I therefore conclude that the bumps insofar as they allowed the respondent to avoid latent recapture on the depreciable property held by the partnerships frustrate the object, spirit and purpose of paragraphs 88(1)(*c*) and (*d*) and subsection 98(3).

- Subsection 100(1)

98 The special computation provided for under subsection 100(1) applies to the capital gain realized when a partnership interest is sold to a tax-exempt entity. Paragraph 100(1)(*a*) calls for the application of the normal rate of inclusion of 50% to the portion of the gain that is attributable to the value of non-depreciable capital property held by the partnership. To the extent that the gain realized on the sale of the partnership interest is attributable to the value of the depreciable property, paragraph 100(1)(*b*) provides for a 100% rate of inclusion.

99 The conclusion reached by the Tax Court judge with respect to the object, spirit and purpose of this provision is also based on new subparagraph 88(1)(*d*)(ii.1). In rejecting the Crown's contention that the purpose of subsection 100(1) was to look through the partnership and tax latent recapture which would otherwise go unpaid by reason of the exempt status of the purchaser, he wrote (Reasons, para. 216):

> A textual, contextual and purposive analysis of subsection 100(1) does not support such a purpose. If Parliament had intended such a result it would have drafted subsection 100(1) in a manner that required such a look-through, in other words, in a manner similar to new subparagraph 88(1)(d)(ii.1) of the bump rules.

100 Given this conclusion, the Tax Court judge gave subsection 100(1) a meaning that tracks its wording. In his words, as "the object of subsection 100(1) is to start with the capital gain computed under the Act and then determine what portion of this gain is a taxable capital gain", and as no gain arose when regard is had to the relevant provisions, particularly the bump rules, subsection 100(1) was not frustrated (Reasons, para. 217).

101 It was incumbent upon the Tax Court judge to conduct an object, spirit and purpose analysis of subsection 100(1). Although he purports to have done so, his analysis simply tracks the wording of subsection 100(1). As explained, subsection 100(1) brings into income 100% of the gain resulting from the sale of a partnership interest to an exempt entity insofar as it is attributable to depreciable property. The question which the Tax Court judge had to ask is why does this provision provide for such an inclusion? The answer is that Parliament wanted tax to be paid on the latent recapture which would otherwise go unpaid on a subsequent sale of the depreciable property by the tax-exempt purchaser. There is no other answer.

102 Given this, the inevitable conclusion is that the object, spirit and purpose of subsection 100(1) was frustrated by the result achieved in this case as the latent recapture in the depreciable property held by the second tier partnerships at the time of the sale of the partnership interests to the tax-exempt entities will forever go unpaid.

103 Before closing the analysis with respect to subsection 100(1), I note that the reassessment issued by the Minister applies a 100% rate of inclusion to both the recapture and the capital gain portion of the increase in value attributable to the depreciable property. This is at odds with the normal rate applicable to capital gains, but the Crown maintains that the Minister was required to apply a 100% rate of inclusion when regard is had to the object, spirit and purpose of subsection 100(1). Specifically, the Crown argues that the 100% rate of inclusion provided for in paragraph 100 (1)(*b*) is explained by the fact that Parliament wanted to "exact a price" in order to "discourage the attempted avoidance of recapture" (Memorandum of the Crown, para. 106).

104 I do not believe that this can explain why paragraph 100(1)(*b*) applies a 100% rate of inclusion to all increases in value attributable to depreciable property. First, doubling the tax on capital gains attributable to depreciable property does not deter attempts to avoid recapture. Indeed, where the attempted avoidance is limited to recapture, the 100% rate of inclusion provided for in paragraph 100(1)(*b*) merely matches the normal rate of inclusion applicable to recapture. If the intent was to "exact a price" on attempts to avoid recapture, subsection 100(1) would be framed differently. Second, there is no logic or reason why Parliament would "exact a price" on attempts to avoid recapture but not on attempts to avoid tax on the other types of property targeted by subsection 100(1).

105 Rather, it appears that subsection 100(1), like the bump provisions, was drafted with a focus on the 100% rate of inclusion applicable to the targeted properties generally. The capital gain aspect of depreciable property which calls for a 50% rate of inclusion does not seem to have warranted special attention, perhaps because this type of property is typically consumed in the income making process and rarely gives rise to capital gains. Whatever the reason, deterring the avoidance of recapture is not part of the explanation.

106 That said, no definitive conclusion needs be drawn because regardless of the explanation, taxing 100% of the capital gain portion of the increase in value attributable to depreciable property, as the Minister did, is not justified when regard is had to the overall result that was achieved. This is the issue to which I now turn.

- The overall result

107 Having concluded that none of the steps which form part of the series of transactions gave rise to an abuse, the Tax Court judge did not believe it necessary to consider the overall result. There are therefore no reasons to which deference could be given on this part of the analysis.

108 The overall result was the circumvention of subsection 100(1) by eliminating the capital gain which would otherwise have resulted from the sale of the partnership interests to the exempt entities. This was achieved by bumping the tax cost of the partnership interests so as to approximate their fair market value, as established by the price paid by the arms' length exempt entities, thereby eliminating any gain on which subsection 100(1) could apply and making the deferral of accrued gains and latent recapture permanent.

109 Specifically, no gain “could reasonably be regarded as attributable to increases [...] in the value” of non-depreciable property held by the second tier partnerships pursuant to paragraph 100(1)(*a*) when the transaction took place, even though the selling price of the partnership interests, as allocated by agreement, revealed that its value stood at $21,835,816.00 above its ACB. Similarly, no gain could be regarded as attributable to increases in the value of depreciable property held by the second tier partnerships pursuant to paragraph 100(1)(*b*), even though the selling price, as allocated by agreement, showed that it had been over depreciated by $116,591,744.00 and had a value that stood at $42,570,999.00 above its capital cost.

110 When considering the overall result as it relates to the underlying depreciable property, a distinction must be drawn between the tax treatment of excess depreciation claimed with respect to depreciable property as revealed by the difference between its capital cost and its UCC, and capital gains as revealed by the difference between its capital cost and its value at the time when it is sold. As noted earlier, when depreciable property is disposed of for a price which exceeds its capital cost, the difference between the UCC and the capital cost will give rise to recapture, subject to a 100% rate of inclusion, while the excess of the selling price over the capital cost will give rise to a capital gain, subject to an inclusion rate of 50%.

111 Keeping this distinct treatment in mind, the result achieved insofar as it allowed Oxford to avoid paying tax on latent recapture in the amount of $116,591,744.00 frustrates paragraph 100(1)(*b*). Selling partnership interests to an exempt entity when the underlying property includes depreciable property on which excess CCA has been claimed without triggering the recapture which would have been subject to tax had the property been sold directly is precisely what this provision is intended to prevent. As explained, paragraph 100(1)(*b*) pre-empts the potential revenue loss which arises by reason of the tax-exempt status of the purchaser by allowing for a look through the partnership, to the partnership property, and making the partners liable for the tax on the latent recapture that would otherwise go unpaid.

112 However, this provision cannot apply unless the sale of the partnership interests yields a capital gain commensurate with the increase in value of the underlying partnership property. In the present case, Oxford succeeded in rendering paragraph 100(1)(*b*) inoperative by offsetting this gain by the use of the bumps and creating a dichotomy between the tax cost of the partnership interests and the underlying property. In the process, the rationale for excluding depreciable property from the bumps pursuant to subparagraphs 88(1)(*c*)(iii) and paragraph 98(3)(*e*) was defeated as the tax cost of the depreciable property was bumped all the way up from its UCC to its capital cost thereby allowing costs originating in property that is subject to a 50% rate of inclusion to be used to offset recapture which is subject to a 100% rate of inclusion. As well, Oxford abused subsections 97(2) and 97(4) because the UCC elected and deemed to continue in the hands of the first and second tier partnerships had no subsequent application thereby making the deferred recapture permanent.

113 In my view, the Crown has successfully discharged her burden of identifying the object, spirit and purpose of the provisions used by Oxford to achieve this result, and showing that all were frustrated in the process (*Trustco* at para. 65).

114 Conversely, it has not been shown that an abuse of paragraph 100(1)(*b*) or any of the relevant provisions results from the fact that the increased value of the depreciable property, from its capital cost to its fair market value, was not reflected in the capital gain generated by the sale of the partnership interests. This is because this portion of the increase in value of the depreciable property was properly offset by their increased tax cost resulting from the bumps when regard is had to the object, spirit and purpose of paragraphs 88(1)(*c*), 88(1)(*d*) and 98(3)(*b*).

115 As alluded to earlier, no abuse of these provisions arises when disappearing costs are used to increase the cost of property that is taxed the same way as the property from which the transferred costs originate. This is what has been shown with respect to the part of the disappearing costs that were used to offset the $42,570,999.00 increase in the value of the

depreciable property from its capital cost up to its fair market value. This result is not abusive because this portion of the capital gain which would otherwise have arisen pursuant to paragraph 100(1)(*b*) was nullified in a manner consistent with the object, spirit and purpose of the bump provisions.

116 For the same reason, subsection 97(2), insofar as it was used to defer tax on this part of the increase in the value of the depreciable property, was not abused. In contrast with the deferred recapture, the deferred capital gain did not simply vanish. Rather, it was offset by adding real costs to the capital cost of the depreciable property. The failure to recognize a cost that has been actually incurred but which would disappear on a vertical amalgamation or a partnership dissolution goes against the integrity of the capital gains system because it allows for the subsequent realization of a capital gain in circumstances where there has been no economic gain. Preventing this outcome is the reason why the bump provisions were enacted.

117 In the end, the only basis on which the Minister could refuse to give the bumps this limited application is by insisting on a construction of the bump provisions which focuses on the meaning of the words, specifically on the unqualified and express disqualification of depreciable property. However, the Crown cannot have it both ways. In a GAAR context, the same interpretative approach must be applied to both the determination of the abuse and the consequential adjustments required in order to counter it.

118 I therefore conclude that the Minister could not reassess Oxford on the basis that the overall result achieved by this circumscribed use of the bump provisions was abusive.

119 The overall result as it applies to the non-depreciable property—*i.e.*: the land—was achieved essentially the same way —*i.e.*: by bumping its value from its ACB to its fair market value, thereby offsetting the deemed capital gain in the amount of $10,917,900.00 which would otherwise have been attributable to the increase in the value of the land pursuant to paragraph 100(1)(*a*).

120 The above reasoning explains why this result does not frustrate subsection 100(1) or any of the provisions relied upon in order to achieve it. The only meaningful difference is that the land, being non-depreciable property, qualifies for the bumps whether the bump provisions are construed with a focus on the meaning of the words or on their object, spirit and purpose.

- The reasonable GAAR consequences

121 The reassessment issued by the Minister nullifies the bumps and applies subsection 100(1) to the resulting gain. The disallowance of the bumps decreased the ACB of the partnership interests, and increased the capital gain realized by the respondent on their sale to the tax-exempt entities by the amount of $148,187,560.00.

122 It can be seen from the above analysis that the amounts included under paragraphs 100(1)(*a*) and 100(1)(*b*) do not reflect consequences that are reasonable in the circumstances as no abuse results from the avoidance of the taxable capital gain in the amount of $10,917,900.00 under the former and the only abuse which was made of the latter pertains to the avoidance of tax on recapture, which the parties agree is in the amount of $116,591,744.00.

- Disposition

123 For these reasons, I would allow the appeal in part, set aside the decision of the Tax Court judge and giving the judgment which the Tax Court judge ought to have given, I would refer the reassessment back to the Minister for reconsideration and reassessment on the basis that subsection 100(1) gives rise to a taxable capital gain in the amount of $116,591,744.00 rather than $148,187,562.00. The Crown should have her costs here and below. The award in both cases should be apportioned based on a rounded 80/20 ratio to reflect the respondent's partial success.

***Eleanor R. Dawson J.A.*:**

I agree

***Donald J. Rennie J.A.*:**

I agree

Appeal allowed in part.

Annex

Income Tax Act, R.S.C., 1985 c. 1 (5th Supp.)

Contribution of property to partnership

97(1) Where at any time after 1971 a partnership has acquired property from a taxpayer who was, immediately after that time, a member of the partnership, the partnership shall be deemed to have acquired the property at an amount equal to its fair market value at that time and the taxpayer shall be deemed to have disposed of the property for proceeds equal to that fair market value.

(2) Notwithstanding any other provision of this Act other than subsection 13(21.2), where a taxpayer at any time disposes of any property that is a capital property, Canadian resource property, foreign resource property, eligible capital property or inventory of the taxpayer to a partnership that immediately after that time is a Canadian partnership of which the taxpayer is a member, if the taxpayer and all the other members of the partnership jointly so elect in prescribed form within the time referred to in subsection 96(4),

(a) the provisions of paragraphs 85(1)(a) to 85(1)(f) apply to the disposition as if

(i) the reference therein to “corporation's cost” were read as a reference to “partnership's cost”,

(ii) the references therein to “other than any shares of the capital stock of the corporation or a right to receive any such shares” and to “other than shares of the capital stock of the corporation or a right to receive any such shares” were read as references to “other than an interest in the partnership”,

(iii) the references therein to “shareholder of the corporation” were read as references to “member of the partnership”,

(iv) the references therein to “the corporation” were read as references to “all the other members of the partnership”, and

(v) the references therein to “to the corporation” were read as references to “to the partnership”;

(b) in computing, at any time after the disposition, the adjusted cost base to the taxpayer of the taxpayer's interest in the partnership immediately after the disposition,

(i) there shall be added the amount, if any, by which the taxpayer's proceeds of disposition of the property exceed the fair market value, at the time of the disposition, of the consideration (other than an interest in the partnership) received by the taxpayer for the property, and

(ii) there shall be deducted the amount, if any, by which the fair market value, at the time of the disposition, of the consideration (other than an interest in the partnership) received by the taxpayer for the property so disposed of by the taxpayer exceeds the fair market value of the property at the time of the disposition; and

(c) where the property so disposed of by the taxpayer to the partnership is taxable Canadian property of the taxpayer, the interest in the partnership received by the taxpayer as consideration therefor shall be deemed to be taxable Canadian property of the taxpayer.

(4) Where subsection 97(2) has been applicable in respect of the acquisition of any depreciable property by a partnership from a taxpayer who was, immediately after the taxpayer disposed of the property, a member of the partnership and the capital cost to the taxpayer of the property exceeds the taxpayer's proceeds of the disposition, for the purposes of sections 13 and 20 and any regulations made under paragraph 20(1)(a)

(a) the capital cost to the partnership of the property shall be deemed to be the amount that was the capital cost thereof to the taxpayer; and

(b) the excess shall be deemed to have been allowed to the partnership in respect of the property under regulations made under paragraph 20(1)(a) in computing income for taxation years before the acquisition by the partnership of the property.

Deemed proceeds of disposition

69(11) Where, at any particular time as part of a series of transactions or events, a taxpayer disposes of property for proceeds of disposition that are less than its fair market value and it can reasonably be considered that one of the main purposes of the series is

(a) to obtain the benefit of

(i) any deduction (other than a deduction under subsection 110.6(2.1) in respect of a capital gain from a disposition of a share acquired by the taxpayer in an acquisition to which subsection 85(3) or 98(3) applied) in computing income, taxable income, taxable income earned in Canada or tax payable under this Act, or

(ii) any balance of undeducted outlays, expenses or other amounts available to a person (other than a person that would be affiliated with the taxpayer immediately before the series began, if section 251.1 were read without reference to the definition *controlled* in subsection 251.1(3)) in respect of a subsequent disposition of the property or property substituted for the property, or

(b) to obtain the benefit of an exemption available to any person from tax payable under this Act on any income arising on a subsequent disposition of the property or property substituted for the property,

notwithstanding any other provision of this Act, where the subsequent disposition occurs, or arrangements for the subsequent disposition are made, before the day that is 3 years after the particular time, the taxpayer is deemed to have disposed of the property at the particular time for proceeds of disposition equal to its fair market value at the particular time.

Winding-up

88(1) Where a taxable Canadian corporation (in this subsection referred to as the “subsidiary”) has been wound up after May 6, 1974 and not less than 90% of the issued shares of each class of the capital stock of the subsidiary were, immediately before the winding-up, owned by another taxable Canadian corporation (in this subsection referred to as the “parent”) and all of the shares of the subsidiary that were not owned by the parent immediately before the winding-up were owned at that time by persons with whom the parent was dealing at arm's length, notwithstanding any other provision of this Act other than subsection 69(11), the following rules apply:

(a) subject to paragraphs 88(1)(a.1) and 88(1)(a.3), each property (other than an interest in a partnership) of the subsidiary that was distributed to the parent on the winding-up shall be deemed to have been disposed of by the subsidiary for proceeds equal to

(i) in the case of a Canadian resource property, a foreign resource property or a right to receive production (as defined in subsection 18.1(1)) to which a matchable expenditure (as defined in subsection 18.1(1)) relates, nil, and

(iii) in the case of any other property, the cost amount to the subsidiary of the property immediately before the winding-up;

(c) subject to paragraph 87(2)(e.3) (as modified by paragraph 88(1)(e.2)), and notwithstanding paragraph 87(2)(e.1) (as modified by paragraph 88(1)(e.2)), the cost to the parent of each property of the subsidiary distributed to the parent on the winding-up shall be deemed to be

(i) in the case of a property that is an interest in a partnership, the amount that but for this paragraph would be the cost to the parent of the property, and

(ii) in any other case, the amount, if any, by which

(A) the amount that would, but for subsection 69(11), be deemed by paragraph 88(1)(a) to be the proceeds of disposition of the property exceeds

(B) any reduction of the cost amount to the subsidiary of the property made because of section 80 on the winding-up,

plus where the property was a capital property (other than an ineligible property) of the subsidiary at the time that the parent last acquired control of the subsidiary and was owned by the subsidiary thereafter without interruption until such time as it was distributed to the parent on the winding-up, the amount determined under paragraph 88(1)(d) in respect of the property and, for the purposes of this paragraph, ineligible property means

(iii) depreciable property,

Rules applicable where partnership ceases to exist

98(3) Where at any particular time after 1971 a Canadian partnership has ceased to exist and all the partnership property has been distributed to persons who were members of the partnership immediately before that time so that immediately after that time each such person has, in each such property, an undivided interest that, when expressed as a percentage (in this subsection referred to as that person's “percentage”) of all undivided interests in the property, is equal to the person's undivided interest, when so expressed, in each other such property, if each such person has jointly so elected in respect of the property in prescribed form and within the time referred to in subsection 96(4), the following rules apply:

(a) each such person's proceeds of the disposition of the person's interest in the partnership shall be deemed to be an amount equal to the greater of

(i) the adjusted cost base to the person, immediately before the particular time, of the person's interest in the partnership, and

(ii) the amount of any money received by the person on the cessation of the partnership's existence, plus the person's percentage of the total of amounts each of which is the cost amount to the partnership of each such property immediately before its distribution;

(b) the cost to each such person of that person's undivided interest in each such property shall be deemed to be an amount equal to the total of

(i) that person's percentage of the cost amount to the partnership of the property immediately before its distribution,

(i.1) where the property is eligible capital property, that person's percentage of 4/3 of the amount, if any, determined for F in the definition cumulative eligible capital in subsection 14(5) in respect of the partnership's business immediately before the particular time, and

(ii) where the amount determined under subparagraph 98(3)(a)(i) exceeds the amount determined under subparagraph 98(3)(a)(ii), the amount determined under paragraph 98(3)(c) in respect of the person's undivided interest in the property;

(c) the amount determined under this paragraph in respect of each such person's undivided interest in each such property that was a capital property (other than depreciable property) of the partnership is such portion of the excess, if any, described in subparagraph 98(3)(b)(ii) as is designated by the person in respect of the property, except that

(i) in no case shall the amount so designated in respect of the person's undivided interest in any such property exceed the amount, if any, by which the person's percentage of the fair market value of the property immediately after its distribution exceeds the person's percentage of the cost amount to the partnership of the property immediately before its distribution, and

(ii) in no case shall the total of amounts so designated in respect of the person's undivided interests in all such capital properties (other than depreciable property) exceed the excess, if any, described in subparagraph 98(3)(b)(ii);

(e) where the property so distributed by the partnership was depreciable property of the partnership of a prescribed class and any such person's percentage of the amount that was the capital cost to the partnership of that property exceeds the amount determined under paragraph 98(3)(b) to be the cost to the person of the person's undivided interest in the property, for the purposes of sections 13 and 20 and any regulations made under paragraph 20(1)(a)

(i) the capital cost to the person of the person's undivided interest in the property shall be deemed to be the person's percentage of the amount that was the capital cost to the partnership of the property, and

(ii) the excess shall be deemed to have been allowed to the person in respect of the property under regulations made under paragraph 20(1)(a) in computing income for taxation years before the acquisition by the person of the undivided interest;

Disposition of an interest in a partnership

100(1) Notwithstanding paragraph 38(a), a taxpayer's taxable capital gain for a taxation year from the disposition of an interest in a partnership to any person exempt from tax under section 149 shall be deemed to be

(a) 1/2 of such portion of the taxpayer's capital gain for the year therefrom as may reasonably be regarded as attributable to increases in the value of any partnership property of the partnership that is capital property other than depreciable property, plus

(b) the whole of the remaining portion of that capital gain.

Determination of tax consequences

245(5) Without restricting the generality of subsection (2), and notwithstanding any other enactment,

(a) any deduction, exemption or exclusion in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part,

(b) any such deduction, exemption or exclusion, any income, loss or other amount or part thereof may be allocated to any person,

(c) the nature of any payment or other amount may be recharacterized, and

(d) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored,

in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.

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88(1)(d)(ii.1) for the purpose of calculating the amount in subparagraph (ii) in respect of an interest of the subsidiary in a partnership, the fair market value of the interest at the time the parent last acquired control of the subsidiary is deemed to be the amount determined by the formula

A-B

where A is the fair market value (determined without reference to this subparagraph) of the interest at that time, and B is the portion of the amount by which the fair market value (determined without reference to this subparagraph) of the interest at that time exceeds its cost amount at that time as may reasonably be regarded as being attributable at that time to the total of all amounts each of which is

(A) in the case of a depreciable property held directly by the partnership or held indirectly by the partnership through one or more other partnerships, the amount by which the fair market value (determined without reference to liabilities) of the property exceeds its cost amount,

(B) in the case of a Canadian resource property or a foreign resource property held directly by the partnership or held indirectly by the partnership through one or more other partnerships, the fair market value (determined without reference to liabilities) of the property, or

(C) in the case of a property that is not a capital property, a Canadian resource property or a foreign resource propert and that is held directly by the partnership or held indirectly through one or more other partnerships, the amount by which the fair market value (determined without reference to liabilities) of the property exceeds its cost amount, and

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