Docket: 2011-3616(IT)G

BETWEEN:

OXFORD PROPERTIES GROUP INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 2 and 3, 2015 at Toronto, Ontario

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

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

JUDGMENT

In accordance with the attached reasons for judgment:

The appeal with respect to a reassessment made under the *Income Tax Act* for the Appellant's taxation year ending August 31, 2006 is allowed, with costs, and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant's transactions, as more particularly set out in the attached Reasons for Judgment, did not result in abusive tax avoidance for the purposes of section 245 of the *Income Tax Act*;

The parties will have 30 days from the date of this judgment to arrive at an agreement on costs, failing which they are directed to file their written submissions

on costs within 60 days of the date of this judgment. Such submissions shall not exceed 15 pages.

Signed at Antigonish, Nova Scotia, this 19th day of September 2016.

"S. D'Arcy"

D'Arcy J.

Citation: 2016 TCC 204
Date: 20160919
Docket: 2011-3616(IT)G

BETWEEN:

OXFORD PROPERTIES GROUP INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

I. Introduction

[1] The Appellant engaged in a series of transactions to *package* certain of its real estate holdings, including the three real estate properties at issue in this appeal, into a number of limited partnerships. With respect to the three properties, it used subsection 97(2) of the *Income Tax Act (Canada)* (the "*Act*") to eventually roll the properties into three separate limited partnerships. As a result, it paid no tax on the transfers and each of the properties retained its tax attributes, including its adjusted cost base and undepreciated capital cost. In the course of packaging the real estate, the Appellant elected to use paragraphs 88(1)(c) and (d) and subsection 98(3) to *bump* the adjusted cost base of its interests in certain limited partnerships, including the three limited partnerships holding the three properties. It then sold its interests in the three limited partnerships to tax-exempt entities.

[2] The Appellant calculated its taxable capital gains on the disposition of its interests in the three limited partnerships by using the increase of $163,981,767 in the adjusted cost base of the limited partnership interests that resulted from the *bumps* under paragraphs 88(1)(c) and (d) and subsection 98(3).

[3] The Minister of National Revenue (the "Minister") concluded that the Appellant, by using the rollover in subsection 97(2) and the *bumps* in paragraphs 88(1)(c) and (d) and subsection 98(3) and then selling its interests in the three limited partnerships to a tax-exempt entity, avoided the payment of tax that would

otherwise have been payable on capital gains and recapture: specifically, the tax on such capital gains and recapture that would have arisen if the three real estate properties themselves had been sold to the tax-exempt entities.

[4] The Minister concluded that the Appellant carried out a series of transactions that avoided tax on taxable capital gains and recapture and, as a result, the transactions abused certain provisions of the Act, including subsections 97(2), 88(1), 98(3) and 100(1). Applying the general anti-avoidance rule (the "GAAR"), the Minister denied the subsection 88(1) and 98(3) bumps, which resulted in a $148,221,522 increase in the taxable capital gain realized by the Appellant on the sale of the three limited partnership interests and the reduction of a capital loss/suspended capital loss with respect to one of the limited partnerships from $5,155,531 to nil.

[5] The Appellant has appealed the Minister's reassessment.

II. Summary of Facts

[6] There were no witnesses at the hearing. The parties filed a statement of agreed facts (the "ASF"). Each party also filed a book of documents (which were entered on consent) and discovery read-ins (filed under section 100 of the *Tax Court of Canada Rules* (*General Procedure*)). The Respondent objected to the Appellant's discovery read-ins. As I will discuss shortly, I have allowed the read-ins to be entered as evidence in this appeal. The Appellant also filed an Answer to the Respondent's Reply. In the Answer, the Appellant admitted numerous facts set out in the Reply.

[7] The ASF (without attachments) is attached hereto as Appendix A. I will begin by summarizing the agreed facts.

[8] The Appellant is a global real estate owner, investor, developer and property manager with offices across Canada, in New York and in London, U.K.

[9] In 2001, the Appellant's business was carried on by a predecessor ("Old Oxford"). Old Oxford was a public company and one of the largest commercial real estate firms in North America. It managed and owned interests in prime office, industrial and retail premises in Canada's major urban markets. It was at all material times a taxable Canadian corporation for the purposes of the Act.

The Takeover and Creation of First Level Limited Partnerships

[10] On August 16, 2001, BPC Properties Ltd. ("BPC") made a proposal to make a bid for all of the common shares of Old Oxford not held by the Ontario Municipal Employees Retirement System ("OMERS"). BPC was formed in May 2001 for the purpose of making the takeover bid. OMERS held 30% of the voting shares of BPC and had an option to acquire the remaining voting shares. The fair market value of the shares of BPC held by OMERS represented the vast majority of the fair market value of the issued shares of BPC.

[11] At all material times, OMERS was a registered pension plan under the Act and exempt from tax under Part I of the Act.

[12] On August 20, 2001, as part of the takeover negotiations, BPC and Old Oxford entered into an agreement (the "Support Agreement"). Pursuant to the provisions of the Support Agreement, Old Oxford agreed to effect a pre-closing reorganization of its business if requested, provided that the request was reasonable and BPC reimbursed Old Oxford for the costs of the reorganization.

[13] Between October 10, 2001 and October 15, 2001, pursuant to the Support Agreement, Old Oxford effected the requested reorganization by establishing newly formed limited partnerships (the "First Level LPs") and then transferring its interest in certain real property to the First Level LPs. The transferred properties included the properties at issue in this appeal, the Atria Complex, the Richmond Adelaide Centre ("RAC"), and a 50% beneficial interest in the Calgary Eaton Centre ("CEC"). I will refer to the properties jointly as the "Three Real Estate Properties".

[14] The various transactions are set out at paragraph 11 of the ASF. They may be summarized as follows:

- Old Oxford created two subsidiaries, GP Co 1 Inc. ("GP1") and GP Co 2 Inc. ("GP2") to act as general partners for the First Level LPs.

- Old Oxford amalgamated with certain other affiliates to form Oxford Properties Group Inc. ("OPGI Amalco").

- OPGI Amalco and GP1 formed OPGI Office Limited Partnership ("OPGI Office LP"), with OPGI Amalco being the limited partner and GP1 the general partner.

- OPGI Amalco then transferred its beneficial interest in certain real property, including RAC and CEC, to OPGI Office LP in exchange for the assumption of debt and additional limited partnership interests in OPGI Office LP. An election was made pursuant to subsection 97(2) with respect to the transfer.
- Certain other affiliates of Old Oxford amalgamated to form Oxford MRC Inc. ("MRC Amalco"). It appears that after the amalgamation MRC Amalco held the beneficial interest in the Atria Complex.
- MRC Amalco and GP2 formed MRC Office Limited Partnership ("MRC Office LP"), with MRC Amalco being the limited partner and GP2 the general partner.
- MRC Amalco then transferred its beneficial interest in certain real property, including the Atria Complex, to MRC Office LP in exchange for the assumption of debt and additional limited partnership interests in MRC Office LP. An election was made pursuant to subsection 97(2) with respect to the transfer.

[15] The subsection 97(2) elections made on the transfer of property to the OPGI Office LP and the MRC Office LP will be referred to as the "**First 97(2) Rollovers**".

[16] On October 16, 2001, BPC completed its takeover of Old Oxford (now OPGI Amalco). The steps taken to complete the takeover are set out in paragraphs 12 to 14 of the ASF. The end result was that BPC owned 100% of the shares of a newly formed subsidiary, 2006186 Ontario Inc. ("Acquireco") and Acquireco owned 100% of the shares of OPGI Amalco.

Formation of the Appellant and the First Bump

[17] On March 12, 2002, Acquireco incorporated a numbered company, 1519052 Ontario Inc. ("1519052").

[18] On May 30, 2002 and May 31, 2002, a reorganization was effected which resulted in the formation of the Appellant and a bump in the adjusted cost base of the interests in the First Level LPs (OPGI Office LP and MRC Office LP). The reorganization is described at paragraphs 16 to 19 of the ASF and may be summarized as follows:

- OPGI Amalco, MRC Amalco and certain other affiliated companies amalgamated to continue as one corporation, Oxford Properties Group Inc. (“First OPGI Amalco”), which was wholly owned by Acquireco. As a result of the amalgamation, First OPGI Amalco held the limited partnership interests in the First Level LPs.

- Acquireco transferred all of the shares of First OPGI Amalco to the numbered company created in March 2002 (1519052) for shares of the numbered company.

- 1519052 and First OPGI Amalco then amalgamated to form the Appellant, which was wholly owned by Acquireco.

- On the amalgamation of 1519052 and First OPGI Amalco, designations were filed pursuant to paragraph 88(1)(d) of the Act to increase the adjusted cost base of the non-depreciable capital properties formerly held by First OPGI Amalco, including the interests in the First Level LPs, i.e., OPGI Office LP and MRC Office LP (the “First Bump”). The Appellant now held the limited partnership interests in the First Level LPs.

Formation of Second Level Limited Partnerships

[19] Between November 12, 2002 and September 12, 2003, a second tier of partnerships were formed “First Bump” the First Level LPs. The formation of the partnerships is described at paragraphs 20 to 22 of the ASF and may be summarized as follows:

- The Appellant incorporated three subsidiaries to serve as the general partners of the new limited partnerships:
    - GP Co. 11 Inc. (“GP11”), created on November 12, 2002
    - GP Co. 16 Inc. (“GP16”) and GP Co. 18 Inc. (“GP18”), both of which were created on September 12, 2003.

- The First Level LPs created three new limited partnerships (the “Second Level LPs”):
    - On December 2, 2002, MRC Office LP and GP11 formed Atria Limited Partnership (“Atria LP”), with MRC Office LP being the limited partner and GP11 the general partner.

- On September 12, 2003, OPGI Office LP and GP16 formed the RAC Limited Partnership ("RAC LP"), with OPGI Office LP being the limited partner and GP16 the general partner.
- On September 12, 2003, OPGI Office LP and GP18 formed the Calgary Eaton Centre Limited Partnership ("CEC LP"), with OPGI Office LP being the limited partner and GP18 the general partner.

[20] Once the Second Level LPs were formed, the Appellant was the limited partner in the OPGI Office LP, which was the limited partner in each of the RAC LP and the CEC LP. The Appellant was also the limited partner in the MRC Office LP, which was the limited partner in the Atria LP.

Transfer of Certain Real Properties by the First Level LPs to the Second Level LPs

[21] On February 1, 2004 the First Level LPs transferred certain real properties to the Second Level LPs. The transactions are described at paragraph 23 of the ASF essentially as follows:

- OPGI Office LP transferred certain real properties to CEC LP, including its 50% interest in CEC, in exchange for the assumption of debt and an additional limited partnership interest in CEC LP. An election was made pursuant to subsection 97(2) with respect to the transfer.
- OPGI Office LP transferred RAC to RAC LP in exchange for the assumption of debt and an additional limited partnership interest in RAC LP. An election was made pursuant to subsection 97(2) with respect to the transfer.
- MRC Office LP transferred certain real properties to Atria LP, including the Atria Complex, in exchange for the assumption of debt and an additional limited partnership interest in Atria LP. An election was made pursuant to subsection 97(2) with respect to the transfer.

[22] The subsection 97(2) elections made on the transfer of properties to the three Second Level LPs will be referred to as the "Second 97(2) Elections".

The Second Bump

[23] On August 27, 2004, the First Level LPs were dissolved, with the parties *bumping* the adjusted cost base of the interests in the three Second Level LPs (the

"Second Bump"). The dissolution and Second Bump are described in paragraphs 24 to 27 of the ASF, and the description includes the following:

- MRC Office LP distributed its assets, including its limited partnership interest in Atria LP, to its partners. An election was made by the partners under subsection 98(3) of the Act, resulting in an increase in the adjusted cost base of the non-depreciable capital properties held by MRC Office LP immediately prior to the dissolution, including the limited partnership interest in Atria LP.
- OPGI Office LP distributed its assets, including its limited partnership interests in RAC LP and CEC LP, to its partners. An election was made under subsection 98(3) of the Act, resulting in an increase in the adjusted cost base of the non-depreciable capital properties held by OPGI Office LP immediately prior to the dissolution, including the limited partnership interests in RAC LP and CEC LP.

[24] Once the First Level LPs were dissolved, the Appellant held the limited partnership interests in each of the Second Level LPs. Its adjusted base in the limited partnerships included an increase of $163,981,767 resulting from the First Bump and the Second Bump.[1]

[25] On August 31, 2004, another reorganization was effected, which resulted in OMERS holding 75% of the Appellant.

Sale by Appellant of Its Interests in Each of the Second Level LPs

[26] During its taxation year ending on August 31, 2006 (the "**2006 Taxation Year**"), the Appellant sold its limited partnership interests in the Second Level LPs. Each sale was made to an entity that was exempt from tax under Part I of the Act.

[27] The sales are described at paragraphs 30 to 36 of the ASF. I have set out below a summary of each sale described in the ASF.

[28] On September 29, 2005, the Appellant sold its limited partnership interest in Atria LP to 1564501 Ontario Inc., a subsidiary of the Alberta Investment

[1] See ASF, paragraphs 31, 34 and 36.

Management Corp ("AIMCo"). 1564501 Ontario Inc. is exempt from tax under Part I of the Act.

[29] At the time of the sale, Atria Complex was the only real property held by Atria LP, as the partnership had prior to that time transferred its interest in another real property to a tax-exempt entity, OMERS Realty Corporation, a wholly owned subsidiary of OMERS.

[30] The Appellant realized a capital gain on the sale of its partnership interest in Atria LP, which was calculated taking into account the $45,583,064 increase in the Appellant's adjusted cost base of its limited partnership interest in Atria LP resulting from the First Bump and the Second Bump.

[31] On October 1, 2005, the Appellant sold its limited partnership interest in CEC LP to 1183044 Alberta Ltd., a subsidiary of AIMCo; 1183044 Alberta Ltd. is exempt from tax under Part I of the Act.

[32] At the time of the sale, the Calgary Eaton Centre was the only real property held by CEC LP, as the partnership had prior to that time transferred its interest in another real property.

[33] The Appellant realized a capital gain on the sale of the partnership interest in CEC LP, which was calculated taking into account the $50,525,179 increase in the Appellant's adjusted cost base of its limited partnership interest in CEC LP resulting from the First Bump and the Second Bump.

[34] On July 1, 2006, the Appellant sold its limited partnership interest in RAC LP to OMERS Realty Corporation. At the time of the sale, RAC was the only real property held by RAC LP.

[35] The Appellant realized a capital loss on the sale of the partnership interest in RAC LP, which loss was suspended. The capital loss was calculated taking into account the $67,873,524 increase in the Appellant's adjusted cost base of its limited partnership interest in RAC LP resulting from the First Bump and the Second Bump.

The Minister's Reassessment

[36] Paragraph 37 of the ASF states that the Minister reassessed the Appellant for the 2006 Taxation Year on the basis that section 245 of the Act applied to the transactions set out in paragraphs 15(xx)(a) to (q) of the Amended Reply.

[37] Generally speaking, those are the transactions I have just discussed, including the creation of the First Level LPs, the transfer of properties to the First Level LPs, the transactions relating to BPC's acquisition of Old Oxford, the formation of the Appellant, the First Bump, the formation of the Second Level LPs, the transfer of properties to the Second Level LPs, the Second Bump and the sale by the Appellant of its limited partnership interests in the Second Level LPs to the exempt entities.

[38] Pursuant to the reassessment, the Minister increased the taxable capital gain realized by Oxford for its 2006 Taxation Year by $148,221,522 and reduced its capital loss/suspended capital loss with respect to the disposition of the RAC LP from $5,155,531 to nil.[2]

[39] Specifically, the Minister reduced the adjusted cost base of the interests in the Second Level LPs by the amount of the Second Bump and then applied subsection 100(1) to determine the taxable capital gain realized on the sale of the Appellant's interests in the Second Level LPs.[3]

Transactions in Respect of Which the Minister Did Not Apply GAAR

[40] The Appellant brought to the Court's attention two sets of transactions which led to the sale by the Appellant of interests it held in other limited partnerships.

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[2] The Amended Reply notes at paragraphs 13 and 14 that the Minister intends to reassess the Appellant's 2005 and 2007 taxation years to apply section 245 to the transactions relating to the sale of two other limited partnerships. The Canada Revenue Agency proposes to increase the taxable capital gains realized on the Appellant's sale of its interests in these two limited partnerships by approximately $251 million.

[3] See Exhibit R-1, Tab 26.

[41] The first four paragraphs of the Appellant's Request to Admit summarize the first set of transactions.[4] The transactions relate to partnership interests Oxford MRC Inc. held in two partnerships: Twelve-Fifty Company Limited and 1250 René Lévesque Land Partnership (together the "René Lévesque Partnerships"). Oxford MRC Inc. owned the partnership interests prior to July 2001, i.e., prior to BPC's proposal to acquire Old Oxford. Further, Oxford MRC Inc. did not transfer the land or properties to, or "prepackage" them into the René Lévesque Partnerships as part of the series of transactions.

[42] As part of the First Bump, the tax cost of the René Lévesque Partnerships was increased to the fair market value of the land and buildings held in these partnerships. Later, the interests in these partnerships were sold to OMERS Realty Corporation, an exempt entity and the same corporation as that which had purchased the limited partnership interests in the RAC LP.

[43] The Minister did not apply the GAAR to these transactions (the "René Lévesque Transactions"). Paragraph 4 of the Request to Admit explains the Minister's reasons for not applying the GAAR as follows:

> The Minister chose not to reassess the Appellant as a result of the transactions in paragraphs 1 and 2, above, because the Minister decided that Oxford (or its predecessors) had not contributed the property to the partnerships as part of the series of transactions, and therefore the transactions in paragraphs 1 to 3 did not comprise a series of transactions to which subsection 245(2) of the Act could apply . . .

[44] The second set of transactions relate to the MRC Shopping Centres Limited Partnership ("MRC Shopping Centres LP") that was formed on October 15, 2001 as one of the First Level LPs. The second set of transactions is set out in paragraphs 5 to 12 of the Appellant's Request to Admit.[5]

[45] The second set of transactions are nearly identical to the transactions relating to Atria LP, CEC LP and RAC LP, except that the second-tier limited partnership was sold to a taxable entity not an exempt entity. Specifically:

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[4] Exhibit A-1, Tab 1, paragraphs 1 to 4. The Respondent accepts the truth of the facts in all of the paragraphs of the Request to Admit; see Exhibit A-1, Tab 2, paragraph 1.

[5] Exhibit A-1, Tab 1, paragraphs 5 to 12.

- On October 15, 2001, MRC Amalco was the limited partner of MRC Shopping Centres LP and a subsidiary of MRC Amalco was the general partner.

- On October 15, 2001 MRC Amalco transferred its beneficial interest in the Dufferin Mall to MRC Shopping Centres LP, using subsection 97(2).

- As part of the First Bump, the tax cost of MRC Shopping Centres LP was increased to the fair market value of the Dufferin Mall.

- On July 10, 2003, a new limited partnership, Dufferin Mall LP, was formed, with MRC Shopping Centres LP as the limited partner and a corporation owned by MRC Shopping Centres LP as the general partner.

- On July 15, 2003, MRC Shopping Centres LP transferred its beneficial interest in the Dufferin Mall to Dufferin Mall LP, using subsection 97(2).

- On July 15, 2003, MRC Shopping Centres LP was dissolved and, pursuant to subsection 98(3), the tax cost of Dufferin Mall LP was "bumped".

- On July 17, 2003, the Dufferin Mall LP was sold to a person taxable under the Act.

[46] I will refer to this series of transactions as the "Dufferin Mall Transactions".

[47] Paragraph 12 of the Request to Admit states the following:

> Although Oxford had "prepackaged" the Dufferin Mall into MRC Shopping Centres LP, "bumped" the value of the MRC Shopping Centres LP under section 88(1)(c) and (d), "prepackaged" the Dufferin Mall into Dufferin Mall LP, and "bumped" the tax cost of the Dufferin Mall LP on dissolution of MRC [Shopping Centres] LP under 98(3)(d), the Minister did not reassess the Appellant in respect of the Dufferin Mall LP.[6]

Admissibility of Appellant's Read-Ins

[48] The Respondent objected to a number of the Appellant's read-ins. The Respondent's primary concern is that the read-ins state the Canada Revenue Agency's views on questions of law and, accordingly, are not facts admissible as evidence. Rather, the read-ins represent expressions of an opinion on domestic law.

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[6] Exhibit A-1, Tab 1, paragraph 12.

[49] The Appellant provided the following accurate summary of the issues addressed in the read-ins:

- The assumptions or conclusions made by the Minister with respect to the object, spirit and purpose of or policy behind the provisions allegedly misused and abused and the basis on which the Minister formed these conclusions;

- The particular facts on which the Minister relied in concluding that the policy behind these provisions was misused or abused in some fact situations but not others;

- The basis of the reassessment and, in particular, the reasons for reassessing Oxford to deny the bump in respect of certain properties and not others; and

- The Minister's conclusions as to the reasonable tax consequences.

[50] The Appellant, relying on the decision my colleague Justice Campbell Miller in *Birchcliff Energy Ltd.,*[7] argued that, since the Minister bears the burden of showing that the avoidance transaction is abusive under subsection 245(5), the Appellant is entitled to know the Minister's view of the object, spirit and purpose of the provisions that she relied on in making her assessment.

[51] Counsel for the Appellant argued that, since the pleadings do not disclose the sections that the Minister feels were abused, the Court requires the read-ins to understand the Appellant's case. In other words, in order for me to understand the Appellant's argument with respect to abuse, I need to understand what position *the Appellant believes* the Minister took when assessing the Appellant.

[52] I have placed no weight on the Appellant's read-ins. All of the relevant facts are included in the ASF, the admissions, the evidence filed on consent, the answers to the Requests to Admit and the Respondent's read-ins. However, the documents will stay on the record to address the concern raised by counsel for the Appellant.

I **The GAAR**

[53] Section 245 is set out in Appendix B hereto.

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[7] Court File number 2012-1087(IT)G, Order and Reasons dated December 20, 2012.

[54] The Supreme Court of Canada, in *Canada Trustco Mortgage Co. v. Canada*,[8] noted that the GAAR is different from the other provisions of the Act. While the Act is dominated by "explicit provisions dictating specific consequences" that invite a largely textual interpretation, the GAAR is "quite a different sort of provision." It "is a broadly drafted provision, intended to negate arrangements that would be permissible under a literal interpretation of other provisions of the *Income Tax Act*, on the basis that they amount to abusive tax avoidance."[9]

[55] The Supreme Court stated that the GAAR draws a line between legitimate tax minimization and abusive tax avoidance, a line that is "far from bright".[10]

[56] The Supreme Court of Canada has set out three steps to be followed in determining the applicability of the GAAR. Those steps consist in ascertaining:

1. Whether there is a "tax benefit" arising from a "transaction" under subsections 245(1) and (2).
2. Whether the transaction is an avoidance transaction under subsection 245(3), in the sense of not being "arranged primarily for *bona fide* purposes other than to obtain the tax benefit".
3. Whether the avoidance transaction is abusive under subsection 245(4).[11]

[57] All three requirements must be fulfilled. The burden is on the taxpayer to refute (1) and (2) and on the Minister to establish (3). If the existence of abusive tax avoidance is unclear, the benefit of the doubt goes to the taxpayer.[12]

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[8] [2005] 2 S.C.R. 601, 2005 SCC 54 ("*Canada Trustco*").

[9] *Canada Trustco*, paragraph 13.

[10] *Canada Trustco*, paragraph 16.

[11] *Canada Trustco*, paragraph 17. *Copthorne Holdings Ltd. v. Canada*, [2011] 3 S.C.R. 721, 2011 SCC 63, paragraph 33 ("*Copthorne*").

[12] *Canada Trustco*, paragraphs 17 and 66.

(a) Was there a tax benefit?

[58] The Appellant concedes in paragraph 14 of its Answer that it obtained the following tax benefits:

1. The deferral of taxation on capital gains and recapture by virtue of subsection 97(2) of the Act.
2. The increase in the adjusted cost base of the interests in the First Level LPs and the Second Level LPs by virtue of subsections 88(1) and 98(3) of the Act.
3. The reduction of the income tax payable by the Appellant on the sale of its partnership interests.

(b) What was the series of transactions that contained one or more avoidance transactions?

[59] Paragraphs 15 (xx) and (yy) of the Amended Reply state that the Minister, when reassessing the Appellant, assumed that the transactions set out in subparagraphs 15(xx)(a) to (q) were avoidance transactions within the meaning of subsection 245(3) of the Act.

[60] Paragraphs 40 and 41 of the ASF state the following:

> 40. The transactions set out in paragraphs 15(xx)(a) to (**p**) of the Amended Reply constituted a "series of transactions" as defined for purposes of subsection 245(3) of the Act.
>
> 41. Such series contained one or more "avoidance transactions" within the meaning of subsection 245(3) of the Act.

[61] The difference between the Minister's assumption and paragraphs 40 and 41 of the ASF is subparagraph 15(xx)(q) of the Amended Reply, which refers to the sale of the Appellant's interests in the Second Level LPs to the tax-exempt entities. In short, the Appellant concedes that, for the purposes of paragraph 245(3)(b), there was a series of transactions that contained one or more avoidance transactions, but does not concede that the sale of its interests in the Second Level LPs to the tax-exempt entities is part of this series.

[62] The SCC in *Copthorne* provided detailed guidance on what constitutes a series of transactions for the purposes of paragraph 245(3)(b). The Court noted that the starting point is the common law series taken from English law, where each transaction in the series is preordained to produce a final result.[13]

[63] The phrase *series of transactions* is qualified in subsection 248(10) of the Act as follows:

> For the purposes of this Act, where there is a reference to a series of transactions or events, the series shall be deemed to include any related transactions or events completed in contemplation of the series.

[64] The SCC noted that this definition expands the common law series by deeming any *related* transaction which is completed in *contemplation of* a series to be part of the series.[14]

[65] It then explained what nexus is required between the series of transactions and the related transaction,

> . . . The court is only required to consider whether the series was taken into account when the decision was made to undertake the related transaction in the sense that it was done "in relation to" or "because of" the series (*Trustco*, at para. 26).
>
> [47] Although the "because of" or "in relation to" test does not require a "strong nexus", it does require more than a "mere possibility" or a connection with "an extreme degree of remoteness" (see *MIL (Investments) S.A. v. R.*, 2006 TCC 460, [2006] 5 C.T.C. 2552, at para. 62, aff'd 2007 FCA 236, 2007 D.T.C. 5437). Each case will be decided on its own facts. . . . In the end, it will be the "because of" or "in relation to" test that will determine, on a balance of probabilities, whether a related transaction was completed in contemplation of a series of transactions.[15]

[66] It also concluded that subsection 248(10) allows either prospective or retrospective connection of a related transaction to a common law series.[16]

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[13] *Copthorne*, paragraph 43.

[14] Ibid.

[15] *Copthorne*, paragraphs 46, 47.

[16] *Copthorne*, paragraph 56.

Further, if I find that there was a series of transactions which resulted in a tax benefit, the finding that one transaction in the series was an avoidance transaction will satisfy the requirements of subsection 245(3).[17]

[67] Counsel for the Appellant did not dispute during the hearing that the sale of RAC LP to OMERS Realty Corporation was part of the series of transactions that the parties agreed contained one or more "avoidance transactions". However, the Appellant argued that the sale of Atria LP and CEC LP to the subsidiaries of AIMCo was different.

[68] The Appellant's argument is summarized at page 5 of its second set of written submissions entitled *Submissions Application of GAAR* [sic] *& Reasonable Tax Consequences* ("Appellant's 2nd Written Submissions"), as follows:

> At the time that BPC acquired control of Old Oxford, it had not determined whether [the] Atria [Complex] and CEC were long term-term hold properties or not (Atria LP and CEC LP each held one property). As such, Old Oxford did not know if the Alberta Revenue [AIMCo] would even be a potential buyer, let alone an actual buyer. Accordingly, if GAAR[sic] is determined to apply to the Transactions, it should not apply to the transfer of the Alberta Partnerships [Atria LP and CEC LP].

[69] Paragraphs 30 and 33 of the ASF state that AIMCo, through two subsidiaries, had a right of first offer and a right of first refusal under co-ownership agreements relating to the Atria Complex and the CEC. Both co-ownership agreements were entered into prior to BPC's acquisition of the shares of Old Oxford. Once Oxford determined that it would dispose of its interests in Atria LP and CEC LP, it was contractually required to give the subsidiaries of AIMCo the right to purchase Oxford's interest in those limited partnerships.

[70] AIMCo exercised its right of first offer/first refusal by having two subsidiaries (1564501 Ontario Inc. and 1183044 Alberta Ltd.) purchase Oxford's interests in the two limited partnerships.

[71] In my view, these facts are inconsistent with the Appellant's argument. It may not have been determined at the time BPC acquired control whether the Atria Complex or CEC would be sold, but it was known that, if they were sold, AIMCo would be a potential buyer. Regardless, I do not believe what Oxford knew at the

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[17] *Copthorne*, paragraph 64.

time of the takeover is determinative of the issue. It is clear that the test can be applied on either a prospective or retrospective basis.

[72] I have no difficulty concluding, solely on the basis of the ASF and the Appellant's admission with respect to the tax benefits, that the sale of the limited partnership interests to the subsidiaries of AIMCo was done in relation to the series of transactions set out in subparagraphs 15(xx)(a) to (p) of the Amended Reply. I come to this conclusion for the same reason that my colleague Justice Campbell reached a similar conclusion in her decision in the *Copthorne* appeal; the sale of the limited partnership interests to the subsidiaries of AIMCo was exactly the type of transaction necessary to make the tax benefit resulting from the series of transactions set out in paragraphs 15(a) to (p) of the Amended Reply (which included the packaging of the real property into a limited partnership and the bump of the adjusted cost base of the interests in the limited partnership) a reality. [18]

[73] Even if I did not reach that conclusion on the basis of the ASF, I would have reached the same conclusion on the evidence provided by the Respondent, particularly the following:

- Prior to October 15, 2001, the date the properties were transferred to the First Level LPs, Oxford understood that OMERS intended to transfer assets to limited partnerships, bump the limited partnership interests on an amalgamation and then sell some of the properties to a tax-exempt entity. It was not aware of which properties would be sold and to whom.[19]

- On December 16, 2002, the accounting firm KPMG[20] wrote a memorandum to officials of OMERS and Oxford. The purpose of the memorandum was "to summarize the proposed steps that should be undertaken in order to minimize the net inherent gain on the future disposition of any non-core real estate property held indirectly by OMERS through its taxable

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[18] *Copthorne Holdings Ltd. v. The Queen*, 2007 TCC 481, 2007 DTC 1230.

[19] Exhibit R-3, Respondent's Read-ins, Tab 2; *Appellant's Answers to undertakings arising from the examination for discovery of Mr. Colin Loudon*, Reply to undertaking number 16.

[20] KPMG advised OMERS on financial, tax and accounting matters from the time the bid was made for all of the common shares of Old Oxford not held by OMERS. Exhibit R-1, Tab 3.

subsidiaries."[21] One of the steps discussed is the transfer of properties "that may be sold to a REIT or a tax-exempt entity (i.e., Alberta Revenue [AIMCo])" to the Second Level LPs. The memo states that "Additional steps will be taken to ensure the high tax basis of the partnerships triggered on the May 31, 2002 amalgamation is preserved and pushed down to the second tier partnerships created."[22] May 31, 2002 is the date of the First Bump.

- On January 24, 2005, the director of taxation of Oxford sent to other Oxford officials an email explaining the income tax that would be saved if Oxford sold its interest in the Atria LP as opposed to making a direct sale of the Atria Complex. He concluded that from an income tax perspective, Oxford should sell its interest in the Atria LP.[23]

- On January 31, 2005 the Executive Vice President and Chief Financial Officer of Oxford sent to other Oxford officials an email noting that any potential purchaser of Oxford's interest in the Atria Complex would be asked to acquire that interest by acquiring Oxford's interest in the Atria LP. She also noted that the acquirer must commit to retaining the acquired interest and not selling it prior to February 2007.[24] In a February 3, 2005 email, a KPMG advisor confirmed that waiting until February 2007 was required in order to avoid the application of subsection 69(11) of the Act.[25]

- In a July 21, 2005 presentation by Oxford to the OMERS Investment Committee, it was noted that the Atria Complex had been designated in Oxford's strategic plan as a non-strategic asset. The author then stated: "However due to Oxford's tax plan restrictions, a sale to any party other than the co-owner (Alberta Revenue [AIMCo]) before February 2007 would incur significant tax penalties".[26]

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[21] Exhibit R-1, Tab 7, page 1.

[22] Exhibit R-1, Tab 7, page 5.

[23] Exhibit R-1, Tab 9.

[24] Exhibit R-1, Tab 10.

[25] Exhibit R-1, Tab 11.

[26] Exhibit R-1, Tab 17, page 4.

- On July 24, 2005 a recommendation was made to the OMERS investment committee to sell its limited partnership interest in Atria LP to the AIMCo subsidiary for a purchase price of $65,500,000. One of the facts supporting the recommendation was that “Alberta Revenue is motivated to diversify its joint venture partners and have agreed to accommodate Oxford’s tax restrictions by structuring the transactions to facilitate the sale. Without a structured transaction, the asset could not be sold without prohibitive tax costs.”[27]

- A July 19, 2005 memorandum from Oxford to the OMERS investment committee summarizes the sale of Oxford’s interest in CEC LP to the subsidiary of AIMCo. The memorandum notes that, as a result of first and second mortgage debt, Oxford has zero equity value in the CEC and that the proposed sale of Oxford’s interest in the CEC LP is in accordance with Oxford’s strategic plan. It states the following with respect to Canadian income tax: “Oxford’s ownership interest, within the limited partnership structure, was put in place to facilitate portfolio tax structuring objectives. [redacted] The sale is in accordance with the KPMG tax plan related to the OMERS purchase of Oxford in October 2001 and to all relevant further developments since that time. A sale of Oxford’s interest to any entity other than its co-owners is cost prohibitive. A property level sale would trigger noticeable gains and therefore the tax benefits of the limited partnership structure would be negated by the taxes due upon a sale.”

[74] The Appellant has admitted that the series of transactions included in subparagraphs 15(xx)(a) to (p) of the Amended Reply contains one or more avoidance transactions.

[75] I agree with counsel for the Respondent that the preceding clearly evidences that the Appellant, when selling its limited partnership interests in Atria LP and CEC LP to the subsidiaries of AIMCo, clearly took into account the transactions included in subparagraphs 15(xx)(a) to (p) of the Amended Reply that resulted in the packaging of the real property into limited partnerships and the bumping of the adjusted cost base with respect to such limited partnerships.

[76] As a result, the sale of the three limited partnership interests to exempt entities was part of a series of transactions that contained one or more avoidance transactions.

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[27] Exhibit R-1, Tab 20, page 11.

[77] In summary, the transactions set out in subparagraphs 15(xx)(a) to (q) of the Amended Reply (the "Oxford Transactions") constitute, for the purposes of subsection 245(3) of the Act, a series of transactions that contains one or more avoidance transactions.

[78] The Oxford Transactions are set out in Appendix C hereto. The key transactions, which I have discussed, are the formation of BPC and Acquireco, the creation of the First Level LPs, the transfer of properties to the First Level LPs, the formation of the Appellant, the First Bump, the formation of the Second Level LPs, the transfer of properties to the Second Level LPs, the Second Bump and the sale of the Appellant's interests in the Second Level LPs to the tax-exempt entities.

*(c) **Was there an abuse of the Act?***

[79] Although subsection 245(4) refers to determinations of "misuse" and "abuse", the SCC has made it clear that there is no distinction between an "abuse" and a "misuse". "Section 245(4) requires a single, unified approach to the textual, contextual and purposive interpretation of the specific provisions of the *Income Tax Act* that are relied upon by the taxpayer in order to determine whether there was abusive tax avoidance." [28] As a result I will only use the term "abuse".

[80] The determination of whether a transaction is an abuse of the Act involves the following two steps:

1. I must first determine the "object, spirit or purpose of the provisions of the *Income Tax Act* that are relied on for the tax benefit, having regard to the scheme of the Act, the relevant provisions and permissible extrinsic aids".
2. Once this step is completed, I will "examine the factual context of [the] case in order to determine whether the avoidance transaction defeated or frustrated the object, spirit or purpose of the provisions in issue".[29]

Position of the Respondent

[28] *Canada Trustco,* paragraph 43, *Copthorne*, paragraph 73.

[29] *Canada Trustco*, paragraph 55.

[81] The Respondent raised four separate abuse arguments in her written submissions. However, counsel for the Respondent focused on the first argument, which he called the *big one*.

[82] The argument is summarized in paragraph 215 of the Respondent's written argument as follows: "Whether utilizing the tax-free rollover in subsection 97(2) and obtaining the 88(1)(c) Bump and 98(3) Bump frustrates subsection 100(1) of the Act in that it circumvented subsection 100(1), achieves an outcome subsection 100(1) was intended to prevent or defeats the underlying rationale of the subsection".

[83] The Respondent argued that the Appellant's use of subsection 97(2), paragraph 88(1)(c) and subsection 98(3) frustrated subsection 100(1) by avoiding tax on recapture and inherent gains relating to the Atria Complex, CEC and RAC.

[84] Counsel for the Respondent argued that the subsection 97(2) rollover that was used to transfer properties to the First Level LPs and the Second Level LPs is meant to defer tax, not to eliminate it completely. The Oxford Transactions resulted in an elimination of tax, not just a deferral. The bumps in paragraph 88(1)(c) and subsection 98(3) cannot be used to bump depreciable property. The Appellant, by transferring the depreciable property to a partnership and then bumping the partnership interest, did something indirectly that it could not do directly under the provisions of the Act.

[85] Further, the Appellant was aware that under subsection 100(1) the computation of tax is based upon the cost base of the property disposed of. As a result, the Appellant, by carrying out the Oxford Transactions, nullified the effect of subsection 100(1).

[86] The Respondent's other three abuse arguments are stated in paragraph 215 of her written submissions as follows:

> . . .
>
> b) Whether the utilization of subsection 97(2) to transfer the Properties tax free, to First Level LPs and Second Level LPs, frustrates the object of subsection 97(2) in that it achieves an outcome subsection 97(2) was intended to prevent or defeats the underlying rational[sic] of the subsection;
>
> c) Whether amalgamation of 1519052 and First OPGI Amalco to form the Appellant and claiming the 88(1)(c) Bump on the cost of the First Level LP's

> Interest held by OPGI Amalco frustrates paragraph 88(1)(c) of the *Act* in that it circumvented 88(1)(c), achieves an outcome paragraph 88(1)(c) was intended to prevent or defeats the underlying rationale of the paragraph; and
>
> d) Whether the wind-up of the First Level LP's and claiming of the 98(3) Bump on the cost of the Second Level LP units frustrates subsection 98(3) of the *Act* in that it circumvented 98(3), achieves an outcome subsection 98(3) was intended to prevent or defeats the underlying rationale of the paragraph.

Position of the Appellant

[87] The Appellant argued that the Minister's case is founded on the proposition that at the relevant time there were two unexpressed legislative intentions.

[88] The first was to require, in the case of sales to tax-exempt entities, the realization of the latent recapture and the taxation thereof in the hands of the Appellant. The Appellant referred to this as a "latent recapture rule".

[89] The second was to require the reduction of the adjusted cost base of a partnership interest by the amount of any previous bump if the partnership interest was sold to an exempt entity. I will refer to this as the "acb reduction rule".

[90] Counsel for the Appellant argued that the Minister's decision not to apply the GAAR to the sale of the Appellant's interest in the MRC Shopping Centres LP to a taxable entity showed that the Minister believed that the latent recapture rule and the acb reduction rule did not apply if the partnership interests were sold to taxable entities.

[91] Counsel argued that in order for the GAAR to apply I would have to find that there was a clear and unambiguous policy (unexpressed legislative intention) that, in the case of sales to tax-exempt entities, the taxpayer was supposed to realize, and pay tax on, the latent recapture and that Parliament intended that the adjusted cost base be reduced by the amount of the unrealized gain. He argued that such a policy does not emerge from a textual, contextual and purposively reading of the Act.

[92] Rather, counsel argued, a clear policy is set out in subsections 97(2), 69(11) and 100(1) to allow the series of transactions at issue in this appeal. This purported policy is explained at paragraph 8 of the Appellant's Memorandum of Fact and Law as follows:

> Contrary to what the Crown asserts, there are three discrete statutory schemes, found in subsections 97(2), 69(11) and 100(1) of the *Act*, which establish that Parliament made a series of careful, measured and deliberate policy choices over the years respecting transfers of property to partnerships on a tax deferred basis. These measures clearly and unambiguously contemplated that the gains realized on the disposition of such property could be sheltered by a tax exemption (i.e., that recapture would not be taxed) and provided very clear and precise parameters of when that could occur. The Minister's use of the GAAR in this case repudiates these careful policy choices.

What sections are being abused?

[93] All of the Respondent's arguments are predicated on the Appellant abusing one or more of subsection 97(2), paragraphs 88(1)(c) and (d), subsection 98(3) and subsection 100(1).

Step 1 – Determining object, spirit or purpose of the relevant provisions

[94] One uses a unified textual, contextual and purposive approach to identify the object, spirit or purpose of the relevant provisions. It is the same interpretive approach as that employed by the courts in all matters of statutory interpretation. However, as the SCC noted in *Copthorne*, the analysis seeks a different result,

> . . . In a traditional statutory interpretation approach the court applies the textual, contextual and purposive analysis to determine what the words of the statute mean. In a GAAR analysis the textual, 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.[30]

[95] When examining the text of the provisions, it is important to remember that compliance with the text of the relevant provisions is not the issue before the Court. In a GAAR case the text of the provision is used to shed light on what the provision was intended to do. As the SCC noted in *Copthorne* (at paragraph 88):

> In any GAAR case the text of the provisions at issue will not literally preclude a tax benefit the taxpayer seeks by entering into the transaction or series. This is

[30] *Copthorne*, paragraph 70.

> not surprising. If the tax benefit of the transaction or series was prohibited by the text, on reassessing the taxpayer, the Minister would only have to rely on the text and not resort to the GAAR. However, this does not mean that the text is irrelevant. In a GAAR assessment the text is considered to see if it sheds light on what the provision was intended to do.

[96] With respect to the contextual analysis, ". . . not every other section of the Act will be relevant in understanding the context of the provision at issue. Rather, relevant provisions are related 'because they are grouped together' or because they 'work together to give effect to a plausible and coherent plan' (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 361 and 364)."[31]

[97] The SCC noted in *Canada Trustco* that "Parliament confers tax benefits under the *Income Tax Act* to promote purposes related to specific activities."[32] Also, a provision "can serve a variety of independent and interlocking purposes."[33]

[98] The Court must "ascertain what outcome Parliament intended a provision or provisions to achieve, amidst the myriad of purposes promoted by the Act."[34]

[99] I will now turn to the provisions at issue in this appeal.

Subsection 97(2)

[100] As discussed previously, Old Oxford used subsection 97(2) when transferring real property, including the Three Real Estate Properties, to the First Level LPs in the course of creating the First Level LPs. The First Level LPs used subsection 97(2) when transferring the Three Real Estate Properties to the Second Level LPs.

[101] Appendix D hereto contains subsection 97(2) as it read during the relevant periods.

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[31] *Copthorne*, paragraph 91.

[32] *Canada Trustco*, paragraph 52.

[33] *Canada Trustco*, paragraph 53.

[34] *Copthorne*, paragraph 113.

[102] That subsection applies when the following conditions are satisfied:

- The taxpayer disposes of property that is capital property, Canadian resource property, foreign resource property, eligible capital property or inventory of the taxpayer.
- The taxpayer disposes of the property to a partnership that immediately after the disposition is a Canadian partnership.
- The taxpayer is a member of the Canadian partnership.
- All of the members of the partnership elect to have subsection 97(2) apply to the transfer of the property.

[103] Canadian partnership is defined in subsection 102(1) to mean a partnership all of the members of which are residents of Canada. There is no requirement that the members be taxable entities.

[104] If the conditions are satisfied then the rollover provisions of paragraphs 85(1)(a) to (f) apply to the transfer, with appropriate modifications. Specifically, the parties elect, within specified limitations, the amount of the proceeds of disposition of the property to the transferor and the adjusted cost base of that property to the partnership.

[105] Before I examine the operation of the text of subsection 97(2), some context is required. First, under the Act, when a person is a member of a partnership the person's income or loss from the partnership is calculated as if the partnership were a separate person.[35]

[106] Further, as a result of subsection 97(1), if a person transfers property to a partnership and immediately after the transfer is a member of the partnership then the person is deemed to have disposed of the property for its fair market value. This triggers tax on any unrealized gains of capital property, including recapture if the property is depreciable capital property.

[107] This tax can be fully or partially avoided if the parties make an election under subsection 97(2).

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[35] Subsection 96(1).

[108] As mentioned previously, under the provisions of subsection 97(2) the transfer occurs at the elected amount. The elected amount in respect of any property can never exceed the fair market value of the property.

[109] Generally speaking, for non-depreciable capital property the elected amount must be between the adjusted cost base of the property (assuming it is higher than the fair market value) and its fair market value. However, the elected amount can never be less than any non-share consideration given (the *boot*).

[110] The calculation of the elected amount for depreciable capital property takes into account the undepreciated capital cost (the "UCC") of the class of depreciable assets to which the particular asset belongs. Specifically, the elected amount cannot be less than the least of:

- The original cost of the particular property to the transferor,
- The fair market value of the property, and
- The remaining UCC of the class of depreciable assets to which the particular asset belongs.

[111] Subsection 97(4) contains a rule that preserves any potential recapture that existed in respect of depreciable capital property that was transferred to the partnership. Elizabeth J. Johnson and Geneviève C. Lille provide the following succinct summary of the rule in their book *Understanding the Taxation of Partnerships*, at page 291:[36]

> . . . under the rule in subsection 97(4), where the original capital cost to the transferor of depreciable property transferred to the partnership exceeds the transferor's proceeds of disposition of that depreciable property (normally the elected amount in respect of that property) the capital cost to the partnership is deemed to be the original capital cost to the transferor, and that excess is deemed to be CCA previously deducted by the partnership. Consequently, if the partnership sells the depreciable property, it will potentially be required to include in its income any applicable recapture of CCA, up to its deemed capital cost.

[112] Generally speaking, taxpayers elect an amount under subsection 97(2) that avoids or reduces the tax otherwise payable on the transfer of capital property to a

[36] Toronto: CCH Canada Limited, 2010.

partnership. In the present appeal, Old Oxford and the First Level LPs elected amounts that resulted in no recapture or capital gain on certain of the relevant transfers of property to the partnerships. However, the parties elected amounts on other relevant transfers of property that resulted in reduced capital gains and recapture.

[113] After the transfer is completed the transferor is left with a partnership interest that is normally non-depreciable capital property. In situations such as the one before me, where the transferor has elected an amount that is less than the fair market value of the transferred property, the partnership interest has an adjusted cost base that is less than its fair market value. In other words, the transferor is left with a non-depreciable capital property that has an accrued taxable capital gain, which will be realized if the transferor subsequently sells the partnership interest and the interest has maintained its fair market value.

[114] The partnership is also left with capital property that has an accrued capital gain and, if the property is depreciable capital property, potential recapture.

[115] The accrued capital gain and potential recapture are only taxed if the partnership subsequently sells the property. The amount of tax is dependent on the sale price on this subsequent sale.

[116] In a situation such as the one before me, where an exempt entity subsequently purchases the partnership interest, one must consider subsection 69(11).

[117] Subsection 69(11) is an anti-avoidance rule that may apply where property has been rolled into a partnership using subsection 97(2) and there is a subsequent sale of the partnership interest. Subsection 69(11) is reproduced in Appendix D hereto.

[118] Originally, subsection 69(11) only applied when it was reasonable to conclude that the rollover was part of a series of transactions and one of the purposes of the series was to obtain the benefit of tax deductions or attributes of a non-related person in respect of a subsequent disposition of the property. However, changes were made to the subsection in 1998, including the addition of current paragraph (b) which extends its application to situations where one of the purposes of the series is to obtain the benefit of the tax-exempt status of a person.

[119] If the subsection applies, the benefit of the rollover is lost; the transferor is deemed to have disposed of the property at the time of the rollover for proceeds equal to its fair market value.

[120] The subsection contains a three-year time limit. Specifically, the subsection will only apply if the subsequent disposition occurs, or arrangements for the subsequent disposition are made, within three years of the original rollover.

[121] In summary, the benefits of the subsection 97(2) rollover are lost, subject to the three-year time limit, if one of the purposes of the series was to obtain the benefit of the tax-exempt status of the person or of the tax deductions or attributes of a non-related person.

[122] Obviously, since the Minister applied the GAAR and not subsection 69(11), the Minister must have been of the view that the subsection did not apply to the transactions before me. It is my understanding that the Minister did not apply subsection 69(11) because of the three-year rule.

[123] I will now turn to the object, spirit and purpose of subsection 97(2). This Court, in *Continental Bank of Canada, et al v. The Queen*, noted that the object of subsection 97(2) is "rather straightforward":

> . . . It is to permit a taxpayer to transfer assets to a partnership in return for a partnership interest without triggering the immediate tax result that such a transfer would normally entail. Tax is not avoided; it is deferred . . . [37]

[124] In my view, the purpose of the subsection is to avoid or reduce the tax that would otherwise by payable on the transfer of property to the partnership and the issuance of partnership interests to the transferor. Such tax is deferred with respect to property acquired by **both** the transferor and the partnership in the course of the rollover.

[125] If the transferor receives a partnership interest as consideration for a portion of the transferred asset and elects an amount that avoids all or a portion of the tax otherwise payable on the transfer, then the transferor is left with non-depreciable capital property (the partnership interest) having an adjusted cost base less than its

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[37] 94 DTC 1858 at page 1872; see also *Understanding the Taxation of Partnerships, supra,* at page 283.

fair market value. One of the purposes of the provision is to preserve this potential gain until it is realized on a subsequent sale of the partnership interest. However, as I will discuss shortly, the potential gain may be reduced or eliminated as a result of the bump under paragraphs 88(1)(c) and (d) or under subsection 98(3).

[126] In the situation where the transferor receives a partnership interest as consideration for a portion of the transferred asset and elects an amount that avoids all or a portion of the tax payable on the transfer, the second tax deferral occurs with respect to the transferred property which is now held by the partnership. Specifically, the provisions of subsection 97(2), together with subsection 97(4), preserve the tax attributes of the transferred property, in particular its adjusted cost base and the potential recapture. As a result, the partnership faces tax on the recapture and on a capital gain if it subsequently sells the transferred property. As is the case with the partnership interest held by the transferor, this potential tax is realized on a subsequent sale of the transferred property by the partnership.

[127] However, Parliament has also decided that the rollover in subsection 97(2) will be denied if the rollover is part of a series of transactions where one of the purposes of the series is to obtain the benefit of the tax-exempt status of a person, provided the series is completed within three years.

Subsection 88(1)(c)

[128] During the reorganization that occurred on May 30, 2002 and May 31, 2002, 1519052 and First OPGI Amalco completed a vertical amalgamation to form the Appellant. Designations were filed under paragraph 88(1)(d) to effect the First Bump: the increase in the adjusted cost base of non-depreciable capital property formerly held by the subsidiary (First OPGI Amalco), including the adjusted cost base of the First Level LPs.

[129] The First Bump was effected under subsection 87(11) and paragraphs 88(1)(c) and (d). Appendix D hereto contains those three provisions as they read during the relevant periods.

[130] The text of subsection 87(11) provides that: where there is an amalgamation of a corporation and one or more of its wholly owned subsidiaries (a vertical amalgamation), the cost to the amalgamated corporation of the subsidiary’s capital property is determined under subsections 88(1) and (1.7) as if the property had been distributed to the parent on a winding-up.

[131] The general rule for determining the cost to the amalgamated company of the property (other than an interest in a partnership) is contained in subparagraph 88(1)(c)(ii), which provides that the amalgamated company inherits the cost amount[38] of the property to the subsidiary immediately before the winding–up.[39] Continuity in respect of capital cost allowance is provided for depreciable property under subparagraph 88(1)(c)(ii) and paragraph 88(1)(f), including the preservation of potential recapture.

[132] For an interest in a partnership, as result of the carve-out in subparagraph 88(1)(c)(i) and the application of paragraphs 88(1)(a.2), 88(1)(e.2) and 87(2)(e.1) the cost to the amalgamated company of the partnership interest is deemed to be the amount that was the cost of that interest to the subsidiary, and in respect of that partnership interest the amalgamated company is deemed to be the same corporation as, and a continuation of, the subsidiary corporation.

[133] Besides these general rules, paragraph 88(1)(c) allows for a bump in the adjusted cost base of qualifying assets of the subsidiary. It is this provision that the Respondent says was abused when the provisions of the Act were used to effect the First Bump.

[134] The relevant portion of paragraph 88(1)(c) provides as follows:

> **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 (d) in respect of the property and, for the purposes of this paragraph, "ineligible property" means
>
> (iii) depreciable property,
>
> . . .

[135] This provision allows the amalgamated company to increase (bump) the cost, determined under the general rules, of the subsidiary's capital property by the

[38] As defined in subsection 248(1).

[39] This is a result of the application of subparagraph 88(1)(c)(ii) and paragraph 88(1)(a).

amount determined under paragraph 88(1)(d). Depreciable property is excluded from the bump.

[136] The amalgamated company is only allowed to bump non-depreciable capital property that was owned by the subsidiary at the time the parent last acquired control of the subsidiary and was owned continuously after that time until the time of the winding-up. In addition, subparagraphs 88(1)(c)(iv) to (vi) define three other types of property that are ineligible for the bump.

[137] The first type is property that was acquired in the course of a butterfly transaction. Generally speaking, the second type is property acquired by the subsidiary from the parent where the acquisition was part of a series of transactions or events in which the parent last acquired control of the subsidiary.

[138] The third type of property is all property of the subsidiary if the so-called *bump denial rule* applies. This rule is described as follows by Paul Stepak and Eric C. Xiao in a paper presented at the Canadian Tax Foundation's 2013 annual conference:

> The bump-denial rule is an anti-avoidance rule that is designed to prevent taxpayers from using the bump to achieve a "backdoor purchase butterfly transaction."
>
> Generally, the bump is denied if, as part of the overall *series of transactions* that includes the winding up (or amalgamation), the parent acquires control of the subsidiary, and any *prohibited persons* acquire any property of the subsidiary distributed on the winding up (*distributed property*) or any *substituted property*. Colloquially, the bump is denied if bad people acquire bad property as part of the series.
>
> The actual bump-denial rule, however, is one of the more complex provisions in the Act. The principal rule is found in subparagraph 88(1)(c)(vi), and it is subject to a legion of interpretive rules in section 88. [40]

[40] "The Paragraph 88(1)(d) Bump: An Update", Paul Stepak and Eric C. Xiao, 2013 Conference Report. (Toronto) Canadian Tax Foundation: 2014, 13:1-60 at pages 13:4-5. In general terms, a "backdoor purchase butterfly transaction" involves a purchaser acquiring a target corporation from its shareholders, bumping the tax cost of the target corporation's underlying non-depreciable capital property to its fair market value and then selling the bumped property back to

[139] Paragraphs 88(1)(c)(iv) to (vi) did not apply to the First Bump. Further, the Respondent is not arguing that these provisions were abused. The Respondent's argument is concerned with the denial of the bump for depreciable property.

[140] Generally speaking, the actual amount of the bump is determined under paragraph 88(1)(d) as being the parent's adjusted cost base of its shares of the subsidiary minus the cost amount of all property of the subsidiary immediately before the amalgamation (the "Parent's Excess Outside Basis").[41] The excess of the parent's adjusted cost base of the shares over the tax cost of the property of the subsidiary normally arises as a result of a prior acquisition by the parent (or affiliated company) of the shares of the subsidiary.

[141] The amalgamated company then designates the Parent's Excess Outside Basis to specific qualifying non-depreciable capital property of the subsidiary that the subsidiary has owned since the parent last acquired control. However, the amount designated in respect of a specific capital property cannot exceed the difference between the fair market value of the property at the time the parent last acquired control of the subsidiary and the greater of the cost amount to the subsidiary of the property at the time the parent last acquired control of the subsidiary and the cost amount to the subsidiary of the property immediately before the winding-up. In effect, a specific non-depreciable capital property cannot be bumped by more than its unrealized gain at the time the parent last acquired control of the subsidiary.

[142] What then is the purpose of the paragraph 88(1)(c) and (d) bump rules?

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the shareholders without incurring corporate-level tax. See Brian R. Carr and Julie A. Colden, in "The Bump Denial Rules Revisited", (2014) 62:1, Can Tax J, 273.

[41] The actual amount deducted from the parent's adjusted cost base of its shares in the subsidiary is the cost amount of all property of the subsidiary immediately before the amalgamation plus the subsidiary's cash on hand plus dividends received by the parent on the shares of the subsidiary (including dividends paid to corporations not at arm's length from the parent and dividends paid on substituted shares) minus any debt or other obligation owing by the subsidiary immediately before the amalgamation and certain reserves of the subsidiary.

[143] In the situation where the adjusted cost base of the parent's shares in the subsidiary arose on an acquisition of the subsidiary's shares, tax was paid on the appreciation of the value of the shares. However, after this acquisition, the assets of the subsidiary retained their historic tax costs and accrued gains. Therefore there is a potential for double tax when the assets are sold subsequent to the acquisition. This potential double tax always exists whenever shares of a corporation, as opposed to the assets of the corporation, are acquired. It is clear from a textual and contextual analysis of the provisions in question that Parliament was concerned with the situation where the tax-paid adjusted cost base of the shares in the subsidiary disappeared on a vertical amalgamation, while the accrued gains on the assets of the subsidiary were retained by the amalgamated company.

[144] The purpose of the subsection 88(1)(c) and (d) bump rules is to help alleviate this potential double tax by allowing for the transfer of the Parent's Excess Outside Basis in the subsidiary to the cost base of qualifying non-depreciable capital property of the amalgamated company (the "Inside Basis") that the subsidiary owned continuously from the time the parent last acquired control of the subsidiary (i.e., from the point in time when the Excess Outside Basis was created) to the time of the amalgamation.

[145] Practically speaking, the purpose of the bump rules is to provide the parent with an opportunity, on the vertical amalgamation, to push down the adjusted cost base of its shares of the subsidiary to qualifying non-depreciable property owned by the subsidiary at the time the parent last acquired control of the subsidiary.

[146] Another purpose of subsection 88(1) is to preserve the tax attributes of depreciable property held by the subsidiary prior to the amalgamation, specifically its adjusted cost base and potential recapture.

[147] Paragraph 88(1)(d) was amended in 2012 to, among other things, add new subparagraph 88(1)(d)(ii.1). The new provision is included in Appendix D hereto.

[148] The amendment limits the amount by which the amalgamated company may bump the cost of any qualifying partnership interest held by the subsidiary. As discussed previously, prior to the amendment the upper limit of the bump was equal to the fair market value of the qualifying partnership interest at the time the parent last acquired control minus the relevant cost amount of the partnership interest. The amendment reduces the upper limit by the portion of the amount by which the fair market value of the partnership interest at that time exceeds the cost amount that is attributable to the following:

- The difference between the fair market value and the cost amount of depreciable property held by the partnership;[42]
- The fair market value of resource property held by the partnership;[43] and
- The difference between the fair market value and the cost amount of non-capital property held by the partnership.[44]

[149] The calculation results in a reduction in the bump that may be designated in respect of an interest in a partnership by the portion of the bump that is attributable to the depreciable property, resource property and non-capital property held by the partnership. As a result, the bump may be reduced if the subsidiary held a partnership interest and the partnership in turn held depreciable property, resource property and/or non-capital property.

[150] The amendment applied on a prospective basis.

[151] The Department of Finance technical notes[45] describe the purpose of the amendment as follows:

> Subparagraph 88(1)(d)(ii.1) is meant to ensure that the bump available in respect of a subsidiary's interest in a partnership does not reflect unrealized gains and recapture income in respect of property that would not be eligible for a bump if it were held directly by the subsidiary (i.e., ineligible property). The subparagraph achieves this by reducing the fair market value of the partnership interest by the unrealized gains and recapture income in respect of ineligible property that is either held directly by the partnership or held indirectly through one or more other partnerships.

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[42] Including depreciable property held indirectly through one or more partnerships.

[43] Including resource property held indirectly through one or more partnerships.

[44] Canadian resource property and foreign resource property are excluded from this amount. The amount includes property that is held indirectly through one or more partnerships.

[45] David M. Sherman, ed., *Department of Finance Technical Notes Income Tax*, 26th ed., vol.1 (Toronto: Carswell, 2014), notes relating to subparagraph 88(1)(d)(ii.1), October 15, 2012.

[152] At the time of the amendment new anti-avoidance rules were added in paragraph 88(1)(e) and subsection 97(3) to “ensure that subparagraph 88(1)(*d*)(ii.1) is effective”.[46]

[153] As I will discuss, new subparagraph 88(1)(d)(ii.1) is relevant when determining whether the object, spirit and purpose of paragraphs 88(1)(c) and (d) were frustrated by the Oxford Transactions.

Subsection 98(3)

[154] As discussed previously, on August 27, 2004 the First Level LPs were dissolved and an election was made to have subsection 98(3) of the Act apply to the dissolution. The election resulted in the Second Bump.

[155] Under the general rule contained in subsection 98(2) of the Act, a partnership is deemed to have disposed of any property distributed to its partners on the partnership’s dissolution at fair market value. Further, the partners are deemed to have acquired the property at fair market value.

[156] Subsection 98(3) provides, in part, a rollover for Canadian partnerships that avoids all or part of the tax that would otherwise be payable on the dissolution of the partnership.

[157] Appendix D hereto contains subsection 98(3) as it read during the relevant periods.

[158] Subsection 98(3) applies when a Canadian partnership ceases to exist, all of the partners jointly make an election and all of the partnership property is distributed to the persons who were members of the partnership immediately before the dissolution. Each partner must receive an undivided co-ownership interest in each partnership property and such interest in any one property must be the same as the partner’s proportionate interest in every other property.

[159] If the conditions are satisfied then paragraph 98(3)(a) allows the partner to avoid all or a portion of the tax that would otherwise be payable on the disposition

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[46] Ibid.

of its partnership interest. Further, the paragraph ensures that the partner can never realize a capital loss on the disposition of the partnership interest.[47]

[160] The partnership is deemed, under paragraph 98(3)(f), to have disposed of the property distributed to the partners for proceeds equal to the cost amount to the partnership of the property immediately before its distribution.

[161] The general rule for determining the cost to the partners of the property distributed to them is contained in subparagraph 98(3)(b)(i), which provides that the cost to each partner of its undivided interest in each property is equal to the partner's percentage of the cost amount to the partnership of the property immediately before the distribution.[48]

[162] Continuity in respect of capital cost allowance for depreciable property, including the preservation of potential recapture, is provided for in paragraph 98(3)(e).

[163] Subparagraph 98(3)(b)(ii) and paragraph 98(3)(c) allow for a bump of distributed property that is capital property, provided the property is not depreciable property. It is these provisions that the Respondent says were abused when they were used to effect the Second Bump.

[164] The provisions allow the partners to increase (bump) the cost determined under the general rule (the cost amount) of the distributed non-depreciable capital property by the amount determined under paragraph 98(3)(c). The bump is calculated in a manner similar to the calculation of the bump under paragraph 88(1)(d).

[165] Generally speaking, the actual amount of the bump is determined under subparagraph 98(3)(b)(ii) as being the excess of the partner's adjusted cost base of its interest in the partnership immediately prior to the dissolution over the partner's

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[47] For a more detailed discussion of these requirements see Johnson and Lille, *op. cit.* at pages 345-348.

[48] A special rule is provided in subparagraph 98(3)(b)(i.1) for eligible capital property.

percentage of the cost amount to the partnership of the partnership property at that time (the “Partner’s Excess Outside Basis”).[49]

[166] The partner then, under paragraph 98(3)(c), designates all or a portion of the Partner’s Excess Outside Basis as referable to its interest in the non-depreciable capital property it received on the dissolution. However, the amount designated in respect of a specific non-depreciable capital property cannot exceed the amount by which the partner’s percentage of the fair market value of the property immediately after the distribution exceeds the partner’s percentage of the cost amount to the partnership of such property. This limits the bump to the partner’s share of the unrealized gain in the specific property.

[167] The purpose of the bump rules in subparagraph 98(3)(b)(ii) and paragraph 98(c) is to provide the partners with an opportunity to preserve their adjusted cost base of the partnership interests. Obviously, this adjusted cost base would disappear on the dissolution of the partnership. Subparagraph 98(3)(b)(ii) and paragraph 98(3)(c) effect this purpose by allowing for the transfer of the Partner’s Excess Outside Basis to the cost base of the partner’s interest in the non-depreciable capital property obtained by the partner on the dissolution of the partnership.

[168] Another purpose of subsection 98(3) is to preserve the tax attributes of depreciable property held by the partnership prior to the dissolution, specifically its adjusted cost base and potential recapture.

Subsection 100(1)

[169] Subsection 100(1) applied to the sale of the Appellant’s interest in the Second Level LPs to each of the tax-exempt entities.

[170] During the relevant periods that subsection read as follows:

> 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

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[49] The amount of the Excess Outside Basis is reduced by any money received by the partner on the dissolution of the partnership.

> (a) ½ 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.

[171] The operation of the section is not complicated. It applies when a taxpayer disposes of an interest in a partnership to a person who is exempt from tax. The section takes the capital gain determined under the Act in respect of the interest in the partnership and splits the gain into two parts. The first part is the portion of the capital gain that may reasonably be regarded as attributable to increases in the value of non-depreciable capital property of the partnership. The second part is the remaining portion of the gain.

[172] The taxable capital gain on the sale of the partnership interest is then deemed to be 50% of the first part (the portion of the gain relating to non-depreciable capital property) and 100% of the second part (which includes the portion of the gain relating to the appreciation of depreciable capital property).

[173] The purpose of the subsection is straightforward: to tax 100% of the portion of the capital gain determined under the Act on the sale of a partnership interest to a tax-exempt entity that is attributable to an increase in the value of depreciable property, inventory and any other property of the partnership that is not non-depreciable capital property.

[174] With respect to the portion of the capital gain determined under the Act that is attributable to an increase in the value of depreciable property, the subsection ensures that such gain is taxed at the same rate as that which would have applied to recaptured depreciation on a sale of the depreciable capital property itself to the tax-exempt entity.

Step 2 - Was there an abuse of the provisions of the Act?

[175] A finding of abusive tax avoidance will be made "(1) where the transaction achieves an outcome the statutory provision was intended to prevent; (2) where the transaction defeats the underlying rationale of the provision; or (3) where the

transaction circumvents the provision in a manner that frustrates or defeats its object, spirit or purpose (*Trustco*, at para. 45; *Lipson*, at para. 40)."[50]

[176] The SCC noted in *Copthorne* that "These considerations are not independent of one another and may overlap. At this stage, the Minister must clearly demonstrate that the transaction is an abuse of the Act, and the benefit of the doubt is given to the taxpayer."[51]

[177] The SCC emphasized in *Canada Trustco* that the abusive nature of the transaction must be clear: ". . . The GAAR will not apply to deny a tax benefit where it may reasonably be considered that the transactions were carried out in a manner consistent with the object, spirit or purpose of the provisions of the Act, as interpreted textually, contextually and purposively."[52]

[178] Since each of the avoidance transactions was part of a series of transactions, I must consider both the individual transactions and the series. This was explained by the SCC in *Copthorne* as follows:

> . . . As earlier stated, while an avoidance transaction may operate alone to produce a tax benefit, it may also operate as part of a series of transactions that results in the tax benefit. While the focus must be on the transaction, where it is part of a series, it must be viewed in the context of the series to enable the court to determine whether abusive tax avoidance has occurred. In such a case, whether a transaction is abusive will only become apparent when it is considered in the context of the series of which it is a part and the overall result that is achieved (*Lipson*, at para. 34, *per LeBel J.*).[53]

Subsection 97(2)

[179] I will first address subsection 97(2), which was used to avoid tax on the transfer of the Three Real Estate Properties to the First Level LPs and the Second Level LPs.

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[50] *Copthorne*, paragraph 72.

[51] Ibid.

[52] *Canada Trustco*, paragraph 62.

[53] *Copthorne*, paragraph 71.

[180] The Respondent argued that the rollover of the Three Real Estate Properties as part of the Oxford Transactions was an abusive use of subsection 97(2) since the series of transactions resulted in little or no tax being paid in respect of the Three Real Estate Properties. Specifically, it is the Respondent's position that such a result is an abuse of subsection 97(2) since it avoided tax "on the recapture and latent capital gains" which would have arisen if the Three Real Estate Properties had been transferred at fair market value.

[181] I do not agree that the fact that the Appellant paid little or no tax on the disposition of the interests in the Second Level LPs resulted in an abuse of subsection 97(2).

[182] The purpose of subsection 97(2) is to allow a rollover when property of the transferor, which may include non-depreciable and depreciable capital property, is transferred to a partnership in exchange for an interest in the partnership. Normally, the interest in the partnership is non-depreciable capital property.

[183] As I discussed previously, after the transfer of the Three Real Estate Properties to the First Level LPs and the Second Level LPs, both parties to the transactions held property with respect to which there were accrued gains. The partners had accrued gains in their partnership interests and the partnerships had accrued gains (including potential recapture) in the transferred assets, which included the Three Real Estate Properties.

[184] In short, the objective of subsection 97(2) was met.

[185] The scheme of the Act involves determining the tax payable on the accrued gain relating to the partnership interest when the partners subsequently sell the interest.

[186] I agree with the Respondent 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.

[187] 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.

[188] 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.

[189] Parliament was concerned with subsection 97(2) being used as part of a series of transactions that resulted in avoidance of tax on the accrued gain and recapture in respect of the transferred property through the inclusion of such gains and income in the income of a tax-exempt entity or a corporation with the ability to shelter any accrued gains or recapture relating to depreciable property. As a result, it introduced subsection 69(11), which basically denies the rollover and taxes the accrued gains and recapture at the time of the transfer.

[190] The Respondent appears to be arguing that it is an abuse of the Act, I assume of subsection 97(2), if such a sale occurs after the three-year limit expires. However, the Respondent's concern is only with respect to a sale to an exempt entity. The Respondent does not appear to have an issue with a sale to a taxable entity which may have the ability to shelter the accrued gains, since she did not apply the GAAR to the Dufferin Mall transactions, a series of transactions that were identical to the Oxford Transactions except for the fact that the interest in the Second Level LPs was sold to a taxable entity.

[191] I do not agree that transferring a property to an exempt entity after the three-year limit, as part of a series of transactions, is an abuse of the provisions of the Act or, specifically, an abuse of subsection 97(2).

[192] The three-year limit existed at the time subsection 69(11) was amended to extend its application to exempt entities. In addition, subsection 69(12) was added at the time of the amendment to subsection 69(11) to remove any time limit for an assessment by the Minister under subsection 69(11).

[193] I agree with counsel for the Appellant that Parliament is presumed to know the law and to take the law into account when making amendments.[54] 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]

[194] For the foregoing reasons, I have concluded that the Oxford Transactions did not achieve an outcome subsection 97(2) was intended to prevent, did not defeat its underlying rationale and did not circumvent subsection 97(2) in a manner that frustrated or defeated its object, spirit or purpose.

Paragraphs 88(1)(c) and (d) and subsection 98(3)

[195] The Respondent's argument is basically the same for both the First Bump that occurred under paragraphs 88(1)(c) and (d) and the Second Bump that occurred under subsection 98(3).

[196] With respect to the First Bump, the Respondent argued that:

> . . . the amalgamation in order to give rise to the 88(1)(c) Bump was done as part of a series of transactions which resulted in the "indirect" bumping of the cost of depreciable capital properties . . . a result explicitly prohibited by subparagraph 88(1)(c)(iii). Although the bump applied to units of the First Level LP, the amount of the bump represented the difference between the UCC and FMV of depreciable properties.

[197] Further, the Respondent noted that the result was "indirect"

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[54] Ruth Sullivan, *Sullivan on the Construction of Statues*, 6th ed. (Markham, Ont: LexisNexis, 2014), at 8.90.

[55] *Canada Trustco*, paragraph 61.

> in the sense that the result achieved is the eliminating/avoiding the taxation of any latent recapture income by prepackaging depreciable property into a partnership using a rollover, bumping the partnership interest and selling the partnership interest to a tax exempt entity. In short, achieving a result indirectly what explicitly cannot be achieved directly.[56]

[198] The Respondent raised the same “indirect” argument for the Second Bump.[57]

[199] The Respondent argued that this so-called “indirect” bumping of the cost of depreciable property frustrated paragraph 88(1)(c) and subsection 98(3) respectively in that it circumvented the prohibition against bumping depreciable property, achieved an outcome the provisions were intended to prevent (a bump to depreciable property) and defeated the underlying rationale of the provisions (that recapture should eventually be taxed).

[200] The Respondent appears to be arguing that this so-called indirect bumping requires the three elements set out in her written argument, namely the prepackaging of the Three Real Estate Properties into the limited partnerships, the bumping of the adjusted cost base of the partnerships and the sale of the Second Level LPs to the tax-exempt entities. I have reached this conclusion for the following reason.

[201] It appears to me, in light of the Dufferin Mall Transactions, that the Minister did not believe that the mere prepackaging of depreciable real estate into a partnership in contemplation of a change in control and the subsequent bumping of the partnership interest is abusive. The Dufferin Mall transactions were identical to the Oxford Transactions except for the fact the interest in the Second Level LP was sold to a taxable entity. In short, the Minister did not find a series of transactions involving prepackaging prior to the change of control, followed by a bump, to be abusive.

[202] The Minister also, as evidenced by the René Lévesque Transactions, did not find abusive the bumping of an existing limited partnership interest (i.e., one that was not prepackaged in contemplation of a change in control) under paragraph 88(1)(c) and the subsequent sale of the “bumped” limited partnership interest to a tax-exempt entity. I have some difficulty reconciling the Minister’s position on the

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[56] Respondent’s Written Argument, paragraph 259, including footnote.

[57] Respondent’s Written Argument, paragraph 275, including footnote.

René Lévesque Partnerships with the Respondent's position that the Oxford Transactions abused paragraph 88(1)(c), because it would seem to me that if the Oxford Transactions resulted in an indirect bump and an avoidance of tax on recapture, then the René Lévesque Partnerships' transactions also resulted in an indirect bump and an avoidance of tax on the recapture.

[203] The only way to reconcile the two is for me to conclude that the Respondent is arguing that it is only when all three elements are present, i.e., the prepackaging, the bump and the sale to the tax-exempt entity that abuse occurs.

[204] I do not accept this argument. In my view, the Respondent is asking me to do exactly what the Supreme Court said was not permissible in *Copthorne*: base my finding of abuse on a broad policy statement that the so-called "indirect" bumping of depreciable property is not permitted under the Act, without attaching the policy to specific provisions of the Act.[58]

[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) or any other provision of the Act that is relied upon by the Respondent 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), as they read during the relevant periods, was to reduce or deny the bump on the basis of the nature of the assets held by the partnerships.

[206] Parliament took extreme care in drafting the paragraph 88(1)(c) and (d) bump rules; they are some of the most complex rules in the Act. The mechanism chosen by Parliament is to first look at the excess of the parent's cost of purchasing the share of the subsidiary over the cost of all the assets of the subsidiary. The paragraphs then allow an allocation of such excess to the qualifying non-depreciable assets of the subsidiary. Section 88, as drafted at the time, 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.

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[58] See *Copthorne,* paragraph 118.

[207] Nor, in my view, was it the object of paragraphs 88(1)(c) and (d) to claw back the bump on the basis of the identity of the person who subsequently purchased the bumped asset.

[208] In subsections 69(11) and 100(2), Parliament has turned its mind to situations where partnership interests are subsequently sold to exempt entities. I have already discussed both sections. Neither section can be used to support the Respondent's "indirect" bumping argument.

[209] I have reached the same conclusion, for similar reasons, with respect to the bump under subsection 98(3).

[210] The legislative scheme that the Respondent 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.

[211] The amendment made substantial changes to the object of the legislation. It is not an amendment that clarified an existing objective. In my view, it is clear from the text of subsection 88(1), as it read prior to the amendment, that the object of the subsection was to base the bump therein provided for 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. However, this changed after the amendment, which restricted the amount by which the partnership interest may be bumped to the amount of the fair market value of the partnership that is not attributable to depreciable property, resource property and/or non-capital property.

[212] This restriction applies regardless of the identity of a subsequent purchaser of the partnership interest. It will apply whether the bumped partnership interest is sold to a taxable entity or an exempt entity. This represents a substantial change in the scope of the bumping provisions; it is not a clarification of the old provisions. When enacting the amendment Parliament decided to substantially narrow the amount by which a partnership interest may be bumped.

[213] In summary, the Respondent's "indirect" bump argument reflects a broadly based policy that is not grounded in the provisions of the Act, particularly paragraphs 88(1)(c) and (d) and subsection 98(3). As the Supreme Court of Canada stated in *Canada Trustco* (at paragraphs 41 and 42):

> The courts cannot search for an overriding policy of the Act that is not based on a unified, textual, contextual and purposive interpretation of the specific provisions in issue. First, such a search is incompatible with the roles of reviewing judges. The *Income Tax Act* is a compendium of highly detailed and often complex provisions. To send the courts on the search for some overarching policy and then to use such a policy to override the wording of the provisions of the *Income Tax Act* would inappropriately place the formulation of taxation policy in the hands of the judiciary, requiring judges to perform a task to which they are unaccustomed and for which they are not equipped. Did Parliament intend judges to formulate taxation policies that are not grounded in the provisions of the Act and to apply them to override the specific provisions of the Act? Notwithstanding the interpretative challenges that the GAAR presents, we cannot find a basis for concluding that such a marked departure from judicial and interpretative norms was Parliament's intent.
>
> Second, to search for an overriding policy of the *Income Tax Act* that is not anchored in a textual, contextual and purposive interpretation of the specific provisions that are relied upon for the tax benefit would run counter to the overall policy of Parliament that tax law be certain, predictable and fair, so that taxpayers can intelligently order their affairs. Although Parliament's general purpose in enacting the GAAR was to preserve legitimate tax minimization schemes while prohibiting abusive tax avoidance, Parliament must also be taken to seek consistency, predictability and fairness in tax law. These three latter purposes would be frustrated if the Minister and/or the courts overrode the provisions of the *Income Tax Act* without any basis in a textual, contextual and purposive interpretation of those provisions.

[214] For the foregoing reasons the Respondent has not met her burden of establishing that the Oxford Transactions resulted in an abuse of paragraphs 88(1)(c) and (d) and subsection 98(3).

Subsection 100(1)

[215] The Respondent argued that the prepackaging of the Three Real Estate Properties into the limited partnerships, the bumping of the adjusted case base of the partnerships and the subsequent sale to an exempt entity frustrate subsection 100(1) since the amount of the taxable capital gain calculated under subsection 100(1) is thereby reduced or eliminated. Specifically, the Respondent argues that subsection 100(1) was frustrated because the prepackaging and bump achieved an outcome subsection 100(1) was intended to prevent (the taxation of recapture or accrued gains from income property where the property is held in a partnership that is sold to a person exempt from tax under section 149) or defeated the underlying rationale of the subsection (the recapture and accrued gains will not be reflected in the cost of the partnership interest and thus can effectively be taxed by the

mechanism of taxing the capital gain at the rate of 100%, rather than the normal rate of 50%).

[216] As discussed previously, subsection 100(1) looks at the capital gain otherwise determined under the Act and then determines which portion of the capital gain is taxable. The Respondent is, in effect, asking me to find that one of the purposes of subsection 100(1) is to base the capital gain not on the gain otherwise calculated under the Act, but rather on accrued gains (including recapture) of property held by the partnership. 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.

[217] As stated previously, the object of subsection 100(1) is to start with the capital gain calculated under the Act and then determine what portion of this gain is a taxable capital gain. Since, as I have already found, the Oxford Transactions did not abuse the provisions of the Act that resulted in the determination of the adjusted cost base of the interest in the Second Level LPs, the transactions did not abuse subsection 100(1). The capital gain calculated using this adjusted cost base was so calculated in a manner that was consistent with the object, spirit and purpose of the relevant provisions of the Act, particularly the bump rules.

III. Conclusion

[218] On a textual, contextual and purposive interpretation of the relevant provisions of the *Income Tax Act*, in my respectful view the Oxford Transactions did not result in abusive tax avoidance. Accordingly, the GAAR did not apply and the appeal is allowed with costs.

[219] The Appellant carried out the Oxford Transactions to minimize its tax. Further, it did so in a manner that did not abuse the relevant provisions of the Act. As the following quotation from *Canada Trustco* confirms, taxpayers are still entitled to structure their affairs to minimize tax provided they do not abuse the provisions of the Act:

> A proper approach to the wording of the provisions of the *Income Tax Act* together with the relevant factual context of a given case achieve balance between the need to address abusive tax avoidance while preserving certainty, predictability and fairness in tax law so that taxpayers may manage their affairs accordingly. Parliament intends taxpayers to take full advantage of the

> provisions of the Act that confer tax benefits. Parliament did not intend the GAAR to undermine this basic tenet of tax law.[59]

[Emphasis added.]

Signed at Antigonish, Nova Scotia, this 19th day of September 2016.

"S. D'Arcy"

D'Arcy J.

[59] *Canada Trustco*, paragraph 61.

APPENDIX A

2011-3616(IT)G

TAX COURT OF CANADA

BETWEEN:

OXFORD PROPERTIES GROUP INC.

Appellant

\- and -

HER MAJESTY THE QUEEN

Respondent

STATEMENT OF AGREED FACTS

The parties to this proceeding admit, for purposes of this proceeding only, the truth of the following facts and to the authenticity of the documents referred to in this Statement of Agreed Facts.

Parties Involved

1. The Appellant, Oxford Properties Group Inc., ("**Oxford**"), is a global real estate owner, investor, developer and property manager with a portfolio of office, retail, multi-residential and hotel assets. Wholly owned by The Ontario Municipal Employees Retirement Systems

("**OMERS**"), the company has offices across Canada, New York and London, UK.

2. In 2001:

   (a) a predecessor to Oxford ("**Old Oxford**"), was at all material times a taxable Canadian corporation for purposes of the *Income Tax Act* (Canada) (the "**Act**"); and

   (b) Old Oxford was one of the largest commercial real estate firms in North America, and managed and owned interests in prime office, industrial and retail premises in Canada's major urban markets.

3. Before October 16, 2001, Old Oxford was a public company and its common shares were listed on the Toronto Stock Exchange.

4. At all material times:

   (a) OMERS was a registered pension plan under the Act and was exempt from tax Under Part 1 of the Act; and

   (b) BPC Properties Ltd. ("**BPC**") was a taxable Canadian corporation for purposes of the Act.

5. Before October 16, 2001, the common shares of Old Oxford were listed on the Toronto Stock Exchange. BPC was formed in May of 2001 to make a takeover bid for the common shares of Old Oxford held by the public. OMERS held 30% of the voting shares of BPC and had an option to acquire the remaining voting shares. The fair market value of the shares of BPC held by OMERS represented the vast majority of the fair market value of all of the issued shares of BPC.

6. Prior to September 2001, OMERS owned approximately 20% of the issued and outstanding shares of Old Oxford. On September 7, 2001, OMERS transferred the shares of Old Oxford to BPC.

B. Pre-Acquisition of Control

7. On August 16, 2001, BPC proposed to Oxford that it would make a bid for all of the common shares of Old Oxford not held by OMERs.

8. Discussion between the parties resulted in an increase to the bid price subject to the entering into of a support agreement on August 20, 2001

(the "**Support Agreement**") and a lock-up agreement on August 20, 2001.

9. Pursuant to the provisions of the Support Agreement, Old Oxford agreed that it would effect a pre-closing reorganization of its business if requested, provided that the request was reasonable and Old Oxford was reimbursed for costs of the reorganization.

10. Pursuant to a request made under the provisions of the support agreement, Old Oxford effected the reorganization by transferring certain real properties to newly-formed limited partnerships (the "**Reorganization**"). The real properties consisted of depreciable buildings and non-depreciable land that were capital properties to Old Oxford and its affiliates.

11. The Reorganization included the following transactions:

    (a) On October 10, 2001, Old Oxford incorporated a new subsidiary, GP Co 1 Inc. ("**GP1**").

    (b) On October 11, 2001, Old Oxford incorporated a new subsidiary, GP Co 2 Inc. ("**GP2**").

    (c) On October 15, 2001, Old Oxford and certain affiliates amalgamated to continue as one corporation named Oxford Properties Group Inc. ("**OPGI Amalco**").

    (d) On October 15, 2001, Oxford MRC Inc., Oxford CTX Inc. and 3408493 Canada Inc. amalgamated to continue as one corporation named Oxford MRC Inc. ("MRC Amalco").

    (e) On October 15, 2001, OPGI Amalco and GP1 formed OPGI Office Limited Partnership ("OPGI Office LP") under the *Limited Partnership Act* (Ontario)(the "**LPA**"). OPGI Amalco was the limited partner of OPGI Office LP and GP1 was the general partner of OPGI Office LP.

    (f) OPGI Amalco transferred its beneficial interest in certain real properties, including RAC and a beneficial interest in 50% of the Calgary Eaton Centre, to OPGI Office LP in exchange for the assumption of debt and an additional limited partnership interest in OPGI Office LP. An election was made pursuant to subsection 97(2) with respect to the transfer.

(g) On October 15, 2001, MRC Amalco and GP2 formed MRC Office Limited Partnership ("**MRC Office LP**") under the LPA. OPGI Amalco was the limited partner of MRC Office LP and GP2 was the general partner of MRC Office LP.

(h) MRC Amalco transferred its beneficial interest in certain real properties, including Atria Complex, to MRC Office LP in exchange for the assumption of debt and an additional limited partnership interest in MRC Office LP. An election was made pursuant to subsection 97(2) with respect to the transfer.

C. Acquisition of Control

12. On October 12, 2001, Old Oxford incorporated a new subsidiary, 2006186 Ontario Inc. ("**Acquireco**").

13. On October 16, 2001,

(a) BPC transferred its 20% interest in OPGI Amalco to Acquireco in exchange for shares of Acquireco;

(b) Acquireco redeemed its shares owned by OPGI Amalco (formerly Old Oxford) for a nominal amount; and

(c) Acquireco purchased the remaining shares of OPGI Amalco.

14. Thereafter, OPGI Amalco was wholly-owned by Acquireco, which was in turn wholly-owned by BPC.

D. Post Acquisition of Control

15. On March 12, 2002, Acquireco incorporated 1519052 Ontario Inc. ("1519052").

16. On May 30, 2002, OPGI Amalco, MRC Amalco, OPQA Management I Inc., Calford Properties Ltd., Oxford Properties Quebec Inc. and OPQA Management II Inc. amalgamated to continue as one corporation named Oxford Properties Group Inc. ("**First OPGI Amalco**") which was wholly-owned by Acquireco.

17. On May 30, 2002, Acquireco transferred all of the shares of First OPGI Amalco to 1519052 in exchange for shares of 1519052.

18. On May 31, 2002, 1519052 and First OPGI Amalco amalgamated to form Oxford (i.e. the Appellant) which was wholly-owned by Acquireco.

19. On the amalgamation of 1519052 and First OPGI Amalco, designations were filed pursuant to paragraph 88(1)(d) of the Act, to increase the adjusted cost base of the non-depreciable capital properties formerly held by OPGI Amalco, including the interests in OPGI Office LP and MRC Office LP.

20. On November 12, 2002, Oxford incorporated a new subsidiary, GP Co 11 Inc. ("**GP11**").

21. On December 2, 2002, MRC Office LP and GP11 formed Atria Limited Partnership ("**Atria LP**") under the LPA. MRC Office LP was the limited partner of Atria LP and GP11 was the general partner of Atria LP.

22. On September 12, 2003:

    (a) Oxford incorporated two new subsidiaries, GP Co 16 Inc. ("GP16") and GP Co 18 Inc. ("**GP18**");

    (b) OPGI Office LP and GP16 formed RAC Limited Partnership ("**RAC LP**") under the LPA. OPGI Office LP was the limited partner of RAC LP and GP16 was the general partner of RAC LP; and

    (c) OPGI Office LP and GP18 formed Calgary Eaton Centre Limited Partnership ("**CEC LP**") under the LPA. OPGI Office LP was the limited partner of CEC LP and GP18 was the general partner of CEC LP.

23. On February 1, 2004:

    (a) OPGI Office LP transferred certain real properties to CEC LP, including a 50% beneficial interest in the Calgary Eaton Centre, in exchange for the assumption of debt and an additional partnership interest in CEC LP. An election was made pursuant to subsection 97(2) with respect to the transfer;

    (b) OPGI Office LP transferred RAC to RAC LP in exchange for the assumption of debt and an additional partnership interest in RAC LP. An election was made pursuant to subsection 97(2) with respect to the transfer; and

    (c) MRC Office LP transferred certain real properties to Atria LP, including Atria Complex, in exchange for the assumption of debt

and an additional partnership interest in Atria LP. An election was made pursuant subsection 97(2) with respect to the transfer.

24. On August 27, 2004, MRC Office LP distributed its assets, including its limited partnership interest in Atria LP, to its partners, the liabilities, if any, of MRC Office LP were assumed by its partners, and MRC Office LP was dissolved. An election was made to have subsection 98(3) of the Act apply to the dissolution.

25. Pursuant to subsection 98(3), the adjusted cost base of the non-depreciable capital properties formerly held by MRC Office LP, including the limited partnership interest in Atria LP, was increased on the dissolution of MRC Office LP.

26. On August 27, 2004, OPGI Office LP distributed its assets, including its limited partnership interests in RAC LP and CEC LP, to its partners, the liabilities, if any, of OPGI Office LP were assumed by its partners, and OPGI Office LP was dissolved. An election was made to have subsection 98(3) of the Act apply to the dissolution.

27. Pursuant to subsection 98(3), the adjusted cost base of the non-depreciable capital properties formerly held by OPGI Office LP, including the limited partnership interests in RAC LP and CEC LP, was increased on the dissolution of OPGI Office LP.

28. On August 31, 2004, Acquireco sold 75% of its common shares of Oxford to BPC. Immediately after, BPC distributed the Oxford common shares to OMERS.

E. Sale of Partnership Interests

29. On September 29, 2005, Oxford sold the limited partnership interest in Atria LP to 1564501 Ontario Inc., a subsidiary of the Alberta Investment Management Corp (“**AIMCo**”) and a corporation exempt from tax under Part I of the Act. At the time of the sale, Atria Complex was the only real property held by Atria LP, as the partnership had prior to that time transferred its interest in another real property to OMERS Realty Corporation, a wholly-owned subsidiary of OMERS which was exempt from tax under Part I of the Act.

30. Patria Properties Inc., another subsidiary of AIMCo, had a right of first offer and a right of first refusal under a co-ownership agreement

relating to Atria Complex, which was entered into prior to BPC's acquisition of the shares of Old Oxford. Once Oxford determined that it would dispose of its interest in Atria LP, Oxford MRC Inc. was contractually required to give Patria Properties Inc. the opportunity to purchase its interest in the Atria Complex.

31. Oxford realized a capital gain on the sale of the partnership interest in Atria LP, which was calculated taking into account the $45,583,064 increase in Oxford's adjusted cost base in the partnership interest in Atria LP pursuant to paragraphs 88(1)(c), 88(1)(d), 98(3)(b) and 98(3)(c) of the Act that had occurred as a result of the relevant transactions set out above.

32. On October 1, 2005, Oxford sold the limited partnership interest in CEC LP to 1183044 Alberta Ltd., a subsidiary of AIMCo and a corporation exempt from tax under Part I of the Act. At the time of the sale, Calgary Eaton Centre was the only real property held by CEC LP, as the partnership had prior to that time transferred its interest in another real property.

33. Orion Properties Inc., another subsidiary of AIMCo, had a right of first offer and a right of first refusal under a co-ownership agreement relating to the Calgary Eaton Centre, which was entered into prior to BPC's acquisition of the shares of Old Oxford. Once Oxford determined that it would dispose of its interest in CEC LP, Oxford was contractually required to give Orion Properties Inc. the opportunity to purchase its interest in the Calgary Eaton Centre.

34. Oxford realized a capital gain on the sale of the partnership interest in CEC LP, which was calculated taking into account the $50,525,179 increase in Oxford's adjusted cost base in the partnership interest in CEC LP pursuant to paragraphs 88(1)(c), 88(1)(d), 98(3)(b) and 98(3)(c) of the Act that had occurred as a result of the relevant transactions set out above.

35. On July 1, 2006, Oxford sold the limited partnership interest in RAC LP to OMERS Realty Corporation. At the time of the sale, RAC was the only real property held by RAC LP.

36. Oxford realized a capital loss on the sale of the partnership interest in RAC LP, which loss was suspended. The capital loss was calculated taking into account the $67,873,524 increase in Oxford's adjusted cost

base in the partnership interest in RAC LP pursuant to paragraphs 88(1)(c), 88(1)(d), 98(3)(b) and 98(3)(c) of the Act that had occurred as a result of the relevant transactions set out above.

F. 2006 Reassessment

37. By way of a reassessment, notice of which was dated June 23, 2011 (the "**2006 Reassessment**"), the Minister reassessed Oxford for the 2006 Taxation Year on the basis that section 245 of the Act applied to the transactions set out in paragraphs 15(xx)(a) to (q) of the Amended Reply.

38. Pursuant to the 2006 Reassessment, the Minister:

(a) increased the taxable capital gain realized by Oxford for its 2006 Taxation Year by $148,221,522 as follows; and

	Atria LP	CEC LP	RAC LP
Increase in taxable capital gain	$45,237,937	$44,996,097	$57,987,488

(b) reduced its capital loss/suspended capital loss with respect to the disposition of RAC LP from $5,155,531 to nil.

39. By Notice of Objection dated August 18, 2011, Oxford duly objected to the reassessment.

G. Additional Facts

40. The transactions set out in paragraphs 15(xx)(a) to (p) of the Amended Reply constituted a "series of transactions" as defined for purposes of subsection 245(3) of the Act.

41. Such series contained one or more "avoidance transactions" within the meaning of subsection 245(3) of the Act.

42. The parties hereto agree that this Agreed Statement does not preclude either party from calling evidence to supplement the facts agreed to herein, it being accepted that such evidence may not contradict the facts agreed.

. . .

Appendix B

Section 245

245 [General Anti-Avoidance Rule—GAAR] -

(1) Definitions - In this section,

“tax benefit” means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty;

“tax consequences” to a person means the amount of income, taxable income, or taxable income earned in Canada of, tax or other amount payable by or refundable to the person under this Act, or any other amount that is relevant for the purposes of computing that amount;

“transaction” includes an arrangement or event.

(2) General anti-avoidance provision [GAAR] - Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.

(3) Avoidance transaction - An avoidance transaction means any transaction

(a) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit; or

(b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.

(4) Application of subsec. (2) - Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction

(a) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of

(i) this Act,

(ii) the *Income Tax Regulations*,

(iii) the *Income Tax Application Rules*,

(iv) a tax treaty, or

(v) any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any amount that is relevant for the purposes of that computation; or

(b) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.

(5) Determination of tax consequences - 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.

(6) Request for adjustments - Where with respect to a transaction

(a) a notice of assessment, reassessment or additional assessment involving the application of subsection (2) with respect to the transaction has been sent to a person, or

(b) a notice of determination pursuant to subsection 152(1.11) has been sent to a person with respect to the transaction,

any person (other than a person referred to in paragraph (a) or (b)) shall be entitled, within 180 days after the day of sending of the notice, to request in writing that the Minister make an assessment, reassessment or additional assessment applying subsection (2) or make a determination applying subsection 152(1.11) with respect to that transaction.

(7) Exception - Notwithstanding any other provision of this Act, the tax consequences to any person, following the application of this section, shall only be determined through a notice of assessment, reassessment, additional assessment or determination pursuant to subsection 152(1.11) involving the application of this section.

(8) Duties of Minister - On receipt of a request by a person under subsection (6), the Minister shall, with all due dispatch, consider the request and, notwithstanding subsection 152(4), assess, reassess or make an additional assessment or determination pursuant to subsection 152(1.11) with respect to that person, except that an assessment, reassessment, additional assessment or determination may be made under this subsection only to the extent that it may reasonably be regarded as relating to the transaction referred to in subsection (6).

Appendix C

The Series of Transactions from Paragraph 15(xx) of the Amended Reply

15. . . .

the following were avoidance transactions that resulted directly or indirectly, or were part of a series of transactions which series resulted directly or indirectly, in a tax benefit to the Appellant within the meaning of subsections 245(2) and 245(3) of the *Act*:

a. the incorporation of BPC;

b. the incorporation of Acquireco;

c. the transfer by BPC of its 20% interest in OPGI to Acquireco in exchange for shares of Acquireco;

d. the redemption of Acquireco of the shares owned by OPGI for a nominal amount;

e. the capitalization of Acquireco by BPC with additional consideration in the amount of approximately $1.3 billion;

f. the incorporation and formation of various companies by OPGI and its affiliates to act as general partners in the First Level Partnerships and Second Level Partnerships;

g. the creation of the First Level Partnerships;

h. the transfer of properties to the First Level Partnerships pursuant to subsection 97(2);

i. the incorporation of 1519052 by Acquireco;

j. the amalgamation to form First OPGI Amalco;

k. the transfer by Acquireco of the shares of First OPGI Amalco to 1519052;

l. the amalgamation to form Second OPGI Amalco;

m. the “bump” designation by Second OPGI Amalco in its May 31, 2003 taxation year, pursuant to paragraph 88(1)(d), of $1,075,045,307 on the following properties:

i. land - $21,900,683;

ii. partnership interests - $1,006,879,104; and

iii. shares - $46,265,521.

n. the creation of the Second Level Partnerships;

o. the transfer of properties to the Second Level Partnerships pursuant to subsection 97(2);

p. dissolution of the First Level Partnerships and designation of a bump pursuant to paragraph 98(3)(c) of the *Act*; and

q. sale of Second Level Partnership interests to tax-exempt entities, in particular the sales of Atria LP, CEC LP and RAC LP;

(collectively, the “Avoidance Transactions”);

Appendix D

The Relevant Provisions

Subsection 97(2)

97(2) Rules where election by partners — 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 (f) apply to the disposition as if

(i) the reference therein to “corporations’ cost” were read as a reference to “partnerships’ 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.

Subsection 69(11)

69 (11) Deemed proceeds of disposition — 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.

87(11) Vertical amalgamations — Where at any time there is an amalgamation of a corporation (in this subsection referred to as the "parent") and one or more other corporations (each of which in this subsection is referred to as the "subsidiary") each of which is a subsidiary wholly-owned corporation of the parent,

(a) the shares of the subsidiary are deemed to have been disposed of by the parent immediately before the amalgamation for proceeds equal to the proceeds that would be determined under paragraph 88(1)(b) if subsections 88(1) and (1.7) applied, with any modifications that the circumstances require, to the amalgamation; and

(b) the cost to the new corporation of each capital property of the subsidiary acquired on the amalgamation is deemed to be the amount that would have been the cost to the parent of the property if the property had been distributed at that time to the parent on a winding-up of the subsidiary and subsections 88(1) and (1.7) had applied to the winding-up.

88. (1) Winding-up [of subsidiary] — 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:

. . .

(c) [cost to parent] — subject to paragraph 87(2)(e.3) (as modified by paragraph (e.2), and notwithstanding paragraph 87(2)(e.1) (as modified by paragraph (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 (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 (d) in respect of the property and, for the purposes of this paragraph, “ineligible property” means

(iii) depreciable property,

(iv) property transferred to the parent on the winding-up where the transfer is part of a distribution (within the meaning assigned by subsection 55(1)) made in the course of a reorganization in which a dividend was received to which subsection 55(2) would, but for paragraph 55(3)(b), apply,

(v) property acquired by the subsidiary from the parent or from any person or partnership that was not (otherwise than because of a right referred to in paragraph 251(5)(b)) dealing at arm's length with the parent, or any other property acquired by the subsidiary in substitution for it, where the acquisition was part of the series of transactions or events in which the parent last acquired control of the subsidiary, and

(vi) property distributed to the parent on the winding-up where, as part of the series of transactions or events that includes the winding-up,

(A) the parent acquired control of the subsidiary, and

(B) any property distributed to the parent on the winding-up or any other property acquired by any person in substitution therefor is acquired by

(I) a particular person (other than a specified person) that, at any time during the course of the series and before control of the subsidiary was last acquired by the parent, was a specified shareholder of the subsidiary,

(II) 2 or more persons (other than specified persons), if a particular person would have been, at any time during the course of the series and before control of the subsidiary was last acquired by the parent, a specified shareholder of the subsidiary if all the shares that were then owned by those 2 or more persons were owned at that time by the particular person, or

(III) a corporation (other than a specified person or the subsidiary)

1. of which a particular person referred to in subclause (I) is, at any time during the course of the series and after

control of the subsidiary was last acquired by the parent, a specified shareholder, or

2. of which a particular person would be, at any time during the course of the series and after control of the subsidiary was last acquired by the parent, a specified shareholder if all the shares then owned by persons (other than specified persons) referred to in subclause (II) and acquired by those persons as part of the series were owned at that time by the particular person;

. . .

(d) **[increase in cost amounts (bump)]** — the amount determined under this paragraph in respect of each property of the subsidiary distributed to the parent on the winding-up is such portion of the amount, if any, by which the total determined under subparagraph (b)(ii) exceeds the total of

(i) the amount, if any, by which

(A) the total of all amounts each of which is an amount in respect of any property owned by the subsidiary immediately before the winding-up, equal to the cost amount to the subsidiary of the property immediately before the winding-up, plus the amount of any money of the subsidiary on hand immediately before the winding-up,

exceeds the total of

(B) all amounts each of which is the amount of any debt owing by the subsidiary, or of any other obligation of the subsidiary to pay any amount, that was outstanding immediately before the winding-up, and

(C) the amount of any reserve (other than a reserve referred to in paragraph 20(1)(n), subparagraph 40(1)(a)(iii) or 44(1)(e)(iii) of this *Act* or in subsection 64(1) or (1.1) of the *Income Tax Act*, chapter 148 of the *Revised Statutes of Canada*, 1952, as those two provisions read immediately before November 3, 1981) deducted in computing the subsidiary's income for its taxation year during which its assets were distributed to the parent on the winding-up, and

(i.1) the total of all amounts each of which is an amount in respect of any share of the capital stock of the subsidiary disposed of by the parent on the winding-up or in contemplation of the winding-up, equal to the total of all amounts received by the parent or by a corporation with which the parent

was not dealing at arm's length (otherwise than because of a right referred to in paragraph 251(5)(b) in respect of the subsidiary) in respect of

(A) taxable dividends on the share or on any share (in this subparagraph referred to as a “replaced share”) for which the share or a replaced share was substituted or exchanged to the extent that the amounts thereof were deductible from the recipient's income for any taxation year by virtue of section 112 or subsection 138(6) and were not amounts on which the recipient was required to pay tax under Part VII of the *Income Tax Act*, chapter 148 of the *Revised Statutes of Canada*, 1952, as it read on March 31, 1977, or

(B) capital dividends and life insurance capital dividends on the share or on any share (in this subparagraph referred to as a “replaced share”) for which a share or a replaced share was substituted or exchanged,

as is designated by the parent in respect of that capital property in its return of income under this Part for its taxation year in which the subsidiary was so wound up, except that

ii) in no case shall the amount so designated in respect of any such capital property exceed the amount, if any, by which the fair market value of the property at the time the parent last acquired control of the subsidiary exceeds the cost amount to the subsidiary of the property immediately before the winding-up,

(iii) in no case shall the total of amounts so designated in respect of all such capital properties exceed the amount, if any, by which the total determined under subparagraph (b)(ii) exceeds the total of the amounts determined under subparagraphs (i) and (i.1).

98(3) Rules applicable where partnership ceases to exist - Where at any particular time after 1971 a Canadian partnership has ceased to exist and all of 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 (a)(i) exceeds the amount determined under subparagraph (a)(ii), the amount determined under paragraph (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 (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 (b)(ii);

(d) [Repealed by S.C. 1986, c. 55, s.26(2)]

(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 (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;

(f) the partnership shall be deemed to have disposed of each such property for proceeds equal to the cost amount to the partnership of the property immediately before its distribution; and

(g) where the property so distributed by the partnership was eligible capital property in respect of the business,

(i) for the purposes of determining under this Act any amount relating to cumulative eligible capital, an eligible capital amount, an eligible capital expenditure or eligible capital property, each such person shall be deemed to have continued to carry on the business, in respect of which the property was eligible capital property and that was previously carried on by the partnership, until the time that the person disposes of the person's undivided interest in the property,

(ii) for the purposes of determining the person's cumulative eligible capital in respect of the business, an amount equal to ¾ of the amount determined under subparagraph (b)(i.1) in respect of the business shall be added to the amount otherwise determined in respect thereof for P in the definition "cumulative eligible capital" in subsection 14(5), and

(iii) for the purpose of determining after the particular time the amount required by paragraph 14(1)(b) to be included in computing the person's income in respect of any subsequent disposition of property of the business, the value determined for Q in the definition "cumulative eligible capital" in subsection 14(5) is deemed to be the

amount, if any, of that person's percentage of the value determined for Q in that definition in respect of the partnership's business immediately before the particular time.

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