Docket: 2015-3423(IT)G

BETWEEN:

IBERVILLE DEVELOPMENTS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 25, 2018, at Montreal, Quebec.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Wilfrid Lefebvre, Q.C. Vincent Dionne
Counsel for the Respondent:	Janie Payette Michel Lamarre

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2008 taxation year is dismissed, with costs, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 28th day of May 2018.

"Patrick Boyle"

Boyle J.

Citation: 2018 TCC 102
Date: 20180528
Docket: 2015-3423(IT)G

BETWEEN:

IBERVILLE DEVELOPMENTS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

Introduction

[1] The sole issue to be decided in this appeal is whether, upon a rollover of property to a partnership under subsection 97(2) of the *Income Tax Act* ("Act"), the transferor's adjusted cost base ("ACB") in its partnership interest is increased by both the fair market value of the property and the elected amount as claimed by the Appellant, or just by the elected amount as submitted by the Respondent.

[2] In this case, the taxpayer limited partner rolled in shopping centres worth $130M with a cost base of $14M and received non-share consideration or boot of $8.5M. When it later carried out an internal reorganization that resulted in the partnership assets being owned by an affiliated corporation, the taxpayer claimed a realized capital loss of $122M. The Minister of National Revenue reassessed the transaction as a realization by the taxpayer of a $140K capital gain.

[3] This significant difference is entirely dependent upon a proper interpretation and application of subsection 97(2) of the Act. Both sides agree that paragraph 97(2)(*b*) increases the ACB of the transferor's partnership interest by an amount equal to the elected amount (subparagraph 97(2)(*b*)(i)), less any non-share consideration or boot (subparagraph 97(2)(*b*)(ii)).

[4] The taxpayer maintains that, by its clear text, paragraph 97(2)(*b*) applies at any time after the transfer of the assets, and does not preclude the ordinary ACB rules in section 54 applying at the time (or upon) the transfer. Thus, the cost of the partnership interest is the value of the transferred asset for which the partnership interest, or increased partnership interest, was received as consideration. In other words, at the time of the transfer, the rules in section 54 determined the cost of the partnership interest or increased partnership interest to be the fair market value of the transferred shopping centres, and immediately after that time paragraph 97(2)(*b*) added an amount equal to the elected amount less any boot.

[5] It is the taxpayer's position that this is the only way that the text of subsection 97(2) can be read and there is no other reasonable interpretation of the text of this provision.

[6] Appellant's counsel candidly and graciously volunteered several times throughout his argument that:

(i) the result of the taxpayer's interpretation is absurd,

(ii) this result must not have been intended by Parliament,

(iii) if this was a general anti-avoidance rule ("GAAR") case, the taxpayer should lose because the result of these transactions is abusive, and

(iv) if the language of subsection 97(2) permits of any other reasonable interpretation, the taxpayer should lose.

[7] The parties filed a complete Agreed Statement of Facts and appended the underlying agreements and other relevant documentation. Nothing factual is left in dispute.

[8] The partnership rollovers occurred in 2003 and 2004. The partnership sold the shopping centres to unrelated third parties, each within the same month as the particular rollover. The partnership realized capital gains that fiscal year of $100M and allocated the gain to the Appellant who included it in its share of income from the partnership in its 2005 taxation year. The Appellant seeks to carry back its claimed 2008 $120M capital loss that is in issue in this appeal, to its 2005 fiscal year to fully offset its capital gains attributable to the sales of the shopping centres by the partnership. The Canada Revenue Agency ("CRA") determined that the 2008 capital loss was nil, such that there was nothing to carry back.

Summary of Facts

[9] The Appellant, Iberville Developments Limited, and all of the entities involved in the internal reorganization (the "Iberville Group") are related and are directly or indirectly controlled by Sylvan Adams and members of his family.

[10] Realty Developments Limited Partnership (the "Partnership") is a limited partnership formed under the laws of Quebec on December 15, 2003 between Iberville as Special Partner and another corporation in the Iberville Group as General Partner.

[11] Also on December 15, 2003, Iberville transferred an $8M shopping centre to the Partnership. The consideration received by the Appellant was described in the Agreement of Purchase and Sale as approximately $700K by way of promissory note (being Iberville's ACB) and additional units in the Partnership.[1] The rollover elected amount was equal to the amount of the promissory note. The Partnership sold the shopping centre later that same month to an arm's length purchaser, realized a capital gain and allocated that gain to Iberville.

[12] On February 1, 2004 and May 1, 2004, Iberville transferred shopping centres valued at approximately $17M and $106M (approximately $121M in the aggregate) to the Partnership. The aggregate consideration received by the Appellant was similarly described as approximately $8M by way of promissory notes and units in the Partnership. The rollover elected amount was approximately $13M, being Iberville's aggregate ACB. Again, the Partnership sold each shopping centre the same month it was acquired to an arm's length purchaser, realized a capital gain and allocated that gain to Iberville.

[13] These gains were approximately $100M in the aggregate. (The actual individual and aggregate amounts are not specified in the Agreed Statement of Facts.) The difference between the aggregate fair market values used days earlier on the rollovers and the aggregate elected amounts would reflect a gross gain of approximately $117M. The resulting capital gains income of the Partnership was allocated to Iberville in Iberville's 2005 taxation year.

[14] In March 2005 the Appellant disposed of most of its interest in the Partnership to another corporation in the Iberville Group for $120M worth of

[1] It should be noted here that the Partnership was not unitized and there is nothing in the Partnership's financial statements or other evidence before the Court that units were issued or that a register of units was maintained.

shares in a section 85 rollover transaction. The balance of the Appellant's interest in the Partnership was disposed of to the same corporation in November 2007 for $30M of shares in a section 85 rollover transaction. On the same day, the Appellant transferred all of its shares in the corporate general partner of the Partnership to the same corporation. On the same day, the transferee corporation wound up the corporate general partner with the result that the transferee corporation was the sole partner in the Partnership.

Legislation

[15] The relevant provisions of sections 53 (adjustments to cost base), 54 (definition of ACB) and 97 (transfers to partnerships) are set out below.

Subdivision C — Taxable Capital Gains and Allowable Capital Losses	**Sous-section C — Gains en capital imposables et pertes en capital déductibles**
53(1) **Adjustments to cost base** — In computing the adjusted cost base to a taxpayer of property at any time, there shall be added to the cost to the taxpayer of the property such of the following amounts in respect of the property as are applicable:	53(1) **Rajustements du prix de base** — Un contribuable doit, dans le calcul du prix de base rajusté, pour lui, d'un bien à un moment donné, ajouter au coût, pour lui, de ce bien les montants suivants qui s'y rapportent :
. . .	[…]
(*e*) **[interest in a partnership]** where the property is an interest in a partnership,	*e*) **[participation dans une société de personnes]** lorsque le bien est une participation dans une société de personnes :
. . .	[…]
(x) any amount required by section 97 to be added before that time in computing the adjusted cost base to the taxpayer of the interest,	(x) toute somme qui, en vertu de l'article 97, doit être ajoutée avant ce moment dans le calcul du prix de base rajusté, pour le contribuable, de la participation,
. . .	[…]
54 **Definitions** — In this subdivision,	54 **Définitions** — Les définitions qui suivent s'appliquent à la présente

	sous-section.
	[…]
adjusted cost base to a taxpayer of any property at any time means, except as otherwise provided,	***prix de base rajusté*** S'agissant du prix de base d'un bien quelconque pour un contribuable à un moment donné s'entend, sauf dispositions contraires :
(*a*) where the property is depreciable property of the taxpayer, . . .	*a*) lorsque le bien entre dans la catégorie des biens amortissables du contribuable, […];
(*b*) in any other case, the cost to the taxpayer of the property adjusted, as of that time, in accordance with section 53,	*b*) dans les autres cas, du coût du bien, pour le contribuable, rajusté à ce moment, conformément à l'article 53;
except that	toutefois :
. . .	[…]
Subdivision J — Partnerships and their Members	**Sous-section J — Les sociétés de personnes et leurs associés**
97(1) **Contribution of property to partnership** — Where at any time after 1971 a partnership has acquired property from a taxpayer who was, immediately after that time, a member of the partnership, the partnership shall be deemed to have acquired the property at an amount equal to its fair market value at that time and the taxpayer shall be deemed to have disposed of the property for proceeds equal to that fair market value.	97(1) **Apport de biens dans une société de personnes** — Lorsque, après 1971, une société de personnes a acquis des biens auprès d'un contribuable qui, immédiatement après le moment de l'acquisition, faisait partie de la société de personnes, cette dernière est réputée les avoir acquis à un prix égal à leur juste valeur marchande à ce moment et le contribuable est réputé en avoir disposé et en avoir tiré un produit égal à cette juste valeur marchande.

(2) **Rules if election by partners** — Notwithstanding any other provision of this Act other than subsections (3) and 13(21.2), where a taxpayer at any time disposes of any property . . . that is a capital property, Canadian resource property, foreign resource property or inventory of the taxpayer to a partnership that immediately after that time is a Canadian partnership of which the taxpayer is a member, if the taxpayer and all the other members of the partnership jointly so elect in prescribed form within the time referred to in subsection 96(4),

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

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

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

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

(2) **Choix par des associés** — Malgré les autres dispositions de la présente loi, sauf les paragraphes (3) et 13(21.2), dans le cas où un contribuable dispose d'un bien […] mais qui est une immobilisation, […] en faveur d'une société de personnes qui est, immédiatement après la disposition, une société de personnes canadienne dont il est un associé, les règles ci-après s'appliquent si le contribuable et les autres associés de la société de personnes en font conjointement le choix sur le formulaire prescrit dans le délai mentionné au paragraphe 96(4) :

a) les alinéas 85(1)*a*) à *f*) s'appliquent à la disposition comme si la mention :

(i) « pour la société » était remplacée par la mention « pour la société de personnes »,

(ii) « autre que toutes actions du capital-actions de la société ou un droit d'en recevoir » était remplacée par la mention « autre qu'une participation dans la société de personnes »,

(iii) « actionnaire de la société » était remplacée par la mention « associé de la société de personnes »,

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

(iv) « la société » était remplacée par la mention « tous les autres associés de la société de personnes »,

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

(v) « à la société » était remplacée par la mention « à la société de personnes »;

(*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,

b) dans le calcul, à un moment donné après la disposition, du prix de base rajusté, pour le contribuable, de sa participation dans la société de personnes, immédiatement après la 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

(i) il doit être ajouté l'excédent éventuel du produit que le contribuable a tiré de la disposition des biens sur la juste valeur marchande, au moment de la disposition, de la contrepartie (autre qu'une participation dans la société de personnes) reçue par le contribuable pour les biens,

(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

(ii) il doit être déduit l'excédent éventuel de la juste valeur marchande, au moment de la disposition, de la contrepartie (autre qu'une participation dans la société de personnes) reçue par le contribuable pour les biens dont il a ainsi disposé sur leur juste valeur marchande au moment de la disposition;

(*c*) where the property so disposed of by the taxpayer to the partnership is taxable Canadian property of the taxpayer, the

c) lorsque les biens dont le contribuable a ainsi disposé en faveur de la société de personnes sont des biens canadiens

interest in the partnership received by the taxpayer as consideration for the property is deemed to be, at any time that is within 60 months after the disposition, taxable Canadian property of the taxpayer.

[Emphasis added.]

imposables du contribuable, la participation dans la société de personnes qu'il a reçue en contrepartie est réputée être, à tout moment de la période de 60 mois suivant la disposition, un bien canadien imposable lui appartenant.

[Je souligne.]

[16] The predecessor subsection 97(2) was added as part of the 1972 tax reform legislation which introduced the concept of taxation of capital gains. The 1972 version of subsection 97(2), which remained in place until 1982, read as follows:

97(2) **Rules applicable where election by partners** — Notwithstanding any other provision of this Act, where at any time after 1971 a Canadian partnership has acquired property from a taxpayer who was, immediately after that time, a member of the partnership, if all the persons who immediately after that time were members of the partnership have jointly so elected in respect of the property in prescribed form and within prescribed time, the following rules apply:

(*a*) the amount that all of those persons have agreed upon in their election in respect of the property shall be deemed to be the taxpayer's proceeds of disposition of the property and the amount for which the partnership acquired the property;

(*b*) the amount, if any, by which the amount so elected in respect of the property exceeds the amount of the consideration (other than an interest in the partnership) received by the taxpayer for the property shall

97(2) **Règles applicables en cas de choix des associés** — Nonobstant toute autre disposition de la présente loi, lorsque, à une date quelconque après 1971, une société canadienne a acquis des biens d'un contribuable qui, immédiatement après cette date, faisait partie de la société, les règles suivantes s'appliquent si toutes les personnes qui, immédiatement après cette date, faisaient partie de la société, en ont fait le choix ensemble, relativement à ces biens, dans la forme et dans les délais prescrits :

a) la somme dont toutes ces personnes ont convenu, lors de leur choix, relativement à ces biens, est réputée être le produit que le contribuable a tiré de leur disposition et le prix auquel la société les a acquis;

b) la fraction, si fraction il y a, de la somme convenue, lors de leur choix, relativement à ces biens, qui est en sus du montant de la contrepartie (autre qu'une participation dans la société) reçue par le contribuable pour ces biens,

	doit
(i) if immediately before that time the taxpayer was a member of the partnership, be included in computing the adjusted cost base to him of his interest in the partnership, and	(i) si, immédiatement avant cette date, le contribuable faisait partie de la société, être incluse dans le calcul du prix de base rajusté, pour lui, de sa participation dans la société, et
(ii) in any other case, be included in computing the cost to him of his interest in the partnership;	(ii) dans tout autre cas, être incluse dans le calcul du coût supporté par lui, de sa participation dans la société;
. . .	[…]
[Emphasis added.]	[Je souligne.]

[17] The 1982 Department of Finance Explanatory Notes[2] which accompanied the amended version of subsection 97(2) that we recognize today read as follows:

Clause 58 — Transfers of Property to a Partnership — ITA 97(2)	**Article 58 — Transferts de biens à une société — LIR 97(2)**
Subsection 97(2) of the existing Act allows any property to be transferred by a partner to a Canadian partnership on a tax-deferred "rollover" basis. This subsection is amended to limit the types of property that can be transferred under subsection 97(2) to capital property, certain resource properties, eligible capital property and inventory. It is also revised to incorporate, with appropriate changes, the rules in subsection 85(1) of the Act relating to transfers of property to a corporation. These rules determine the transferor's proceeds of disposition, the partnership's cost of the property and the cost to the transferor of property received as consideration for the transfer. The rules in subsection 97(2) relating to adjustments to the	Le paragraphe 97(2) de la Loi actuelle permet à un associé de transférer un bien à une société canadienne en franchise d'impôt, dans le cadre d'un « roulement ». Il est modifié afin de limiter les biens susceptibles d'être ainsi transférés aux biens en immobilisations, à certains avoirs miniers, aux biens en immobilisations et aux éléments d'inventaire admissibles. Il est également révisé afin d'incorporer, sous réserve des modifications voulues, les règles du paragraphe 85(1) de la Loi relatives aux transferts de biens à une corporation. Ces règles déterminent le produit de la disposition pour le cédant, le coût du bien pour la société et le coût, pour le cédant, du bien reçu en contrepartie du transfert. Les règles

[2] Explanatory Notes to a Bill Amending the *Income Tax Act* issued by the Honourable Marc Lalonde, Minister of Finance, December 1982, clause 58, page 98.

cost base of the partner's interest in the partnership are generally unchanged but a rule is added deeming the partnership interest to constitute taxable Canadian property where the transferred property was itself taxable Canadian property. "Taxable Canadian property" is a technical expression defined in subsection 115(1) and generally means capital property any gain on which would be taxable under the Act if it were disposed of by a non-resident.	du paragraphe 97(2) relatives aux rajustements du prix de base de la participation de l'associé dans la société ne sont pas, de façon générale, modifiées, mais une nouvelle règle stipule que la participation dans la société est réputée être un bien canadien imposable lorsque le bien transféré était lui-même un bien canadien imposable. Un « bien canadien imposable » est une expression technique définie au paragraphe 115(1) de la Loi, qui désigne généralement les biens en immobilisations sur lesquels un gain serait imposable en vertu de la Loi, si le bien était aliéné par un non-résident.
. . .	[…]
[Emphasis added.]	[Je souligne.]

Relevant Case Law on Subsection 97(2) and ACB of Partnership Interest

[18] The correctness of the specific interpretation of subsection 97(2) adopted by the Appellant in this case does not appear to have been judicially considered previously. However, there are several cases in which subsection 97(2) has figured prominently and in which the courts have commented on its purpose and effect.

[19] In *Continental Bank of Canada v. Canada*,[3] former Chief Justice Bowman of this Court wrote:

> 94 What, then, is the "object and spirit" of subsection 97(2)? I am not sure what its spirit, if any, is, – spirits tend to be somewhat elusive – but its object seems 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 and the potential tax is preserved within the partnership until the assets are disposed of, unless, of course, a second rollover is subsequently made to a corporation under section 85. That deferral is not obtained without a certain hidden cost. Both the assets within the partnership and the partnership interest have, for the purposes of the *Income Tax Act*, a lower cost base than they would have had if no subsection 97(2) election had been filed. This may result in an element of potential double taxation but it is something that taxpayers are normally informed of by their

[3] [1994] T.C.J. No. 585 (QL).

> advisors and are prepared to live with. The apparent premise upon which the rollover provisions of both section 85 and subsection 97(2) are based is that where a taxpayer transfers assets to a corporation or a partnership and receives as consideration shares or a partnership interest, as the case may be, for a portion of the value of the assets exceeding the "cost amount", the taxpayer's real economic position has not been enhanced. The interest in the assets is merely being held in a different vehicle.
>
> [Emphasis added.]

[20] In *Canada v. Oxford Properties Group Inc.*,[4] the Federal Court of Appeal wrote:

> 55 Subsection 97(2) allows for the transfer of property – including non-depreciable capital property, depreciable capital property and inventory – to a partnership on a tax deferred basis subject to a joint election being filed by the partners. In this case, where the ACB was elected with respect to the land portion of the property – i.e.: the non-depreciable capital property – and the UCC was elected with respect to the buildings erected thereon – i.e.: the depreciable capital property – the accrued capital gain and the recapture which would otherwise have resulted from the transfer by virtue of subsection 97(1) were deferred. This last provision provides that the partners, upon contributing property to a partnership, are deemed to receive proceeds equal to the fair market value of the transferred property.
>
> 56 Rollovers, including the one provided for in subsection 97(2), defer the tax consequences of transfers which take place amongst selected groups such as shareholders and their corporations (subsection 85(1)) and partners and their partnerships (subsection 97(2)), the premise being that no tax consequences should be recognized given that there is no fundamental change in ownership – i.e.: rather than holding the transferred property, the transferor holds a partnership interest or shares having the same value (Vern Krishna, *The Fundamentals of Canadian Income Tax*, 9th ed. (Toronto: Thomson/Carswell, 2006) at p. 1112).
>
> 57 The logic behind rollovers as revealed by the mechanism used to give effect to them – i.e.: the fact that a transferor's deemed proceeds become the transferee's deemed cost – ACB or UCC as the case may be – makes it clear that any tax thereby deferred will be paid on a subsequent disposition giving rise to a change in the transferor's economic position. As was said in direct reference to subsection 97(2): "tax is not avoided; it is deferred […]" (*Continental Bank of Canada et al. v. the Queen*, 94 D.T.C. 1858 at 1872 (T.C.C.), aff'd 96 D.T.C. 6355 (F.C.A.). This flows from both the wording and the object, spirit and purpose of subsection 97(2).
>
> . . .

[4] 2018 FCA 30.

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

[21] In *Oxford Properties Group Inc. v. The Queen*,[5] Justice D'Arcy of this Court wrote:

> 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.
>
> . . .
>
> 124 In my view, the purpose of the subsection is to avoid or reduce the tax that would otherwise be 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 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).
>
> [Emphasis added.]

Analysis and Conclusion

Formation of the Partnership

[5] 2016 TCC 204. The decision of the Federal Court of Appeal in *Oxford Properties* was released after the hearing and before additional written submissions were filed in this case. Neither party sought to make additional submissions thereon.

[22] Before analyzing and applying subsection 97(2) to the Appellant's transfers, it is necessary to first determine whether the Partnership was created before any shopping centres were transferred to it, or upon the initial 2003 transfer of a shopping centre to it.

[23] A review of the Limited Partnership Agreement made "as of the 15th day of December, 2003", but otherwise undated, and the Agreement of Purchase and Sale made "as of 2 P.M. December 15th, 2003" between the Appellant and the Partnership leads to a conclusion that the proper interpretation is clearly that the Partnership was established pursuant to the Limited Partnership Agreement on December 15, 2003 and before the first shopping centre was transferred later on that same date to the Partnership. This is permitted by the articles of the *Civil Code of Québec* ("Civil Code")[6] applicable to limited partnerships set out below.

[24] The first recital of the Limited Partnership Agreement provides that "the General Partner and the Special Partner have agreed to constitute a limited partnership among them" (emphasis added). Section 1 of the Agreement provides that "the preamble hereto shall constitute and form an integral part hereof as though herein recited in full and at length".

[25] "Initial Capital Contribution" is defined in section 2.1.10, and it appears that none was to be made for purposes of this Agreement. That is, the shopping centre is not stated to be Iberville's capital contribution.

[26] Section 2.1.13 defines the Limited Partnership to mean "the partnership created by virtue of this Agreement" (emphasis added).

[27] Section 3.1 provides "the Partners do hereby constitute themselves the Limited Partnership as and from the date hereof" (emphasis added).

[28] Section 4 headed "Term" specifies in 4.1 "the Limited Partnership shall commence as and from the date hereof".

[29] The Agreement of Purchase and Sale of the shopping centre is said to be made "as of 2 P.M." on that same date. It describes the Limited Partnership as "a limited partnership, herein acting and represented by Sylvan Adams". This states that the Partnership was in existence at the time it entered into the Agreement of Purchase and Sale.

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[6] Chapter CCQ-1991, updated to January 1, 2018.

[30] The first recital of the Agreement of Purchase and Sale specifies that "the Vendor . . . has agreed to sell . . . the Purchased Assets to the Purchaser and the Purchaser has agreed to purchase and acquire the Purchased Assets from the Vendor subject to the terms and conditions set forth in this Agreement" (emphasis added). This Agreement does not anywhere address the formation of the Limited Partnership.

[31] Section 4.2(a) of the Agreement of Purchase and Sale is a representation and warranty from the Purchaser that "the Purchaser is a limited partnership existing under the laws of the Province of Quebec" (emphasis added).

[32] The Agreement of Purchase and Sale is, as stated, to be the entire agreement.

[33] The relevant provisions of the Civil Code relating to the formation of a partnership contemplate a limited partnership coming into existence prior to any property being contributed to it. These are as follows:

2186. A contract of partnership is a contract by which the parties, in a spirit of cooperation, agree to carry on an activity, including the operation of an enterprise, to contribute thereto by combining property, knowledge or activities and to share among themselves any resulting pecuniary profits.	2186. Le contrat de société est celui par lequel les parties conviennent, dans un esprit de collaboration, d'exercer une activité, incluant celle d'exploiter une entreprise, d'y contribuer par la mise en commun de biens, de connaissances ou d'activités et de partager entre elles les bénéfices pécuniaires qui en résultent.
. . .	[…]
2187. The partnership or association is created upon the formation of the contract if no other date is indicated in the contract.	2187. La société ou l'association est formée dès la conclusion du contrat, si une autre époque n'y est indiquée.
. . .	[…]
2198. A partner is a debtor to the partnership for everything he promises to contribute to it.	2198. L'associé est débiteur envers la société de tout ce qu'il promet d'y apporter.
. . .	[…]
2236. A limited partnership consists of one or more general partners who are the sole persons authorized to administer and bind the partnership,	2236. La société en commandite est constituée entre un ou plusieurs commandités, qui sont seuls autorisés à administrer la société et à l'obliger,

and of one or more special partners who are bound to contribute to the common stock of the partnership.	et un ou plusieurs commanditaires qui sont tenus de fournir un apport au fonds commun de la société.
. . .	[…]
2240. The contribution of a special partner, where it consists of a sum of money or of any other property, is furnished at the time of establishment of the common stock or at any other time as an additional contribution to the common stock.	2240. L'apport du commanditaire, lorsque cet apport consiste en une somme d'argent ou en un autre bien, est fourni lors de la constitution du fonds commun ou en tout autre temps, comme apport additionnel à ce fonds.
. . .	[…]
2249. In all other respects, the rules governing general partnerships, adapted as required, apply to limited partnerships. [Emphasis added.]	2249. Les règles relatives à la société en nom collectif sont, pour le reste, applicables à la société en commandite, compte tenu des adaptations nécessaires. [Je souligne.]

[34] Both parties filed submissions on this issue after the hearing and referred to treaties and doctrines which address the timing of formation of a partnership. Those referred to by the Respondent support my interpretation of the Civil Code, and those of the Appellant would not preclude it.

[35] The Respondent's additional submissions filed on February 8, 2018 identified the following:

> 7. A person becomes a member of a partnership upon the formation of the partnership. A number of Québec scholars suggest that a member of a partnership holds an interest in the partnership[4] upon its formation. M[e] Michelle Thériault in *Collection de droit 2016-2017*, states as follows:[5]
>
> > Toute personne, physique ou morale, qui a la capacité de contracter peut devenir associé d'une société.
> >
> > Une personne devient associée dès la formation de la société, si tous les éléments essentiels à la création de la société sont présents ou dès qu'elle agit à ce titre, si elle se joint à une société déjà formée.
> >
> > À ce moment, l'associé est réputé détenir une part sociale dans la société. La part de chaque associé dans l'actif, dans les bénéfices et dans la contribution aux pertes est égale si elle n'est pas

> déterminée par le contrat (art. 2202 C.c.Q.). La part d'un associé dans l'actif ou dans les bénéfices de la société peut, à certaines conditions, faire l'objet d'une hypothèque (art. 2211 C.c.Q.).
>
> [our emphasis]

8. Another author, Donald A. Riendeau, is also of the view that a partner holds a share in the partnership upon its formation even before the contribution of property. He stated as follows with respect to a discussion on the distinction between indivision and partnership:

> **2.1 Détention de biens en commun**
>
> L'indivision est essentiellement un état des biens. Elle naît de l'acquisition (par succession ou autrement) d'un bien avec d'autres personnes. C'est un système centré sur le bien lui-même : pas de biens, pas d'indivision. Au contraire, la société prend naissance dès la signature du contrat de société (du moins entre les parties) et avant même que les biens soient mis en commun : chaque associé détient une part sociale même en l'absence d'actifs sociaux. À ce sujet, il est intéressant de noter que le législateur n'a pas repris dans le nouveau Code civil les dispositions de l'article 1893 C.c.B.C. prévoyant la dissolution de la société « par la perte de la chose » mise en commun. N'est-ce pas là une indication de la volonté du législateur de s'écarter davantage du concept de l'indivision en matière de société?[6] [our emphasis]

[4] The Civil Code uses the term "share".

[5] M[e] Michelle Thériault, *Collection de droit 2016-2017*, École du Barreau du Québec, Volume 9 – Entreprises et sociétés – Titre I – Les entreprises et les sociétés, Chapitre I – L'entreprise contractuelle, *1. La Société, I Qui peut être associé?*, https://edoctrine.caij.qc.ca/collection-de-droit/2016/9/1350596918/ p. 16 of 43. **[Tab 1]**

[6] Donald A. Riendeau, *La société en droit québécois*, [2003] 63 R. du B. 127, p. 142. https://www.barreau.qc.ca/pdf/publications/revue/2003-tome-63-1-p127.pdf **[Tab 2]**

[36] The Appellant's response to the Respondent's additional submissions filed on February 12, 2018 identified the following:

6. As confirmed by some authors, the contribution of property by a partner is mandatory for the constitution of the partnership under the C.c.Q. For example, the author M[tre] Charlaine Bouchard in her article *Les sociétés de personnes « nouvelle génération » : l'abécédaire de leur fonctionnement*[1] confirms the following with respect to the contribution to be made to the partnership:

> **1. Le droit individuel de l'associé**
>
> La mise en commun de biens, de connaissances ou d'activités – l'apport à la société – est l'une des conditions fondamentales pour

être en présence d'une société. Le mécanisme de l'affectation de biens au but commun transforme le droit de l'associé (son apport), qu'il soit en propriété ou en jouissance, en droit personnel. L'affectation de biens au but commun a donc un pouvoir transformateur de droit, et nul besoin de recourir à la création d'un être moral pour expliquer le caractère mobilier de la part sociale – ou encore de faire de l'associé un étranger au regard de la société pour satisfaire le dogme de la personne morale et de l'unité patrimoniale.

[…]

A. La condition juridique de l'apport

La part sociale représente les droits personnels de chaque associé dans la société de personnes. La part sociale constitue donc une fraction du capital social dont l'appropriation donne à l'associé le droit de participer à la vie de la société et au partage des bénéfices.

La mise en commun d'apports est indispensable à la constitution d'une société. Sans cette injection d'argent, de biens ou de moyens, la société ne pourra pas réaliser les objets pour lesquels elle est formée. Il s'agit d'une obligation qui pèse sur chacun des associés, mais qui peut être variable en genre et en nombre. La seule condition étant la « réalité » de l'apport, aussi minime soit-il! L'obligation d'effectuer un apport est donc étroitement liée à la constitution d'un patrimoine indépendant affecté à la réalisation du but commun des associés. […]

[…]

L'apport est translatif de propriété. L'apporteur reçoit en contrepartie la qualité d'associés, matérialisée par une part sociale – un droit personnel à caractère mobilier – avec les droits et obligations qui y sont rattachés : des droits pécuniaires, d'une part, qu'il s'agisse du « droit aux bénéfices réalisés, qu'ils soient distribués en fin d'exercice ou affectés aux réserves, droit au remboursement du capital au cours de la vie sociale ou lors de la liquidation et aux éventuelles plus-values réalisées sur les différents éléments d'actifs », des droits sociaux, d'autre part, pensons notamment au droit de se renseigner sur les affaires de la société – ou encore de participer aux décisions importantes concernant celle-ci.

7. In the same vein, professor Michelle Thériault in *Sociétés de personnes et associations*[2] confirms that:

12. Forme et valeur des apports à fournir – Les parties doivent contribuer à la société par la mise en commun d'apports. Le Code

civil est très flexible en ce qui concerne la nature et la quotité des apports à être fournis par chacun des associés. En effet, l'apport peut être d'une quantité ou d'une valeur inégale entre les parties et peut prendre plusieurs formes différentes : l'apport peut être en argent, en biens (en propriété, en usufruit ou en jouissance), en connaissance ou en activités.

13. Apport réel et non fictif – L'apport doit être réel et non fictif. L'associé doit se départir de ce qu'il fournit à la société. La remise d'un bien par un associé à la société, en contrepartie du paiement d'un loyer, ne peut constituer un apport au sens du Code civil ni le prêt d'une somme d'argent par un associé à la société.

[…]

32. Part sociale d'une société en nom collectif ou en commandite – Une fois la société créée, les associés forment la société. La société en nom collectif ou en commandite possédant son propre patrimoine, les apports fournis par les associés deviennent la propriété de la société, lesquels sont exploités pour en faire des profits. En cours d'exploitations, la société peut acquérir d'autres actifs dont elle est propriétaire.

En contrepartie, les associés détiennent une part sociale dans la société. Cette notion, plutôt abstraite, n'est pas définie dans le Code civil. Elle n'est pas aussi familière ni aussi tangible, vu l'absence de remise d'un certificat, que celle des actions formant le capital-actions d'une société par actions. Ce qu'on peut en dire, c'est que la part sociale d'une société est de nature capitale. Elle constitue un bien meuble incorporel.

En détenant une part sociale dans la société, l'associé partage les profits (pertes) et les actifs de la société en cas de liquidation selon les pourcentages prévus dans le contrat de société ou, à défaut, en parts égales. La part sociale peut être hypothéquée, tant sur les profits que sur les actifs. En ce qui concerne la société en commandite, la part d'un associé commanditaire est cessible. À l'égard des tiers, le commanditaire qui vend sa part demeure responsable des obligations qui en découlent.

[1] M[tre] Charlaine Bouchard, *Les sociétés de personnes « nouvelle génération » : l'abécédaire de leur fonctionnement*, Cours de perfectionnement du notariat, Chambres des notaires, 2009 **[Tab 1]**.

[2] Michelle Thériault, *Sociétés de personnes et associations*, JurisClasseur Québec, Fascicule 2, Collection Droit des affaires (mise à jour avril 2017) **[Tab 2]**.

Situating the Definition of ACB and the Rollover Provisions

[37] It is helpful to next situate the partnership ACB and the corporate and partnership rollover provisions within the Act.

[38] The adjustments to cost base in subsection 53(1) and the definition of ACB in section 54 are placed in subdivision C of Part I of the Act dealing with capital gains and capital losses. The ACB of a property disposed of by a taxpayer is used to compute the capital gain or capital loss realized by the taxpayer. As a general rule, if the taxpayer's proceeds from the property disposed of exceed the taxpayer's ACB of the property, the excess is a capital gain. Similarly, if the taxpayer's proceeds are exceeded by the property's ACB, the difference/excess is a capital loss.

[39] Section 85 is in subdivision H of Part I of the Act which sets out particular rules applicable to corporations resident in Canada and their shareholders. Subsection 85(1) is an elective rollover available to a person who transfers eligible property to a corporation and receives shares in the corporation as consideration for the property transferred. Eligible property can include capital property or property that is not capital property. Section 85 sets out rules that apply if such a rollover is elected.

[40] The transferor's proceeds and the corporation's cost are at the lesser elected amount allowing a deferral of the capital or income gain. Paragraphs 85(1)(*g*) and (*h*) specify what the transferor's cost of the shares received is set at the lesser elected amount. Paragraphs 85(1)(*g*) and (*h*) apply for determining cost for all purposes not just for the definition of ACB.

[41] Section 97 is in subdivision J of Part I of the Act which sets out particular rules applicable to partnerships and their members. Subsection 97(1) is a general income computation rule that applies to the transfer of any property by a taxpayer who immediately after the transfer is a member of the partnership. It deems the transaction to have been an acquisition by the partnership of the property's fair market value and a disposition by the transferor at that same amount. There is no directly comparable provision to subsection 97(1) in section 85. The deemed disposition in subsection 97(1) reflects that a partnership is not a person under the Act, though the income of a partnership is computed as if it were a person.

[42] Subsection 97(2) provides an elective rollover available to a person who transfers eligible property to a partnership of which they are a member immediately after the transfer to avoid the immediate income recognition consequences of subsection 97(1) that would otherwise apply.

[43] Unlike subsection 85(1), there is no requirement that the transferor receive units of the partnership upon the transfer. Whereas the Act generally treats each share of a corporation as distinct property, the Act generally only tracks a partner's interest in a partnership. The exceptions, where the Act looks to units of a partnership instead of the overall interest in a partnership, are in Part IX.1 of the Act dealing with specified investment flow-through ("SIFT") partnerships, in the definition of qualified investments for deferred profit sharing plans in Part X, and in the definition of excluded property and specified property for foreign affiliates and their foreign accrual property income ("FAPI") in subdivision I applicable to non-resident corporations and their shareholders.

[44] The exceptional concept of units of a partnership does not appear in either subdivision C dealing with capital gains and capital losses or in subdivision J dealing with partnerships. It is for this reason that there is no need for a subsection 97(2) equivalent for the partnership interest to paragraphs 85(1)(*g*) and (*h*) dealing with the cost of shares received by a transferor in a corporate rollover transaction.

[45] The rules in paragraph 97(2)(*b*) dealing with the ACB of the transferor's partnership interest by definition only apply to a partnership interest that is capital property. This is in contrast to the rules in paragraphs 85(1)(*g*) and (*h*) dealing with the transferor's shares under a corporate rollover.

[46] Clearly, subsection 85(1) is intended to permit the deferral of a gain on the transfer of property to a corporation for consideration that includes shares. It is also clear that the deferred gain is instead to be realized by any later gain on a sale of the property by the corporation or the sale of the shares by the transferor shareholder as a result of the deemed costs of these two properties.

[47] Subsection 97(2) is clearly intended to permit the deferral of a gain on the transfer of property to a partnership of which one is, or thereupon becomes, a partner. It is also clear that the deferred gain will be realized by the partnership upon any later sale of the property by virtue of the incorporation by reference of the section 85 deemed cost to transferee rule.

[48] It is also clear, from the focus of paragraph 97(2)(*b*) being the ACB of the transferor's partnership interest, that this paragraph is relevant to the computation of a gain (or loss) on a later disposition by the transferor of their partnership interest. If subsection 97(2) is to serve as the partnership equivalent of the section 85 corporate rollover rules, it is only logical to expect to find the deferred gain similarly imbedded in the transferor's partnership interest.

[49] It is abundantly clear under the pre-1993 version of subsection of 97(2) that this was the case given the reference in former subparagraph 97(2)(*b*)(ii) to computing the cost of his interest in the partnership if he was not already a partner prior to the transfer.

[50] The question remains whether the Act applicable since the 1982 amendments now requires that the imbedded gain or loss in the transferor's partnership interest is clearly required by the new wording, at least in certain circumstances, to be something totally different than the amount of the deferred gain on the transfer, and the imbedded gain on the property to the partnership.

The Computation of Iberville's ACB in its Partnership Interest Following the Transfers of the Shopping Centres to the Partnership

[51] On the particular facts of this case and the transactions undertaken by the Appellant and others in the Iberville Group including the Partnership and the general partner, I do not see how, even if the Appellant's preferred interpretation of subsection 97(2) was applied, this would give rise to any different result than if the Respondent's interpretation applied.

[52] The reason for this is that the Appellant's interpretation, in addition to giving it the elected amount as an increase in its cost base under paragraph 97(2)(*b*) and subparagraph 53(1)(*e*)(x), also seeks to recognize its cost of the shopping centres computed as their fair market value as the "cost" for purposes of the definition of ACB in section 54.

[53] However, the Appellant does not dispute that the section 54 definition of ACB incorporates the "cost" of a property into its ACB only at the time the particular property was first acquired, and that thereafter only the adjustments provided for in section 53 change that cost base.

[54] In this case the Partnership was validly created and established prior to any of the shopping centres being transferred. The relevant property of the taxpayer whose ACB is to be ascertained in this appeal is Iberville's interest in the partnership. It had already acquired that before the shopping centre transfers. There is therefore no possibility of a successful argument that the "cost" of the increase in their partnership interest should be captured under section 54 in addition to the subsection 97(2) adjustment.

[55] The taxpayer's position is that the "cost" being sought was the difference between the value of the shopping centres and the amount of the promissory notes received, reflected by the additional units in the Partnership received. Not only was this partnership not unitized, as described above, subdivisions C and J dealing with capital gains and losses and partners and partnerships, respectively, do not recognize either (i) changes in the relative interest of a partnership as the acquisition of separate property nor (ii) the issuance of additional units in a partnership.

[56] This is the reason for which this appeal must fail. Paragraph 97(2)(*b*) would apply in this same manner in this case regardless of whether the Partnership was unitized or not.

[57] In the event my interpretation of the Partnership Agreement is incorrect and Iberville first acquired an interest in the Partnership upon the December 15, 2003 transfer of shopping centres from Iberville to the Partnership, I will carry on to consider the Appellant's interpretation of subsection 97(2). This could only be relevant in any event to the December 15, 2003 transfer, as my earlier analysis would not change with respect to the later transfers which occurred long after Iberville first acquired an interest in the Partnership.

Proper Interpretation and Meaning of Paragraph 97(2)(*b*)

Principles of Statutory Interpretation

[58] In *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*,[7] the Supreme Court wrote:

> 21 In *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, this Court rejected the strict approach to the construction of taxation statutes and held that the modern approach applies to taxation statutes no less than it does to other statutes. That is, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (p. 578): see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. However, because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where taxation statutes are concerned: *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, at para. 11. Taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words of a statute are

[7] 2006 SCC 20.

> precise and unequivocal, those words will play a dominant role in the interpretive process.
>
> 22 On the other hand, where the words of a statute give rise to more than one reasonable interpretation, the ordinary meaning of words will play a lesser role, and greater recourse to the context and purpose of the Act may be necessary: *Canada Trustco*, at para. 10. Moreover, as McLachlin C.J. noted at para. 47, "[e]ven where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities." The Chief Justice went on to explain that in order to resolve explicit and latent ambiguities in taxation legislation, "the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation".
>
> 23 The interpretive approach is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. Reference to the purpose of the provision "cannot be used to create an unexpressed exception to clear language": see P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (5th ed. 2005), at p. 569; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622. Where, as in this case, the provision admits of more than one reasonable interpretation, greater emphasis must be placed on the context, scheme and purpose of the Act. Thus, legislative purpose may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision.
>
> 24 Although there is a residual presumption in favour of the taxpayer, it is residual only and applies in the exceptional case where application of the ordinary principles of interpretation does not resolve the issue: *Notre-Dame de Bon-Secours*, at p. 19. Any doubt about the meaning of a taxation statute must be reasonable, and no recourse to the presumption lies unless the usual rules of interpretation have been applied, to no avail, in an attempt to discern the meaning of the provision at issue. In my view, the residual presumption does not assist PDC in the present case because the ambiguity in the *Mining Tax Act* can be resolved through the application of the ordinary principles of statutory interpretation. I will say more on this below.
>
> [Emphasis added.]

[59] In *Canada Trustco Mortgage Co. v. Canada*,[8] a GAAR case, the Supreme Court wrote:

> 47 The first part of the inquiry under s. 245(4) requires the court to look beyond the mere text of the provisions and undertake a contextual and purposive approach to interpretation in order to find meaning that harmonizes the wording, object, spirit and purpose of the provisions of the *Income Tax Act*. There is nothing novel

[8] 2005 SCC 54.

> in this. Even where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities. "After all, language can never be interpreted independently of its context, and legislative purpose is part of the context. It would seem to follow that consideration of legislative purpose may not only resolve patent ambiguity, but may, on occasion, reveal ambiguity in apparently plain language." See P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (4th ed. 2002), at p. 563. In order to reveal and resolve any latent ambiguities in the meaning of provisions of the *Income Tax Act*, the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation.
>
> [Emphasis added.]

[60] In *Montréal (City) v. 2952-1366 Québec Inc.*,[9] the Supreme Court wrote:

> 9 As this Court has reiterated on numerous occasions, "[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see also *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26). This means that, as recognized in *Rizzo & Rizzo Shoes* "statutory interpretation cannot be founded on the wording of the legislation alone" (para. 21).
>
> 10 Words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation. The fact that a municipal by-law is in issue rather than a statute does not alter the approach to be followed in applying the modern principles of interpretation: P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 24.
>
> [Emphasis added.]

[61] In *Silicon Graphics Ltd. v. Canada*,[10] the Federal Court of Appeal wrote the following with respect to the use of Department of Finance Technical Notes that at times accompany changes to income tax legislation:

> 50 Of course, Technical Notes are not binding on the courts, but they are entitled to consideration. See *Canada v. Ast Estate (C.A.)*, [1997] F.C.J. No. 267 (C.A.), para. 27:
>
> > Administrative interpretations such as technical notes are not binding on the courts, but they are entitled to weight, and may

[9] 2005 SCC 62.
[10] 2002 FCA 260.

> constitute an important factor in the interpretation of statutes. Technical Notes are widely accepted by the courts as aids to statutory interpretation. The interpretive weight of technical notes is particularly great where, at the time an amendment was before it, the legislature was aware of a particular administrative interpretation of the amendment, and nonetheless enacted it.
>
> [Emphasis added.]

[62] In *National Bank Life Insurance v. Canada*,[11] the Federal Court of Appeal wrote the following with respect to conflicting interpretations of a statutory provision:

> 9 One of the fundamental principles of legislative construction is that a statute or provision of a statute which deals specifically with a subject-matter must take priority over, and override, any general legislation or provision dealing with the same subject-matter. The rule is derived from the Latin maxim *generalia specialibus non derogant*. In her work entitled *Sullivan and Driedger on the Construction of Statutes*, 4th ed., Toronto, Butterworths, 2002, at p. 273, Prof. Sullivan states the following regarding this rule of construction:
>
> > When two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first.
>
> 10 In *Vidéotron Ltée v. Industries Microlec*, [1992] 2 S.C.R. 1065, at page 1080, Gonthier J. observed that "[i]t is well settled that specific rules prevail over general rules". In the case at bar, section 2 prevails over section 1 and the tax treatment of financial services relating to an insurance policy is governed by section 2.
>
> [Emphasis added.]

Application

[63] There is no suggestion that subsection 97(1) should apply in the circumstances described in subsection 97(2), and it is subsection 97(1) that would be the specific rule which would provide that a transferor partner's cost of their partnership interest is fair market value. Subsection 97(1) appears to be a necessary part of the Act given that partnerships are not themselves persons under the Act, but are only required by section 96 to compute their income as if they were.

---

[11] 2006 FCA 161.

[64] Subsection 97(2) specifically sets out the rules which apply where a rollover is elected by all of the members of the partnership. Both the French and English versions of the subsection begin with the phrase "notwithstanding any other provision of this Act". The French version specifies that "the following rules apply".[12] There is no clear suggestion in the specific rules in subsection 97(2) that the general rules for determining cost base in paragraph (*b*) of the definition of ACB in section 54 should give a cost equal to fair market value in circumstances where subsection 97(2) applies.[13]

[65] It is not obvious from the language used in subsection 97(2), read in context, that there is a moment in time at which the transferor partner could recognize a cost under the section 54 definition of ACB that is not immediately after the partnership acquired the property. Section 97 uses the phrase "immediately after . . . the partnership . . . acquired the property" in subsection 97(1), or in French "immediately after the moment of acquisition". It uses the phrase "immediately after the disposition" in subsection 97(2).

[66] Similarly, paragraph 97(2)(*c*) which deals with the flow-through of the character of taxable Canadian property if such property is transferred from a partner to a partnership on a taxable basis or on a rollover basis, applies "at any time that is within 60 months after the disposition", or in French "at any moment in the 60 months following the disposition". Just as the Appellant's moment in time of the disposition not being after the disposition would lead to an absurd and presumably unintended result, so too would it similarly lead to an absurd and unintended opportunity to shed a property's taxable Canadian property status by flowing it into a partnership.

[67] In short, I do not see room for the taxpayer's interpretation of the text of subsection 97(2) and the section 54 definition of ACB if read in context and having regard to their purpose.

[68] If the taxpayer is correct and there is a moment in time upon the disposition, that is not at least immediately after the disposition or acquisition, at which point the cost of transferred property could be added under section 54 to the transferor's ACB of its partnership interest, I would nonetheless reject such an interpretation of

[12] The phrase "the following rules apply" was also in the English version prior to the 1982 amendments.
[13] Paragraph (*b*) of the definition of ACB in section 54 would sensibly keep any pre-existing cost of the partnership interest to the transferor partner, for example with respect to the later shopping centre transfers by Iberville in this case.

the words of the statute, in favour of my reading as described above for the following reasons:

(i) The Appellant acknowledges it leads to an absurd and unintended result.

(ii) The specific language used in section 97 for exactly such transactions should override the general.

(iii) The 1982 Explanatory Notes confirm that no substantive changes were intended by the 1982 amendments.

(iv) The preferred interpretation described above is more consistent with the purpose of the provisions in question themselves.

(v) Even if the taxpayer is correct that its interpretation is the only one the text of subsection 97(2) permits of, since the Supreme Court of Canada in *Placer Dome* and in *Canada Trustco*, above, recognizes the possibility that the text of a provision which has no patent ambiguity can have a latent ambiguity revealed or resolved by statutory context or purpose, this is perhaps an example of just such a latent ambiguity in which case I would again arrive at the same result for the same reasons in arriving at the proper interpretation and meaning of these provisions given the latent ambiguity. It is an unfortunate fact that the French and English languages are capable of more precision than many people using them — including judges, lawyers, drafters and legislators. This is perhaps why the courts have introduced the concept of a latent ambiguity in a textual reading.

[69] The appeal is dismissed with costs.

Signed at Ottawa, Canada, this 28th day of May 2018.

"Patrick Boyle"

Boyle J.

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