Docket: 2012-1424(IT)G

BETWEEN:

PAUL LIVINGSTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 20, 2014, at Toronto, Ontario.

Before: The Honourable Justice K. Lyons

Appearances:

Counsel for the Appellant:	Gordon R. McClellan
Counsel for the Respondent:	Laurent Bartleman

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2006 taxation year is dismissed, with costs to the respondent.

Signed at Ottawa, Canada, this 29th day of January 2015.

"K. Lyons"

Lyons J.

Citation: 2015 TCC 24
Date: 20150129
Docket: 2012-1424(IT)G

BETWEEN:

PAUL LIVINGSTON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lyons J.

[1] This is an appeal by Paul Livingston, the appellant, from a reassessment of his 2006 taxation year relating to an increase to the taxable capital gain in respect of the sale of his interest in land described as Part 1, situated in Brampton, Ontario. The Minister of National Revenue reassessed based on his determination that farm assets (non-real property), acquired following the sale of the appellant's interest in land, did not constitute "replacement property" within the meaning of subsection 44(5) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the "*Act*").

[2] The appellant, a farmer, operated the dairy Farm Business on the Farmland Property with his mother prior to her death. They each owned one-half interest in the Farmland Property. He and his six siblings entered into agreements with trustees of his mother's estate (the "Estate") to settle the Estate.

[3] The Farmland Property was subsequently severed into three parts to facilitate the sale of Part 1 ("Total Land Sold") to a third party land developer to settle the Estate. The Total Land Sold included eight acres the appellant had beneficially owned. Of the eight acres, he used the proceeds from the sale of 3.2 acres interest in land (the "farmland" and also identified as the Extra Portion), to satisfy the Promissory Note he had given to the Estate in order to purchase the remaining one-third interest in the Farm Business.[1]

[4] The Farm Business comprised livestock, farm equipment, feed, grain, growing crops, the bank account and the milk quota (the "Assets"), all of which had been used in the Farm Business when he operated it with his mother.[2]

[5] The appellant elected under subsection 44(1) of the *Act* to defer the capital gain on the sale of the farmland, which would otherwise be included in income, and claims that the Assets constitute "replacement property".

[6] The issue in this appeal is whether the Assets acquired by him qualify as "replacement property", within the meaning of subsection 44(5) of the *Act*, for the farmland sold.

I. Facts

[7] The facts of this case are undisputed. An Agreed Upon Statement of Facts was provided by the parties. The agreed upon facts are as follows:

> **Agreed Upon Statement of Facts**
>
> **A. BACKGROUND**
>
> **The Farmland Property**
>
> 1. Kathleen Livingston ("**Kathleen**") and Armous Livingston ("**Armous**"),the mother and father respectively of the Taxpayer, acquired real property in or about 1952, comprising approximately 97.02 acres[1] in the City of Brampton, Ontario (the "**Farmland Property**"). Armous and Kathleen were the owners of the Farmland Property on December 31, 1971.
>
> 2. On August 25, 1999, Kathleen and Armous transferred an undivided one third (1/3) interest in the Farmland Property to the Taxpayer[2] pursuant to subsection 73(3.1) of the *Income Tax Act* (the "Tax Act"). By virtue of this transfer, the Farmland Property was owned equally by Armous, Kathleen and the Taxpayer as joint tenants, all with right of survivorship.
>
> 3. On or about April 13, 2001, Armous died, and the Taxpayer and 1Kathleen became the owners of the Farmland Property, each as to an undivided one half (1/2) interest, as joint tenants. This result occurred by automatic operation of law as a result of the death of Armous, by virtue of the joint tenancy.
>
> 4. Pursuant to an election under subparagraph 70(9.01)(b) of the Tax Act, Armous was deemed to have disposed of his undivided one third (1/3)

interest in the Farmland Property immediately prior to his death for $574,760.[3]

5. On November 27, 2001, Kathleen executed a transfer of her interest in the Farmland Property from herself to herself for the purpose of severing the joint tenancy with the Taxpayer.[4] This step was taken by Kathleen in order to prevent the Taxpayer from becoming the exclusive owner of the Farmland Property upon her death by virtue of the automatic operation of law attributable to the joint tenancy. If she had not done this she would have, effectively, disinherited the balance of her heirs from any entitlement to participate in the ownership of the Farmland Property.

6. After the transfer the Taxpayer and Kathleen continued each to own an undivided one half (1/2) interest in the Farmland Property, provided only that their ownership was now as tenants in common and not as joint tenants. The undivided one half (1/2) interest thereafter owned by Kathleen as a tenant in common with the Taxpayer is hereinafter referred to as the "**Mother's Land Interest**". The Taxpayer's undivided one half (1/2) interest is hereinafter referred as the "**Taxpayer's Land Interest**".

The Farm Business

7. Kathleen and Armous owned and continuously operated a dairy farm on the Farmland Property from the early 1950s until 1992 (the "**Farm Business**"). The dairy farm consisted, and continues to consist, of all the necessary and customary assets required to operate a dairy farming business for the lawful production of milk. The assets of the Farm Business as of June 3, 2005 were as set out in Schedule A. The assets of the Farm Business, the preponderance of which is non-depreciable, were at all material times, materially the same as those set out Schedule A, all of which were used, and continue to be used, solely in the Farm Business.

8. In 1992 Kathleen and Armour gifted a one third (1/3) interest in the Farm Business to the Taxpayer.

9. The Taxpayer operated the Farm Business under the name "Goreridge Farm" together with Kathleen and Armous until their respective deaths and the Taxpayer has continued to operate the Farm Business at all times material to this appeal.

10. Upon the death of Armous on November 27, 2001, the Taxpayer received Armous' one third (1/3) interest in the Farm Business. Thereafter the Taxpayer owned two thirds (2/3) and Kathleen owned one third (1/3) of the Farm Business, Kathleen's interest in the Farm Business is hereinafter referred to as the "**Mother's Farm Business Assets**".

B. DEATH OF KATHLEEN LIVINGSTON

Kathleen's Will

11. Kathleen died on June 3, 2005. The terms of her Will, attached as **Schedule B**, provided that the residue of her estate (the "**Estate**") which included, but did not specifically refer to, the Mother's Land Interest and the Mother's Farm Business Assets, passed to her children other than the Taxpayer ("**Kathleen's Beneficiaries**"). None of Kathleen's Beneficiaries had previously had an ownership interest in the Farmland Property or the Farm Business.

12. In connection with the administration of the Estate, the total assets of the Farm Business were valued at $1,250,666.00 (the "**Farm Business Value**"), of which approximately $416,889.00, being 1/3 of the Farm Business Value, was attributable to the Mother's Farm Business Assets.

13. The Taxpayer did not wish to own or operate the Farm Business with any of Kathleen's Beneficiaries.

14. As part of the administration of the Estate, Kathleen's undivided one half (1/2) interest in the Farmland Property was conveyed to Kathleen's Estate Trustees.[5] By virtue of the Transmission, the Farmland Property was vested in the Estate and the Taxpayer personally each as to an undivided one half (1/2) interest as tenants in common.

C. OFFER TO PURCHASE PART OF THE FARMLAND PROPERTY

Agreement to sell Part of the Farmland Property

15. The Taxpayer and the Estate received an unsolicited offer from a third party to purchase part of the Farmland Property.

16. The Estate wished to divest itself of its entire interest in the Farmland Property; the Taxpayer did not. The Taxpayer agreed to the sale of part of the Farmland Property subject to the following conditions which were imposed by the Taxpayer:

    (i) any agreement of purchase and sale of part of the Farmland Property would be conditional on the Estate and the Taxpayer entering into an asset purchase agreement pursuant to which the Estate agreed to sell, and the Taxpayer agreed to buy, the Mother's Farm Business Assets;

    (ii) the Farmland Property would be divided into (2) unequal portions and dealt with as follows:

(a) one portion, being Part 3 in the R Plan, comprising 16.958 hectares would be registered exclusively in the name of, and beneficially owned by, the Taxpayer ("**Taxpayer's Retained Land**"), following the severance referred to in Paragraph 17; and

(b) the other portion, being Part 1 on the R Plan comprising 23.561 hectares (the "**Total Sold Land**") remained registered in the names of the Estate Trustees and the Taxpayer to be dealt with in accordance with the provisions of the Asset Purchase Agreement and would include 3.301 hectares (the "**Taxpayer's Sold Land**") beneficially owned by the Taxpayer. All of the Total Sold Land would be sold to the third party.

(iii) the agreement of purchase and sale for the sale of the Total Sold Land must contain a provision requiring the purchaser to enter into a lease (the "**Farm Lease**") permitting the Taxpayer to continue farming all of such land until the Total Sold Land was ready for development. This entitled the Taxpayer to continue farming the Farmland Property in the same manner as he and his parents had done historically, notwithstanding the sale of the Total Sold Land.

The Severance

17. In order to make the Farmland Property lawfully saleable it was necessary to sever the Farmland Property (the "**Severance**") into the requisite parts. In order to obtain the severance it was necessary to agree to transfer a part of the Farmland Property to the Corporation of the City of Brampton to be used as a road allowance.

18. By Agreement of Purchase and Sale effective April 19, 2006 (the "**Estate Sale Agreement**") attached as **Schedule C**, the Estate, together the Taxpayer, as a covenantor for other purposes, agreed to sell the Total Sold Lands to Edenfield Developments Inc. ("**Edenfield**"), an arm's length party.

19. The Estate Sale Agreement was conditional for a period of four (4) months upon the vendor obtaining the Severance. The Severance was obtained, and the Farmland Property was severed into the three (3) parts, being Part 1, Part 2 and Part 3 on Plan 43R-31133 (the "**R Plan**"), a copy of R Plan is attached as **Schedule D**. The three (3) Parts of the R Plan were disposed of as follows:

(i) Instrument No. PR1176017 is a Transfer by Personal Representative registered November 28, 2006 pursuant to which

the Estate Trustees of the Estate and the Taxpayer transferred Part 2 on the R Plan, consisting of 0.13 hectares, to the Corporation of the City of Brampton as a road allowance in satisfaction of the Severance condition referred to in paragraph 17;

(ii) Instrument No. PR1176018 is a Transfer by Personal Representative registered November 28, 2006 pursuant to which the Estate Trustees of the Estate and the Taxpayer jointly transferred Part 3 on the R Plan, comprising 16.95 hectares, to the Taxpayer; and

(iii) Instrument No. PR1179557, registered December 4, 2006, is a Transfer of Part 1 on the R Plan pursuant to which the Total Sold Land was transferred by the Taxpayer and the Estate Trustees of the Estate to Richmead, pursuant to the Estate Sale Agreement;

The Asset Purchase Agreement

20. As a requirement of the Taxpayer, the Estate Sale Agreement for the Total Sold land was made conditional until May 19, 2006, upon him and the Estate entering into a mutually satisfactory asset purchase agreement pursuant to which the Taxpayer would purchase the Mother's Farm Business Assets from the Estate.

21. (a) The Estate and the Taxpayer entered into an Asset Purchase Agreement made as of the April 19, 2006 (the "**Asset Purchase Agreement**"), a copy of which is attached as **Schedule E**, respecting the Taxpayer's purchase of the Mother's Farm Business Assets. Attached as **Schedule F** is a copy of the Bill of Sale dated June 1, 2006 delivered by the Estate to effect the transfer of the Mother's Farm Business Assets to the Taxpayer.

(b) The Asset Purchase Agreement provides as follows:

(i) the Taxpayer agreed to provide consideration on closing for his purchase of the Mother's Farm Business Assets in the form of a promissory note (the "**Promissory Note**"), a copy of which is attached as **Schedule G**;

(ii) the Total Sold Lands would comprise the lands described in the Asset Purchase Agreement as the "**Remainder Lands**", being beneficially owned by the Estate, the "**Extra Portion**", and the "**Additional Acreage**",[6] both being beneficially owned by the Taxpayer; and

(iii) the proceeds from the sale of the Total Sold Land would be distributed as follows:

(a) the proceeds on account of the Remainder Lands would be kept by the Estate as its exclusive property;

(b) the proceeds on account of the Extra Portion would be kept by the Estate in full satisfaction of the **Promissory Note**; and

(c) the Estate would receive the proceeds (net of any real estate commissions and Goods and Services Tax) on account of the Additional Acreage and as bare trustee for the Taxpayer.

Allocation of the Sale Proceeds

22. The sale price for the Total Sold Land was approximately $7,628,850 of which the Taxpayer's share, being the amounts attributable to the Extra Portion and the Additional Acreage, was $1,003,088 (the "**Taxpayer's Sale Proceeds**"). The Taxpayer's Sale Proceeds were distributed as follows:

(i) $423,555, which was on account of the sale of the Extra Portion, was kept by the Estate in full satisfaction of the Promissory Note; and

(ii) $579,533, which was on account of the sale of the Additional Acreage, was paid by the Estate to the Taxpayer as his absolute and exclusive property.

23. On the closing of the Estate Sale Agreement, Edenfield directed that title to the Total Sold Land be registered in the name of Richmead Developments Inc. ("**Richmead**"), who became the registered owner of that land.

The Farm Lease

24. It was a condition of the Estate Sale Agreement that Richmead, as landlord, would enter into a lease with the Taxpayer, as tenant, (the "**Farm Lease**") permitting the Taxpayer to continue farming Part 1 on the R Plan, without the payment of rent, until the issuance of draft plan approval for a residential plan of subdivision upon that property and Richmead commenced preparing Part 1 on the R Plan for the installation of roads and services. The Farm Lease was duly executed and registered against Part 1

on the R Plan the 4th day of December, 2006 as Instrument No. PR1180033, a copy of Instrument No. PR1180033 is attached as **Schedule H**, and a copy of the Farm Lease is attached as **Schedule I**.

25. Since the execution of the Farm Lease, at all times material to this appeal, the Taxpayer continued using the Farm Property for the purposes of the Farm Business in exactly the same manner that he did when he and Kathleen owned and operated the Farm Business.

26. The Taxpayer recognized the following capital gain on the disposition of his interest in the Farmland Property:

Sale price	$1,003,088
ACB	69,779
Subtotal	933,309
Outlays and expenses	37,093
	$ 896,216

27. The Taxpayer had $6,658 of unused net capital losses from prior years which were applied against the Taxpayer's taxable capital gain from the sale of his interest in the Farmland Property.

All footnote references in the Agreed Upon Statement of Facts are set out in the attached Schedule "A".

[8] The Agreed Upon Statement of Facts was supplemented by the appellant's testimony at the hearing. He gave his evidence in a forthright manner. The appellant chose the farming lifestyle and his six siblings chose to pursue other occupations. He had entered into a succession plan with his siblings relating to his late mother's half-interest in the Farmland Property and her one-third interest in the Farm Business. He testified that the sale of any part of the Farmland Property was conditional upon him acquiring the Assets to gain full ownership of the Farm Business. This is confirmed by the agreements tendered in evidence at the hearing. He ultimately used the proceeds from the sale of the farmland to satisfy the Promissory Note that he had provided to purchase the Assets.[3]

[9] The appellant asked the developer to lease the Total Land Sold to allow him to continue to use it for the dairy farm - as in the past - to grow forage crops and cattle would pasture on grazing grass. The agreements in evidence show that it was a condition requested by the appellant that the developer enter into the Farm Lease permitting the appellant to continue farming the Total Land Sold, including the farmland, in the same manner that he and his parents had done. The developer

agreed to do so at $1.00 per year until the developer started to remove the topsoil for development. This leasing arrangement was ongoing at the time of the hearing.

[10] The appellant stated that good quality feed is grown on the Farmland Property and it cannot be purchased from other farmers. He described the interconnectedness of the equipment to work the land. This produced forages and the harvest went into silos to feed the cows so there is milk production to fill the daily milk quota that must be provided to the Dairy Farmers of Ontario in order for the business to sell the milk through that organization.

[11] When asked in cross-examination if the appellant could grow crops on the tractor, he stated that all the equipment (Assets) purchased was used to enable the farming operation to grow crops and that everything revolves around the production of forages for the dairy herd. He admitted that the right to sell milk (the milk quota) is the most valuable asset to a dairy farm. He agreed he acquired the equipment and that right as depreciable assets which he depreciated. Except for gaining full ownership of the Farm Business, he indicated that there has been no change in the use of the farmland or the use of the Assets in producing the forages.

II. Statutory Provisions

[12] The relevant portions of subsection 44(1) provide that:

> **44(1) Exchanges of property.** Where at any time in a taxation year (in this subsection referred to as the "initial year") an amount has become receivable by a taxpayer as proceeds of disposition of a capital property that is not a share of the capital stock of a corporation (which capital property is in this section referred to as the taxpayer's "former property") that is …
>
> …
>
> (*b*) a property that was, immediately before the disposition, a former business property of the taxpayer,
>
> and the taxpayer has
>
> …
>
> (*d*) in any other case, before the later of the end of the first taxation year following the initial year and 12 months after the end of the initial year,
>
> acquired a capital property that is a replacement property for the taxpayer's former property …

[13] Replacement property is defined in subsection 44(5) as:

> **44(5) Replacement property.** For the purposes of this section, a particular capital property of a taxpayer is a replacement property for a former property of the taxpayer, if
>
> > (*a*) it is reasonable to conclude that the property was acquired by the taxpayer to replace the former property;
> >
> > (*a*.1) it was acquired by the taxpayer and used by the taxpayer… for a use that is the same as or similar to the use to which the taxpayer … put the former property;
> >
> > (b) where the former property was used by the taxpayer … for the purpose of gaining or producing income from a business, the particular capital property was acquired for the purpose of gaining or producing income from that or a similar business… for such a purpose.

[14] Former business property is defined in subsection 248(1) as:

> "former business property" of a taxpayer means a capital property of the taxpayer that was used by the taxpayer or a person related to the taxpayer primarily for the purpose of gaining or producing income from a business, and that was real property of the taxpayer, an interest of the taxpayer in real property, but does not include
>
> > (*a*) a rental property of the taxpayer,
> >
> > (*b*) land subjacent to a rental property of the taxpayer,
> >
> > (*c*) land contiguous to land referred to in paragraph (*b*) that is a parking area, driveway, yard or garden or that is otherwise necessary for the use of the rental property referred to in that paragraph, or
> >
> > (*d*) a leasehold interest in any property described in paragraphs (*a*) to (*c*),
>
> …

III. Analysis

[15] Section 44 is an exception to the normal rule on capital gains that tax is normally payable on the disposition of capital property. Subsection 44(1) permits a taxpayer to a rollover of the cost base of the property and deferral of the accrued capital gain arising on the disposition of capital property (that was stolen, destroyed or expropriated and paid by insurance or was a "former business

property") if the proceeds are reinvested in a "replacement property" and it is acquired within a specified time. A taxpayer must file an election in his or her return of income for the year in which the replacement property was acquired.

[16] The taxpayer has the onus to bring himself or herself within the four corners of the exempting provision satisfying all its requirements to meet the definition of a "replacement property" in subsection 44(5) of the *Act*. In this appeal, only paragraphs 44(5)(*a*), (*a.1*) and (*b*) are in issue, paragraphs (*c*) and (*d*) are not. The provisions are written conjunctively.

[17] Replacement property in subsection 44(5) focuses on a particular capital property acquired to replace the former property disposed of and if the acquisition was:

1. to replace the former property (paragraph (*a*));

2. for the same or similar use to which the taxpayer put and used the former property (paragraph (*a.1*)); and

3. for the same or similar business as the former property for income producing purposes (paragraph (*b*)).

[18] In this case, the "former property" was immediately before the disposition a "former business property", referenced in paragraph 44(1)(*b*), and in turn the later is defined in subsection 248(1) to be real property or an interest therein.

[19] The formulation of the proper approach to statutory interpretation - requiring a textual, contextual and purposive analysis – was restated by the Supreme Court in *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54, [2005] 2 SCR 601 in stating:

> 10. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. …

> 13. The Income Tax Act remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation.[4]

Textual Analysis

[20] In the *Canadian Oxford Dictionary,* 2d ed., the word "replace" is defined as follows:

> replace **1** put back in place. **2** take the place of; succeed; be substituted for. **3** find or provide a substitute for. **4** … fill up the place of. **5** … be succeeded or have one's place filled by another; be superseded.

[21] In *Black's Law Dictionary,* 7th ed.,"replace" is defined as:

> **Replace.** To place again; to restore to a former condition. … Term, given its plain, ordinary meaning, means to supplant with substitute or equivalent.

[22] A textual interpretation of the words in paragraph 44(5)(*a*) that a particular capital property is a replacement property if it was acquired as a substitute for or an equivalent to a former property suggests that the replacement property should be the same type of property. In the present case, farmland is to replace farmland.

[23] The appellant's position is that the Assets constitute "replacement property" for the farmland sold because the Assets are inextricably linked to the dairy Farm Business. This is demonstrated by the sale of the farmland and that the purchase of the Assets were interconnected with causality of that sale and the obligation of the Estate to sell the Assets to the appellant. Further, there is no explicit requirement in section 44 that a former business property must be replaced with the same type of property except that it be capital property.

[24] The respondent's position is that the Assets - being fundamentally different in nature than the farmland - do not qualify as "replacement property" as the words "to replace" within the meaning of paragraph 44(5)(*a*) means a direct substitution of land for land in the present appeal. Therefore, it is not reasonable to conclude that the Assets were acquired to replace the farmland. Further, since the farmland, as part of the Total Land Sold, was immediately leased back to the appellant by the developer, there was no change or substitution for the farmland.

[25] Neither counsel were able to cite any case involving the replacement property provisions in which the acquired and disposed of capital properties differed in type or nature from each the other. Respondent counsel stated that other

than the dictionary definitions, he was unable to find any useful guidance interpreting section 44 of the *Act* in the circumstances of the present appeal.

[26] Despite the textual interpretation, conceivably there is some potential ambiguity as to whether capital property must be replaced by capital property of the same type thus supporting more than one interpretation. In such instances, the ordinary meaning of the words plays a lesser role in the interpretive process and recourse to the context and purpose is necessary.[5]

[27] Therefore, I turn to the contextual analysis to read the provision of the *Act* as a harmonious whole.

Contextual Analysis

[28] Implicit in the contextual analysis is that the grammatical and ordinary view of a provision is not determinative of its meaning. Therefore, the Court aims from the text and the wider context of the provision to ascertain Parliament's intent.

[29] Contextual aids are found in the evolution of the *Act* which may throw light on Parliament's intention when amending or adding to a statute or in considering other similar provisions.

[30] Section 44 was added to the *Act* at the time that the capital gains tax was implemented in 1972.[6] The Carter Commission's report outlined that section 44 provided a rollover for capital property that was expropriated or destroyed. However, the wording in section 44, modelled on subsection 20(5a), did not have an equivalent "like property for like property clause" similar to the predecessor paragraph 20(5a)(*i*) which was introduced in 1955 and provided a rollover when insurance proceeds for the loss or destruction of depreciable property were reinvested in the same class of depreciable property.[7]

[31] The term "replacement property" was used, but not defined in section 44 until April 1978. Section 44 was amended twice in 1978. The first amendment restructured section 44 into its present form leading to the addition of:

1. a voluntary rollover for replacing real property in paragraph 44(1)(*b*);
2. the definition of "former business property" in subsection 248(1); and
3. the definition of "replacement property" in subsection 44(5).

[32] The Minister of Finance described the purpose of the voluntary rollover as a means of helping taxpayers to expand their businesses. He remarked that:[8]

> In order to qualify, the properties must be real property and replacement must be effected before the end of the year following the year of the sale.

[33] Under the first amendment, subsection 44(5) required that the replacement property had to be put to the "same" use as the former property and be used in the same business.[9] It was noted that the word "same" was problematic because:

> The definition was too narrow, and if a farmer was operating a grain business there were some rulings by the Department of National Revenue that the reinvestment had to be in grain-producing land. We broadened the definition so that if a person sells a grain-producing farm and buys a new farm to raise cattle, or some other farming operation, that is allowed, rather than the narrow interpretation National Revenue was applying.[10]

[34] The second amendment was made quickly adding the word "similar" to both tests in paragraphs 44(5)(*a.1*) and (*b*). The wording was revised to reflect the "same as or similar to the use" and "that or similar business" for income earning purposes, respectively. Parliament's objective in introducing the second amendment was to ensure a broader application allowing farmers a tax-free rollover on the disposition of property "so long as they stay in the farming business".[11]

[35] The Technical Notes to the amendments in 1991 to paragraphs 44(5)(*a*) [now *a.1*] and 44(5)(*b*) to broaden the availability and benefit of the rollover to allow parties related to the taxpayer (not relevant in this appeal) provide an example indicating in the Notes a land for land proposition.[12]

[36] In 1998, subsection 44(5) was amended so that existing paragraph 44(5)(*a*) was moved to (*a.1*) and a new paragraph 44(5)(*a*) was added so that a property will be a replacement property if it is reasonable to conclude that the property was acquired by the taxpayer to replace the former property.[13]

[37] Interpretation bulletins can be a factor a court can consider in a case of doubt in the meaning of legislation. At the time of the acquisition and disposition of properties in the present appeal, the relevant Interpretation Bulletin was IT-259R4 dated September 23, 2003. At paragraph 15, it reads:

> **Replace the Former Property**

> 15. To satisfy the requirement in paragraph 14(7)(a) and in paragraphs 13(4.1)(a) and 44(5)(a) (as described in s 14(a)(i) and 14(b)(i)), it must be reasonable to conclude that the property was acquired to replace the former property. In this regard, there must be some correlation or direct substitution, that is, a causal relationship between the disposition of a former property and the acquisition of the new property or properties. Where it cannot readily be determined whether one property is actually being replaced by another, the newly acquired property will not be considered a replacement property for the former property.

[38] That Interpretation Bulletin refers to a "direct substitution" of the former property with the acquired property. A recurring theme in the interpretation bulletins, as section 44 evolved, has been the need, according to the Minister's opinion, for the acquired property to generally bear the same physical description as the former property (such as land replaced by land).[14]

[39] Parliament has also created parallel rules, with similar treatment and requirements to section 44, for more specific species of property. In taking that approach, presumably Parliament's intent is that capital properties disposed of and acquired, within the context of section 44, would also need to be the same species.[15]

[40] When paragraph 44(5)(*a*) was added to the existing requirements in subsection 44(5), it specifies that reasonableness is to be considered as to whether the acquired property was to replace the former property. Thus would an objective and knowledgeable observer, with judgment, conclude that the Assets were purchased as a direct substitute for the farmland.

[41] The appellant argues that all that is required is some correlation or interconnectedness between the Assets and the farmland which are inextricably linked by virtue of the Assets being used in the exact same dairy Farm Business for the purpose of earning income. The sale of the farmland and the purchase of the Assets supports that interconnection. The appellant's submission on this paragraph is broader and more expansive and conflates the requirements in each of paragraphs 44(5)(*a*) and (*a.1*) and likely (*b*), without focussing more directly on the elements within that paragraph.

[42] In my opinion, given the differences as between the Assets and the farmland and considering the wider context, encompassing its historical evolution and in line with the statutory regime providing for specific rules for specific types of property, I interpret the words "to replace" in paragraph 44(5)(*a*) to mean that Parliament

intended a direct substitution so that the same species of capital property would be required for the acquired property to constitute a replacement property for the former property. I find that it cannot reasonably be concluded that the Assets were to replace the farmland within the meaning of paragraph 44(5)(*a*) of the *Act*.

[43] The word "use" in paragraph 44(5)(*a.1*) has been interpreted to mean actual use for some purpose .[16]

[44] The appellant's position is that the use in question was earning income and the Assets were acquired – and were used – in the same Farm Business in which he used the farmland, all of which were inextricably linked with the purpose of making the farm work and generating income. In his evidence, the appellant described his farming process as commencing with seeding in the springtime and harvesting of the crops in the summer months. He grew good quality feed on the farmland as part of the greater Farmland Property with storage of the forages for the cows so that they can be milked.

[45] Where the taxpayer can show more than a passing resemblance between the purpose or utilization of the former property and the replacement property, they should be considered similar for the purposes of paragraph 44(5)(*a.1*).[17]

[46] Appellant counsel asserts the use and the purpose the farmland was put to was dairy farming and that wide scope should be given to the word "similar" in interpreting paragraph 44(5)(*a.l*). Such that the land was used to grow crops and pasture cattle. Tractors were used to pull equipment. The harrow and the rake were used to prepare the land. Preparing the land to grow grass is very similar to growing the grass. The purpose remains the same, the production and sale of milk, with the utilization being very similar.

[47] Similarly, he argues, where the land was used to feed and pasture the cows which produced the milk, the milk quota is used to gain access to the market to sell the milk. Without the milk quota, there would be no dairy farm. The purpose of the milk quota remains the same as the land, the production and sale of milk. Plus there was no change in the use to which any of the Assets were put or in the purpose for which they were used in the same Farming Business for the purpose of producing income. All of which worked in concert for the production of milk in the Farm Business. Therefore, paragraph 44(5)(*a.1*) is satisfied. In his view, parsing out different aspects of the Farming Business would be artificial. I disagree.

[48] First, the *Act* routinely makes distinctions between different classes of assets. For example, subsections 13(4), in respect of a depreciable property of a prescribed class, and 14(6), in respect of eligible capital property with the companion "replacement property" rules in subsections 13(4.1) and 14(7), respectively. Second, the net is not cast as broadly as suggested by the appellant in suggesting that it is suffice for paragraph 44(5)(*a.1*) that the Assets be used for the same overall purpose of gaining or producing income from a dairy farm to make it work. That paragraph, in my view, requires a narrower scope with a comparative analysis of the actual use of the acquired and disposed of properties in determining if the Assets were acquired and used for a use that is the "same as or similar to" the use to which the appellant put the farmland.

[49] Respondent counsel argues the actual use of the farmland was growing grass and pasturing cattle and the purpose of the use was the production and sale of milk. Although the physical Assets were used to help grow the grass and pasture the cows, the use to which the farmland was put differed. Preparing the land with a tractor is not the same as growing crops on land nor can crops be grown on a tractor. The milk quota is even further removed from growing crops or pasturing cattle. It was the major farm asset, as part of the production and sale of milk, providing a right to access the supply management system set up to regulate the price of milk. He said that the Assets were not acquired for the use - nor used – for the "same" purpose to which the appellant had put the farmland.

[50] I disagree with respondent counsel that it has to be the "same" use. As noted, the legislation was amended to also permit a "similar" use. Other than that, I agree that growing crops and pasturing cattle on the farmland is not the same nor, in my view, is it similar to a use to which the physical Assets and milk quota were put. As noted by respondent counsel, the Assets merely helped as part of the wider process. I find that the Assets were not acquired for the "same or similar" use to which the farmland was put.

[51] With respect to paragraph 44(5)(*b*), the question is whether the Assets acquired were for the purpose of earning income from a business that was the same or similar to the business carried out on the farmland. Other than the appellant having obtained full ownership in the Assets and that farmland was leased, the appellant continued to use the same Assets in the same business on the farmland.

[52] For the reasons set out above, the requirements in each of paragraphs 44(5)(*a*) and (*a.1*) were not satisfied. I conclude that the Assets cannot be a

"replacement property" for the farmland within the meaning of subsection 44(5) of the *Act*.

[53] The appeal is dismissed, with costs to the respondent.

Signed at Ottawa, Canada, this 29th day of January 2015.

"K. Lyons"

Lyons J.

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[1] The proceeds from the remaining 4.8 acres "Additional Land" was used by the appellant for purposes unrelated to the farmland. The Extra Portion forms part of 23.561 hectares sold to the land developer and identified as Total Sold Land in Part 1 in R Plan.

[2] Exhibit R-1, Tab E, Schedule B, The Business Assets – pages 14 and 15.

[3] The appellant provided a non-interest bearing Promissory Note as the Assets transaction closed before the ESA transaction was completed and $432,000 was held back by the lawyer to discharge the liability for the Note.

[4] See also *Placer Dome Canada Ltd. v Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 SCR 715 (*Placer Dome*).

[5] In *Placer Dome, supra*, the Supreme Court held that taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words of a statute are clear and unequivocal, those words will play a dominant role in the interpretive process. 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. Legislative purpose may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision. See also *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559. The modern approach to statutory interpretation recognizes the important role that context plays when construing the words of a statute.

[6] In 1972, subsection 20(5a) was moved to subsection 13(4) and was expanded to cover amounts payable as compensation for property of a prescribed class taken under statutory authority.

[7] The Royal Commission on Taxation (the "Carter Commission") recommended taxing capital gains and also that a similar rollover be created to cover the capital gains resulting from involuntary dispositions comprising insurance payments, expropriations and accidents as businesses would normally need to reinvest the proceeds in order to "ensure continuity of business" providing relief from capital gains when a disposition was triggered by an involuntary event. It stated that the rollover should require that the replacement property be similar to the former property, but cautioned against providing a rollover on voluntary dispositions even if the proceeds were re-invested in a business because of "serious definitional problems" and uncertainty.

[8] Minister of Finance, Jean Chrétien, House of Commons Debates, 30th Parliament, 3rd Session (December 1, 1977) at 1458.

[9] During the debate on this provision in Parliament, the Opposition remarked that the wording of this provision was vague and uncertain. Comments critiquing the section were read into the record to highlight the problems stating it will undoubtedly cause problems of interpretation querying how “same” must the use be?

[10] Minister of Finance, Jean Chrétien, House of Commons Debates, 30th Parliament, 3rd Session (June 12, 1978) at 6321.

[11] Parliamentary Secretary to the Minister of Supply and Services, Aiden Nicholson, House of Commons Debates, 30th Parliament, (April 25, 1978) at 4875.

[12] That is, that land that is rented to a related party who uses the land in a business.

[13] The Technical Note accompanying paragraph 44(5)(*a*) does note provide any guidance as to the mischief being addressed by this amendment. In his reply submission, appellant counsel argued that paragraph 44(5)(*a*) was intended to block business expansions, and this was not a business expansion. Prior to 2002, that was Canada Revenue Agency's view as to blocking business expansions. Since then, it has resiled from that stance and has removed such references from the IT Bulletin.

In 2001, subsection 44(1) was further amended to provide that this rollover rule did not apply to the shares of a capital stock of a corporation. A rollover for shares was created in section 44.1.

[14] Interpretation Bulletins IT-259 dated November 3, 1975 at paragraph 7(b), IT-259R dated December 29, 1980 at paragraphs 18 and 22, IT-259R2 dated September 30, 1985 at paragraph 16, IT-259R2 dated December 1, 1994 at paragraph 11, IT-259R3 dated August 4, 1998 at paragraph 17 and IT-259R4 dated September 23, 2003 at paragraph 17.

IT-259R2 dated September 30, 1985, at paragraph 4, indicates that where more than one capital property has been disposed of in circumstances where subsection 44(1) is applicable, the provisions of that subsection apply to each such property and its replacement property individually. In the case of land and buildings thereon, this term is considered to refer to land and each individual building thereon separately and for the purposes of this subsection, the capital gain on each of these properties should be calculated separately. However, since March 31, 1977 a taxpayer is permitted to reallocate the proceeds of disposition of a former business property composed of land and one or more buildings between the land component and the building component. This ability to reallocate is found in subsection 44(6) of the *Act*.

15 Subsection 13(4) allows a rollover of undepreciated capital cost for capital cost allowance purposes where depreciable property is acquired (because of an involuntary disposition) to prevent recapture under subsection 13(1). Subsection 14(6) allows a rollover for eligible capital property for involuntarily or voluntarily dispositions; this is a subset of property given special treatment and generally includes non-depreciable intangibles such as goodwill and specific rights such as quotas. In each instance, the taxpayer is permitted to defer a capital gain and for the depreciable property there might also be an income gain. There is a reference in paragraph 44(1)(*a*) to subsection 13(21) and proceeds of disposition.

16 Justice Bowman (as he then was) considered the word "use" in *Glaxo Wellcome Inc. v The Queen*, 96 DTC 1159. This was affirmed by the Federal Court of Appeal in *Glaxo Wellcome Inc. v. Canada*, [1999] 4 CTC 371 (FCA). In *DePaoli v the Queen*, 96 DTC 1820, [1996] 3 CTC 2640, Justice Hamlyn applied Justice Bowman's definition in determining farming property that was used in the same manner as the former property and thus a replacement property. It was held that maintaining the land by keeping the land clean that was important and the use the land was put to rather than the manner it was maintained (leased by other farmers).

17 *Glaxo Wellcome Inc., supra*.

SCHEDULE "A"

Footnote References in Agreed Upon Statement of Facts

1 being Part of Lot 14, Concession 11 ND Toronto Gore, as in RO572989, except Part 1, 43R17212; Secondly Part of Lot 14, Concession 11 ND Toronto Gore, designated as Part 3, 43R17212, Brampton, all as described in PIN No. 14213-0262(LT)

2 by Transfer registered as Instrument No. LT1980008

3 The original election was made pursuant to subsection 70(9) of the Tax Act. This provision was renumbered as paragraph 70(9.01) effective May 1, 2006. The original election set Armous' proceeds of disposition in respect of his interest in the Farmland Property at $323,333. However, the Canada Revenue Agency subsequently granted a request for Taxpayer Relief to amend this election. The amended election increased the proceeds of disposition to $574,760.

4 by Transfer registered as Instrument No. PR171194

5 Instrument No. PR1064368 registered May 19, 2006

6 all as defined in the Asset Purchase Agreement

CITATION:	2015 TCC 24
COURT FILE NO.:	2012-1424(IT)G
STYLE OF CAUSE:	PAUL LIVINGSTON and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 20, 2014
REASONS FOR JUDGMENT BY:	The Honourable Justice K. Lyons
DATE OF JUDGMENT:	January 29, 2015

APPEARANCES:

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COUNSEL OF RECORD:

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