Docket: 2017-1140(IT)G

BETWEEN:

ROGERS ENTERPRISES (2015) INC.
(SUCCESSOR BY AMALGAMATION TO CGESR LIMITED),

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2017-3617(IT)G

BETWEEN:

ROGERS ENTERPRISES (2015) INC.
(SUCCESSOR BY AMALGAMATION TO ESRIL (1998) LIMITED),

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on February 25 and 26, 2019, at Toronto, Ontario

By: The Honourable Justice Don R. Sommerfeldt

Appearances:

Counsel for the Appellant:	Pooja Mihailovich, Hemant Tilak
Counsel for the Respondent:	Justine Malone, Marie-Eve Aubry

JUDGMENT

The Appeals are allowed, with costs, and the Determinations that are the subject of the Notices of Determination dated August 21, 2015 are vacated.

The Appellants are entitled to costs. The Parties shall have 30 days from the date of this Judgment to reach an agreement on costs and to so advise the Court, failing which the Appellants shall have a further 30 days to file written submissions on costs, and the Respondent shall have yet a further 30 days to file a written response. Any such submissions shall be limited to five pages in length. If, within the applicable time limits, the Parties do not advise the Court that they have reached an agreement and no submissions are received from the Parties, costs shall be awarded to the Appellants in accordance with the Tariff.

Signed at Vancouver, British Columbia, this 27th day of August 2020.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2020 TCC 92
Date:20200917
Docket: 2017-1140(IT)G

BETWEEN:

ROGERS ENTERPRISES (2015) INC.
(SUCCESSOR BY AMALGAMATION TO CGESR LIMITED),

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2017-3617(IT)G

BETWEEN:

ROGERS ENTERPRISES (2015) INC.
(SUCCESSOR BY AMALGAMATION TO ESRIL (1998) LIMITED),

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to the Appeals brought by Rogers Enterprises (2015) Inc. ("RE 2015"), as successor by amalgamation to CGESR Limited ("CGESR") and as successor by amalgamation to ESRIL (1998) Limited ("ESRIL 98"), in respect of determinations (the "Determinations") made pursuant to subsection 152(1.11) of the *Income Tax Act* (the "*ITA*"),[1] as set out in Notices of Determination dated August 21, 2015 and issued by the Canada Revenue Agency (the "CRA"), on behalf of the Minister of National Revenue (the "Minister"), for

1 *Income Tax Act*, RSC 1985, c. 1 (5th Supplement), as amended.

the taxation year of CGESR ended September 30, 2010 and the taxation year of ESRIL 98 ended December 31, 2009.

II. FACTS

[2] The Parties submitted a Statement of Agreed Facts (the “SAF”),[2] a copy of which is attached as Appendix A. For the convenience of the reader, a concise summary of the material facts is set out in the following paragraphs.

[3] Edward Samuel (Ted) Rogers was the President and the Chief Executive Officer of Rogers Communications Inc. (“RCI”), a Canadian public corporation. Several corporations and trusts (collectively, the “RPC Group”)[3] held the interests of the Rogers family in RCI. Members of the RPC Group that are relevant for the purpose of these Appeals were ESR Limited (“ESRL”), ESRIL 98, CGESR, CGESR (2009) Limited (“CGESR 2009”) and Rogers Telecommunications Limited (“RTL”). ESRIL 98 and CGESR were taxable Canadian corporations, private corporations and Canadian-controlled private corporations (“CCPCs”). According to paragraph 8 of each Notice of Appeal, ESRL, CGESR 2009 and RTL were also CCPCs.

[4] The September 5, 1984 Rogers Ownership Trust (the “1984 Trust”) and the August 24, 1995 Rogers Ownership Trust (the “1995 Trust”) were family trusts established to hold property for the benefit of Loretta Rogers and the descendants of Mr. Rogers. In addition, the 1984 Trust held property for the benefit of Mr. Rogers.

[5] From 1981 to 1991, twelve life insurance policies (the “Policies”) insuring the life of Mr. Rogers were issued to various private corporations in the RPC Group or to the 1984 Trust. At the time that each Policy was issued, the policyholder (or owner) of each Policy was also the beneficiary of the Policy. It is my understanding that the policyholder of each Policy was required to pay the premiums in respect of that Policy.

---

2 Exhibit AR-1.

3 In the pleadings, the term “RPC” is an acronym for “Rogers Private Companies,” which is defined as being the private corporations that hold the interests of the Rogers family in RCI. However, the SAF defines the term “RPC Group” as including not only those private corporations but also certain trusts.

[6] At a time which is not specified in the SAF but which was before February 25, 2005, the holders of the various Policies changed the beneficiaries of the Policies, in each case designating RTL as the beneficiary.

[7] In 2005, in conjunction with a significant corporate reorganization undertaken by the RPC Group, ESRL became the holder of ten of the Policies. The other two Policies continued to be held by the 1984 Trust.

[8] Sometime in 2005, the beneficiary of the twelve Policies was changed again, this time to be CGESR. Notwithstanding the successive changes of beneficiary, ESRL and the 1984 Trust, as the holders of ten and two of the Policies respectively, continued to pay the premiums in respect of their Policies.

[9] In the course of a subsequent reorganization in 2006, CGESR became the direct shareholder of RTL.

[10] By 2009, after CGESR 2009 had been incorporated, ESRL owned Class A and Class D shares in the capital of ESRIL 98, which owned Class A – Series 5 preferred shares and Class A – Series 6 preferred shares in the capital of CGESR, with the 1,000 common shares in the capital of CGESR being owned by CGESR 2009 and the other issued shares in the capital of CGESR being owned by other members of the RPC Group. CGESR owned shares in the capital of RTL and also owned shares in the capital of RCI. The 1984 Trust and other shareholders which are not identified in the SAF held shares in the capital of ESRL.

[11] Mr. Rogers died on December 2, 2008. On December 17, 2008, the proceeds of the Policies were paid to CGESR, as the designated beneficiary of the Policies. The total amount of the life insurance proceeds was $102,309,794,[4] of which $4,555,420 derived from the Policies held by the 1984 Trust and $97,754,374 derived from the Policies owned by ESRL. As there was no adjusted cost basis (“ACB”) of the Policies to CGESR, the entire amount of $102,309,794 was added by CGESR to its capital dividend account (“CDA”).

4 Paragraph 29 of the SAF states that the amount of the life insurance proceeds was $102,309,794. However, note (1) in Schedule A to the SAF states that the amount of the life insurance proceeds was $102,309,795.

[12] Immediately before the death of Mr. Rogers, the total ACB to the 1984 Trust of the two Policies held by it was $1,755,055, and the total ACB to ESRL of the ten Policies held by it was $42,239,105.[5]

[13] On July 15, 2009, CGESR paid dividends in the amount of $702,742 to ESRIL 98 and dividends in the amount of $10,000,000 to CGESR 2009. CGESR elected under subsection 83(2) of the *ITA* in respect of the full amounts of the dividends that it paid on July 15, 2009.

[14] On July 15, 2009, CGESR 2009 paid dividends in the amount of $9,999,950.50 to the 1995 Trust. CGESR 2009 elected under subsection 83(2) of the *ITA* in respect of the full amount of the dividends that it paid on July 15, 2009.

[15] On October 27, 2009, CGESR redeemed some of the class A preferred shares in its capital that were owned by ESRIL 98, as a result of which ESRIL 98 was deemed to have received dividends in the amount of $91,745,839. CGESR elected under subsection 83(2) of the *ITA* in respect of the full amount of the deemed dividends of $91,745,839.[6]

[16] On the understanding that the dividends received, or deemed to have been received, by ESRIL 98 from CGESR were capital dividends, the full amount of those dividends was added by ESRIL 98 to its CDA.

[17] According to the records of ESRIL 98, on October 27, 2009, after the above transactions, its CDA balance was $92,448,860. On October 27, 2009, ESRIL 98 paid capital dividends in the amount of $49,998,834 to ESRL. After the payment of those dividends, the balance remaining in ESRIL 98's CDA was, according to its records, $42,450,026. I was advised by counsel for RE 2015 that, although it is not so stated in the SAF, the balance of $42,450,026 still remains in ESRIL 98's CDA. In other words, there have been no capital dividends paid by ESRIL 98 after October 27, 2009.[7]

---

5 SAF, ¶27(e).

6 As a portion of the dividends paid, or deemed to be paid, by CGESR to ESRIL 98 derived from interest received by CGESR in respect of the proceeds of the Policies, the subsection 83(2) election was excessive to the extent of $84,090, which resulted in CGESR being assessed for tax under Part III of the *ITA*. CGESR paid that tax, which is not in dispute in these proceedings.

7 There is nothing in the evidence that contradicts, or is inconsistent with, the above statement.

[18] Sometime after October 27, 2009, by reason of one or more amalgamations that are not described in detail in the SAF, RE 2015 became the successor by amalgamation to both ESRIL 98 and CGESR.

[19] On August 21, 2015, the Minister issued Notices of Determination to CGESR for its taxation year ended September 30, 2010 and to ESRIL 98 for its taxation year ended December 31, 2009. The Minister considered that, for the purposes of the general anti-avoidance rule (the "GAAR") in section 245 of the *ITA*, the following transactions constituted a series of transactions (the "Series"):

a) the acquisition of the Policies;

b) the designations by ESRL, as the policyholder of the ten Policies owned by it, to make first RTL and subsequently CGESR the beneficiary of those Policies;

c) the receipt by CGESR of the proceeds of the Policies and the interest paid thereon;

d) the payment by CGESR of dividends (actual or deemed) to ESRIL 98; and

e) the elections by CGESR under subsection 83(2) of the *ITA*, such that those dividends were deemed by paragraph 83(2)(a) of the *ITA* to be capital dividends.

[20] The Minister concluded that the Series included one or more avoidance transactions (the "Subject Transactions"), as follows:

a) the designations by ESRL, as the policyholder of the Policies owned by it, to make CGESR the beneficiary of those Policies;

b) the receipt by CGESR of the proceeds of the Policies;

c) the payment by CGESR of dividends (actual or deemed) to ESRIL 98; and

d) the elections by CGESR under subsection 83(2) of the *ITA* in respect of the dividends (actual or deemed) paid to ESRIL 98.

[21] Relying on subsection 245(2) of the *ITA*, the Minister determined what she considered to be the reasonable tax consequences to CGESR and ESRIL 98 in order to deny the tax benefits that had been identified by the Minister. In particular:

a) in respect of CGESR, the Minister determined that:

   i. to the extent of $42,239,100, the dividends paid by CGESR to ESRIL 98 were taxable dividends, rather than capital dividends;

   ii. CGESR's CDA as at October 28, 2009 was nil; and

b) as a consequence, in respect of ESRIL 98, the Minister determined that:

   i. the dividends received by ESRIL 98 from CGESR, to the extent of $42,239,100, were, pursuant to subsection 112(1) of the *ITA*, deductible in computing the taxable income of ESRIL 98; and

   ii. ESRIL 98's CDA balance as at December 31, 2009 was reduced by $42,239,100.

III. <u>ISSUES</u>

[22] The issues in respect of these Appeals are:

a) Was there a tax benefit that, but for section 245 of the *ITA*, resulted, directly or indirectly, from the Series?

b) If there was a tax benefit, may it reasonably be considered that any of the transactions in the Series, if the *ITA* were read without reference to section 245, resulted directly or indirectly in a misuse of the provisions of the *ITA*, or resulted directly or indirectly in an abuse having regard to the provisions of the *ITA*, other than section 245, read as a whole?

IV. <u>ADMISSIONS</u>

[23] For the purposes of these Appeals, RE 2015 admits that:

a) the transactions defined in paragraph 19 as the "Series" were a "series of transactions" for the purposes of section 245 of the *ITA*; and

b) each of the Subject Transactions was part of the Series.[8]

[24] While RE 2015 takes the position that there was no tax benefit resulting from any of the Subject Transactions, if the Court finds that there was a tax benefit, RE 2015 admits that:

a) but for section 245 of the *ITA*, one or more of the Subject Transactions resulted, directly or indirectly, in the tax benefit; and

b) each such Subject Transaction was an avoidance transaction within the meaning of subsection 245(3) of the *ITA*.[9]

V. ANALYSIS

A. General Principles

[25] To analyze the Minister's application of the GAAR, three steps are required:

a) The Court must determine whether there is a tax benefit arising from a transaction, as contemplated by subsections 245(1) and (2) of the *ITA*.

b) The Court must determine whether the transaction is an avoidance transaction, within the meaning of subsection 245(3) of the *ITA*.

c) The Court must determine whether the avoidance transaction would result directly or indirectly in a misuse of certain enumerated statutory or treaty provisions or would result directly or indirectly in an abuse, as more fully particularized in subsection 245(4) of the *ITA*.[10]

B. Tax Benefit

[26] Subsection 245(1) of the *ITA* defines the term "tax benefit" as follows:

---

8 Paragraph 30 of the CGESR Notice of Appeal and paragraph 31 of the ESRIL 98 Notice of Appeal.

9 Paragraph 31 of the CGESR Notice of Appeal and paragraph 32 of the ESRIL 98 Notice of Appeal.

10 *The Queen v Canada Trustco Mortgage Company*, [2005] 2 SCR 601, 2005 SCC 54, ¶17.

> "tax benefit" means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act….

[27] According to the Crown, the following were the tax benefits resulting from the Series:

a) the increase in the amounts of the respective CDAs of CGESR and ESRIL 98;

b) the reduction in the computation of income pursuant to subsection 83(2) of the *ITA*, by an amount which would otherwise have been included as taxable dividends for ESRIL 98 pursuant to sections 3 and 9, subsection 82(1) and paragraph 12(1)(j) of the *ITA*;

c) the avoidance of tax under Part III of the *ITA* by ESRIL 98 and the reduction of tax under Part I of the *ITA* by the ultimate shareholders of ESRIL 98; and

d) the avoidance of tax under Part III of the *ITA* by CGESR.[11]

(1) <u>CDA Increase</u>

[28] With respect to the first of the above alleged tax benefits, the Crown submits that the increase in the respective CDAs of CGESR and ESRIL 98 fell within the phrase "an increase in … [an] other amount under this Act," as contained in the statutory definition of "tax benefit." The actual more complete phrase in the definition of "tax benefit" in subsection 245(1) is "an increase in a refund of tax or other amount under this Act." There are two ways of interpreting the statutory provision. One interpretation ("Interpretation A") is:

> "tax benefit" means … an increase in[:]
>
> • a refund of tax[,] or
>
> • other amount under this Act….

The other interpretation ("Interpretation B") is:

> "tax benefit" means … an increase in a refund of[:]

---

[11] Respondent's Written Submissions, dated February 23, 2019 and filed February 25, 2019 ("Crown's Submissions"), ¶29.

• tax[,] or

• other amount under this Act….

[29] The French version of the *ITA* does not assist in clarifying the above ambiguity. In 2009, the French definition of "tax benefit" (i.e., avantage fiscal) read as follows:

> «avantage fiscal» Réduction, évitement ou report d'impôt ou d'un autre montant exigible en application de la présente loi ou augmentation d'un remboursement d'impôt ou d'un autre montant visé par la présente loi.

As in English, the concluding portion of the French definition may be read in one of two ways. The first (i.e., the French equivalent of Interpretation A) is:

> «avantage fiscale» … augmentation[:]
>
> • d'un remboursement d'impôt[,] ou
>
> • d'un autre montant visé par la présente loi.

The other way to interpret the French provision (i.e., the French equivalent of Interpretation B) is :

> «avantage fiscale» … augmentation d'un remboursement[:]
>
> • d'impôt[,] ou
>
> • d'un autre montant visé par la présente loi.

[30] The Crown prefers Interpretation A. The Crown submits that a tax benefit includes "an increase in … [an] other amount under this Act." For the reasons set out below, I prefer Interpretation B, i.e., the particular portion of the definition of "tax benefit" refers to an increase in a refund of tax or an increase in a refund of another amount under the *ITA.*

[31] My first reason for preferring Interpretation B is based on the wording of the relevant portion of the definition of "tax benefit" as shown in paragraph 28 above. If the Crown's interpretation were correct, one would expect that the word "an" would have appeared before the phrase "other amount," or that the word "another" would have been used rather than the word "other."

[32] The second reason is based on the *Explanatory Notes* released by the Department of Finance in June 1988, when the GAAR was introduced. Those notes stated the following about the definition of "tax benefit":

> Generally, for the purposes of section 245, a transaction, to be an avoidance transaction, must result in a "tax benefit". This expression is defined as a reduction, avoidance or deferral of tax or other amount payable under the Act or an increase in a refund of tax or other amount under the Act. The references in this definition to "other amount payable under this Act" and "other amount under this Act" are intended to cover interest, penalties, the remittance of source deductions, and other amounts that do not constitute tax.[12]

Like the French and English statutory provisions themselves, the *Explanatory Notes* do not clarify whether the term "tax benefit" is to be read as including an increase in a refund of tax or an increase in another amount under the *ITA*, or as including an increase in a refund of tax or an increase in a refund of another amount under the *ITA*. However, if the *ejusdem generis* rule can be applied to the last sentence of the above quotation from the *Explanatory Notes*,[13] it would seem that the phrase "other amount under this Act" is intended to refer to amounts that are payable or refundable under the *ITA*, such as interest, penalties and source deductions.

[33] The third reason derives from *Canada Trustco*, in which the Supreme Court of Canada stated the following in respect of the meaning of "tax benefit":

> "Tax benefit" is defined in s. 245(1) as "a reduction, avoidance or deferral of tax" or "an increase in a refund of tax or other amount" *paid under the Act*.[14] [*Emphasis added*.]

The above statement is similar to the following statement made in 1988 by Brian Arnold and James Wilson:

> A "tax benefit" is defined very broadly in subsection 245(1) to be a reduction, avoidance, or deferral of tax or other amount payable (such as interest and

---

12 Michael H. Wilson (Minister of Finance), *Explanatory Notes to Legislation Relating to Income Tax* (Department of Finance: Ottawa, June 1988), p. 462.

13 As the *ejusdem generis* rule is a rule of statutory interpretation, it may not have any application in the context of an *Explanatory Note*.

14 *Canada Trustco*, *supra* note 10, ¶19.

> estimated tax instalments) or an increase in a refund of tax or other amount *payable under the Act*.[15] [*Emphasis added*.]

The phrase "paid under the Act," as used by the Supreme Court, and the phrase "payable under the Act," as used by Arnold and Wilson, after the phrase "an increase in a refund of tax or other amount," suggest that the words "other amount" refer to something that a particular taxpayer has paid, or is required to pay, under the *ITA*.

[34] The fourth reason for preferring Interpretation B, rather than Interpretation A, is based on an analysis of the *ITA*. The *ITA* refers to many amounts, some of which are typically more advantageous to a taxpayer as the amounts increase, and others of which are typically more advantageous to a taxpayer as the amounts decrease, at least for the purposes of the *ITA* (but not necessarily for economic purposes). For instance, an increase in the amount of a deduction, an increase in the amount of a loss or an increase in the amount of a tax attribute (such as the paid-up capital in respect of shares or the adjusted cost base to a taxpayer of a capital property) may well be viewed as a tax benefit. On the other hand, it would seem peculiar to consider that an increase in the amount of income or an increase in the amount of profit would constitute a tax benefit. Thus, it does not seem reasonable that increases in all amounts under the *ITA* are to be viewed as tax benefits.[16]

[35] A fifth reason is based on an article written by Robert Couzin, which focused on subsection 245(3) of the *ITA* (which defines "avoidance transaction"). Couzin made the following comment about the definition of "tax benefit" in subsection 245(1) of the *ITA*:

> One reason to define "tax benefit" is to extend the scope of the concept beyond what might otherwise be comprehended. A tax benefit, undefined, would include a reduction in or avoidance of tax, but not necessarily the mere deferral of tax. The extended definition is certainly needed to reach a reduction in interest or penalty, since these are not "tax." While an increase in a refund may, in some circumstances, be the result of a reduction in tax, that is not always the case (for

---

15 Brian J. Arnold & James R. Wilson, "The General Anti-Avoidance Rule – Part 2" (1988) 36:5 Can Tax J 1123 at 1154.

16 See also paragraphs 47 and 48 below.

> example, the increase in a refundable credit). Thus, the definition is required to catch *such additional refundable amounts*.[17] [*Emphasis added*.]

The above statement seems to suggest that the phrase "other amount under this Act" refers to an amount that could be refundable under the *ITA*.

[36] On the other hand, one could argue that, because Parliament included the word "payable" in the first portion of the definition of "tax benefit" (when referring to "a reduction, avoidance or deferral of tax or other amount payable under this Act"), the failure to include the word "refundable" in the concluding portion of the definition must have some significance. In other words, perhaps it is significant that the concluding portion does not read "an increase in a refund of tax or other amount refundable under this Act." The counter argument, which I prefer, is that, because "tax" and "other amount" are both objects of the preposition "of", which follows the word "refund," it is not necessary to use both "refund" and "refundable" in the same phrase, i.e., "refundable" would be redundant.

[37] For the reasons set out above,[18] the increases in the amounts of the respective CDAs of CGESR and ESRIL 98 were not tax benefits.

(2) <u>Reduction in Computation of Income</u>

[38] The Crown submits that the reduction in the computation of income pursuant to subsection 83(2) of the *ITA* (i.e., the treatment of the actual or deemed dividends as capital dividends, rather than as taxable dividends) was a tax benefit. In making this argument, the Crown is not suggesting that there was a reduction of tax, but merely a reduction in the computation of income.

[39] In a GAAR context, the computation of income is relevant for the purposes of the definition of "tax consequences," defined in subsection 245(1) of the *ITA* as follows:

> "tax consequences" to a person means the amount of income, taxable income, or taxable income earned in Canada of, tax or other amount payable by or refundable

---

17 Robert Couzin, "Subsection 245(3): A Framework," *Report of Proceedings of Forty-Ninth Tax Conference*, 1997 Conference Report (Toronto: Canadian Tax Foundation, 1998) 4:1 at 4:4.

18 A sixth reason for preferring Interpretation B, rather than Interpretation A, in the context of the definition of "tax benefit," is set out in footnote 19 below.

> to the person under this Act, or any other amount that is relevant for the purposes of computing that amount….[19]

However, the concepts of income, taxable income and taxable income earned in Canada do not appear in the definition of "tax benefit." To constitute a tax benefit, it is insufficient that there be a reduction in the computation of income. Rather, in this context, a reduction of tax is required. Admittedly, in many situations a reduction in the computation of income will generally result in a reduction of tax. However, in this particular situation, where capital dividends (actual or deemed) aggregating $92,448,581 were paid by CGESR to ESRIL 98 and subsequently a capital dividend aggregating $49,998,834 was paid by ESRIL 98 to ESRL, although those capital dividends were not included in computing the recipient corporation's income, there was no less tax paid than if those dividends had been taxable dividends, which would have been included (pursuant to subsection 82(1) of the *ITA*) in computing the income of the recipient corporation, but which would have been deductible (pursuant to subsection 112(1) of the *ITA*) in computing the taxable income of the corporation. In other words, whether the dividends in question were capital dividends or taxable dividends, there would have been no tax payable. Thus, while there was a reduction in income, there was no reduction in tax. Therefore, the reduction in the computation of income did not constitute a tax benefit.

(3) <u>Avoidance of Part III Tax by ESRIL 98 and Reduction of Part I Tax by Its Ultimate Shareholders</u>

(a) <u>Avoidance of Part III Tax by ESRIL 98</u>

[40] To perform the first of the three steps in a GAAR analysis, some form of measurement or comparison is typically required in order to ascertain whether there is a tax benefit. As Justice Bonner explained in *McNichol*:

---

19 The phrase "tax or other amount payable by or refundable to the person under this Act," as used in the definition of "tax consequences," may assist in construing the meaning of the phrase "an increase in a refund of tax or other amount under this Act," as used in the definition of "tax benefit." It is clear that the words "other amount" as used in the definition "tax consequences," refer to an amount that is payable or refundable under the ITA. If the words "other amount" are to have the same meaning in the definitions of both "tax benefit" and "tax consequences," it follows that the words "other amount," as used in the definition of "tax benefit," also refer to an amount that is payable or refundable under the ITA.

> There is nothing mysterious about the subsection 245(1) concept of tax benefit. Clearly a reduction or avoidance of tax does require the identification in any given set of circumstances of a norm or standard against which reduction is to be measured. Difficulties may exist in other cases in identifying the standard but in this case there is no such difficulty….[20]

[41] After discussing the "tax benefit" analysis undertaken by Justice Bonner in *McNichol* and by Justice Bowman (as he then was) in *Equilease*,[21] in the above-referenced article Couzin observed:

> None of this eliminates the problem of finding a comparable transaction (or series of transactions) in order to judge whether the transaction (or series) actually undertaken resulted in a tax benefit. Judge Bonner admitted as much, as both he and Judge Bowman did in fact identify the comparable: a taxable dividend distribution. What is perhaps less clear is how one might formulate a general rule for finding such a comparable. In these particular cases, the evidence before the court, and the long history of surplus stripping in Canada, may have pointed the way. But in other cases that path is likely to be less evident. In a sophisticated tax plan, based on arcane tax rules, judges may not find the normative transaction quite so obvious.[22]

As will be noted below[23], these Appeals by RE 2015 are among those envisioned by Couzin, i.e., a comparable normative transaction is not readily apparent.

[42] In *Canada Trustco*, the Supreme Court of Canada stated the following in respect of the comparison of alternative arrangements:

> If a deduction against taxable income is claimed, the existence of a tax benefit is clear, since a deduction results in a reduction of tax. In some other instances, it may be that the existence of a tax benefit can only be established by comparison with an alternative arrangement…. In such cases, the existence of a tax benefit might only be established upon a comparison between alternative arrangements. In all cases, it must be determined whether the taxpayer reduced, avoided or deferred tax payable under the Act.[24]

---

20 *McNichol et al.v The Queen*, [1997] 2 CTC 2088, at 2108 (¶20); 97 DTC 111, at 119 (TCC).

21 *RMM Canadian Entreprises Inc. v The Queen, subnom. Equilease Corporation*, [1998] 1 CTC 2300, 97 DTC 302 (TCC).

22 Couzin, *supra* note 17, p. 4:6.

23 See paragraphs 53-57 below.

24 *Canada Trustco, supra* note 10, ¶20.

[43] In *Copthorne*, the Supreme Court of Canada reiterated and expanded upon the above point made in *Canada Trustco*, as follows:

> As found in *Trustco*, the existence of a tax benefit can be established by comparison of the taxpayer's situation with an alternative arrangement…. If a comparison approach is used, the alternative arrangement must be one that "might reasonably have been carried out but for the existence of the tax benefit" (D. G. Duff, et al. *Canadian Income Tax Law* (3rd ed. 2009), at p. 187). By considering what a corporation would have done if it did not stand to gain from the tax benefit, this test attempts to isolate the effect of the tax benefit from the non-tax purpose of the taxpayer.[25]

[44] As indicated above, on October 27, 2009, ESRIL 98 redeemed certain shares, made an election under subsection 83(2) of the *ITA*, and was deemed to have paid capital dividends in the amount of $49,998,834 to ESRL. At the time, ESRIL 98 understood that its CDA balance was $92,448,860. According to the CRA, this balance was inflated to the extent of $42,239,105 (being the ACB to ESRIL of the ten Policies held by it).[26] If the CRA's position is correct, the proper CDA balance would have been $50,209,755 (i.e., $92,448,860 – $42,239,105). Thus, even if the CRA's position were correct, the amount of the capital dividend paid by ESRIL 98 to ESRL was less than the amount of the available CDA balance. Accordingly, it is difficult to see how ESRIL 98 avoided the payment of Part III tax when it redeemed the shares, made the subsection 83(2) election, and was deemed to have paid the capital dividend on October 27, 2009.[27]

[45] ESRIL 98 has not paid any capital dividends after October 27, 2009. Therefore, there could not have been an avoidance of Part III tax by ESRIL 98 subsequent to October 27, 2009, nor was there a tax benefit, based on this argument.

(b) Reduction of Part I Tax by Ultimate Shareholders

---

25 *Copthorne Holdings Ltd. v The Queen*, [2011] 3 SCR 721, 2011 SCC 63, ¶35.

26 See subparagraph 27(e) of the SAF and Note (3) of Schedule A to the SAF. However, in the Notices of Determination and in the Replies, the Minister and the Crown respectively said that the excessive amount of the CDA balance was $42,239,100. See paragraph 21 above.

27 See also the discussion of subsections 184(3) & (4) of the *ITA* in paragraph 54 below.

[46] The CRA also takes the position that the ultimate shareholders of ESRIL 98 have reduced the amount of Part I tax that would be payable by them if they were to receive taxable dividends, rather than capital dividends, derived from ESRIL 98.[28] However, there is no evidence to indicate that any capital dividends in excess of $49,998,834 have been paid by ESRIL 98 to ESRL or that any capital dividends have been paid by ESRL to its shareholders.

[47] In *Wild*, the Federal Court of Appeal, in conducting a GAAR analysis, distinguished between the creation of the potential for a tax-free distribution of a corporation's retained earnings and the realization of that potential.[29] The Court indicated that, similar to the pre-packaging of tax losses in *OSFC*,[30] the transactions in *Wild* that resulted in the increased paid-up capital in respect of certain shares did not result in a tax benefit.[31]

[48] In commenting on the *Wild* decision, Brian Arnold stated:

> Apart from the taxpayer's concession [that he had obtained a tax benefit from the transactions in question], it seems clear to me that the increase in paid-up capital was not a tax benefit. A deduction, allowance, credit, exemption or exclusion is clearly a tax benefit because they all result in a reduction of tax payable. However, an increase in a tax attribute does not result in any reduction, avoidance or deferral of tax; it may be a benefit in a general sense because it allows an amount to be distributed tax-free in the future.[32]

After making the above comment, Arnold went on to discuss the significance of the phrase "directly or indirectly" in subsections 245(2), (3) and (4) of the *ITA*. He stated:

---

28 There is no evidence as to the identity of those ultimate shareholders. Presumably the CRA is referring to individuals (as distinct from corporations), who thus would not be entitled, in computing taxable income, to the deduction available under subsection 112(1) of the *ITA*.

29 *1245989 Alberta Ltd. and Wild v Attorney General of Canada*, 2018 FCA 114, ¶31.

30 *OSFC Holdings Ltd. v The Queen*, 2001 FCA 260; leave to appeal denied by SCC, 2002 CarswellNat 1388, 294 NR 398 (note), June 20, 2002.

31 *Wild*, *supra* note 29, ¶39.

32 Brian J. Arnold, "Does A Tax Benefit Have To Be Realized? *Wild v. Canada* 2018 FCA 114," *The Arnold Report*, #140, September 17, 2018 (Canadian Tax Foundation website), sixth paragraph. The *Wild* case and Arnold's comments are also relevant to the above discussion of whether the increased CDA balances constituted a tax benefit; see paragraphs 33 and 34 above.

> Although it is not completely clear, it would seem that the phrase "directly or indirectly" is used out of excess caution to ensure that the application of the GAAR cannot be avoided by technical arguments about whether a transaction or a series of transactions has resulted in a tax benefit. *For example, where a taxpayer engages in a transaction that results in an increase in the cost of depreciable property, there is no tax benefit until the taxpayer claims capital cost allowance. Once the taxpayer claims capital cost allowance, there is a tax benefit;* however, does the tax benefit result directly from the transaction that increased the capital cost of the property or from the taxpayer's claim for capital cost allowance? This issue is resolved by the use of the term "indirectly" because the tax benefit results indirectly from the transaction that increased the cost of the property. However, in most cases, the concept of a series of transactions will capture tax benefits that are achieved circuitously.
>
> Therefore, it is unclear what, if anything, the inclusion of the phrase "directly or indirectly" in the definition of an avoidance transaction adds to the GAAR. Nevertheless, *it is clear that the phrase does not extend the GAAR to tax benefits that have not yet resulted in any tax saving but may do so in the future.*[33] [*Emphasis added*.]

Arnold then said the following in respect of the applicability of subsection 152(1.11) of the *ITA*:

> Subsection 152(1.11) is also relevant to this discussion. The purpose of subsection 152(1.11) would appear to be to allow the Minister to make a determination of an amount, such as the paid-capital of shares or the adjusted cost base of property, rather than an assessment of tax, since tax may not be payable until a subsequent year. As Jim Wilson and I pointed out back in 1988 (*Canadian Tax Journal*, vol. 36, no. 5 at 1176), the wording of the GAAR and subsection 152(1.11) is inconsistent with this purpose. Subsection 152(1.11) does not explicitly refer to a tax benefit and subsection 245(2) does not apply until there is an avoidance transaction and a tax benefit; as a result, subsection 152(1.11) applies only where the Minister ascertains the tax consequences under subsection 245(2). Therefore, the earliest time that subsection 152(1.11) would allow the Minister to make a determination (for example, a determination of the amount of paid-capital of shares or the adjusted cost base of capital property) is the first taxation year in which the taxpayer claims a tax benefit.
>
> This result is problematic because it forces the CRA to maintain a watching brief on the taxpayer and the taxpayer's successors in order to apply the GAAR when the increased paid-capital is used to shelter an otherwise taxable distribution. Take the simple example where the capital cost of depreciable property is increased through an abusive avoidance transaction, but the taxpayer does not claim any capital cost allowance in the year in which the transaction occurs. The CRA must

---

[33] Arnold, *supra* note 32, eighth and ninth paragraphs.

> wait until the first year in which the taxpayer claims capital cost allowance before it can apply the GAAR. Once the GAAR applies, however, the Minister can make a determination under subsection 152(1.11) to reduce the capital cost of the properties; the Minster does not have to wait and apply the GAAR every time the taxpayer claims capital cost allowance.[34]

[49] Accordingly, the future reduction of tax under Part I of the *ITA* by the ultimate shareholders at ESRIL 98, as suggested by the Crown, is not a tax benefit at this time.

(4) <u>Avoidance of Part III Tax by CGESR</u>

[50] In *Canadian Pacific*, Justice Bonner revisited the question of identifying a standard against which to measure an alleged reduction in tax, as follows:

> The definition of tax benefit in s. 245(1), by referring to "a reduction, avoidance or deferral of tax…", assumes the existence of a standard amount of tax against which reduction may be measured…. The standard against which reduction is to be measured is not a transaction which is theoretically possible but, practically speaking, unlikely in the circumstances.[35] [*Footnote omitted.*]

[51] After CGESR received life insurance proceeds on December 17, 2008 in respect of the twelve Policies in the total amount of $102,309,794 and interest in the amount of $84,090 (which CGESR mistakenly treated as life insurance proceeds), CGESR understood that the amount of its CDA was increased by $102,393,885 (i.e., $102,309,794 + $84,090, with rounding), given that the ACB of the Policies to CGESR was nil.[36] As the balance of CGESR's CDA had been $54,701 on December 2, 2008, CGESR understood that its CDA balance on December 17, 2008 was $102,448,586 (i.e., $54,701 + 102,393,885). On July 15, 2009, CGESR paid capital dividends in the total amount of $10,702,742. On October 27, 2009, CGESR redeemed some of the class A preferred shares in its capital that were owned by ESRIL 98, resulting in a deemed dividend in the amount of $91,745,839, in respect of which CGESR made a capital dividend election under subsection 83(2) of the *ITA*. Therefore, during the four-month period from July 2009 to October 2009, CGESR paid capital dividends (actual or deemed) in the aggregate amount of $102,448,581 (i.e., $10,702,742 + $91,745,839), which was $5 less than the understood balance of its CDA.

---

[34] *Ibid*, tenth and eleventh paragraphs.

[35] *Canadian Pacific Ltd. v The Queen*, [2001] 1 CTC 2190 (TCC), ¶12; *aff'd* 2001 FCA 398.

[36] See paragraph 11 above and see Schedule A to the SAF.

However, as indicated in footnote 6 above, this balance was excessive to the extent of $84,090, representing interest paid on the insurance proceeds by the insurer to CGESR and inadvertently included in computing the balance of CGESR's CDA. CGESR was assessed, and paid, Part III tax in respect of the $84,090.

[52] According to the Crown's theory, if the ACB to ESRL of the ten Policies held by it (i.e., $42,239,105) were subtracted from the amount of the actual life insurance proceeds (not including interest) added to CGESR's CDA, the CDA balance would have been only $60,070,689 (i.e., $102,309,794 – $42,239,105), and the aggregate capital dividends (actual or deemed but excluding the capital dividend in respect of the interest of $84,090) paid by CGESR in 2009 would have exceeded the CDA to the extent of $42,293,807 (i.e., $102,364,496[37] – $60,070,689). It is the position of the Crown that CGESR avoided tax under Part III in respect of that excess.[38]

[53] The Crown's position assumes that CGESR would have paid capital dividends (actual or deemed) in the total amount of $102,364,496, even if its CDA balance had been only $60,070,689. This is the alternative transaction which the Crown submits should be used in determining whether there was an avoidance of tax for the purposes of the definition of "tax benefit." However, in my view, this is not a reasonable alternative transaction, as it is unlikely that CGESR would have paid capital dividends (actual or deemed) in the aggregate amount of $102,364,496 if its CDA balance had been only $60,070,689.

[54] The above view is consistent with the mechanism set out in subsections 184(3) and (4) (which are in Part III) of the *ITA*, whereby, if a corporation makes a capital dividend election under subsection 83(2) of the *ITA* and the amount of the dividend exceeds the corporation's capital dividend account, the corporation may, with the concurrence of all its shareholders, elect under subsection 184(3), whereupon the excess portion of the dividend is deemed to be a separate taxable dividend. Therefore, while it was unlikely that CGESR would have knowingly made an election under subsection 83(2) in respect of a dividend that exceeded the

---

37 As mentioned in paragraph 51 above, CGESR understood that its CDA balance on December 17, 2008 was $102,448,586, although that amount improperly included $84,090 of interest that had been paid by the insurer to CGESR, together with the life insurance proceeds. Subtracting $84,090 from $102,448,586 results in $102,364,496.

38 To correct for the error concerning interest, as discussed in the preceding footnote, in performing the calculations referenced in this paragraph, I have ignored the $84,090 of interest that CGESR mistakenly added to its CDA and in respect of which it has already paid Part III tax.

balance of its capital dividend account by $42,293,807, if such had occurred, by making an election under subsection 184(3), no Part III tax would have been payable in any event.

[55] The Notice of Determination issued by the CRA on behalf of the Minister for the taxation year of CGESR ended September 30, 2010 did not actually impose any Part III tax (or tax under any other part of the *ITA*). Rather, the Minister determined that, to the extent of $42,239,100, the dividends (actual or deemed) paid by CGESR to ESRIL 98 were taxable dividends, rather than capital dividends, and that those taxable dividends were deductible under paragraph 112(1)(a) of the *ITA* in computing the taxable income of ESRIL 98. This is consistent with the result that would have occurred if the CRA had assessed Part III tax under subsection 184(2) of the *ITA* and if CGESR had made an election under subsection 184(3) of the *ITA* (as explained in the preceding paragraph).

[56] As noted above,[39] in *Copthorne*, the Supreme Court indicated that, if a taxpayer's situation is compared with an alternative arrangement, "the alternative arrangement must be one that 'might reasonably have been carried out but for the existence of the tax benefit'…."[40] I am of the view that, if the balance of CGESR's CDA had been only $60,070,689 on October 27, 2009, it would have been unreasonable for CGESR to have made capital dividend elections under subsection 83(2) of the ITA in the aggregate amount of $102,364,491.

[57] Applying the principle enunciated by Justice Bonner in *Canadian Pacific*,[41] while it is theoretically possible that CGESR may have paid capital dividends in the aggregate amount of $102,364,491[42] if the balance of its CDA was only $60,070,689, practically speaking, it is unlikely that CGESR would have done so. Rather, it is my view that, if the balance of CGESR's CDA had been only $60,070,689, CGESR would have paid a capital dividend equal to or less than that amount, and any additional dividends would have been structured as taxable dividends. In fact, as noted above, that is the way that the CRA processed the Determinations. Accordingly, I am of the view that the Crown's view as to the comparative alternative arrangement was only a theoretical possibility that was,

---

39 See paragraph 43 above.

40 *Copthorne, supra* note 25, ¶35.

41 *Canadian Pacific* (TCC), *supra* note 35, ¶12. See paragraph 50 above.

42 This number represents the total capital dividends (actual or deemed) (i.e., $102,448,581) less the amount of interest that was mistakenly treated as life insurance proceeds (i.e., $84,090).

practically speaking, unlikely in the circumstances. Accordingly, there was no tax benefit in this regard.

(5) Summary

[58] It is my view that the Subject Transactions did not result in a tax benefit; however, in case that view is mistaken, I will proceed to the other two steps of a GAAR analysis.

C. Avoidance Transaction

[59] Subsection 245(3) of the *ITA* defines an "avoidance transaction" as follows:

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

[60] While I have found that the Subject Transactions did not result in a tax benefit, in the event that my finding is incorrect (i.e., if there was a tax benefit), RE 2015 has admitted that:

a) but for section 245 of the *ITA*, one or more of the Subject Transactions resulted, directly or indirectly, in the tax benefit; and

b) each such Subject Transaction was an avoidance transaction within the meaning of subsection 245(3) of the *ITA*.[43]

Therefore, nothing more needs to be said about this step of the GAAR analysis.

D. Abusive Tax Avoidance

---

[43] See paragraph 24 above.

(1) Applicable Principles

[61] Subsection 245(2) of the *ITA* provides that, where a transaction is an avoidance transaction, the tax consequences to a person shall be determined in order to deny a tax benefit that would otherwise result from that transaction. By reason of subsection 245(4) of the *ITA*, subsection 245(2) applies only if there is a misuse of a provision of (in the context of these Appeals) the *ITA* or an abuse of the provisions of the *ITA* (other than section 245) read as a whole. In *Canada Trustco*, the Supreme Court of Canada stated:

> 44. The heart of the analysis under s. 245(4) lies in a contextual and purposive interpretation of the provisions of the Act that are relied on by the taxpayer, and the application of the properly interpreted provisions to the facts of a given case. The first task is to interpret the provisions giving rise to the tax benefit to determine their object, spirit and purpose. The next task is to determine whether the transaction falls within or frustrates that purpose….
>
> 45. This analysis will lead to a finding of abusive tax avoidance when a taxpayer relies on specific provisions of the *Income Tax Act* in order to achieve an outcome that those provisions seek to prevent. As well, abusive tax avoidance will occur when a transaction defeats the underlying rationale of the provisions that are relied upon. An abuse may also result from an arrangement that circumvents the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or defeats the object, spirit or purpose of those provisions. By contrast, abuse is not established where it is reasonable to conclude that an avoidance transaction under s. 245(3) was within the object, spirit or purpose of the provisions that confer the tax benefit.[44]

[62] In *Copthorne*, the Supreme Court of Canada provided additional guidance concerning the use of the textual, contextual and purposive analysis to determine the object, spirit or purpose of a statutory provision, as follows:

> 70. The object, spirit or purpose can be identified by applying the same interpretative approach employed by this Court in all questions of statutory interpretation — a "unified textual, contextual and purposive approach"…. While the approach is the same as in all statutory interpretation, the analysis seeks to determine a different aspect of the statute than in other cases. In a traditional statutory interpretation approach the court applies the textual, contextual and purposive analysis to determine what the words of the statute mean. In a GAAR analysis the textual, contextual and purposive analysis is employed to determine the object, spirit or purpose of a provision. Here the meaning of the words of the statute may be clear enough. The search is for the rationale that underlies the

[44] *Canada Trustco, supra* note 10, ¶44-45.

> words that may not be captured by the bare meaning of the words themselves. However, determining the rationale of the relevant provisions of the Act should not be conflated with a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought to do.[45]

(2) Object, Spirit and Purpose[46]

[63] Central to the analysis required to resolve these Appeals is an interpretation of the object, spirit and purpose of the provision (which I will call the "Reduction Provision") in the definition of "capital dividend account" that reduces the amount of the proceeds of a life insurance policy received by a corporation that may be added to the corporation's capital dividend account. As will be shown below, the wording of the Reduction Provision has changed over the years. It is my view that the policy underlying the Reduction Provision has also changed from time to time. Before embarking on an interpretation of the Reduction Provision, I will review the legislative history of the Reduction Provision and other relevant provisions in the *ITA*, with a focus on several significant amendments.

(a) Legislative History

[64] Counsel for the Crown took me through the legislative history of the definition of "capital dividend account" and a couple of the legislative provisions pertaining to life insurance policies.[47]

(i) 1969

[65] The taxation of income earned in respect of a life insurance policy was inserted in the former *Income Tax Act* (the "*Former Act*")[48] in 1969, when the following provision was added as subsection 79D(1):

---

45 *Copthorne*, *supra* note 25, ¶70.

46 Given the technical nature of this discussion of the meaning of various legislative provisions and its ancillary focus on the historical evolution of the terms "adjusted cost basis" and "capital dividend account," I will, in this discussion, refer to those terms by their full names, rather than by the abbreviations used above.

47 The authors Jinyan Li, Joanne Magee and J. Scott Wilkie, in *Principles of Canadian Income Tax Law,* 9th ed. (Toronto: Carswell, 2017), p. 500, classify legislative history as materials that are extrinsic to the *ITA*. Accordingly, the following review of relevant legislative history is germane primarily to the discussion, which appears later, of the purpose of the Reduction Provision. However, the legislative history also provides useful background for an appreciation of the text and the context of the Reduction Provision.

> 79D. (1) There shall be included in computing the income for a taxation year of a policyholder,
>
> (a) in respect of any life insurance policy other than an annuity contract, the amount, if any, by which the proceeds of the disposition of an interest in the policy that he became entitled to receive in the year exceeds the *adjusted cost basis* of the policy *to the policyholder* as of the time of the disposition….[49] [*Emphasis added.*]

The above provision indicates that Parliament was aware of the need to determine the adjusted cost basis of a policy by reference to a particular person, in this case the policyholder.

[66] At the same time, the following definitions of "adjusted cost basis" and "cash surrender value" were included in subsection 79D(10) of the *Former Act*:

> (10) In this section,
>
> (a) "adjusted cost basis" to a policyholder as of a particular time of an interest in a life insurance policy means the amount, if any, by which
>
> (i) the aggregate of the cost to him of acquiring all his interests in the policy and all amounts paid by him or on his behalf before that time as or on account of premiums under the policy,
>
> exceeds
>
> (ii) all proceeds of disposition of his interests in the policy that he became entitled to receive before that time, except to the extent that such proceeds were required to be included in computing his income for a taxation year by virtue of paragraph (a) of subsection (1);
>
> (b) "cash surrender value" at a particular time of a life insurance policy means its cash surrender value at that time computed without regard to

---

48 *Income Tax Act*, RSC 1952, c. 148.

49 The amending legislation was SC 1968-69, c. 44, s. 20. I have omitted, from the above quotation, paragraph 79D(1)(b), which dealt with life insurance policies (other than policies that were, or were issued pursuant to, a registered retirement savings plan or a registered pension fund or plan) having a segregated fund, as that paragraph is not relevant here.

> any policy dividends payable thereunder or any interest payable on such dividends; ….[50]

It is noteworthy that "cash surrender value" was defined without any reference to the holder of the particular life insurance policy, whereas "adjusted cost basis" was defined by reference to the particular policyholder. In other words, as the adjusted cost basis of an interest in a life insurance policy could be determined only by reference to a particular person (in this case the policyholder), the policyholder was part of the context to be considered in applying the definition of "adjusted cost basis." It is also significant that, insofar as premiums were concerned, the definition of "adjusted cost basis" recognized the premiums paid by the policyholder or on behalf of the policyholder.

(ii) 1972

[67] With the advent of tax reform, effective as of January 1, 1972, paragraph 79D(1)(a) of the *Former Act* became paragraph 148(1)(a) of the *ITA* (without any changes in the wording of that provision). Similarly, the definition of the term "adjusted cost basis" in paragraph 79D(10)(a) of the *Former Act*, in essence, became paragraph 148(9)(a) of the *ITA*.[51] By reason of capital gains becoming taxable in 1972, the definition of "capital dividend account" was added as paragraph 89(1)(b) of the *ITA*. For the purposes of these Appeals, the following portions of that definition are relevant:

> (b) "capital dividend account" of a corporation at any particular time means the amount, if any, by which the aggregate of …
>
> (iv) the amount, if any, by which
>
> (A) the proceeds of any life insurance policy received by the corporation in the period and after 1971 in consequence of the death of any person whose life was insured under the policy,
>
> exceeds

---

[50] See SC 1968-69, c. 44, s. 20.

[51] I have not reproduced paragraph 148(9)(a) of the *ITA* here, as it was substantially the same as paragraph 79D(10)(a) of the *Former Act*. The only difference between paragraph 79D(10)(a) of the *Former Act* and paragraph 148(9)(a) of the *ITA* was found in the concluding phrases of the two paragraphs. Specifically, the phrase "paragraph (a) of subsection (1)" in the *Former Act* became "paragraph (1)(a)" in the *ITA*.

> (B) *all amounts paid as or on account of premiums paid under the policy,….*[52] [*Emphasis added.*]

Thus, in the initial version of the definition of "capital dividend account," the Reduction Provision consisted of the word "exceeds" and clause 89(1)(b)(iv)(B). Clause 89(1)(b)(iv)(B) referred to amounts paid as or on account of premiums, without any reference to the person by whom or on whose behalf those premiums may have been paid. In other words, insofar as the payor of the premiums was concerned, clause 89(1)(b)(iv)(B) was broader than subparagraph (i) in the definition of "adjusted cost basis" in paragraph 148(9)(a) of the *ITA*, as it read at that time.

(iii) <u>1977</u>

[68] In 1977, Parliament amended clause 89(1)(b)(iv)(B) of the *ITA*, so as to include in the Reduction Provision a reference to the adjusted cost basis of a life insurance policy to the corporate beneficiary (rather than referring only to the premiums paid under the policy). The amended definition of "capital dividend account" read as follows:

> (b) "capital dividend account" of a corporation at any particular time means the amount, if any, by which the aggregate of …
>
> (iv) the amount, if any, by which
>
> (A) the proceeds of any life insurance policy received by the corporation in the period and after 1971 in consequence of the death of any person whose life was insured under the policy,
>
> exceeds
>
> (B) the *adjusted cost basis* of the policy (within the meaning of paragraph 148(9)(a) *to the corporation* immediately before that person's death,….[53] [*Emphasis added.*]

[69] In 1977, Parliament also amended paragraph 148(9)(a) of the *ITA* so as to expand the definition of "adjusted cost basis" to a policyholder of an interest in a life insurance policy. The expanded definition read as follows:

---

52 SC 1970-71-72, c. 63, s.1. (originally Bill C-259).

53 Clause 89(1)(b)(iv)(B) was substituted by SC 1977, c. 1, subsection 44(2), applicable with respect to life insurance proceeds received after March 31, 1977.

(a) "adjusted cost basis" to a policyholder as at a particular time of his interest in a life insurance policy means the amount, if any, by which the aggregate of

(i) the cost of each interest in the policy acquired by him before that time but not including an amount referred to in subparagraph (ii) or (iv),

(ii) all amounts each of which is an amount paid before that time, by him or on his behalf, in respect of a premium under the policy,

(iii) all amounts, each of which is an amount in respect of the disposition of an interest in the policy before that time that was required by paragraph (1)(a) as it read for the 1977 taxation year, subsection (1), section 16 or paragraph 56(1)(d) to be included in computing his income for a taxation year,

(iv) all amounts, each of which is an amount in respect of the repayment before that time and after March 31, 1978 of a policy loan in respect of the policy but not including any payment of interest thereon or any repayment of a loan that was deductible pursuant to paragraph 20(1)(hh), and

(v) the amount, if any, by which the cash surrender value of the policy as at its first anniversary date after March 31, 1977, exceeds the adjusted cost basis (determined under this Act as it would have read on that date if subsection (8) had not been applicable) of his interest in the policy on that date

exceeds the aggregate of

(vi) the aggregate of amounts of which is proceeds of the disposition of his interest in the policy that he became entitled to receive before that time,

(vii) the amount payable on March 31, 1978 in respect of a policy loan in respect of the policy; and

(viii) the aggregate of all amounts each of which is an amount received before that time in respect of the policy that he was entitled to deduct under paragraph 60(a) in computing his income for a taxation year;….[54]

The expanded definition of "adjusted cost basis" contained a number of additional factors, as well as the three original factors, i.e., the cost of acquiring an interest in a policy, the premiums paid under the policy and the proceeds of disposition of an interest in the policy.

---

[54] SC 1977, c. 1, s. 74(4). In subparagraph 148(9)(a)(vi), I think that the word "each" should have been inserted after the word "amounts."

[70] The 1977 amendment also added the definition of "proceeds of the disposition" to the *ITA*, as paragraph 148(9)(e.2).[55]

[71] Also in 1977, Parliament amended subsection 148(1) of the *ITA*. Until that time, paragraph 148(1)(a) had remained unchanged since its original enactment as paragraph 79D(1)(a) of the *Former Act*. The relevant portions of the subsection, as amended in 1977, read as follows:

> 148(1) There shall be included in computing the income for a taxation year of a policyholder in respect of the disposition of an interest in a life insurance policy other than,
>
> (a) [n/a], or
>
> (b) [n/a]
>
> the amount, if any, by which the proceeds of the disposition of that interest in the policy that the policyholder, beneficiary or assignee, as the case may be, became entitled to receive in that year exceeds *the adjusted cost basis to the policyholder of that interest* immediately before the disposition.[56] [*Emphasis added.*]

It is noteworthy that in 1977 Parliament continued, in subsection 148(1), to use the same concept that had been in place since 1969, by using the phrase "the adjusted cost basis to the policyholder of that interest," notwithstanding that, in the 1977 definition of "capital dividend account" in clause 89(1)(b)(iv)(B), as amended by the same statute, Parliament had adopted the phrase "the adjusted cost basis of the policy … to the corporation…." To me, this suggests that Parliament had deliberately chosen to use two different entities as the complementary reference points (i.e., the objects of the preposition "to") for the term "adjusted cost basis," i.e. the corporation in the context of clause 89(1)(b)(iv)(B) and the policyholder in the context of subsection 148(1) and paragraph 148(9)(a).

[72] In 1977, as noted above, paragraph 148(9)(a) of the *ITA* continued to define the "adjusted cost basis" to a policyholder of his interest in a life insurance policy by reference to (among other things) the amounts paid by or on behalf of the policyholder in respect of a premium under the policy, while paragraph 89(1)(b) defined "capital dividend account" by reference to the adjusted cost basis of a policy to the corporation (notwithstanding that subsection 148(1) and paragraph

---

55 SC 1977, c. 1, s. 74(6).

56 Subsection 148(1) was substituted by SC 1977, c. 1, subsection 74(1), applicable to 1978 *et seq*.

148(9)(a) continued to refer to the adjusted cost basis to the policyholder of the particular interest in the policy). By reading paragraphs 89(1)(b) and 148(9)(a) and subsection 148(1) together, there was an implication that, for the purpose of determining the amount to be added to a corporation's capital dividend account, one was to consider the premiums paid by the corporation, but not by the policyholder (assuming that the policyholder was not the beneficiary).[57] This was a change from the legislative situation that had existed before April 1, 1977, and indicated that in 1977 there was a change in legislative policy.

[73] To summarize, from 1972 to March 31, 1977, clause 89(1)(b)(iv)(B) of the *ITA* had referred to "all amounts paid as or on account of premiums paid under the policy," regardless of the identity of the payor of those premiums. With the 1977 amendment, upon a corporation receiving the proceeds of a life insurance policy, the amount to be added to the corporation's capital dividend account was now calculated by reference to the adjusted cost basis of the policy to the corporation. Thus, after March 31, 1977, only premiums paid by or on behalf of the corporation, as well as the cost of acquiring each interest in the policy, any proceeds of the disposition of an interest in the policy and several other factors, were to be considered in calculating the amount to be added to the corporation's capital dividend account. This clearly signalled a change in the factors to be considered in determining the amount to be added to a corporation's capital dividend account upon the corporation receiving proceeds of a life insurance policy. As noted above, this was indicative of a change in legislative policy in 1977.

(iv) <u>1982-83</u>

[74] In 1983, when Parliament introduced the concept of a life insurance capital dividend account effective as of June 28, 1982, it also amended the definition of "capital dividend account" to read as follows:

> (b) "capital dividend account" of a corporation at any particular time means the amount, if any, by which the aggregate of …
>
> (iv) the amount, if any, by which
>
> (A) <u>the aggregate of all amounts each of which is</u> the proceeds of <u>a</u> life insurance policy <u>of which the corporation was a beneficiary</u>

57 As the 1977 definition of "adjusted cost basis" indicated, in addition to premiums, a number of other factors also went into the calculation of a policy's adjusted cost basis.

on or before June 28, 1982 received by the corporation in the period and after 1971 in consequence of the death of any person whose life was insured under the policy,

exceeds

(B) the aggregate of all amounts each of which is the *adjusted cost basis* of the policy (within the meaning of paragraph 148(9)(a)) *to the corporation* immediately before that person's death,…[58] [*Emphasis added; see footnote below*.]

[75] The following definition of "life insurance capital dividend account" was enacted by Parliament at the same time:

(b.2) "life insurance capital dividend account" of a corporation at any particular time means the amount, if any, by which the aggregate of

(i) the amount, if any, by which

(A) the aggregate of all amounts each of which is the proceeds of a life insurance policy of which the corporation was not a beneficiary on or before June 28, 1982 received as a consequence of the death of a person whose life was insured under the policy by the corporation in the period

(I) commencing on the first day of the first taxation year commencing after the time the corporation last became a private corporation and ending after 1971, and

(II) ending immediately before the particular time

exceeds

(B) the aggregate of all amounts each of which is the *adjusted cost basis* (within the meaning assigned by paragraph 148(9)(a)) *to the corporation* immediately before that person's death of a policy referred to in clause (A), and ….[59] [*Emphasis added.*]

---

58 Subparagraph 89(1)(b)(iv) was substituted by SC 1980-81-82-83, c. 140, subsection 54(2), applicable after June 28, 1982. The underlining in the above quotation shows the amendments. The italicized font shows my emphasis.

59 Paragraph 89(1)(b.2) was added by SC 1980-81-82-83, c. 140, subsection 54(3), applicable after June 28, 1982. I have omitted subparagraphs 89(1)(b.2)(ii) and (iii).

There was a similarity between the manner of calculating a corporation's life insurance capital dividend account and the manner in which a corporation's capital dividend account had previously been calculated. In particular, there was symmetry between clauses 89(1)(b)(iv)(B) and 89(1)(b.2)(i)(B). If Parliament had intended that premiums paid by the policyholder would be taken into consideration in calculating the amount of insurance proceeds to be added to the life insurance capital dividend account, it could easily have so provided, rather than continuing to use the phrase "adjusted cost basis … to the corporation."

[76] In 1983, Parliament also amended the definition of "adjusted cost basis" in subsection 148(9), so as to exclude from that term the net cost of pure insurance in respect of a life insurance policy acquired by a policyholder after December 1, 1982. The relevant portion of the amended definition was the following:

> (a) "adjusted cost basis" to a policyholder as at a particular time of his interest in a life insurance policy means the amount, if any, by which the aggregate of
>
> (i) the cost of each interest in the policy acquired by him before that time but not including an amount referred to in subparagraph (ii) or (iv),
>
> (ii) all amounts each of which is an amount paid before that time, by him or on his behalf, in respect of a premium under the policy,….
>
> exceeds the aggregate of
>
> (vi) the aggregate of amounts each of which is proceeds of the disposition of his interest in the policy that he became entitled to receive before that time,….
>
> (ix) in the case of an interest in a life insurance policy (other than an annuity contract) that was last acquired after December 1, 1982 by the policyholder, the aggregate of all amounts each of which is the net cost of pure insurance in respect of the interest, as determined in prescribed manner, immediately before the end of the calendar year ending in a taxation year commencing after May 31, 1985 and before that time,….[60]

[77] Turning to subsection 148(1) of the *ITA*, although amendments were made in 1983 to the opening and middle portions of that subsection, the concluding

[60] Subparagraph 148(9)(a)(ix) was added by SC 1980-81-82-83, c. 140, subsection 102(9), applicable to taxation years commencing after 1982.

portion contained only a minor amendment (the phrase "in that year" was replaced with the phrase "in the year"). In particular, the phrase "exceeds the adjusted cost basis to the policyholder of that interest" remained unchanged.[61]

(v) 1986

[78] In 1986, in conjunction with the repeal of the short-lived rules relating to the life insurance capital dividend account, the definition of "capital dividend account" in paragraph 89(1)(b) of the *ITA* was amended to read as follows:

> (b) "capital dividend account" of a corporation at any particular time means the amount, if any, by which the aggregate of …
>
> (iv) the amount, if any, by which the aggregate of
>
> (A) all amounts each of which is the proceeds of a life insurance policy of which the corporation was a beneficiary on or before June 28, 1982 received by the corporation in the period and after 1971 in consequence of the death of any person, and
>
> (B) all amounts each of which is the proceeds of a life insurance policy of which the corporation was not a beneficiary on or before June 28, 1982 received by the corporation in the period and after May 23, 1985 in consequence of the death of any person
>
> exceeds the aggregate of all amounts each of which is the *adjusted cost basis* (within the meaning assigned by paragraph 148(9)(a)) of a policy referred to in clause (A) or (B) *to the corporation* immediately before that person's death,…[62] [*Emphasis added.*]

The 1986 amendment did not change the general import of the Reduction Provision that had been in place since 1977, i.e., the amount to be added to a corporation's capital dividend account, upon receiving proceeds of a life insurance policy, was to be reduced by the adjusted cost basis of the policy to the corporation.

---

61 See SC 1980-81-82-83, c. 140, subsection 102(1), applicable with respect to dispositions occurring after November 12, 1981.

62 Subparagraph 89(1)(b)(iv) was substituted by SC 1986, c. 6, subsection 48(1), applicable after May 23, 1985.

(vi) 1994

[79] The *ITA* was brought within the *Revised Statutes of Canada 1985* ("RSC 1985") on March 1, 1994, as chapter 1 of the Fifth Supplement, with the result that defined terms were no longer identified as particular paragraphs of a section or subsection, but rather were listed alphabetically (in both official languages) in the particular section or subsection. This led to some internal renumbering of paragraphs, subparagraphs and the like in many of the defined terms. Consequently, the relevant portion of the definition of "capital dividend account" was reworded as follows:

> "capital dividend account" of a corporation at any particular time means the amount, if any, by which the total of …
>
> (d) the amount, if any, by which the total of
>
> (i) all amounts each of which is the proceeds of a life insurance policy of which the corporation was a beneficiary on or before June 28, 1982 received by the corporation in the period and after 1971 in consequence of the death of any person, and
>
> (ii) all amounts each of which is the proceeds of a life insurance policy of which the corporation was not a beneficiary on or before June 28, 1982 received by the corporation in the period and after May 23, 1985 in consequence of the death of any person
>
> exceeds the total of all amounts each of which is the *adjusted cost basis* (within the meaning assigned by subsection 148(9)) of a policy referred to in subparagraph (i) or (ii) *to the corporation* immediately before that person's death,….[63] [*Emphasis added.*]

Thus, notwithstanding the conversion to the formatting of the RSC 1985, the substance of the life insurance portion of the definition of "capital dividend account" remained essentially the same as previously.[64]

[80] More significant changes in form were visible in the RSC 1985 version of the definition of "adjusted cost basis," now listed alphabetically in subsection 148(9) of the *ITA*. Notably, a formulaic approach to the definition was used. In addition, shortly after the RSC 1985 version took effect and before the

---

63 RSC 1985, c. 1 (5th Supplement), subsection 89(1).

64 There were a few minor differences between the two provisions. For instance, the word "aggregate" in the prior version was changed to "total" in the RSC 1985 version.

commercial publishers could release a new edition of the *ITA*, Parliament made a few amendments. For the purposes of these Appeals, the relevant portions of the definition of "adjusted cost basis," in RSC 1985 format and with an amendment made in 1994, read as follows:

> "adjusted cost basis" to a policyholder as at a particular time of the policyholder's interest in a life insurance policy means the amount determined by the formula
>
> (A + B …) – (H + … L)
>
> where
>
> A is the total of all amounts each of which is the cost of an interest in the policy acquired by the policyholder before that time but not including an amount referred to in the description of B or E,
>
> B is the total of all amounts each of which is an amount paid before that time by or on behalf of the policyholder in respect of a premium under the policy, other than amounts referred to in clause (2)(a)(ii)(B), in subparagraph (iii) of the description of C in paragraph (a) of the definition "proceeds of the disposition" or in subparagraph (b)(i) of that definition, …
>
> H is the total of all amounts each of which is the proceeds of the disposition of the policyholder's interest in the policy that the policyholder became entitled to receive before that time,…
>
> L is
>
> (a) in the case of an interest in a life insurance policy (other than an annuity contract) that was last acquired after December 1, 1982 by the policyholder, the total of all amounts each of which is the net cost of pure insurance, as defined by regulation and determined by the issuer of the policy in accordance with the regulations, in respect of the interest immediately before the end of the calendar year ending in a taxation year commencing after May 31, 1985 and before that time,…[65]

While there were formatting and numbering changes and a few other minor changes in the above portions of the definition of "adjusted cost basis," the overall substance remained essentially the same.

---

[65] RSC 1985, c. 1 (5th Supplement), subsection 148(9). The amendment to the description of variable B in the definition of "adjusted cost basis" was enacted by *Income Tax Amendments Revision Act*, SC 1994, c. 7, vol. I, Sch. VIII, subsection 87(4), applicable to amounts paid in taxation years commencing after December 20, 1991.

(vii) 2013

[81] In 2013, Parliament enacted amendments designed to address concerns relating to leveraged insurance annuity (“LIA”) policies and 10/8 arrangements. Accordingly, paragraph (d) of the definition of “capital dividend account” was amended to exclude, from the computation of a corporation’s capital dividend account, the proceeds of an LIA policy, and to provide that, if an insurance policy is a 10/8 policy, the outstanding amount of a described borrowing is not to be included in computing the capital dividend account. The amended definition read as follows:

> “capital dividend account” of a corporation at any particular time means the amount, if any, by which the total of …
>
> (d) the amount, if any, by which the total of
>
> (i) all amounts each of which is the proceeds of a life insurance policy of which the corporation was a beneficiary on or before June 28, 1982 received by the corporation in the period and after 1971 in consequence of the death of any person, and
>
> (ii) all amounts each of which is the proceeds of a life insurance policy (other than an LIA policy) of which the corporation was not a beneficiary on or before June 28, 1982 received by the corporation in the period and after May 23, 1985 in consequence of the death of any person
>
> exceeds the total of all amounts each of which is:
>
> (iii) the adjusted cost basis (within the meaning assigned by subsection 148(9)) of a policy referred to in subparagraph (i) or (ii) *to the corporation* immediately before the death, or
>
> (iv) if the policy is a 10/8 policy immediately before the death and the death occurs after 2013, the amount outstanding, immediately before the death, of the borrowing that is described in subparagraph (a)(i) of the definition “10/8 policy” in subsection 248(1) in respect of the policy,….[66] [*Emphasis added.*]

The 2013 amendments did not make any significant changes to the relevant provisions of subsection 148(1) and the definition of “adjusted cost basis.”

---

[66] The amendment was enacted by SC 2013, c. 40, section 41, applicable to taxation years that end after March 20, 2013.

(viii) 2016

[82] In 2016, Parliament amended subparagraph (d)(iii) of the definition of "capital dividend account" in subsection 89(1) of the *ITA*, so as to preclude the type of planning that was done by the RPC Group in 2005. After the amendment, which took effect as of December 15, 2016, subparagraphs (d)(i)–(iii) of that definition read as follows:

> "capital dividend account" of a corporation at any particular time means the amount, if any, by which the total of …
>
> (d) the amount, if any, by which the total of
>
> (i) all amounts each of which is the proceeds of a life insurance policy of which the corporation was a beneficiary on or before June 28, 1982, received by the corporation in the period and after 1971 in consequence of the death of any person, and
>
> (ii) all amounts each of which is the proceeds of a life insurance policy (other than an LIA policy) of which the corporation was not a beneficiary on or before June 28, 1982 received by the corporation in the period and after May 23, 1985 in consequence of the death of any person
>
> exceeds the total of all amounts each of which is
>
> (iii) the *"adjusted cost basis"* (in this paragraph as defined in subsection 148(9)), immediately before the death, of
>
> (A) if the death occurs before March 22, 2016, a policy referred to in subparagraph (i) or (ii) *to the corporation*, and
>
> (B) if the death occurs after March 21, 2016, *a policyholder's interest in a policy* referred to in subparagraph (i) or (ii),…[67] [*Emphasis added.*]

[83] The amendment referred to in the preceding paragraph was announced on March 22, 2016, in conjunction with the Budget Speech delivered by the Minister of Finance on that day. The proposed legislation set out in the budget documents released on March 22, 2016 was slightly different from the legislation that was actually enacted (as set out above). Specifically, in the proposed legislation

---

[67] Enacted by SC 2016, c. 12, subsection 29(3), in force December 15, 2016 (being the date of Royal Assent).

released on March 22, 2016, the parenthetical phrase, after the words "adjusted cost basis" in the initial portion of subparagraph (d)(iii), read simply "(as defined in subsection 148(9))." The words "in this paragraph" were added to that parenthetical phrase in a Notice of Ways and Means Motion tabled in the House of Commons in October 2016.

[84] The Notice of Ways and Means Motion tabled in October 2016 made further amendments to paragraph (d) of the definition of "capital dividend account," which resulted in the term "adjusted cost basis" being used three additional times in the amended provision.[68] Curiously, in the four situations in paragraph (d) of the amended definition of "capital dividend account" where the term "adjusted cost basis" is used, three different wordings are used, as follows:

(a) In clause (d)(iii)(B), the wording is:

> … adjusted cost basis … of … a policyholder's interest in a policy….

(b) In subclause (d)(v)(A)(I), the wording is:

> … the adjusted cost basis to the policyholder of the interest….

(c) In subparagraph (d)(vi), in defining variable A (as used in the formula in that subparagraph), the wording is:

> … the adjusted cost basis to the policyholder of the interest….

(d) In subparagraph (d)(vi), in defining variable B (as used in the formula in that subparagraph), the wording is:

> … the adjusted cost basis … of the interest in the policy….

It is difficult to determine whether the three variations in the language of the provisions set out above were intended by Parliament to have any significance in interpreting those provisions or in ascertaining the legislative policy underlying those provisions.

[85] The 2016 version of paragraph (d) of the definition of "capital dividend account" was the first time that the term "adjusted cost basis" was enclosed within

[68] The complete text of paragraph (d) of the definition of "capital dividend account," as amended in 2016, is set out in Appendix B.

quotation marks in that definition. In all previous iterations of that definition, from 1977 to 2015, the term "adjusted cost basis" was not enclosed within quotation marks. Perhaps the reason for this difference was that, in previous iterations, the parenthetical phrase in the definition was "(within the meaning assigned by subsection 148(9))," whereas in the 2016 iteration the parenthetical phrase was "(in this paragraph as defined in subsection 148(9))."

[86] The wording in clause (d)(iii)(B) of the definition of "capital dividend account," as enacted by the 2016 budget legislation, is peculiar in that it deviates from the general practice in the *ITA* of describing an adjusted cost basis as being the adjusted cost basis to a particular person.[69] For instance, the definition of "adjusted cost basis" in subsection 148(9) of the *ITA* actually defines the "'adjusted cost basis'… *to a policyholder* of the policyholder's interest in a life insurance policy…" [*emphasis added*]. Similarly, both before and after the 2016 budget amendments, subsection 148(1) of the *ITA* described, and continues to describe, the income inclusion contemplated by that subsection (in the context of a disposition of a life insurance policy) as being determined by reference to "the amount … by which the proceeds of the disposition of the policyholder's interest in the policy … exceeds the adjusted cost basis *to the policyholder* of that interest…"[*emphasis added*]. Even in two of the other three situations in paragraph (d) of the definition of "capital dividend account" where the term "adjusted cost basis" was inserted by the 2016 amendments, the traditional wording (i.e., "adjusted cost basis *to the policyholder*") [*emphasis added*] is used.[70] Only in the definition of variable B, in subparagraph (d)(vi), is the wording (i.e., "the adjusted cost basis … of the interest in the policy") somewhat consistent with (but not identical to) the wording in clause (d)(iii)(B).

(b) Effect of a Statutory Amendment

(i) Applicable Principles

[87] Subsections 45(2) and (3) of the *Interpretation Act* state:

> (2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

69 This is only a general practice. For an example of different terminology (namely, "… the taxpayer's adjusted cost basis …"), see subsection 148(1.1) of the *ITA*.

70 See paragraph 84 above.

> (3) The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.

[88] In commenting on the above provisions, the Federal Court of Appeal has stated:

> 46. … I note for now that subsequent amendments cannot be assumed to alter or confirm the prior state of the law (see subsections 45(2) and (3) of the *Interpretation Act*…). The recent decision of this Court in *Univar Holdco Canada ULC* … illustrates the point that in a GAAR context, the provisions used to obtain the tax benefit must first be construed on their own. Only then can one say whether a subsequent amendment that touches upon the same subject matter confirms or alters the prior state of the law….
>
> 86. Whether an amendment clarifies the prior law or alters it turns on the construction of the prior law and the amendment itself. As explained, the *Interpretation Act* prevents any conclusion from being drawn as to the legal effect of a new enactment on the prior law on the sole basis that Parliament adopted it. Keeping this limitation in mind, the only way to assess the impact of a subsequent amendment on the prior law is to first determine the legal effect of the law as it stood beforehand and then determine whether the subsequent amendment alters it or clarifies it.[71]

[89] The Federal Court of Appeal went on to caution that, in a GAAR context, when determining the effect of an amendment, it is not sufficient simply to compare the wording of the former provision to the wording of the amended provision. The Court stated:

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

---

71 *The Queen v Oxford Properties Group Inc.*, 2018 FCA 30, ¶46 & 86.

> still be demonstrated by inquiring into the provision's reason for being (*Copthorne* at paras. 110-111).[72]

(ii) Pre-2016 Amendments

[90] When the definition of "adjusted cost basis" was added to the *ITA* in 1969, there were only three factors to be considered in computing the adjusted cost basis to a policyholder of an interest in a life insurance policy, namely, the cost of acquiring each of the policyholder's interests, the premiums paid under the policy by or on behalf of the policyholder, and the proceeds of disposition (if any) of interests in the policy. An almost identical definition of "adjusted cost basis" was included in the 1972 version of the *ITA*.

[91] When the definition of "capital dividend account" was added to the *ITA* in 1972, as part of tax reform, the Reduction Provision in the definition provided that, in determining the portion of life insurance proceeds received by a corporation to be added to the corporation's capital dividend account, all amounts paid as or on account of premiums under the policy were to be subtracted. This situation continued until the definition was amended in 1977, when the Reduction Provision was changed, such that it no longer referred to total premiums paid, and instead referred to the adjusted cost basis of the policy to the corporation.

[92] The 1977 definition of "adjusted cost basis" continued to refer to the cost of acquiring each interest in the policy, the premiums paid by or on behalf of the policyholder, and the proceeds of the disposition of any interests in the policy. However, by reason of the 1977 amendment, the definition of "adjusted cost basis" was expanded to include five additional factors, as set out in subparagraphs 148(9)(a)(iii), (iv), (v), (vii) and (viii) of the *ITA*. Thus, the factors to be considered in applying the Reduction Provision after March 31, 1977 were more numerous than the factors to be considered in applying the Reduction Provision before April 1, 1977.

[93] In my view, the amendments made to the definitions of "capital dividend account" and "adjusted cost basis" in 1977 represented alterations in the law, rather than clarifications of the prior law. No longer did the Reduction Provision in the

---

72 *Ibid*, ¶88.

definition of “capital dividend account” refer only to premiums paid under the policy, but rather, beginning in 1977, it referred to the adjusted cost basis of the policy to the corporation. As well, the fact that, in 1977, the amended definition of “adjusted cost basis” no longer referred only to the cost of acquiring each interest in the policy, premiums paid by or on behalf of the policyholder, and the proceeds of the disposition of any interests in the policy, but also referred to five additional factors, further indicated that the 1977 amendment of the definition of “capital dividend account” went beyond a mere clarification of the prior law.

[94] It is also significant that, in 1977, although Parliament had previously used the phrase “adjusted cost basis to a policyholder” (or words to that effect) in several instances in section 148 of the *ITA*, in amending the definition of “capital dividend account” in paragraph 89(1)(b), Parliament chose to use the phrase “adjusted cost basis of the policy … to the corporation….” This appears to have been a deliberate choice on the part of Parliament.

[95] The definitions of “capital dividend account” and “adjusted cost basis” are highly technical and very complex, such that one would expect that the wording of those definitions should play a significant role in determining the underlying policies of the definitions. Thus, it is my view that, before 1977, the legislative policy underlying the Reduction Provision in the definition of “capital dividend account” was that any premiums paid by anyone in respect of a life insurance policy were to be taken into consideration in determining the portion of the proceeds paid under the policy to a corporate beneficiary that could be added to the capital dividend account of that beneficiary. After the 1977 amendment, the underlying legislative policy was that premiums paid by the corporate beneficiary, together with the other factors listed in the definition of the “adjusted cost basis” of the life insurance policy to that beneficiary (and not to the policyholder), were to be taken into consideration.

[96] While there were a number of amendments to the definitions of “capital dividend account” and “adjusted cost basis” between 1977 and 2015, in my view, during that period, the legislative policy underlying the Reduction Provision in the definition of “capital dividend account” remained the same.

[97] During that period there were several occasions when Parliament considered concerns in respect of the method of calculating a corporation’s capital dividend account in the context of the receipt of life insurance proceeds. As indicated above, some of those concerns were dealt with, or arose in the context of, the introduction and subsequent repeal of the life insurance capital dividend account and the

introduction of rules relating to LIA policies and 10/8 policies. Each of those concerns resulted in amendments to the definition of "capital dividend account," and yet, on none of those occasions did Parliament see fit to amend the portion of the Reduction Provision that is relevant to these Appeals and that, throughout the period from 1977 to March 21, 2016, continued to refer to the adjusted cost basis of the particular life insurance policy to the corporation.

(iii) <u>2016 Amendment</u>

[98] The Department of Finance ("Finance") issued two public statements in respect of the amendment made in 2016 to paragraph (d) of the definition of "capital dividend account" in subsection 89(1) of the *ITA*. In the *Budget Supplementary Information* that accompanied the federal budget of March 22, 2016, Finance stated the following:

> Life insurance proceeds received as a result of the death of an individual insured under a life insurance policy (a "policy benefit") are generally not subject to income tax. A private corporation may add the amount of a policy benefit it receives to its capital dividend account, which consists of certain non-taxable amounts. A private corporation may elect to pay a dividend as a capital dividend to the extent that the corporation's capital dividend account has a positive balance. Capital dividends are received tax-free by shareholders….
>
> In the life insurance context, only the portion of the policy benefit received by the corporation … that is in excess of the policyholder's adjusted cost basis of the policy (the "insurance benefit limit") may be added to the capital dividend account of a corporation….
>
> Some taxpayers have structured their affairs so that the insurance benefit limit may not apply as intended, resulting in an artificial increase in a corporation's capital dividend account balance…. This planning may allow those taxpayers to avoid income tax on dividends payable by a private corporation…. These results are unintended and erode the tax base.
>
> Although the Government is challenging a number of these structures under the existing tax rules, Budget 2016 proposes to amend the *Income Tax Act* to ensure that the capital dividend account rules for private corporations … apply as intended. This measure will provide that the insurance benefit limit applies regardless of whether the corporation … that receives the policy benefit is a policyholder of the policy. To that end, the measure will also introduce information-reporting requirements that will apply where a corporation … is not a policyholder but is entitled to receive a policy benefit.

> This measure will apply to policy benefits received as a result of a death that occurs on or after Budget Day.[73]

[99] With respect, I am not certain that the second paragraph of the statement quoted above is correct. Although Finance stated that "only the portion of the policy benefit received by the corporation … that is in excess of the policyholder's adjusted cost basis of the policy … may be added to the capital dividend account," the legislation that was in place before March 22, 2016 actually indicated that the limit was determined by reference to the adjusted cost basis of the policy to the corporation (rather than the policyholder). Finance may have hoped or supposed that the insurance benefit limit (as defined in the above-mentioned budget document) would be calculated by reference to the policyholder's adjusted cost basis of the policy, but the legislation did not actually say that. Thus, it appears that some of the comments made in the above statement may come within the self-serving language to which the Federal Court of Appeal referred in *Oxford Properties*, as follows:

> 93. While publications of this type [i.e., Budget Supplementary Information documents issued by Finance], including Explanatory Notes, are considered as permissible extrinsic aids …, I do not believe that this particular publication … should be given any weight in this case. This is because, as acknowledged at p. 415 of this publication, it was issued at a time when officials of the Department of Finance were aware that structures like the one here in issue were being challenged by the Minister. This raises the obvious concern that the publication may be self-serving, particularly in a GAAR context, where the object, spirit and purpose of the pre-amendment law is the matter in issue. As such, the opinion expressed in this publication must be disregarded.[74]

[100] In the *Explanatory Notes* released by Finance on October 21, 2016, the following was stated:

> Paragraph (d) of the definition [of "capital dividend account"] permits a corporation to add to its capital dividend account the amount of proceeds of a life insurance policy received by the corporation, as a beneficiary under the policy, in consequence of the death of an individual whose life is insured under the policy.
>
> The addition applies only to the extent that those proceeds exceed the adjusted cost basis of the policy to the corporation immediately before the death. In effect,

---

73 Canada, Department of Finance, *Tax Measures: Supplementary Information* (Ottawa, March 22, 2016), p. 34.

74 *Oxford Properties*, *supra* note 71, ¶93.

> the corporation's policy adjusted cost basis is not included in the amount added to the capital dividend account.
>
> Subparagraph (d)(iii) of the definition is amended so that the policy adjusted cost basis limit described above also applies in cases where the corporation is not a policyholder of the policy. Specifically, where the death that gives rise to the insurance proceeds received by the corporation occurs after March 21, 2016, the adjusted cost basis limit is the total of all amounts each of which is the adjusted cost basis to a policyholder of the policyholder's interest in the policy.[75]

The first sentence of the third paragraph quoted above is confusing. That sentence indicates that, under the amended definition of "capital dividend account," the policy adjusted cost basis limit described in the second paragraph quoted above will also apply in cases where the corporation is not a policyholder of the policy. However, the policy adjusted cost basis limit[76] (as described in the second paragraph quoted above) refers to the adjusted cost basis of the policy to the corporate beneficiary, and not the adjusted cost basis of the policy to the policyholder. It is my view that the second paragraph quoted above actually describes the law as it existed before March 22, 2016, as there is nothing in the first two paragraphs quoted above to suggest that the corporation referred to in those paragraphs is the holder of the policy. Rather, the corporation referenced in those paragraphs is the recipient of the proceeds of the policy, i.e. the corporate beneficiary. The description of the law, as amended effective as of March 22, 2016, is actually set out in the second sentence of the third paragraph quoted above.

[101] The statements made by Finance in 2016 appear to be at odds with statements that it made in 1985 and 2013. In November 1985, Finance stated:

> Paragraph 89(1)(b) defines the "capital dividend account" of a corporation. Where an appropriate election has been made by a private corporation, dividends paid out of the capital dividend account are received tax-free by its shareholders resident in Canada. Subparagraph (iv) thereof includes the receipt of certain net life insurance proceeds (proceeds minus the adjusted cost base [*sic*] *to the corporation* of the policy) *where the corporation was a beneficiary* under the policy on or before June 28, 1982. As a consequence of the repeal of the provisions relating to life insurance capital dividends, net life insurance proceeds received after May 23, 1985 will be included in calculating a corporation's capital

---

75 Canada, Department of Finance, *Explanatory Notes Relating to the Income Tax Act, Excise Tax Act, Excise Act, 2001 and Related Texts*, (Ottawa, October 21, 2016), p. 69. The *Explanatory Notes* are sometimes referred to as *Technical Notes.*

76 This is the wording used by Finance in the third paragraph quoted above.

> dividend account regardless of the date on which *the corporation became a beneficiary*.[77] [*Emphasis added.*]

In October 2013, Finance stated:

> Where the appropriate elections have been made by a private corporation, dividends paid out of the capital dividend account of the corporation are received tax-free by the corporation's shareholders who are resident in Canada.
>
> Paragraph (d) of the definition "capital dividend account" includes in computing the capital dividend account of a corporation the amount of certain net life insurance proceeds (proceeds minus the adjusted cost basis *to the corporation* of the policy) *received by the corporation* in consequence of the death of any person.
>
> Paragraph (d) of the definition is amended so that a corporation's capital dividend account is not increased by any amount received in respect of an LIA policy. That paragraph is also amended to reduce the amount otherwise included under that paragraph in a corporation's capital dividend account by certain specified amounts, in respect of deaths that occur after 2013, under a 10/8 policy. Those amounts are, if the policy is a 10/8 policy immediately before the relevant death, the amount of any 10/8 borrowings, in respect of the policy, that remained outstanding immediately before the relevant death.[78] [*Emphasis added.*]

In the 1985 and 2013 statements by Finance, the referenced corporation was the beneficiary of the life insurance policy, and not necessarily the holder of that policy. In fact, there was nothing in either statement that specifically referred to the policyholder. The 1985 and 2013 statements by Finance undermine the 2016 assertion by Finance that the intended adjusted cost basis to be used for the purpose of the Reduction Provision before March 22, 2016 was the adjusted cost basis to the policyholder, and not the adjusted cost basis to the corporate beneficiary.

[102] Returning to the 2016 *Explanatory Notes*, it is curious that Finance stated in those *Explanatory Notes* that the "adjusted cost basis limit is the total of all amounts each of which is the adjusted cost basis *to a policyholder* of the policyholder's interest in the policy" [*emphasis added*], given that the words "to a policyholder" do not actually appear in subparagraph (d)(iii) of the amended definition of "capital dividend account."

---

77 David Sherman, *2019 Department of Finance Technical Notes: Income Tax*, 31st ed. (Toronto: Carswell, 2019), s. 89(1) "capital dividend account" (d) (Taxnet Pro).

78 *Ibid.*

[103] It is clear, particularly as one considers the "effective-date" references (i.e., "before March 22, 2016" and "after March 21, 2016") in clauses (d)(iii)(A) and (B) of the definition of "capital dividend account," as amended in 2016, that the 2016 amendment changed the wording of the previous Reduction Provision. However, as noted by the Federal Court of Appeal in *Oxford Properties*, in a GAAR analysis, rather than looking at the wording of the former and the amended versions of a legislative provision, it is necessary to consider the object, spirit and purpose (or underlying rationale) of the former and amended provisions,[79] which I will proceed to do.

[104] As explained above, when discussing the amendment to the Reduction Provision made in 1977, it is my view that there was a change in legislative policy made at that time. Similarly, I am of the view that in 1977 there was a change in the object, spirit and purpose of the Reduction Provision. Before April 1, 1977, the object, spirit and purpose of the Reduction Provision was to limit the amount added to a corporate beneficiary's capital dividend account by reference to the amounts paid by any person on account of the premiums under the particular life insurance policy. After March 31, 1977, the object, spirit and purpose of the Reduction Provision was to limit the amount added to a corporate beneficiary's capital dividend account by reference to the premiums paid by that beneficiary, together with such other factors as might be relevant in computing the adjusted cost basis of the policy to that beneficiary. It is also my view that, from April 1, 1977 to March 21, 2016, the object, spirit and purpose of the Reduction Provision continued to be the same.

[105] Turning to the 2016 amendment, it is my view that, notwithstanding the self-serving language and ambiguity in the *Budget Supplementary Information* and the *Explanatory Notes* issued by Finance in 2016, the object, spirit and purpose of the Reduction Provision, as amended, had clearly changed. After March 21, 2016, the object, spirit and purpose of the Reduction Provision, as amended, was to refer to the adjusted cost basis of a policyholder's interest in the particular policy in order to determine the amount that could be added to the capital dividend account of a corporate beneficiary, even where that beneficiary was not the policyholder.

(c) Interpretation of the Reduction Provision

[106] I will now turn to an interpretation of the Reduction Provision in the definition of "capital dividend account," as it read in 2008 (when the proceeds of

---

[79] *Oxford Properties, supra* note 71, ¶88.

the life insurance policies were added to CGESR's capital dividend account) and 2009 (when the capital dividends were paid or deemed to be paid).

[107] In *Canada Trustco* the Supreme Court of Canada indicated that the first task in a GAAR analysis is to interpret the statutory provision giving rise to the tax benefit to determine its object, spirit and purpose.[80] In *Copthorne*, the Supreme Court indicated that a unified textual, contextual and purposive approach is to be used to determine the object, spirit or purpose (which are sometimes collectively referred to as the underlying rationale) of the provision.[81]

[108] In *Copthorne*, the Supreme Court explained that, once the object, spirit or purpose of a statutory provision has been identified, a Court must then consider whether the transaction falls within or frustrates the identified purpose.[82] The Court went on to state:

> 72. The analysis will then lead to a finding of abusive tax avoidance: (1) where the transaction achieves an outcome the statutory provision was intended to prevent; (2) where the transaction defeats the underlying rationale of the provision; or (3) where the transaction circumvents the provision in a manner that frustrates or defeats its object, spirit or purpose…. These considerations are not independent of one another and may overlap. At this stage, the Minister must clearly demonstrate that the transaction is an abuse of the Act, and the benefit of the doubt is given to the taxpayer.[83]

[109] In accordance with above framework, I will first consider the text, context and purpose of the Reduction Provision. I will then determine whether there was a misuse of the Reduction Provision (i.e., whether there was abusive tax avoidance).

(i) <u>The Text of the Reduction Provision</u>

[110] In *Copthorne*, the Supreme Court stated:

> 88. In any GAAR case the text of the provisions at issue will not literally preclude a tax benefit the taxpayer seeks by entering into the transaction or series. This is not surprising. If the tax benefit of the transaction or series was prohibited by the text, on reassessing the taxpayer, the Minister would only have to rely on the text and not resort to the GAAR, However, this does not mean that the text is

---

80 *Canada Trustco*, *supra* note 10, ¶44.
81 *Copthorne*, *supra* note 25, ¶70 & 109.
82 *Ibid*, ¶71.
83 *Ibid*, ¶72.

> irrelevant. In a GAAR assessment the text is considered to see if it sheds light on what the provision was intended to do….
>
> 109. … When the Minister invokes the GAAR, he is conceding that the words of the statute do not cover the series of transactions at issue. Rather, he argues that although he cannot rely on the text of the statute, he may rely on the underlying rationale or object, spirit and purpose of the legislation to support his position.
>
> 110. I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.[84]

[111] In December 2008 (which was the month in which Mr. Rogers died and the resultant life insurance proceeds were received by CGESR), paragraph (d) of the definition of "capital dividend account" read as follows:

> "capital dividend account" of a corporation at any particular time means the amount, if any, by which the total of …
>
> (d) the amount, if any, by which the total of
>
> (i) all amounts each of which is the proceeds of a life insurance policy of which the corporation was a beneficiary on or before June 28, 1982 received by the corporation in the period and after 1971 in consequence of the death of any person, and
>
> (ii) all amounts each of which is the proceeds of a life insurance policy of which the corporation was not a beneficiary on or before June 28, 1982 received by the corporation in the period and after May 23, 1985 in consequence of the death of any person
>
> exceeds the total of all amounts each of which is *the adjusted cost basis (within the meaning assigned by subsection 148(9)) of a policy* referred to in subparagraph (i) or (ii) *to the corporation* immediately before that person's death,….[85] [*Emphasis added.*]

At that time, subsection 148(9) of the *ITA* defined "adjusted cost basis" as follows:

---

[84] *Ibid*, ¶88, 109-110.

[85] The portion of paragraph (d) which follows subparagraph (ii) was the 2008 version of the Reduction Provision.

"adjusted cost basis" to a policyholder as at a particular time of the policyholder's interest in a life insurance policy means the amount determined by the formula

$$(A + B + \ldots) - (H + \ldots L)$$

where

A is the total of all amounts each of which is the cost of an interest in the policy acquired by the policyholder before that time but not including an amount referred to in the description of B or E,

B is the total of all amounts each of which is an amount paid before that time by or on behalf of the policyholder in respect of a premium under the policy, other than amounts referred to in clause (2)(a)(ii)(B), in subparagraph (iii) of the description of C in paragraph (a) of the definition "proceeds of the disposition" or in subparagraph (b)(i) of that definition, …

H is the total of all amounts each of which is the proceeds of the disposition of the policyholder's interest in the policy that the policyholder became entitled to receive before that time,….

L is

(a) in the case of an interest in a life insurance policy (other than an annuity contract) that was last acquired after December 1, 1982 by the policyholder, the total of all amounts each of which is the net cost of pure insurance, as defined by regulation and determined by the issuer of the policy in accordance with the regulations, in respect of the interest immediately before the end of the calendar year ending in a taxation year commencing after May 31, 1985 and before that time,…

[112] For the purposes of these Appeals, the key phrase in the 2008 version of the Reduction Provision is "… the adjusted cost basis (within the meaning assigned by subsection 148(9)) of a policy … to the corporation…." This phrase referred to the adjusted cost basis of a policy. However, the definition of "adjusted cost basis" in subsection 148(9) actually defined the adjusted cost basis of a policyholder's interest in a life insurance policy. It is not clear whether there is a difference between an adjusted cost basis of a policy and an adjusted cost basis of an interest in a policy. For the purposes of these Reasons, I will assume that the two phrases mean essentially the same thing.

[113] The 2008 version of the Reduction Provision referred to "the adjusted cost basis … to the corporation…," whereas the definition of "adjusted cost basis" in subsection 148(9) of the *ITA* referred to the "'adjusted cost basis' to a

policyholder….” This raises the question of whether the adjusted cost basis to a policyholder of the policyholder’s interest in a life insurance policy of which a corporation is the beneficiary is, in a sense, impliedly deemed to constitute the adjusted cost basis of the policy to the corporation, or whether the adjusted cost basis of a policy to a corporate beneficiary of the policy is to be determined in accordance with the formulaic methodology used to calculate the adjusted cost basis to a policyholder of the policyholder’s interest in a life insurance policy, subject to such modifications as may be necessary to address the corporation’s situation, rather than the policyholder’s situation. In other words, the question is: (a) whether the adjusted cost basis to a policyholder of its interest in a policy is informally deemed to be the adjusted cost basis of the policy to a corporation that is the beneficiary of that policy, or (b) whether the calculation of the adjusted cost basis of the policy to the corporation is to be determined by substituting the word “corporation” for “policyholder” wherever it appears in the definition of “adjusted cost basis.” In this latter situation (i.e., clause (b) in the preceding sentence), assuming that only variables A, B, H and L of the definitional formula are applicable, the adjusted cost basis of a policy to a corporation would be determined by considering the following factors:

A: the cost of each interest in the policy acquired by the corporation;

B: each amount paid by or on behalf of the corporation in respect of a premium under the policy;

H: the proceeds of the disposition of the corporation’s interest in the policy that the corporation became entitled to receive; and

L: the net cost of pure insurance.

[114] Neither approach is wholly satisfactory. The approach set out in clause (a) above is unsatisfactory because it discounts or ignores the phrase “to the corporation,” and it disregards the general practice in the *ITA*, when referring to an adjusted cost basis or an adjusted cost base, to follow that term with the word “to” and a reference to the person in respect of whom the adjusted cost basis or the adjusted cost base is to be determined. In my view, the parenthetical phrase in the Reduction Provision, i.e., “(within the meaning assigned by subsection 148(9)),” was used because the opening words of subsection 148(9) of the *ITA* indicated that the definitions in that subsection applied only for the purposes of section 148 and

paragraph 56(1)(d.1) of the *Income Tax Act*, RSC 1952, c. 148.[86] Furthermore, the parenthetical phrase in the Reduction Provision did not actually contain any deeming language. In other words, if Parliament had intended that the adjusted cost basis to a policyholder of its interest in a policy was to be treated as the adjusted cost basis of the policy to the corporation, Parliament could have said precisely that, i.e., in the definition of "capital dividend account" Parliament could have referred to "the adjusted cost basis … to the policyholder," rather than referring to "the adjusted cost basis … to the corporation…" or Parliament could have expressly deemed the adjusted cost basis to the policyholder to be the adjusted cost basis to the corporation.

[115] The approach set out in clause (b) above is not entirely satisfactory either, because a corporation that is a revocable beneficiary of a life insurance policy:

a) generally has not incurred a cost to acquire an interest in the policy, such that variable A in the definitional formula would generally not be applicable;

b) usually does not pay the premiums in respect of the policy, such that variable B in the definitional formula would generally not be applicable; and

c) typically does not dispose of an interest in the policy or receive proceeds of the disposition of an interest in the policy, such that variable H in the definitional formula would generally not be applicable.

[116] In view of the foregoing, the nature of the interaction between the definition of "adjusted cost basis" in subsection 148(9) and the phrase "… the adjusted cost

86 In 2008 (as well as today), subsection 248(1) of the *ITA* contained numerous definitions that applied throughout the *ITA*; however, while the definition of "adjusted cost base" was in subsection 248(1), the definition of "adjusted cost basis" was not in that subsection. Therefore, without the parenthetical phrase in the Reduction Provision, there would have been no indication as to the meaning of the term "adjusted cost basis," as used in the Reduction Provision. Examples from 2008 of this drafting style, using a parenthetical "within the meaning assigned" phrase, were found in paragraph 53(1)(f) ["… substituted property (within the meaning assigned by paragraph (a) of the definition "superficial loss" in section 54) of the taxpayer …"], clause 60(j)(iv)(B) ["… as a premium (within the meaning assigned by subsection 146(1)) under a registered retirement savings plan …"], and subsection 129(1.1) ["… a corporation that controlled (within the meaning assigned by subsection 186(2)) the particular corporation …"].

basis (within the meaning assigned by subsection 148(9)) of a policy … to the corporation …," as used in the Reduction Provision in 2008, could have been given greater clarity. Nevertheless, the text of the Reduction Provision specifically referred to "... the adjusted cost basis … to the corporation", and not the adjusted cost basis to the policyholder.

[117] As discussed above in my review of the historical development of the statutory definition of "capital dividend account," it is my view that Parliament acted intentionally and deliberately when it initially used the phrase "the adjusted cost basis of the policy … to the corporation" in the Reduction Provision in the definition of "capital dividend account" from 1977 to 1986, and subsequently used the phrase "the adjusted cost basis … of a policy … to the corporation" in the Reduction Provision from 1986 to 2016. In other words, Parliament said what it meant to say.

[118] Although, as indicated above, in 2008 there may have been a lack of clarity in respect of the interaction between the Reduction Provision and the definition of "adjusted cost basis" in subsection 148(9), such that there may have been a question as to the precise manner of determining that adjusted cost basis, the text of the Reduction Provision expressly referred to "… the adjusted cost basis … of a policy … to the corporation…." Thus, the text of the Reduction Provision supports the position of RE 2015.

(ii) <u>The Context of the Reduction Provision</u>

[119] Turning to the contextual analysis, the term "adjusted cost basis" is used in several provisions in the *ITA*, some of which are discussed below.

[120] Subsection 12.2(1) of the *ITA*, which provides for the annual inclusion in income of a particular amount in respect of certain non-exempt life insurance policies, read as follows in 2008 and 2009:

> 12.2(1) Where in a taxation year a taxpayer holds an interest … in a life insurance policy that is not
>
> (a) an exempt policy …,
>
> on any anniversary day of the policy, there shall be included in computing the taxpayer's income for the taxation year the amount, if any, by which the accumulating fund on that day in respect of the

> interest in the policy … exceeds the *adjusted cost basis to the taxpayer* of the interest in the policy on that day. [*Emphasis added*.]

From 1983 to 1989, an earlier version of subsection 12.2(1) read as follows:

> 12.2(1) In computing the income for a taxation year of a corporation, partnership, unit trust or any trust of which a corporation or partnership is a beneficiary that holds
>
> (a) an interest in a life insurance policy …,
>
> other than
>
> (c) an exempt policy …,
>
> there shall be included the amount by which the accumulating fund at the end of the calendar year ending in the taxation year … in respect of the interest exceeds the *adjusted cost basis* of the interest *to the corporation, partnership, unit trust or trust* at the end of that calendar year. [*Emphasis added.*]

A review of the above versions of subsection 12.2(1) indicates that Parliament was careful and precise in specifying the person or entity (specifically, a corporation, partnership, unit trust or trust before 1990, and a taxpayer after 1989) in respect of which the adjusted cost basis of an interest in a life insurance policy was to be determined.

[121] As noted in the historical review above, in the now-repealed definition of "life insurance capital dividend account," as it read immediately before its repeal in May 1985, the following wording was used:

> (b.2) "life insurance capital dividend account" of a corporation at any particular time means the amount, if any, by which the aggregate of
>
> (i) the amount, if any, by which
>
> (A) the aggregate of all amounts each of which is the proceeds of a life insurance policy of which the corporation was not a beneficiary on or before June 28, 1982 received as a consequence of the death of a person whose life was insured under the policy by the corporation in the period...
>
> exceeds

> (B) the aggregate of all amounts each of which is the *adjusted cost basis* (within the meaning assigned by paragraph 148(9)(a)) *to the corporation* immediately before that person's death of a policy referred to in clause (A), and ….[*Emphasis added.*]

From 1982 to 1985, the underlying concept in respect of the definition of "life insurance capital dividend account" was similar to that of subparagraph 89(1)(b)(iv) of the *ITA*, which contained the life insurance provision in the definition of "capital dividend account." Both provisions provided for the proceeds of a life insurance policy of which a corporation was a beneficiary, less the adjusted cost basis of the policy to the corporation, to be included in the corporation's capital dividend account or life insurance capital dividend account, as the case may have been. In both situations (be it a capital dividend account or a life insurance capital dividend account), Parliament chose to designate the particular adjusted cost basis of the policy by reference to the corporation that was the beneficiary of the policy, rather than by reference to the holder of the policy. It appears that this symmetry was deliberate.

[122] As noted above, subsection 148(1) of the *ITA* contains a provision requiring a policyholder who disposes of an interest in a life insurance policy to include an amount in computing the policyholder's income. The relevant portions of subsection 148(1), as it read in 2008 and 2009, were as follows:

> 148(1) There shall be included in computing the income for a taxation year of a *policyholder* in respect of the disposition of an interest in a life insurance policy, other than [certain excepted policies], the amount, if any, by which the proceeds of the disposition of the *policyholder's* interest in the policy that the *policyholder, beneficiary or assignee*, as the case may be, became entitled to receive in the year exceeds the *adjusted cost basis to the policyholder* of that interest immediately before the disposition. [*Emphasis added*.]

The above provision is significant because it distinguished among the policyholder, the beneficiary and the assignee, as the case may have been, in respect of the particular policy that was the subject of the disposition, and then went on to specify that the relevant adjusted cost basis to be used in computing the income inclusion was the adjusted cost basis to the policyholder. In other words, even though, in a particular situation, a beneficiary or an assignee of the policy may have received the proceeds of the disposition of the policyholder's interest in the policy, it was the adjusted cost basis to the policyholder (and not to the beneficiary or assignee) that was to be used in calculating the income inclusion. It is clear that in 2008 and 2009 Parliament knew how to use such language to distinguish between a policyholder and a beneficiary, and yet make it clear that the relevant adjusted cost basis was that of the policyholder, and not that of the beneficiary. Parliament chose not to use such distinguishing language in the definition of "capital dividend account," as it read in 2008 and 2009.

[123] Paragraph (e) of the definition of "disposition" in subsection 148(9) of the ITA refers to a payment by an insurer of a particular amount in respect of a certain type of life annuity contract.[87] Where such a disposition occurs, subsection 148(1.1) of the ITA contains a provision to require a particular amount to be included in computing the income of the taxpayer who has realized that disposition. In 2009 (as well as today), subsection 148(1.1) read (and reads) as follows:

> (1.1) There shall be included in computing the income for a taxation year of a taxpayer in respect of a disposition of an interest in a life insurance policy described in paragraph (e) of the definition "disposition" in subsection (9) the amount, if any, by which the amount of a payment described in paragraph (e) of that definition that the taxpayer became entitled to receive in the year exceeds the amount that *would be the taxpayer's adjusted cost basis* of the taxpayer's interest in the policy immediately before the disposition *if, for the purposes of the definition "adjusted cost basis" in subsection (9), the taxpayer were, in respect of that interest in the policy, the policyholder*. [*Emphasis added*.]

It is significant that subsection 148(1.1) concludes with a hypothetical provision treating the taxpayer, for the purposes of determining the adjusted cost basis of the policy, as though the taxpayer were the policyholder. Clearly Parliament knew how to use such hypothetical language, but chose not to do so in the definition of "capital dividend account." In other words, if Parliament had intended that the adjusted cost basis to be used in computing the portion of life insurance proceeds to be added to a corporation's capital dividend account was to be computed by reference to the adjusted cost basis to the policyholder, rather than by reference to the adjusted cost basis to the corporation, Parliament could have used hypothetical language similar to that used in the concluding portion of subsection 148(1.1).

[124] Subsections 148(3) through (8.2) of the *ITA* set out various rules to deal with particular situations, such as the computation of the adjusted cost basis of a life insurance policy with a segregated fund, a disposition of a partial interest in a life insurance policy, non-arm's-length dispositions of interests in life insurance policies and certain rollovers of interests in life insurance policies. Several of those

---

[87] Subsection 138(12) of the *ITA* defines "life insurance policy" as including an annuity contract.

provisions specifically indicate the person by reference to which an adjusted cost basis is to be determined. For instance, subsection 148(4) refers to "the adjusted cost basis to the taxpayer," and subsections 148(8), (8.1) and (8.2) refer to "the adjusted cost basis to the policyholder." Had Parliament been so inclined, it could have included a similar provision in section 148 to determine, for the purposes of the definition of "capital dividend account," the identity of the entity by reference to which the adjusted cost basis of a life insurance policy was to be ascertained in a situation where a corporation was the beneficiary, but not the holder, of the policy.

[125] The provisions summarized in the preceding paragraph, as well as the other contextual provisions discussed above, indicate that Parliament has been deliberate and intentional in describing the adjusted cost basis of a life insurance policy by reference to a particular person. Thus, the above contextual analysis indicates that, in 2008, when determining the portion of life insurance proceeds to be added to a corporation's capital dividend account, we were to use the adjusted cost basis of the particular life insurance policy to the corporation that received the proceeds of the policy.

(iii) <u>The Purpose of the Reduction Provision</u>

[126] During the course of written examinations for discovery, the Crown stated the following in respect of the purpose for excluding the adjusted cost basis of a life insurance policy from the amount of life insurance proceeds that may be added to a corporation's capital dividend account:

> 23. … Does the Respondent admit that, in raising the Determination, the Minister concluded that: …
>
> (c) the purpose of excluding the adjusted cost base [*sic*] from the capital dividend account is to limit the amount of retained earnings that a corporation can distribute to a shareholder on a tax-free basis through the purchase of a life insurance contract?
>
> Yes….
>
> 24. Precisely what did the Minister conclude was the "scheme of the Income Tax Act" referenced … above?
>
> The Minister concluded that the scheme of the Income Tax Act (ITA) is to limit the tax-free growth in an investment component of a life insurance policy and to limit the tax-free distribution of an amount representing a corporation's funds used to purchase a savings component

> of a life insurance policy. That is, the scheme, or purpose, of the ITA with respect to paragraph 89(1)(d) of the ITA is that the amount of the proceeds of a life insurance policy to be included in the capital dividend account (CDA) be reduced by the ACB, within the meaning assigned by subsection 148(9) of the ITA, of the policy….
>
> 36. … the Respondent asserts that the avoidance transactions may reasonably be considered to have resulted directly or indirectly in a misuse or abuse of subsections 83(2), 89(1) and 148(9) of the Act (the "Subject Provisions").
>
> (a) What did the Minister conclude was the Tax Policy of ***each,*** [*sic*] of the Subject Provisions?
>
> The Minister concluded in respect of the provisions read together that the purpose of excluding the ACB of the life insurance policies is to limit the amount of retained earnings that a corporation can distribute to a shareholder on a tax-free basis through the purchase of a life insurance contract and the use of CDA account.[88]

[127] In its written submissions presented at the hearing, the Crown stated the following:

> The reduction of the credit to the CDA for the ACB of the policy is intended to account for the fact that, if amounts had been distributed by the corporation to the shareholder personally to personally pay for the life insurance policy, such amounts would have been taxable to the shareholders.[89]

The above statement of intent or purpose differs from the answers given by the Minister on examination for discovery. The inconsistency between the Crown's examination-for-discovery answers and the Crown's written submissions weakens the Crown's argument concerning the purpose of the Reduction Provision.

[128] An argument based on a linkage between corporate distributions and premiums paid under a life insurance policy would have had greater force between January 1, 1972 and March 31, 1977, when the Reduction Provision referenced "all amounts paid as or on account of premiums paid under the policy." After March

---

88 *Read-ins of the Appellant* (filed during the hearing of these Appeals), p. 3 & 5-6, questions 23(c), 24 and 36(a).

89 Crown's Submissions, *supra* note 11, ¶157. See also ¶160 of those submissions. The authority cited by the Crown for the statements made in paragraphs 157 and 160 of its submissions is Florence Marino and John Natale (editors), *Canadian Taxation of Life Insurance*, 9th ed. (Toronto: Thomson Reuters, 2018), chapter 6, part 6.2, p. 200.

31, 1977, when the Reduction Provision was amended to refer to the adjusted cost basis of a life insurance policy to the corporation (rather than referring to premiums paid), the argument breaks down to some extent when one considers that, after that amendment, the amounts to be considered in computing the adjusted cost basis of a life insurance policy included not only the premiums paid under the policy, but also amounts representing the cost (if any) of acquiring an interest in the policy, certain amounts in respect of the disposition of an interest in the policy that were required to be included in computing the policyholder's income, certain amounts in respect of the repayment of a policy loan and in some situations certain mortality gains.

[129] In endeavouring to ascertain the purpose of the Reduction Provision, particularly its reference to the adjusted cost basis of a life insurance policy to the corporation (i.e., the corporate beneficiary), a further interpretational challenge arises by reason of the fact that the adjusted cost basis of a policy can in some cases decrease to nil, as explained below:

> The NCPI [i.e., net cost of pure insurance] of a policy reduces the ACB of policies last acquired after December 1, 1982. This has the effect of reducing the ACB of a policy over time to nil, thereby increasing the taxable portion of funds received upon a policy disposition…. Generally, the NCPI determined for an insurance policy will increase every year as the life-insured grows older. For "level-pay" insurance policies, this creates a pattern in which the ACB of the policy increases in the early years (as a result of premium or deposit payments and lower NCPI deductions) but at later durations the ACB is reduced to nil (as a result of an NCPI charge that exceeds the premiums or deposits paid into the policy).[90] [*Footnotes omitted.*]

Thus, when a life insured is young, a policy that insures that individual's life typically has a significant adjusted cost basis, but as the life insured ages, the adjusted cost basis may decrease, perhaps to nil.

[130] The Crown has not established that, where the beneficiary of a life insurance policy is a corporation other than the holder of the policy, the purpose of the Reduction Provision is to use the adjusted cost basis of the policy to the policyholder, rather than the adjusted cost basis of the policy to the corporate

---

[90] Kevin Wark & Michael O'Connor, "The Next Phase of Life Insurance Policyholder Taxation is Nigh," (2016) 64:4 *Can Tax J* 705, at 733-734. See also William D. Hawley, "Insurance and the Closely Held Corporation," *Report of Proceedings of the Forty-Third Tax Conference*, 1991 Conference Report (Toronto: Canadian Tax Foundation, 1992), 24:1 at 24:26.

beneficiary, in determining the amount of life insurance proceeds to be added to the corporate beneficiary's capital dividend account.

[131] To summarize, I am not satisfied that the Crown has adequately explained the purpose of the Reduction Provision as it read in 2008 and 2009. I accept that from January 1, 1972 to March 31, 1977, the purpose of the Reduction Provision was to exclude an amount equal to the aggregate premiums paid in respect of a life insurance policy from the portion of the proceeds of the policy that a corporate beneficiary was allowed to add to its capital dividend account. However, I am not persuaded that the purpose remained the same after March 31, 1977, when the key phrase in the Reduction Provision was amended to read "… the adjusted cost basis of the policy … to the corporation…." As the Crown has not satisfactorily identified the purpose of the 2008-2009 version of the Reduction Provision, particularly its key phrase (as it then read, i.e., "… the adjusted cost basis of a policy referred to in subparagraph (i) or (ii) to the corporation…"),[91] I am of the view that this is one of those, perhaps rare, situations where the underlying rationale of the Reduction Provision in 2008 and 2009 was no broader than the text itself.[92]

[132] Following the approach taken by the Supreme Court in *Copthorne*,[93] the question which I ask is why the Reduction Provision was concerned in 2008 and 2009 with limiting the amount of life insurance proceeds added to a corporate beneficiary's capital dividend account to the amount by which those proceeds exceeded the adjusted cost basis of the policy to the policyholder (as the Crown submits), even though the Reduction Provision specifically referred to the adjusted cost basis to the corporate beneficiary. In my view, the Crown has not provided a satisfactory answer to that question. The Crown has not persuaded me that in 2008 and 2009 the purpose of the Reduction Provision was to do anything other than to reduce the addition of life insurance proceeds to a corporation's capital dividend

---

91 See *Canada Trustco, supra* note 10, ¶65, where the Supreme Court stated, "It is for the Minister … to identify the object, spirit or purpose of the provisions that are claimed to have been frustrated or defeated…. The Minister is in a better position than the taxpayer to make submissions on legislative intent…."

92 See *Copthorne, supra* note 25, ¶110, where the Supreme Court indicated that, in some situations, the text of a provision (as construed having regard to its content and purpose) may be conclusive because the text is consistent with and fully explains its underlying rationale.

93 *Ibid*, ¶89. In *Copthorne,* the Supreme Court stated, "The question is why s. 87(3) is concerned with limiting PUC in this way."

account by the amount of the adjusted cost basis of the life insurance policy to that corporation.

(3) Misuse of the Reduction Provision or Abuse of the ITA

[133] As explained by the Supreme Court of Canada in *Canada Trustco*, the determinations of “misuse” and “abuse” are not separate inquiries. Rather, subsection 245(4) requires a single, unified approach to the textual, contextual and purposive interpretation of the specific provisions of the *ITA* that were relied on by the taxpayer.[94]

[134] The Supreme Court also stated the following in *Canada Trustco*:

> The taxpayer, once he or she has shown compliance with the wording of a provision, should not be required to disprove that he or she has thereby violated the object, spirit or purpose of the provision.[95]

The Supreme Court went on to state that the burden is on the Minister to establish that there was abusive tax avoidance in the sense that it cannot be reasonably concluded that a tax benefit would be consistent with the object, spirit or purpose of the provision relied on by the taxpayer.[96] In addition, if the existence of abusive tax avoidance is unclear, the benefit of the doubt goes to the taxpayer.[97]

[135] As explained above, in 2008 and 2009, the text and the context of the Reduction Provision clearly indicated that the adjusted cost basis of a life insurance policy to a corporate beneficiary of the policy, and not the adjusted cost basis of the policy to the holder of the policy, was to be used in determining the portion of the life insurance proceeds to be added to the capital dividend account of the corporate beneficiary. I have not been persuaded that in 2008 and 2009, the purpose of the Reduction Provision was inconsistent with the text and context of that provision. Accordingly, in my view (particularly considering that the benefit of any doubt must be given to the taxpayer), CGESR and ESRIL 98 did not violate the object, spirit or purpose of the Reduction Provision. Therefore, there was not a misuse of the Reduction Provision, nor was there abusive tax avoidance.

VI. CONCLUSION

---

94 *Canada Trustco*, *supra* note 10, ¶43; and *Copthorne, supra* note 25,¶73.
95 *Canada Trustco*, *supra* note 10, ¶65.
96 *Ibid*, subitem 1(3) and item 2 of ¶66.
97 *Ibid*, item 3 of ¶66.

[136] The Appeals are allowed, with costs, and the Determinations are vacated.[98]

[137] The Parties shall have 30 days from the date of the Judgment in respect of these Appeals to reach an agreement on costs and to so advise the Court, failing which the Appellants shall have a further 30 days to file written submissions on costs, and the Respondent shall have yet a further 30 days to file a written response. Any such submissions shall be limited to five pages in length. If, within the applicable time limits, the Parties do not advise the Court that they have reached an agreement and no submissions are received from the Parties, costs shall be awarded to the Appellants in accordance with the Tariff.

[138] These Reasons are confined to the Subject Transactions, including the capital dividends (actual or deemed) paid by CGESR to ESRIL 98 in 2009, and the capital dividends paid by ESRIL 98 to ESRL in 2009. These Reasons do not consider whether the GAAR will apply if ESRIL 98 pays additional capital dividends to ESRL or if ESRL pays capital dividends to its shareholders. If, at some point in the future, ESRIL 98 pays additional capital dividends to ESRL or ESRL pays capital dividends to its shareholders (or if any such shareholders in turn pay capital dividends to their shareholders, and so on), and if the Minister assesses ESRIL 98, ESRL or any direct or indirect shareholders thereof so as to apply the GAAR, these Reasons should not be construed as pronouncing, in any way, on the eventual outcome of such an assessment, any objection thereto or any appeal therefrom.[99]

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated August 27th 2020.

Signed at Edmonton, Alberta, this 17th day of September 2020.

"Don R. Sommerfeldt"

Sommerfeldt J.

---

98 See *Wild*, *supra* note 29, ¶43.

99 See *Wild*, *supra* note 29, ¶44.

APPENDIX A

2017-1140(IT)G
2017-3617(IT)G

TAX COURT OF CANADA

B E T W E E N:

ROGERS ENTERPRISES (2015) INC.
(Successor by Amalgamation to CGESR Limited and ESRIL (1998) Limited)

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

STATEMENT OF AGREED FACTS

The parties to this proceeding admit, for the purposes of this proceeding only, the truth of the following facts, and the relevance and authenticity of the documents, referred to in this Statement of Agreed Facts ("**Agreed Statement**"). The parties each reserve the right to adduce additional evidence which is relevant and probative of any issue before the Court, and which is not inconsistent with or does not contradict the facts admitted. The facts in this Agreed Statement are organized under the following headings:

A. Parties

1. Rogers Enterprises (2015) Inc. (the "**Appellant**") is the successor by amalgamation to CGESR Limited ("**CGESR**") and ESRIL (1998) Limited ("**ESRIL 98**"), both of which subsisted under the *Business Corporations Act* (Ontario).

2. The shareholders of the Appellant are E.S.R. Limited ("**ESRL**") and other members of the RPC Group (as defined in paragraph 4).

3. For purposes of the *Income Tax Act* (Canada) (the "**Act**"), at all relevant times:

   (a) CGESR was a taxable Canadian corporation, a private corporation and a Canadian-controlled private corporation; and

   (b) ESRIL 98 was a taxable Canadian corporation, a private corporation and a Canadian-controlled private corporation.

B. RPC Group

4. Several corporations and trusts (the "**RPC Group**") collectively hold the Rogers family's interest in Rogers Communications Inc. ("**RCI**"), a Canadian public company.

5. The RPC Group also owns portfolio investments and interests in real property.

6. Among others, the following investment holding companies were part of the RPC Group:

   (a) ESRL;

   (b) CGESR;

   (c) ESRIL 98; and

   (d) CGESR (2009) Limited ("**CGESR 2009**").

7. ESRL was incorporated in 1985.

8. CGESR was incorporated in 1993. Its sole shareholder was Rogers Telecommunications Limited ("**RTL**"), a member of the RPC Group, until August 2006 (as described in paragraph 23 below).

9. ESRIL 98 was incorporated in 1998. It held Class A - Series 5 and Class A - Series 6 preferred shares, of CGESR. ESRL held Class A and Class D shares of ESRIL 98. Prior to the amalgamation described in paragraph 1 above, the remaining shares of ESRIL 98 were held by members of the RPC Group.

10. CGESR 2009 was incorporated on May 22, 2009. Its sole shareholder was the 1995 Trust (as defined in paragraph 13 below). Following its incorporation, CGESR 2009 acquired from the 1995 Trust, 1000 common shares of CGESR, representing 100% of the issued common shares of CGESR, and 23% of the voting stock. The remaining shares were held by members of the RPC Group, including ESRIL 98.

C. Trusts

11. The September 5, 1984 Rogers Ownership Trust ("**1984 Trust**") is a family trust.

12. The 1984 Trust was established to hold property for the benefit of Edward Samuel (Ted) Rogers ("**Ted Rogers**"), Loretta Rogers (his spouse), and their descendants.

13. The August 24, 1995 Rogers Ownership Trust (the "**1995 Trust**") is another family trust that was established in 1995 to hold property for the benefit of Loretta Rogers and the descendants of Ted Rogers.

14. Ted Rogers was not a beneficiary of the 1995 Trust.

D. Policies

15. Ted Rogers was the President and Chief Executive Officer of RCI.

16. From 1981 to 1991, twelve life insurance policies insuring Ted Rogers' life were issued (collectively, the "**Policies**"; each, a "**Policy**") to members of the RPC Group and the 1984 Trust. Two of those Policies were held by the 1984 Trust (the "**1984 Trust Policies**"). Details of the other ten Policies are shown in the table below.

	Policy #	**ACB (December 2008)**	**Life Insurance Proceeds and Interest Received in 2008**
1	2981707	$3,869,160	$10,543,332

2	2539040	$5,417,514	$11,009,994
3	2539680	$2,907,181	$6,422,480
4	2560444	$3,732,103	$11,282,885
5	2887947	$2,732,103	$11,282,885
6	2887968	$5,411,284	$11,009,994
7	2891148	$2,964,712	$5,804,653
8	2891681	$5,181,191	$10,093,522
9	2891690	$5,154,232	$10,093,522
10	2891700	$3,869,125	$10,291,455

17. At all relevant times:

(a) each Policy was an "exempt policy" within the meaning of section 306 of the *Income Tax Regulations*; and

(b) the policyholders (that is, the owners of the Policies) paid the life insurance premiums and the premiums paid were expensed for accounting purposes (however, not for tax purposes) and, therefore, reduced retained earnings; and

(c) each Policy provided that the policyholder could designate a beneficiary to receive the life insurance proceeds payable under the Policy.

18. At the time of the acquisition of the Policies and until sometime prior to February 25, 2005, the policyholders were also the beneficiaries of the Policies.

19. At some time prior to February 25, 2005, the policyholders designated as the beneficiary of the Policies, RTL, a direct shareholder of CGESR from September 30, 2000 through September 30, 2005.

20. In 2005, prior to the 21st anniversary of the 1984 Trust, a fairly significant corporate reorganization was undertaken by the RPC group (the "**2005 Reorganization**").

21. In August 2005, ESRL became the policyholder of the ten Policies (the "**ESRL Policies**") which were not owned by the 1984 Trust.

22. Following the 2005 Reorganization, among other changes, the beneficiary of the Policies was CGESR.

23. As a result of a subsequent reorganization in August 2006, CGESR became the direct shareholder of RTL.

E. Adjusted Cost Basis of Policies

24. The “adjusted cost basis” (“**ACB**”), as defined by subsection 148(9), of a life insurance policy to a policyholder at any time represents, in general terms, the total of the amounts paid into the policy before that time by the policyholder less the total of the net cost of pure insurance (“**NCPI**”) (as defined by regulation) before that time. In general terms, it represents the remaining “investment” in the life insurance policy made by the policyholder.

25. The NCPI represents, in general terms, the amount related to the cost or value of the insurance benefit provided by the policy. The NCPI is calculated according to a prescribed formula in which the probability of death in the year for the life insured (using a prescribed mortality table) is multiplied by the net amount at risk of the taxpayer’s interest at the end of the year. Generally, the NCPI determined for an insurance policy will increase every year as the life insured grows older and may exceed the premiums paid.

26. On December 2, 2008, Ted Rogers passed away.

27. Immediately before the time of Ted Rogers’ death:

(a) ESRL owned the ESRL Policies;

(b) the 1984 Trust owned the 1984 Trust Policies;

(c) CGESR was the beneficiary of the Policies;

(d) the total ACB to the 1984 Trust of the 1984 Trust Policies was $1,755,055; and

(e) the total ACB to ESRL of the ESRL Policies was $42,239,105 as detailed in the table at paragraph 16 above.

F. Life Insurance Proceeds

28. At the time of Ted Rogers' death, the total of the life insurance proceeds payable under the Policies to CGESR, as the beneficiary, was $102,309,794. Of that amount, $4,555,420 was paid in respect of the 1984 Trust Policies and $97,754,374 was paid in respect of the ESRL Policies.

29. On December 17, 2008, the insurer of the Policies paid the life insurance proceeds of $102,309,794 to CGESR, and CGESR received those proceeds (the "**Life Insurance Proceeds**"), which proceeds were not taxable under the Act. CGESR increased its retained earnings for accounting purposes (however, not for tax purposes) by the amount of those proceeds.

30. The insurer also paid interest to CGESR in the amount of $84,090 (the "**Interest Amount**"). Of that amount, $3,744 was paid in respect of the 1984 Trust Policies and $80,346 was paid in respect of the ESRL Policies.

31. Of the total of the Life Insurance Proceeds and the Interest Amount, $4,559,164 was paid in respect of the 1984 Trust Policies and $97,834,720 was paid in respect of the ESRL Policies for a total payment to CGESR of $102,393,885 (as rounded).

32. The Life Insurance Proceeds received by CGESR were added to its CDA as defined in subsection 89(1). In error, CGESR also added the Interest Amount to its CDA. As a result, CGESR took the position that its total CDA balance at that time was increased by $102,393,885. The CDA balances of CGESR, at relevant times, are set out in **Schedule A** to this Agreed Statement.

33. From that time to October 27, 2009, CGESR paid dividends (actual and deemed) totaling $102,448,581 to CGESR 2009 and ESRIL 98. In particular,

(a) on July 15, 2009, CGESR paid dividends of $10,702,742 comprised of:

(i) dividends of $702,742 to ESRIL 98; and

(ii) dividends of $10,000,000 to CGESR 2009;

(b) CGESR elected under subsection 83(2) in respect of the full amount of the dividends it had paid on July 15, 2009;

(c) on July 15, 2009, CGESR 2009 paid dividends of $9,999,950.50 to the 1995 Trust;

(d) CGESR 2009 elected under subsection 83(2) in respect of the full amount of the dividends it had paid on July 15, 2009;

(e) on October 27, 2009, CGESR redeemed certain of its Class A preferred shares that were owned by ESRIL 98, and CGESR elected under subsection 83(2) in respect of the full amount of the dividends of $91,745,839 that were deemed to arise as a result of those redemptions (collectively, with the dividends described in paragraph 33(a)(i), the "**ESRIL 98 Dividends**"); and

(f) as a result of the error in respect of the Interest Amount described in paragraph 32, CGESR was assessed tax under Part III on $84,090 of the capital dividends arising on the redemptions described in paragraph 33(e). The Part III tax assessed was paid.

34. On the basis that the ESRIL 98 Dividends were elected under subsection 83(2) to be capital dividends for purposes of the Act, the ESRIL 98 Dividends were added to ESRIL 98's CDA at that time under paragraph (b) of the definition of "capital dividend account" in subsection 89(1). The CDA balances of ESRIL 98, at relevant times, are set out in **Schedule B** to this Agreed Statement.

G. Determinations

35. The Minister of National Revenue (the "**Minister**") determined that the reasonable tax consequences, as a result of the application of subsection 245(2), were to reduce the CDA balances of CGESR and ESRIL 98. The Minister considered, but did not assess, tax

under Part III in respect of the capital dividends described in paragraph 33(e) (except as described in paragraph 33(f)).

36. Pursuant to section 245 and subsection 152(1.11), the Minister issued a determination, notice of which was dated August 21, 2015 (collectively, the "**Determinations**") to each of:

(a) CGESR for the taxation year ended September 30, 2010; and

(b) ESRIL 98 for the taxation year ended December 31, 2009.

37. The following transactions were the "series of transactions" (the "**Series**"):

(a) the acquisition of the Policies;

(b) the designation(s) by ESRL, the policyholder of the ESRL Policies, to make RTL and, subsequently, CGESR the beneficiary of those Policies;

(c) the receipt by CGESR of the Life Insurance Proceeds and of the Interest Amount;

(d) the payment by CGESR of the ESRIL 98 Dividends; and

(e) the elections by CGESR to designate the ESRIL 98 Dividends as capital dividends.

38. In issuing the Determinations, the Minister concluded that the Series included one or more "avoidance transactions" (within the meaning of subsection 245(3)), namely:

(a) the designation(s) by ESRL, the policyholder of ESRL Policies, to make CGESR the beneficiary of those Policies;

(b) the receipt by CGESR of the Life Insurance Proceeds;

(c) the payment by CGESR of the ESRIL 98 Dividends; and

(d) the elections by CGESR to designate the ESRIL 98 Dividends as capital dividends.

39. The Minister applied section 245 to determine the tax consequences to CGESR and ESRIL 98 by making the following adjustments. More particularly,

(a) in respect of CGESR, the Minister determined that,

(i) the ESRIL 98 Dividends in the amount of $42,239,100 were taxable dividends that CGESR paid to ESRIL 98, and

(ii) CGESR's CDA as at October 28, 2009 was nil; and

(b) as a consequence, in respect of ESRIL 98, the Minister determined that,

(i) the ESRIL 98 Dividends in the amount of $42,239,100 received by ESRIL 98 from CGESR were deductible pursuant to section 112; and

(ii) ESRIL 98's CDA balance as at December 31, 2009 was reduced by $42,239,100.

DATED at the City of Toronto, in the Province of Ontario, this 13th day of February, 2019.

Osler, Hoskin & Harcourt LLP

Pooja Mihailovich

____

Per: **Pooja Mihailovich**
Hemant Tilak

Osler, Hoskin & Harcourt LLP
P.O. Box 50
1 First Canadian Place
Toronto, ON M5X 1B8

Tel: (416) 862-6624
Fax: (416) 862-6666

Counsel for the Appellant

DATED at the City of Ottawa, in the Province of Ontario, this 13th day of February, 2019.

Deputy Attorney General of Canada

______________________________ [100]

Per: **Justine Malone**
Marie-Eve Aubry

Department of Justice Canada
Tax Law Services Section
99 Bank Street, 11th Floor
Ottawa, ON K1A 0H8

Tel: (613) 670-6410
Fax: (613) 941-2293

Counsel for the Respondent

100 The copy of the Statement of Agreed Facts marked as Exhibit AR-1 was signed by counsel for the Crown, as well as by counsel for RE 2015.

Schedule A

CGESR CDA Balances

CGESR CDA Balances	**Per Appellant**	**Per Minister**	**Difference re CDA Balance (Per s. 245)**	
CDA Opening Balance on December 2, 2008	$54,701	$54,701		
Life Insurance Proceeds (**1**)	$102,393,885	$60,154,780		(**3**)
CDA Closing Balance on December 31, 2008	$102,448,586	$60,209,481	($42,239,105)	
Less:				
Capital Dividends Paid				
July 15, 2009	$248,368	$248,368		
July 15, 2009	$454,374	$454,374		
July 15, 2009	$10,000,000	$10,000,000		
Total as of July 15, 2009	$10,702,742	$10,702,742		
October 27, 2009 at 10:00 AM	$87,572,454	$87,572,454		
October 27, 2009 at 10:05 AM	$4,173,385	$4,173,385		
Total as of October 27, 2009 (**2**)	$91,745,839	$49,506,739	$42,239,100	
Dividends Allowed as Capital Dividends				
		$45,333,354		(**4**)
		$4,173,385		
		$49,506,739		
Taxable Dividends Paid		$42,239,100		
CGESR CDA Balance on December 31, 2009	**$5**	**$0**	**($5)**	

(**1**) Includes Life Insurance Proceeds of $102,309,795 and Interest Amount of $84,090.

(**2**) CGESR was assessed tax under Part III on $84,090 of these capital dividends.

(3) Adjustment (Per Minister)

Life Insurance Proceeds	$ 102,393,885
Less Adjusted Cost Basis of ESRL Policies	$ 42,239,105
Addition to CGESR's CDA	$ 60,154,780

(4) Adjustment (Per Minister)

CDA Closing Balance on December 31, 2008	$	60,209,481	
Capital Dividends Paid in July 2009	$	10,702,742	
CDA Closing Balance on October 26, 2009	$	49,506,739	(A)
Capital Dividends Paid on October 27, 2009	$	4,173,385	(B)
Dividends Allowed as Capital Dividends	$	45,333,354	

(A) CGESR's election to treat its October 27, 2009 dividend of $87,572,454 as a capital dividend was denied.

(B) CGESR's election to treat its dividend of $4,173,385 as a capital dividend was allowed.

Schedule B

ESRIL 98 CDA Balances

CDA Balances	Per Appellant	Per Minister	Difference re CDA Balance (Per s. 245)
CDA Opening Balance on December 2, 2008	$279	$279	
Capital Dividends Received			
July 15, 2009	$248,368	$248,368	
July 15, 2009	$ 454,374	$454,374	
Total as of July 15, 2009	$702,742	$702,742	
October 27, 2009 at 10:00 AM	$87,572,454	$45,333,354	
October 27, 2009 at 10:05 AM	$4,173,385	$4,173,385	
Total as of October 27, 2009	$91,745,839	$49,506,739	
Total capital dividends received per ss. 83(2)	$92,448,581	$50,209,482	($42,239,100)
Total taxable dividends received		$42,239,100	
ESRIL 98 CDA Balance Before Payment	$92,448,860	$50,209,760	
Capital dividends paid on October 27, 2009 at 10:10 AM	$49,998,834	$ 49,998,834	
ESRIL 98 CDA Balance on December 31, 2009	**$42,450,026**	**$210,926**	**($42,239,100)**

APPENDIX B

The 2016 version of paragraph (d) of the definition of "capital dividend account" in subsection 89(1) of the *ITA* (as amended in that year) was the following:

> "capital dividend account" of a corporation at any particular time means the amount, if any, by which the total of …
>
> (d) the amount, if any, by which the total of
>
> (i) all amounts each of which is the proceeds of a life insurance policy of which the corporation was a beneficiary on or before June 28, 1982 received by the corporation in the period and after 1971 in consequence of the death of any person, and
>
> (ii) all amounts each of which is the proceeds of a life insurance policy (other than an LIA policy) of which the corporation was not a beneficiary on or before June 28, 1982 received by the corporation in the period and after May 23, 1985 in consequence of the death of any person
>
> exceeds the total of all amounts each of which is
>
> (iii) the "adjusted cost basis" (in this paragraph as defined in subsection 148(9)), immediately before the death, of
>
> (A) if the death occurs before March 22, 2016, a policy referred to in subparagraph (i) or (ii) to the corporation, and
>
> (B) if the death occurs after March 21, 2016, a policyholder's interest in a policy referred to in subparagraph (i) or (ii),
>
> (iv) if the policy is a 10/8 policy immediately before the death and the death occurs after 2013, the amount outstanding, immediately before the death, of the borrowing that is described in subparagraph (a)(i) of the definition "10/8 policy" in subsection 248(1) in respect of the policy,
>
> (v) if the death occurs after March 21, 2016, an interest in the policy was disposed of by a policyholder (other than a taxable Canadian corporation) after 1999 and before March 22, 2016 and subsection 148(7) applied to the disposition, the total of

(A) the amount, if any, by which the fair market value of consideration given in respect of the disposition exceeds the total of

(I) the greater of the amount determined under subparagraph 148(7)(a)(i) in respect of the disposition and the adjusted cost basis to the policyholder of the interest immediately before the disposition, and

(II) the amount by which the paid-up capital of any class of the capital stock of a corporation resulting from the disposition is reduced at the beginning of March 22, 2016 because of the application of paragraphs 148(7)(c) and (f) in respect of the disposition, and

(B) if the paid-up capital in respect of a class of shares of the capital stock of a corporation was increased before March 22, 2016 as described in subparagraph 148(7)(f)(iii) in respect of the disposition, the amount, if any, by which the total reduction in the paid-up capital in respect of that class — not exceeding the amount of that increase — after that increase and before March 22, 2016 (except to the extent that the amount of the reduction was deemed by subsection 84(4) or (4.1) to be a dividend received by a taxpayer) exceeds the amount determined under subparagraph 148(7)(a)(i) in respect of the disposition, or

(vi) if the death occurs after March 21, 2016, an interest in the policy was disposed of by a policyholder (other than a taxable Canadian corporation) after 1999 and before March 22, 2016 and subsection 148(7) applied to the disposition, the amount, if any, determined by the formula

$$A - B$$

where

A is the amount, if any, by which the lesser of the adjusted cost basis to the policyholder of the interest immediately before the disposition and the fair market value of consideration given in respect of the disposition exceeds the amount determined under subparagraph 148(7)(a)(i) in respect of the disposition, and

B is the absolute value of the negative amount, if any, that would be, in the absence of section 257, the adjusted cost basis, immediately before the death, of the interest in the policy,

CITATION:	2020 TCC 92
COURT FILE NOS.:	2017-1140(IT)G, 2017-3617(IT)G
STYLE OF CAUSE:	ROGERS ENTERPRISES (2015) INC. (SUCCESSOR BY AMALGAMATION TO CGESR LIMITED) AND HER MAJESTY THE QUEEN and ROGERS ENTERPRISES (2015) INC. (SUCCESSOR BY AMALGAMATION TO ESRIL (1998) LIMITED) AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 25 and 26, 2019
AMENDED REASONS FOR JUDGMENT BY:	The Honourable Justice Don R. Sommerfeldt
DATE OF AMENDED REASONS FOR JUDGMENT:	September 17, 2020
DATE OF JUDGMENT:	August 27, 2020

APPEARANCES:

Counsel for the Appellant:	Pooja Mihailovich, Hemant Tilak
Counsel for the Respondent:	Justine Malone, Marie-Eve Aubry

COUNSEL OF RECORD:

For the Appellant:

Name:	Pooja Mihailovich, Hemant Tilak
Firm:	Osler, Hoskin & Harcourt LLP
For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada