

# Holdco and Sisterco owners of life insurance with Opco as beneficiary results in shareholder and indirect benefits

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## Federal Court of Appeal affirms Tax Court decision

In *Gestion M.-A. Roy Inc. and 4452712 Canada Inc. v. The King* 2024 FCA 16, the Federal Court of Appeal affirmed the reasoning of the Tax Court in *M.-A. Roy Inc. v. The King* 2022 CCI 144, to include in Holdco and Sisterco's income the amount of premiums paid by Opco in respect of policies owned by Holdco and Sisterco that designated Opco as a revokable beneficiary. In the former instance, subsection 15(1) was applied to include the premium amounts in Holdco's income as a shareholder benefit. In the latter situation, subsection 246(1) applied to include the premium amounts in Sisterco's income as indirect benefits. For a full discussion of the facts and the Tax Court reasoning see: [As a matter of tax - January 2023 | Manulife Advisors](#)

The facts of this case are peculiar in that Opco directly paid insurance premiums on the policies owned by Holdco and Sisterco. Eventually, Opco also received the surrender proceeds at the direction of Holdco and Sisterco and reported the taxable policy gain arising from the surrender of the policies in its income.

The reason why this owner and beneficiary structure was employed was to provide Opco with funding to redeem shares of the founder of the Opco under a shareholders' agreement assuring other shareholders (50 employee/officers and the founder's brother) that in the event of death of the founder, a third party would not acquire control of Opco. At the same time, it also allowed for changes in beneficiary if the structure of the corporate group, which was rapidly growing, changed and creditor protected the cash values of the policies from creditors of Opco. This structure would avoid the potential of a taxable transfer of a policy that would arise if Opco held the policy and Opco was later sold. And that is precisely what eventually happened with Opco.

The facts of this case are unique, making this case distinguishable in some respects. Normally, where this structure is put in place, Opco would pay dividends to Holdco and Holdco would pay its own premiums. There would remain a question whether Holdco conferred a benefit on Opco due to the beneficiary designation.

In prior commentary (see: [As a matter of tax | Manulife Advisors](#)) the CRA has suggested that it would apply subsection 246(1) to include such a benefit in Opco's income. This is a broad provision that includes amounts that would have otherwise been taxable had the amount of the benefit been a payment made directly to the recipient (in this case Opco). Payments from a shareholder (Holdco) to Opco need not be taxable events. Holdco can make capital contributions or lend money at no interest to Opco. The application of subsection 246(1) is far from clear in this instance.

In the case at hand, subsection 246(1) was used to include the premium amounts in Sisterco's income after having included the premiums in Holdco's income as a shareholder benefit under subsection 15(1). The founder was the majority shareholder of both Holdco and Sisterco. Citing the *Laliberte v. The Queen*, 2020 FCA 97 case the FCA approved of the Tax Court's conclusion that the analysis to be conducted under subsection 246(1) is substantially the same as that required by subsection 15(1).

We beg to differ. Subsection 246(1) requires a fiction. That the amount if received directly would have been taxable. In the case at hand, the fiction existed – that is, that if Sisterco were Holdco it would have had a 15(1) benefit. That just simply does not hold when Holdco names Opco as a revokable beneficiary under a policy because the benefit, if it were a payment, could have otherwise been a contribution of capital or an interest free loan.

And, if Opco were to have reimbursed the premium expended by Holdco or Sisterco to receive the death benefit as beneficiary, instead of there being some benefit conferred on Opco, Holdco or Sisterco would then have to consider whether the reimbursed amount is income to it either under paragraph 12(1)(x) or as income from property pursuant to section 9 (per CRA's prior commentary discussed above.) Every alternative has its issues.

## Best practices

It may not be possible to pick the perfect spot to place life insurance in a corporate group. Things will inevitably change over time. What are best practices? Where possible, the owner and beneficiary of a policy should be the same corporation. Choosing a corporation within a group should consider:

- the purpose of the insurance,
- where the proceeds need to ultimately be paid on death,
- which corporation has the cash flow to pay premiums,
- whether a corporation has creditors,
- whether any corporation is more likely to be sold to a third party,
- whether a distinct holding corporation for insurance is warranted.

Ideally, this is considered not just at the time of placement but as the corporate group grows and evolves. Checking in on the placement of the insurance throughout the life of the policy and considering these questions on an ongoing basis can get at these issues before they become problematic.

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