Federal Court of Appeal | Cour d'appel fédérale

Date: 20110706

Docket: A-285-10

Citation: 2011 FCA 221

CORAM: **NADON J.A.**
EVANS J.A.
LAYDEN-STEVENSON J.A.

BETWEEN:

THE TORONTO-DOMINION BANK

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on June 16, 2011.

Judgment delivered at Ottawa, Ontario, on July 6, 2011.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: NADON J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

Introduction

[1] This is an appeal by the Toronto-Dominion Bank (TD) from a decision of the Tax Court of Canada (2010 TCC 275), in which Justice Little (Judge) dismissed TD's appeal from a reassessment of its tax liability for the taxation year 1989. At issue is a realized net capital loss of more than $48 million on the disposition of TD's shares in Oxford Holdings Ltd., which the Minister of National Revenue disallowed. In order to avoid complexities not relevant to the issues in this appeal, I refer to Oxford Holdings Ltd. and its corporate predecessors as Oxford.

[2] The Judge held that former subsection 55(1) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (Act), applied to the disposition. As a result, TD could not claim the loss because the circumstances in which it had occurred "may reasonably be considered to have artificially or unduly … created a loss from the disposition".

[3] Subsection 55(1) was repealed by S.C. 1988, c. 55, subsection 33(1), as of September 13, 1988. However, a transitional provision, paragraph 33(4)*(a)*, continued to apply subsection 55(1) to a transaction entered into between the date of its repeal and the end of the year, if it was part of a "series of transactions" that commenced before September 13, 1988, and was completed no later than December 31, 1988. TD disposed of its Oxford shares on December 1, 1988, within the transitional period. Thus, subsection 55(1) would apply to this disposition only if it was part of a "series of transactions" starting before September 13.

[4] The Judge held that "series of transactions" in the transitional provision does not have the common law meaning of a pre-ordained series of transactions that it has in other anti-avoidance provisions in the Act, including section 245, the General Anti-Avoidance Rule (GAAR), which was also enacted by S.C. 1988, c. 55. In the Judge's view, "series" had its ordinary meaning in the transitional provision. Hence, TD's disposition of its shares did not have to be part of a pre-ordained series of transactions in order to fall within subsection 55(1).

[5] The Judge concluded that the disposition was part of a series of transactions in the ordinary sense of "series". The other transactions in the series comprised those set out in a dividend policy of

1982, to which TD and Oxford's other shareholders agreed: the payment of dividends by Oxford; the creation of Class D and Class E shares; and the reinvestment in Oxford of most of the dividends through the acquisition of those shares. Largely because he found the price of the Class E shares to be inflated, the Judge concluded that the loss claimed by TD on their disposition was artificial, and hence could not be claimed by virtue of subsection 55(1).

[6] The appeal raises three substantive issues. First, did the Judge err in law in interpreting "series of transactions" in the transitional provision as not requiring the transactions to be pre-ordained? Second, if he did, was the "series of transactions" ending with TD's disposition of the shares in Oxford pre-ordained? Third, if subsection 55(1) does not apply, does subsection 112(3), the "stop-loss rule", apply so as to reduce the loss that TD may claim on the disposition of its Class E shares by the amount of dividends that it received in respect of its other Oxford shares?

[7] TD also raises a procedural issue. It says that the appeal should be allowed because the Judge breached the duty of fairness when, after the appeal had been heard, he permitted the Minister to make written submissions. Those submissions purported to justify the reassessment on grounds that either the Minister had not raised at the hearing of the appeal, or contradicted the position taken by the Crown earlier in the Tax Court proceeding.

[8] In my respectful view, a "series of transactions" must be pre-ordained to fall within the transitional provision and, on the basis of the undisputed facts and the uncontradicted evidence before the Tax Court, the disposition of the shares was not pre-ordained as that term has been

defined in the jurisprudence. On the other hand, I agree with the Judge that subsection 112(3) is inapplicable. It only prevents the Minister from offsetting dividends received by a taxpayer on shares against a loss claimed by the taxpayer on the disposition of shares when the shares on which the dividends were paid were of the same class as the shares disposed of.

[9] Finally, since TD had ample opportunity to respond to the written submissions made by the Minister after the end of the hearing, the Judge did not breach the duty of procedural fairness when he exercised his discretion to accept the Minister's submissions.

[10] Accordingly, I would allow TD's appeal.

Factual background

[11] The appeal before the Tax Court was conducted on the basis of a lengthy agreed statement of facts, which the Judge set out in his reasons. The following abbreviated account will suffice for present purposes.

[12] For many years TD had invested in Oxford, a large and successful publicly traded real estate company. TD had purchased Series A preferred shares in Oxford in 1976 and 1979, and common shares in 1978.

[13] In 1979, Donald Love, the president and chairman of Oxford, together with members of his family, entered into transactions, directly and through companies that they beneficially owned

(collectively the Love Group), to turn Oxford into a private company. TD agreed to participate in taking Oxford private.

[14] Following the incorporation of a holding company, the acquisition of outstanding shares in Oxford, and a subsequent corporate amalgamation, the privatization of a new corporation was completed in 1980. TD ended up with 40% of the shares in Oxford, comprising common voting shares and, because of the statutory restrictions on the percentage of voting shares that a chartered bank may own in a corporation, non-voting convertible Class A and Class B shares. The Love Group owned the other 60%. Two out of five, and later six, directors of Oxford were TD employees.

[15] Under a dividend policy proposed by TD and designed by Robert Teskey, a commercial lawyer who was both Oxford's outside counsel and a director, Oxford declared and paid dividends on all its shares from 1982 to 1988. As a corporate owner of 40% of Oxford's shares, TD was paid tax-free dividends totalling $79.4 million during this period.

[16] In order to maintain Oxford's capital, TD and the Love Group reinvested most of the dividends that they received by subscribing for newly created classes of non-voting shares in Oxford: Class E shares for TD, and Class D for the Love Group. Their subscription price was fixed at $300 each by Oxford's board of directors. Unlike the other shares in Oxford, these were par value shares. Since their par value was only $1, the subscription price enabled Oxford to accumulate a

substantial contributed surplus from which it could discharge existing obligations. TD reinvested in Class E shares more than 90% of the dividends that it received between 1982 and 1988.

[17] The dividends declared in December 1985 and May 1988 were paid from Oxford's contributed surplus; the other seven dividends, declared between July 1982 and May 1985, were paid from earnings. Oxford elected that dividends on its common and Class D shares would be capital dividends, as would all dividends paid in May 1985.

[18] In the December 1, 1988 disposition, all of TD's shares, except its Class E shares, were redeemed at $46.809 *per* share, for a total of more than $30.4 million in cash. The Love Group acquired TD's Class E shares, also at $46.809 *per* share, for a total of more than $11.3 million in cash. Following the disposition, TD acquired shares in an Oxford affiliate for a consideration of nearly $38.5 million in cash.

Issues and Analysis

[19] A standard of review analysis is not required for the procedural fairness issue. The only question is whether the Tax Court Judge's exercise of his discretion to permit the Crown to file a memorandum of fact and law after the hearing was, in all the circumstances, unfair to TD because it deprived it of an effective opportunity to make its case and to answer the case against it.

[20] On questions of law, including statutory interpretation, correctness is the applicable standard of review. In the present case, there are two questions of law: the meaning of "series of

transactions" in the transitional provision, and the applicability of subsection 112(3) of the Act to a loss claimed on the disposition of shares other than those on which dividends had been paid.

Issue 1: Did the Judge breach the duty of fairness when he permitted the Minister to file a memorandum of fact and law after the hearing had ended?

[21] As is not uncommon in proceedings before the Tax Court, the parties did not file memoranda of fact and law before the start of the hearing of the appeal. However, on the fourth day of the five-day hearing before the Tax Court, TD filed a lengthy submission, with supporting documents, to which the Crown thought it prudent to reply. Accordingly, two business days after the hearing ended, and before the Judge rendered judgment, counsel for the Crown wrote to the Court for permission to submit a memorandum of fact and law in response to TD's written submissions. TD opposed the request.

[22] In the reasons for his order granting the Crown's request, dated November 2, 2009 (2009 TCC 564), the Judge noted that, subject to certain restrictions that did not apply to the facts of the present case, subsection 152(9) of the Act enables the Minister to advance an alternative argument to support an assessment at any time after the "normal reassessment period".

152. (9) The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act	152. (9) Le ministre peut avancer un nouvel argument à l'appui d'une cotisation après l'expiration de la période normale de nouvelle cotisation, sauf si, sur appel interjeté en vertu de la présente loi :
(a) there is relevant evidence that the taxpayer is no longer able to adduce	*a)* d'une part, il existe des éléments de preuve que le contribuable n'est plus en

without the leave of the court; and	mesure de produire sans l'autorisation du tribunal;
(b) it is not appropriate in the circumstances for the court to order that the evidence be adduced.	*b)* d'autre part, il ne convient pas que le tribunal ordonne la production des éléments de preuve dans les circonstances.

[23] The Judge also referred to rule 138 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, which provides as follows:

138. (1) The judge may reopen a hearing before judgment has been pronounced for such purposes and upon such terms as are just.	138. (1) Le juge peut rouvrir l'audience avant que le jugement n'ait été prononcé aux fins et aux conditions qui sont appropriées.

[24] At this point, the Judge did not know what submissions the Crown intended to make. Nonetheless, he exercised the broad discretion conferred by rule 138(1) to grant the request because the case was complex. He permitted TD to file a written reply no later than fifteen days after it received the Crown's written submissions, and ordered the Crown to pay costs to TD of $10,000.

[25] The Crown's principal argument in its written submissions was that subsection 112(3) applied to the disposition of the Class E shares and reduced the loss on their disposition to nil. Previously, the Crown had relied on subsection 112(3) merely to reinforce its argument on subsection 55(1), not as a stand-alone justification for the reassessment.

[26] The Crown also argued that pre-ordination was not necessary for a transaction to be part of a series of transactions for the purpose of paragraph 33(4)*(a)*, the transitional provision governing the

application of subsection 55(1) to the facts of the present case. The hearing before the Tax Court appears to have proceeded on the assumption that pre-ordination was necessary before subsection 55(1) could apply to the disposition of TD's shares as part of a "series of transactions". However, even if the Crown had previously conceded that pre-ordination was required, it was not bound by a concession on a question of law.

[27] Before this Court, TD argued that the Judge had acted unfairly in permitting the Crown to advance arguments different from those on which it had based its case in the Tax Court during discoveries and at the hearing itself.

[28] It is clear from subsection 152(9) of the Act that the Minister has broad discretion to advance alternative arguments in support of an assessment. The Tax Court Judge has an equally broad discretion under rule 138 of the *Tax Court of Canada Rules (General Procedure)* to reopen a trial at any time before rendering judgment. In my view, the Judge's exercise of his discretion to permit the Crown to make written submissions after the close of the hearing did not deprive TD of its right to procedural fairness.

[29] The Judge permitted TD to make a full reply in writing to the Crown's submissions, which did not require additional evidence. Counsel for TD did not request further discoveries when served with the Crown's written submissions. The Judge's decision did not therefore deprive TD of the opportunity to participate in the Tax Court's proceeding: it was able to put its own case before the Tax Court and to respond to the Crown's. Whether the Crown took a position on a question of law

in its written submissions different from that taken earlier in the proceeding is, in the circumstances of this case, irrelevant to the fairness of the procedure.

[30] Nonetheless, it is not difficult to understand counsel's frustration when he received notice of the Crown's request, especially since the Crown had already shifted its ground between the reassessment and the hearing of the appeal. However, the Judge's award of substantial costs was an appropriate recognition of the inconvenience and additional expense to which the Crown's conduct of the litigation had put TD.

Issue 2: Does the phrase "series of transactions" in the transitional provision, paragraph 33(4)*(a)*, require that the transactions be pre-ordained?

(i) *statutory scheme*

[31] Former subsection 55(1) of the Act provided as follows.

55. (1) For the purposes of this subdivision, where the result of one or more sales, exchanges, declarations of trust, or other transactions of any kind whatever is that a taxpayer has disposed of property under circumstances such that he may reasonably be considered to have artificially or unduly	55. (1) Aux fins de la présente sous-section, lorsque les circonstances dans lesquelles ont été effectuées une ou plusieurs opérations de vente ou d'échange, ou autres transactions de quelque nature que ce soit, permettent de croire raisonnablement que le contribuable a disposé d'un bien de façon à artificiellement ou indûment
…	[…]
(b) created a loss from the disposition, or *(c)* increased the amount of his loss from the disposition, the taxpayer's gain or loss, as the case may be, from the disposition of the property shall be computed as if such reduction, creation or increase, as the	*b)* occasionner une perte résultant de la disposition, ou *c)* augmenter le montant de sa perte résultant de la disposition, le gain ou la perte du contribuable, selon le cas, résultant de la disposition du bien, est calculée comme si une telle réduction, perte ou augmentation, selon

case may be, had not occurred.	le cas, ne s'était pas produite

[32] Subsection 55(1) was repealed by subsection 33(1) of S.C. 1988, c. 55, and ceased to apply to most transactions entered into after September 13, 1988, when it received royal assent. However, paragraph 33(4)*(a)* kept subsection 55(1) alive until the end of the year with respect to post-September 13 transactions, if they were part of a series of transactions that commenced before September 13.

33. (4) Subsection (1) is applicable with respect to transactions entered into on or after the day on which this Act is assented to other than *(a)* transactions that are part of a series of transactions, determined without reference to subsection 248(10) of the said Act, commencing before the day on which this Act is assented to and completed before 1989; …	33. (4) Le paragraphe (1) s'applique aux opérations conclues à la date de sanction de la présente loi ou après cette date, à l'exclusion : *a)* de celles qui font partie d'une série d'opérations – abstraction faite du paragraphe 248(10) de la même loi – commençant avant cette date et terminée avant 1989; …

[33] Although "series of transactions" was not defined in section 33, paragraph 33(4)*(a)* stated that whether a transaction is part of a series is to be determined without reference to subsection 248(10) of the Act, which was enacted by S.C. 1986, c. 55. Subsection 248(10) extends the common law meaning of "series of transactions", that is, a series of *pre-ordained* transactions, by deeming the series to include related transactions completed in contemplation of the series, even if not themselves pre-ordained: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paras. 25 and 26 (*Canada Trustco*).

248. (10) For the purposes of this Act, where there is a reference to a series of transactions or events, the series shall be deemed to include any related transactions or events completed in	248. (10) Pour l'application de la présente loi, une série d'opérations ou d'événements, lorsqu'il y est renvoyé, est réputée comprendre les opérations et événements liés terminés en vue de

contemplation of the series. réaliser la série.

(ii) *application of the statutory scheme to the facts*

[34] Unless TD's disposition of the Oxford shares was part of a "series of transactions" commencing before September 13, 1988, subsection 55(1) will not apply to it because it occurred on December 1, 1988, after the repeal of subsection 55(1) took effect. However, if the disposition was part of a "series of transactions", the series would include pre-September 13 transactions: the payment of dividends by Oxford, the creation of Class E shares, and TD's reinvestment of most of the dividends in Oxford by acquiring Class E shares.

(iii) *decision of the Tax Court*

[35] In its written submissions to the Tax Court, the Crown took the position that, while the courts have interpreted the phrase "series of transactions" in section 245, and elsewhere in the Act, to mean a "pre-ordained" series, it should be given its ordinary meaning in the transitional provision.

[36] After briefly describing the parties' arguments on this issue, the Judge said (at para. 33):

> I have concluded that the ordinary meaning should be given to the word "series" and, therefore, it is not necessary to consider whether there was an element of preordination.

Having presumably decided that the various transactions in relation to TD's shares in Oxford constituted a "series" in the "ordinary" sense, the Judge concluded that the loss claimed on their disposition in December 1988 was "undue", largely because he found (at paras. 41 and 42) that the price of $300 *per* Class E share was "inflated". Consequently, he held that subsection 55(1) justified

the Minister's disallowance of the loss claimed by TD in respect of its disposition of the Class E shares, and upheld the reassessment.

(iv) *interpreting the transitional provision*

[37] With all respect to the Judge, the phrase "series of transactions" in paragraph 33(4)(*a*) of the transitional provision has, in my view, the same meaning that it has in anti-avoidance provisions of the Act, including section 245. Thus, in order for the December 1, 1988 disposition of TD's Oxford shares to be subject to subsection 55(1), it must have been part of a pre-ordained series of transactions that had commenced before September 13, 1988.

[38] I start with the general presumption of statutory interpretation that Parliament intends a word or phrase to have the same meaning when used in the same statute, and that statutes dealing with the same subject matter are intended to operate harmoniously together: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ontario: LexisNexis Canada Inc., 2008), 215-23, 416-19. I would add that, unlike the Judge, I take the view that the relevant question is the meaning, not of the single word "series", but of the complete phrase "series of transactions", which has acquired the status of a legal term of art in the context of anti-avoidance provisions.

[39] However, "series of transactions" is contained in a transitional provision. The interpretation of words in such provisions was considered in *Canada v. Trade Investments Shopping Centre Ltd.* (1993), 93 D.T.C. 5382 (F.C.), *aff'd.* (1996), 96 D.T.C. 6570 (F.C.A.) (*Trade Investments*) by my

colleague Justice Noël, when a Judge of the then Federal Court – Trial Division. He said (at p. 5387):

> … when a question of interpretation arises as to the scope of a transitional provision, it must be answered by reference to the provision of substantive law it accompanies and the specific situation which Parliament sought to alleviate by introducing it.

[40] In affirming the decision in *Trade Investments,* Justice Décary, writing for the Court, described (at p. 6571) Justice Noël's approach to the interpretation of the transitional provision as « impeccable ». For further endorsement, see *Medovarski v. Canada (Minister of Citizenship and Immigration),* 2005 SCC 51, [2005] 2 S.C.R. 539 at paras. 14-17.

[41] Applying this approach to the present case, counsel for the Crown argued that the substantive context of the Act indicates that "series of transactions" in paragraph 33(4)*(a)* did not mean a pre-ordained series.

[42] First, subsection 55(1), whose life the transitional provision extended, did not itself contain the phrase "series of transactions". It operated to prevent a taxpayer from claiming a loss on a disposition in circumstances where it was reasonable to think that the loss had been artificially or unduly created or increased. In contrast, the GAAR, which was introduced at the same time that subsection 55(1) was repealed, is a more complex measure, designed to rebalance the public interests in preventing abusive tax avoidance on the one hand, and in providing a degree of predictability for taxpayers on the other. Parliament should not be taken to have intended to limit the scope of subsection 55(1) during the transitional period by transplanting the common law meaning of "series of transactions" to the very different scheme of subsection 55(1).

[43] Second, the transitional provision is merely a “sorting” device to allocate a transaction to either the old subsection 55(1) or the new section 245. Thus, a disposition that occurs after September 13, 1988, but before the end of the year, is governed by one or other of these regimes. In contrast, counsel says, TD hypothesizes a third, hybrid regime, which would operate only for the three and a half months between September 13 and December 31, 1988: former subsection 55(1) plus a requirement of a pre-ordained series of transactions, but without the extension contained in subsection 248(10). It is implausible, says counsel, that this is what Parliament intended.

[44] While there is force in these arguments, I cannot accept them.

[45] First, paragraph 33(4)*(a)* provides that whether a post-September 13 transaction is part of a series of transactions commencing before that date is to be determined “without reference to subsection 248(10)”. This is the provision that extends the common law meaning of “series of transactions” to include related transactions completed in contemplation of the series, even though not themselves pre-ordained. If, as the Crown argues, “series of transactions” in paragraph 33(4)*(a)* simply means sequential and related, but not necessarily pre-ordained, transactions, it would have been pointless to provide that subsection 248(10) does not apply: such transactions would already be included in the series by virtue of the ordinary definition of “series of transactions”.

[46] It would only make sense to exclude subsection 248(10) – which is designed to include transactions otherwise excluded from the common law meaning of “series of transactions” because not pre-ordained – if the series of transactions had to be pre-ordained. In my opinion, the transitional

provision's exclusion of subsection 248(10) is a positive indication that "series of transactions" in paragraph 33(4)*(a)* has its common law meaning.

[47] Second, a statutory provision does not normally apply to events after its repeal. Subsection 33(4) can plausibly be viewed as designed to balance anti-avoidance and taxpayer certainty by applying subsection 55(1), after the date of its repeal, only to dispositions that are an integral and pre-planned part of a scheme that commenced before its repeal. To continue to apply subsection 55(1) to a post-repeal disposition that was part of a series of sequential but not pre-ordained transactions would unduly extend the life of a repealed statutory provision and defeat taxpayer expectations.

[48] Third, drawing the line between the end of one statutory regime and the start of another inevitably involves an element of arbitrariness. I do not share the Crown's view that there is something absurd in the notion that Parliament would create a separate anti-avoidance regime for the three and a half months following the repeal of subsection 55(1).

Issue 3: Was TD's disposition of its Oxford Class E shares part of a pre-ordained "series of transactions"?

[49] In *OSFC Holdings Ltd. v. Canada*, 2001 FCA 260, [2002] 2 F.C. 288 at para. 24, Justice Rothstein (then of this Court), writing for the majority, defined "series of transactions" in paragraph 245(3)*(b)* and subsection 248(10) of the Act as follows:

> Thus, for there to be a series of transactions, each transaction in the series must be pre-ordained to produce a final result. Pre-ordination means that when the first

> transaction of the series is implemented, all essential features of the subsequent transaction or transactions are determined by persons who have the firm intention and ability to implement them. That is, there must be no practical likelihood that the subsequent transaction or transactions will not take place.

This approach was endorsed by the Supreme Court of Canada in *Canada Trustco* at para. 25.

[50] Because the Judge in the present case held that "series of transactions" in the transitional provision did not have the same meaning that it has in the substantive provisions of the Act, he did not have to determine whether TD's 1988 disposition of its Oxford shares was part of a series of transactions in the common law sense.

[51] Determining whether the disposition was part of a "series of transactions" in the common law sense is a question of mixed fact and law. Nonetheless, despite the absence of findings on this issue by the Judge, this Court may make the necessary findings for itself, without imposing on the parties the expense and delay that would be involved in returning the matter to the Tax Court: *Baker Petrolite Corp. v. Canwell Enviro-Industries Ltd*., 2002 FCA 158, [2003] 1 F.C. 49 at paras. 81-83. In my opinion, the Court is in a position to make the relevant findings, because most of the evidence is documentary and uncontested, and the oral testimony was not contradicted. The Court can draw the necessary inferences from the material before the Tax Court as to whether the disposition was part of a pre-ordained series of transactions.

[52] TD's disposition of the shares must be the end transaction of any possible series of transactions that subjects the loss on the disposition to subsection 55(1). Working backwards, the

series would also include the reinvestment of the bulk of the dividends through the acquisition of Class E shares, the issue of the Class E shares, and the payment of dividends by Oxford.

[53] There is no evidence in the record that, when the first dividends were paid, "all essential features" of the eventual disposition of the shares, such as its timing, the purchase price, and the identity of the purchaser, were determined. Indeed, the evidence was that TD only decided to sell what had been a profitable investment in Oxford shortly before the disposition occurred. The fact that TD may have intended ultimately to sell its Oxford shares, like any other of its other investments, is insufficient to make the 1988 disposition pre-ordained.

[54] The evidence also indicates that each of the other transactions contemplated by the dividend policy, and potentially comprising the series, was driven by independent, commercial considerations. Thus, substantial dividends were paid because TD wanted its *pro rata* share of Oxford's earnings to be reflected in its financial statements; Oxford needed the dividends to be reinvested in order to maintain its capital; and par value Class D and E shares were created in order to increase Oxford's contributed surplus from which to meet existing obligations. This evidence was not contradicted. There was no evidence that the transactions were designed as a tax avoidance scheme to create a loss for TD on the disposition of its Class E shares.

[55] On the basis of the material before the Tax Court, I have concluded that TD's disposition of its Oxford Class E shares in December 1988 was not part of a series of transactions within the meaning of the transitional provision and that, accordingly, subsection 55(1) does not apply to it.

Issue 4: Does subsection 112(3) apply to the loss claimed by TD on the disposition of the shares?

[56] The part of subsection 112(3) of the Act relevant to this issue provides as follows.

112. (3) Where a corporation owns a share that is a capital property and receives a taxable dividend, a capital dividend or a life insurance capital dividend in respect of that share, the amount of any loss of the corporation arising from transactions with reference to the share on which the dividend was received shall,	112. (3) Lorsqu'une corporation possède une action qui est un bien en immobilisations et reçoit un dividende imposable, un dividende en capital ou un dividende en capital d'assurance-vie à l'égard de cette action, le montant de toute perte de la corporation découlant d'opérations relatives à l'action sur laquelle le dividende a été reçu est réputé être,
…	[…]

[57] The Crown argued that if subsection 55(1) does not apply, subsection 112(3) operates to preclude TD from claiming a loss on its disposition of the Class E shares in Oxford because it had received dividends in respect of its common shares, and its Class A and Class B shares, which were virtually identical to the Class E shares. The Crown also relied on subsection 33(2) of the current *Interpretation Act*, R.S.C. 1985, c. I-21, to argue that "share" in subsection 112(3) includes the plural "shares".

[58] The Tax Court Judge rejected this argument (at para. 25):

> I do not find that subsection 112(3) applies as asserted by the [Crown] since the loss created cannot be applied against a different class of shares, no matter how similar the share attributes are.

[59] I agree with this conclusion. The text of subsection 112(3) could scarcely be clearer. The dividends must be received and any corresponding loss must arise in respect of the same share or

shares. The Class E shares were the subject of the disposition by TD; they were not the same shares as the common shares, and the Class A and B shares in respect of which TD received dividends. Indeed, the attributes of the different classes of shares were not identical since the Class E shares were par value shares and, unlike TD's common shares in Oxford, non-voting.

[60] The Crown alleges that TD was only able to claim a loss on the disposition as a result of a manipulation of Oxford's share structure and thereby evaded the policy underlying the stop-loss provisions of subsection 112(3). The essence of the Crown's argument is that subsection 112(3) should be interpreted to offset dividends received on shares against capital losses sustained on the disposition of materially similar shares in the same corporation. This interpretation would be consistent with the purpose of subsection 112(3): the prevention of corporate value-stripping through the issue of tax-free dividends out of contributed capital and the creation of a corresponding capital loss. Parliament cannot have intended, counsel says, to permit taxpayers to evade subsection 112(3) by the creation of new classes of shares that are virtually identical to those on which dividends have been paid.

[61] I do not agree. Like other legislation, the provisions of tax statutes are to be interpreted in light of their text, context and objectives. However, the following passage from *Canada Trustco* (at para. 11) is apt here:

> … the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.

See also *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715 at paras. 21-24. In my opinion, what the Crown urges as the correct interpretation of subsection 112(3) is, because of the specificity of its text, more properly characterized as a proposed amendment.

Conclusions

[62] For these reasons, I would allow the appeal with costs in this Court and below, set aside the judgment of the Tax Court, rendering the judgment that the Tax Court ought to have rendered, I would allow TD's appeal from the Minister's reassessment, and remit the matter to the Minister to reassess in accordance with these reasons.

"John M. Evans"
J.A.

"I agree
M. Nadon J.A."

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-285-10
(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE LITTLE OF THE TAX COURT OF CANADA DATED JUNE 3, 2010, COURT FILE NO. 2006-2996(IT)G)	
STYLE OF CAUSE:	The Toronto-Dominion Bank v. Her Majesty The Queen
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 16, 2011
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	NADON J.A. LAYDEN-STEVENSON J.A.
DATED:	July 6, 2011

APPEARANCES:

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