Federal Court of Appeal | Cour d'appel fédérale

Date: 20200504

Docket: A-337-18

Citation: 2020 FCA 82

CORAM: **WEBB J.A.**
NEAR J.A.
MACTAVISH J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

BANK OF MONTREAL

Respondent

Heard at Toronto, Ontario, on February 6, 2020.

Judgment delivered at Ottawa, Ontario, on May 4, 2020.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NEAR J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the Judgment rendered by Graham J. of the Tax Court of Canada on September 12, 2018 (2018 TCC 187). The Tax Court Judge found that there was no tax benefit for the purposes of section 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) as a result of the transactions undertaken by the Bank of Montreal (BMO) in relation to certain financing arrangements made for its U.S. subsidiaries known as the Harris Group.

[2] BMO had undertaken certain transactions to reduce its foreign exchange risk in financing the Harris Group. As part of these transactions, BMO was a limited partner in a Nevada limited partnership that acquired the shares of a Nova Scotia unlimited liability company, BMO (NS) Investment Company (NSULC). BMO was concerned that if the Canadian dollar increased in value relative to the American dollar between the time when it borrowed the necessary funds from third parties in American currency and the time when it unwound the transactions and repaid the debt, it would incur a capital loss on the disposition of the shares of this company. Since this company would be paying (and did pay) dividends, to avoid the possible application of subsection 112(3.1) of the Act (which, if it applied, would reduce its capital loss by the amount of such dividends), the limited partnership acquired a separate class of shares on which the dividends would be (and were) paid.

[3] The Canadian dollar increased in value relative to the American dollar and, in unwinding the transactions, BMO incurred a loss as a result of the disposition of the shares of NSULC. The Minister reassessed BMO on the basis that the general anti-avoidance rule (the GAAR) in section 245 of the Act applied to the transactions undertaken to avoid the reduction in the capital loss contemplated by subsection 112(3.1) of the Act.

[4] The finding that there was no tax benefit was based entirely on the interpretation of subsection 39(2) of the Act. The Tax Court Judge found that this subsection applied to any capital property. Because the loss realized by BMO on the disposition of the shares in issue was entirely attributable to the change in the exchange rate between the Canadian dollar and the American dollar, this loss was deemed to be a loss from the disposition of a foreign currency.

Therefore, it was not a loss from the disposition of shares. As a result, the provisions of subsection 112(3.1) of the Act would not have applied to reduce this loss for the dividends paid, even if only one class of shares had been issued and no tax benefit was realized by BMO in completing the transactions to avoid the possible application of this subsection.

[5] For the reasons that follow, I would dismiss this appeal.

I. Background

[6] The parties filed a detailed Partial Agreed Statement of Facts with the Tax Court. The facts are not in dispute in this appeal.

[7] BMO arranged for financing of $1.4 billion US for the Harris Group in 2005. In order to complete this financing, BMO implemented a structure that is commonly referred to as a tower structure. In this structure, BMO formed a limited partnership in Nevada, BMO Funding L.P. (Funding LP). BMO held a 99.9% interest in this partnership (as a limited partner) and the other 0.1% was held by the general partner, which was a wholly-owned subsidiary of BMO.

[8] Funding LP incorporated NSULC. NSULC formed a wholly-owned subsidiary, BMO (US) Funding LLC (LLC), which was a Delaware limited liability company.

[9] The funds were borrowed either by BMO and invested in Funding LP or were borrowed by Funding LP. Funding LP used these funds to acquire shares of NSULC, which in turn used

these funds to acquire shares in LLC. LLC then lent the funds to the Harris Group. Funding LP also acquired Class A shares of LLC.

[10] Since all of the borrowed funds ($1.4 billion US) were used to acquire common shares of NSULC, the adjusted cost base (ACB) of these shares was equal to this amount. With such a significant ACB, there was a risk that if the Canadian dollar were to rise in value relative to the American dollar, BMO (as a partner of Funding LP) could realize a significant loss on the disposition of the shares of NSULC. For the purposes of the Act, the proceeds of disposition for the shares and the ACB of the shares would be determined using the Canadian dollar equivalent of the American dollar, as of the relevant time.

[11] Subsection 112(3.1) of the Act applies to a person who is a member of a partnership. This subsection provides that such person's share of a capital loss realized on the disposition of shares by the partnership is reduced by any dividends paid on such shares, to the extent that such person was entitled to a deduction under subsection 112(1) of the Act in respect of such dividends.

[12] To avoid the possible application of subsection 112(3.1) of the Act, NSULC paid a stock dividend on its common shares in the amount of $100,000 US. This dividend was paid by NSULC issuing 100 Preferred Shares, Series 1 to Funding LP. NSULC could, therefore, pay dividends on these preferred shares, and not on the common shares that had the high ACB.

[13] From 2005 to 2010, the Harris Group paid interest to LLC on the borrowed amounts. LLC, in turn, paid dividends to NSULC. NSULC then paid corresponding dividends to Funding LP on the Preferred Shares, Series 1. Funding LP would then use the funds it received to pay interest on the amount that it had borrowed and distribute money to BMO. The amount of the dividends was included in the income of BMO under paragraphs 96(1)(f), 12(1)(j) and subsection 82(1) of the Act. Since NSULC was a taxable Canadian corporation, BMO was also entitled, in computing its taxable income, to a deduction under subsection 112(1) of the Act in an equal amount.

[14] When the transactions were put in place in 2005, the exchange rate between the American dollar and the Canadian dollar was 1.2550 ($1 US = $1.255 CDN). The transactions were unwound in 2010 when the Harris Group repaid the principal amount of the loan to LLC. LLC was wound up and its assets were distributed to NSULC. NSULC was wound up and its assets were distributed to Funding LP. Funding LP repaid the third party lenders from whom it had borrowed funds and distributed the remaining money to BMO, who also repaid the third party lenders from whom it had borrowed funds. The payment that was made when the structure was collapsed was the repayment of the principal amount borrowed. The dividends paid over the years were from the interest that was paid by the Harris Group.

[15] When the tower structure was dismantled in 2010, the exchange rate had changed to 1.0236 ($1 US = $1.0236 CDN). The cancellation of the common shares of NSULC on the winding-up was a disposition of these shares (subparagraph (b)(i) of the definition of disposition in subsection 248(1) of the Act). Since the amount paid in Canadian currency was less than the

paid-up capital of these shares in Canadian currency, there was no deemed dividend under subsection 84(2) of the Act and the proceeds of disposition of these shares (as defined in section 54 of the Act) were less than the ACB of these shares. The result was a capital loss.

[16] As a result of this change in the exchange rate from the time when the transactions were implemented to the time when they were unwound, Funding LP realized a foreign exchange gain of $289,250,000 CDN on the repayment of the amounts that it had borrowed in American dollars and a capital loss of $321,755,973 CDN as a result of the disposition of its shares of NSULC. Funding LP also realized a capital gain of $126,108 CDN on the disposition of its Class A shares of LLC. There was no explanation of why Funding LP realized a capital loss (in Canadian dollars) on the disposition of the shares of NSULC, and a capital gain (in Canadian dollars) on the disposition of the shares of LLC. In any event, the net result of these gains and losses was a capital loss. BMO reported its 99.9% share of this net capital loss, which was approximately $32 million.

[17] The Minister of National Revenue (Minister) reassessed BMO to reduce the capital loss realized in respect of the NSULC shares by its share of the dividends that had been paid over the years by NSULC to Funding LP. This reassessment was based on the application of the GAAR. The Minister had determined that BMO had avoided the application of subsection 112(3.1) of the Act by creating a separate class of preferred shares on which the dividends were paid. The tax benefit, according to the Minister, was the increase in the capital loss that was otherwise available to BMO. The Minister also determined that these transactions were avoidance transactions and were an abuse of the Act.

II. Decision of the Tax Court

[18] The Tax Court Judge determined that the first issue to be resolved was whether there was a tax benefit in this case. The Tax Court Judge examined subsection 39(2) of the Act on a thorough textual, contextual and purposive basis. He concluded that subsection 39(2) of the Act applied to a capital loss arising from the disposition of any property, to the extent that such loss was attributable to a change in the exchange rate between the Canadian dollar and a foreign currency. In this case, the entire capital loss on the disposition of the common shares of NSULC was attributable to the change in the exchange rate between the Canadian dollar and the American dollar. As a result of the application of subsection 39(2) of the Act, the capital loss was deemed to be a loss from the disposition of a foreign currency, and not a loss from the disposition of shares.

[19] Since subsection 112(3.1) of the Act only applies if there has been a loss from the disposition of shares, the Tax Court Judge determined that, even if a separate class of preferred shares of NSULC had not been created (and, therefore, all of the dividends would have been paid on the common shares), subsection 112(3.1) of the Act would not have applied to reduce the capital loss realized on the disposition of the common shares. He concluded that there was no tax benefit arising as a result of the creation of the preferred shares and the payment of dividends on those shares, since there would be no grind to the capital loss in any event.

[20] The Tax Court Judge allowed BMO's appeal and referred the matter back to the Minister for reassessment on the basis that section 245 of the Act did not apply to the transactions in question.

III. Issue and Standard of Review

[21] The issue in this appeal is the interpretation of subsections 39(2) and 112(3.1) of the Act. In particular, the issue is whether subsection 39(2) of the Act, as it read in 2010, applied to any capital property. The issue related to subsection 112(3.1) of the Act is whether this subsection would still reduce the capital loss realized by BMO on the disposition of the common shares of NSULC if subsection 39(2) of the Act applied in relation to this loss.

[22] The parties do not agree on the applicable standard of review. The Crown submits that the standard of review should be correctness since the issue relates to the interpretation of subsections 39(2) and 112(3.1) of the Act. BMO submits that the standard of review should be palpable and overriding error since the Tax Court Judge found that there was no tax benefit.

[23] In support of its view, BMO refers to the following excerpt from paragraph 34 of the decision of the Supreme Court in *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721 (*Copthorne*):

> 34 …Where, as here, the Tax Court judge has made a finding of fact on the existence of a tax benefit, it is only appropriate for a reviewing court to overturn such a finding where an appellant can show a palpable and overriding error.

[24] However, it should be noted that the Supreme Court was specifically referring to a situation where a Tax Court judge has made a finding of fact on the existence of a tax benefit. In this case, the existence of the tax benefit is not the result of any finding of fact, but rather the interpretation of subsection 39(2) of the Act. Therefore, the finding of the tax benefit was based on a question of law, not on a question of fact. In my view, the applicable standard of review is therefore correctness, as the interpretation of subsections 39(2) and 112(3.1) of the Act is a question of law.

IV. Relevant Statutory Provisions

[25] There are a number of statutory provisions that are relevant in this appeal. The full text of these provisions (as they read in 2010) is set out in the Appendix attached to these reasons. In 2013, subsection 39(2) of the Act was amended and subsection 39(1.1) was added to the Act. The full text of the amended subsection 39(2) of the Act and the new subsection 39(1.1) of the Act is also included in the Appendix.

V. Analysis

[26] This case arises in the context of the application of the GAAR. As noted in paragraph 34 of *Copthorne*, in conducting a GAAR analysis, "[t]he first question that must be answered is whether there was a tax benefit". The Crown alleges that the tax benefit is the increased capital loss arising on the disposition of the common shares of NSULC claimed by BMO, without taking into account any reduction of this capital loss for the dividends that were paid by NSULC

over the years. This tax benefit, as noted by the Tax Court Judge, would only be present if subsection 112(3.1) of the Act would have applied to reduce this capital loss, if all of the dividends were paid on those common shares. If subsection 112(3.1) of the Act would not have applied to reduce the capital loss, as a result of the application of subsection 39(2) of the Act, there would be no tax benefit. Therefore, the critical question is whether subsection 39(2) of the Act would have applied if BMO had acquired only one class of shares of NSULC and all of the dividends would have been paid on that one class of shares.

[27] The interpretation of this provision, as noted by the Tax Court Judge, is to be based on a textual, contextual and purposive analysis (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 10, [2005] 2 S.C.R. 601). The role of this Court is to determine the interpretation of this provision that was intended by Parliament.

[28] Subsection 39(2) was added to the Act when the taxation of capital gains was introduced in 1972. Other than minor wording changes, it remained as first drafted until 2013. During that 40 year span, it appears that the only reported case that addressed whether this subsection could apply to the disposition of property (other than the decision under appeal) is the informal procedure decision of Bowman A.C.J. (as he then was) in *Rezvankhah v. Canada*, [2003] 1 C.T.C. 2473, [2002] T.C.J. No. 586 (QL). The issue in that case was described in paragraph 2 as "the correct method of calculation of capital gains or losses realized on the disposition of securities which were purchased and sold on margin using U.S. currency". The only comment made with respect to the possible application of subsection 39(2) of the Act to the disposition of property is in paragraph 10:

> 10 The third point is that counsel for the Crown stated that the respondent was prepared to concede that the appellant was entitled to the $200 exemption contemplated by subsection 39(2) of the *Income Tax Act*. I informed him that I had some doubt whether subsection 39(2) had any application. However I make no final determination on the point. Far be it from me to deprive a taxpayer of the benefit of a concession that the Crown is prepared to make.

[29] By expressing doubt as to whether subsection 39(2) of the Act applied, Bowman A.C.J. was supporting the interpretation that this subsection did not apply to dispositions of property. By allowing the $200 exemption contemplated by this subsection, he was supporting the interpretation that it applied to such dispositions. This case is of no assistance in interpreting subsection 39(2) of the Act.

[30] Members of the tax community have also expressed uncertainty with respect to the correct interpretation of this subsection. For example, Eric Bretsen and Heather Kerr in their paper "Tax Planning for Foreign Currency", *Report of Proceedings of the Sixty-First Tax Conference,* 2009 Tax Conference (Toronto: Canadian Tax Foundation, 2010), 35:1-44 and James W. Murdoch and Mark A. Barbour in their paper "Foreign Exchange" in *2010 Ontario Tax Conference* (Toronto: Canadian Tax Foundation, 2010), 12:1-19 all struggled with the interpretation of subsection 39(2) of the Act and whether it applied to any disposition of capital property.

[31] Following the significant amendments made to subsection 39(2) and the addition of subsection 39(1.1) to the Act in 2013, it is now clear that a loss realized on a disposition of shares by a corporation, to the extent that such loss is attributable to a change in the value of a foreign currency relative to Canadian currency, will not be deemed to be a capital loss from the

disposition of a foreign currency under subsection 39(2) of the Act. Since these amendments were effective (except with respect to foreign affiliates for whom the amendments were effective earlier) for any gains or losses realized in taxation years that began after August 19, 2011, the interpretation of former subsection 39(2) of the Act will have limited application.

A. *Textual Analysis*

[32] With respect to the text of the provision, the condition that had to be satisfied for subsection 39(2) of the Act to apply in 2010 was:

> … where, by virtue of any fluctuation after 1971 in the value of the currency or currencies of one or more countries other than Canada relative to Canadian currency, a taxpayer has made a gain or sustained a loss in a taxation year…

[33] In applying the text of this provision, the answer to the question of whether BMO has sustained a loss by virtue of the fluctuation of the Canadian dollar vis-à-vis the American dollar is, simply, yes. In this particular case, it is evident that the only reason BMO sustained the loss in issue was as a result of the fluctuation in the value of Canadian currency. This can be established by simply asking the question of what gain or loss would have been made or sustained if the only change to the transactions is the exchange rate. If the exchange rate in 2010 would have been exactly the same amount as it was in 2005, Funding LP would have received the same amount in Canadian dollars in 2010 for the common shares of NSULC as it had paid in Canadian dollars in 2005 for these shares. There would not have been any gain made or loss sustained on these shares. Therefore, it is evident that the only reason BMO suffered a loss was because of the change in the exchange rate between the Canadian dollar and the American dollar from 2005 to

2010. The Crown does not dispute this, but does dispute the application of subsection 39(2) of the Act to a loss arising from the disposition of shares.

[34] The text simply links a gain or a loss to currency fluctuations. A gain or loss could be realized on a disposition of property or on the repayment of a debt denominated in a foreign currency. Neither party disputes that subsection 39(2) of the Act applied to gains or losses made or realized on the repayment of a debt denominated in a foreign currency. The dispute relates to the extent to which subsection 39(2) of the Act applied to dispositions of property.

[35] While the text of subsection 39(2) of the Act did not refer to a disposition of property, it did not exclude the possibility that the disposition of property could have triggered the particular gain or loss. For the purposes of the Act, generally a gain or loss would arise from a disposition of property.

[36] Subsection 39(2) began with the phrase "[n]otwithstanding subsection (1)". The Tax Court Judge found that this meant that Parliament intended that subsection 39(2) of the Act would have applied to dispositions of property that would otherwise have been subject to subsection 39(1) of the Act. The Crown, in paragraph 52 of its memorandum, agrees that the use of the phrase "[n]otwithstanding subsection (1)" indicates that subsection 39(2) of the Act would have applied to a disposition of property to which subsection 39(1) of the Act would otherwise have applied. However, the Crown submits that it only applied to one particular property — foreign currency.

[37] As noted by the Tax Court Judge, the presence of the $200 exemption for individuals in subsection 39(2) of the Act indicated that it was contemplated that subsection 39(2) of the Act applied to dispositions of property. While, arguably, this was included to address gains and losses realized by individuals from the disposition of foreign currency (to avoid individuals having to account for small gains realized on the disposition of such currency), there is nothing in the text that limited this exemption to gains (or losses) arising only from foreign currency.

[38] The Crown also notes that subsection 39(2) of the Act did not refer to a disposition of property, but only referred to a gain or loss. This absence of a link between the gain or loss and a disposition of property would be relevant in applying subsection 39(2) of the Act to a gain or loss realized on the repayment of a debt denominated in a foreign currency (since the repayment of the debt is a discharge of an obligation and not a disposition of that debt). It is, however, of no assistance in determining whether subsection 39(2) of the Act would only have applied to the disposition of one particular property — foreign currency.

[39] If it had been intended that subsection 39(2) of the Act would only have applied to the repayment of obligations, there would have been no need to provide that it was to be applicable "[n]otwithstanding subsection (1)". A debt is a liability of the debtor, not an asset of that person. The discharge of a debt by the debtor is not, in and of itself, a disposition of property that would have been addressed under subsection 39(1) of the Act. By providing that subsection 39(2) of the Act will be applicable "[n]otwithstanding subsection (1)", Parliament acknowledged that both subsections 39(1) and (2) of the Act could apply to dispositions of property. If foreign currency

was the only property to which subsection 39(2) of the Act was to have applied, the text of the provision could have so provided.

B. *Context and Purpose*

[40] The Crown, in its memorandum, notes that subsection 39(1) of the Act applies to gains and losses arising on the disposition of capital property. Subsection 39(1) of the Act provides (and in 2010 also provided) that a taxpayer's capital gain or capital loss from the disposition of any property is the taxpayer's gain or loss for the year determined under subdivision c (which includes sections 38 to 55 of the Act). A taxpayer's gain from the disposition of property is generally the amount by which the proceeds of disposition for that property exceed the ACB of that property, and a taxpayer's loss from the disposition of property is generally the amount by which the ACB of that property exceeds the proceeds of disposition for that property (section 40 of the Act). The taxable capital gain or allowable capital loss is one-half of the capital gain or capital loss (section 38 of the Act).

[41] Subsection 39(2) of the Act, in 2010, did not address how a gain or loss was to be calculated, but rather only addressed the source of that gain or loss. The gain or loss arising as a result of a disposition of a particular property was (and still is) determined under subsection 40(1) of the Act. There was no conflict between subsections 40(1) and 39(2) of the Act with respect to the computation of the amount of a gain. Subsection 39(2) of the Act was premised on the assumption that the gain or loss had already been determined. The question for subsection 39(2) of the Act was: why did the taxpayer realize the particular gain or sustain the particular

loss? If it was because of a change in the value of Canadian currency relative to a foreign currency, then the condition for the application of the subsection was satisfied.

[42] The only overlap between subsections 39(1) and (2) of the Act related to the source of the gain. Subsection 39(1) of the Act provides that a taxpayer's capital gain or capital loss from the disposition of any property is the taxpayer's gain or loss from such disposition. Subsection 39(2) of the Act provided for an aggregation of the gains or losses that arose by virtue of any fluctuation in the value of a foreign currency relative to Canadian currency, and provided that the net result was deemed to be either a capital gain or a capital loss from the disposition of a particular property — foreign currency.

[43] In paragraph 61 of its memorandum, the Crown includes an excerpt from Interpretation Bulletin IT-95 "Foreign Exchange Gains and Losses" dated March 15, 1973, in support of its position that the purpose of subsection 39(2) of the Act was only to address dispositions of foreign currency. In paragraph 70 of its memorandum, the Crown also acknowledges that the Canada Revenue Agency expressed a broader view of subsection 39(2) of the Act in CRA document no. 2007-0242441C6 dated October 5, 2007. This broader view was discussed by the Tax Court Judge in paragraphs 38 and 39 of his reasons. He noted that, at a conference of the Association de planification fiscale et financière in 2005, the Canada Revenue Agency stated:

> The CRA's position, in respect of a gain or loss resulting from the disposition of a property that is a capital property, is that subsection 39(2) of the ITA will apply if, and only if, the gain or loss, as calculated in accordance with section 40 ..., is solely attributable to the fluctuation in the value of a foreign currency relative to the Canadian currency. If the aforesaid gain or loss is not solely attributable to the fluctuation in the value of a foreign currency relative to the Canadian currency,

> subsection 39(1) ... and not subsection 39(2)..., must be used to calculate the capital gain or loss resulting from the disposition of the property.
>
> (emphasis added by the Tax Court Judge)

[44] As noted by the Tax Court Judge, the Canada Revenue Agency has not been consistent in its position with respect to the interpretation of subsection 39(2) of the Act.

[45] The Crown also referred to the subsequent amendments that were made to subsection 39(2) of the Act as confirmation of the intention of Parliament. In 2013, subsection 39(2) of the Act was substantially amended and subsection 39(1.1) was added to the Act. The full text of these provisions is set out in the Appendix.

[46] In paragraph 68 of its memorandum, the Crown stated, "[i]n light of the amendments made to section 39 in 2013, there can be no doubt as to Parliament's intent: subsection 39(1) applies to foreign-currency gains and losses arising on dispositions of capital property such as shares, even where the gain or loss encompasses a foreign exchange component".

[47] I agree with the submission of the Crown that, following the amendments made in 2013, it is clear that any gain or loss arising on the disposition of shares that are capital property and that is attributable to a change in the exchange rate between the Canadian dollar and a foreign currency would now be treated as a capital gain under subsection 39(1) of the Act, and not subsection 39(2) of the Act. However, that is not the question that is before us. The question that is before us is whether the previous version of subsection 39(2) of the Act would lead to the same result.

[48] I do not agree with the Crown's submission that these amendments lead to a conclusion that the previous version of subsection 39(2) of the Act only applied to foreign currency and the discharge of obligations. The amendments that were made to subsection 39(2) (and the addition of subsection 39(1.1) of the Act) are substantial. In particular, subsection 39(2) no longer commences with "[n]otwithstanding subsection (1)". Rather, subsection 39(2) of the Act now provides that it does not apply to "a gain or loss that would, in the absence of this subsection, be a capital gain or capital loss to which subsection (1) or (1.1) applies". Instead of applying to a capital gain or capital loss to which subsection 39(1) of the Act would otherwise apply (by commencing with "notwithstanding subsection (1)"), it now clearly states that it does not apply to such a gain or loss. Since subsection 39(1) of the Act applies to a capital gain or capital loss arising from the disposition of any property, there is no property the disposition of which could now result in the application of subsection 39(2) of the Act. The reference to subsection 39(1.1) of the Act is included because this new subsection addresses the gain or loss realized by individuals from the disposition of foreign currency.

[49] When the Act is being amended the Department of Finance releases Technical Notes to explain the amendments. In *Silicon Graphics Ltd. v. Canada*, 2002 FCA 260, [2003] 1 F.C. 447, this Court made the following comments on the use of Technical Notes:

> 50 Of course, Technical Notes are not binding on the courts, but they are entitled to consideration. See *Canada v. Ast Estate (C.A.)*, [1997] F.C.J. No. 267 (Fed. C.A.), para. 27:
>
> > Administrative interpretations such as technical notes are not binding on the courts, but they are entitled to weight, and may constitute an important factor in the interpretation of statutes. Technical Notes are widely accepted by the courts as aids to statutory interpretation. The interpretive weight of technical notes is particularly great where, at the time an amendment was before it,

> the legislature was aware of a particular administrative interpretation of the amendment, and nonetheless enacted it.

[50] The Technical Notes that were released by the Department of Finance in conjunction with the amendments made to subsection 39(2) of the Act do not support the position of the Crown. In part, these Technical Notes stated:

> Subsection 39(2) currently applies in circumstances where a taxpayer makes a gain or sustains a loss in a taxation year from foreign exchange fluctuations. This provision, which only applies to gains and losses that are on capital account, deems the net amount of all such gains and losses to be a capital gain or loss for the year from a disposition of currency of a country other than Canada. In the case of taxpayers that are individuals, there is a $200 *de minimis* exclusion applicable for each year.
>
> Subsection 39(2) is being amended in the following ways:
>
> First, subsection 39(2) will now apply only to debt and similar obligations that are denominated in foreign currency. Thus, foreign exchange gains and losses in respect of asset dispositions, including dispositions of foreign currency, will now be determined (subject to, in the case of individuals other than trusts, new subsection 39(1.1) — as discussed above) exclusively under subsection 39(1)….
>
> (emphasis added)

[51] The reference to "foreign exchange gains and losses in respect of asset dispositions, including dispositions of foreign currency, will now be determined … exclusively under subsection 39(1)" indicates a change from the way in which such foreign exchange gains and losses were treated under the previous version of subsection 39(2) of the Act.

[52] This change in direction or application of subsection 39(2) of the Act is also reflected in the amendments that were made to paragraph 95(2)(f.15) of the Act. Paragraph 95(2)(f.15) of the Act is included as part of the complex foreign accrual property income (FAPI) rules. This paragraph provided how subsection 39(2) of the Act was to be read for the purpose of applying subparagraph 95(2)(f.12)(i) of the Act.

[53] Subparagraph 95(2)(f.12)(i) of the Act required a foreign affiliate of a taxpayer to determine (using its calculating currency) the amount of its capital gains and capital losses realized from the disposition of excluded property. The definition of excluded property is in subsection 95(1) of the Act and has not been amended since 2010. The assets that are included as excluded property are not restricted to foreign currency, but rather include, in general, property "used or held by the foreign affiliate principally for the purpose of gaining or producing income from an active business carried on by it" and shares of qualifying foreign affiliates.

[54] Paragraph 95(2)(f.15) of the Act was amended in 2013 when subsection 39(2) of the Act was amended. The Technical Notes released by the Department of Finance in conjunction with the amendments to paragraph 95(2)(f.15) of the Act stated:

> Paragraph 95(2)(f.15) provides a "reading rule" for the application of subsection 39(2) where a foreign affiliate is required to determine the foreign exchange gains and losses contemplated by that subsection in its "calculating currency", as provided by current subparagraph 95(2)(f.12)(i).
>
> Paragraph 95(2)(f.15) is being amended partly as a consequence of the amendments to subsection 39(2) (described under the above commentary for that subsection) and partly to clarify the applicable currency rule for determining foreign currency gains and losses in respect of debts referred to in paragraph 95(2)(i). First, the reference to subparagraph 95(2)(f.12)(i) is being removed because the amendments to subsection 39(2) result in, among other things, the

> latter subsection applying only to debt and similar obligations, such that there is no longer any need for paragraph 95(2)(f.15) to apply to the asset dispositions referred to in subparagraph 95(2)(f.12)(i).
>
> (emphasis added)

[55] Although the Crown contended that the only disposition of property to which subsection 39(2) of the Act (as it read in 2010) applied was a disposition of foreign currency, the reference to the changes made to subsection 39(2) of the Act leading to the conclusion that there was no longer any need for paragraph 95(2)(f.15) of the Act "to apply to the asset dispositions referred to in subparagraph 95(2)(f.12)(i)" suggests otherwise. This Technical Note indicates that it was contemplated that subsection 39(2) of the Act (as it read in 2010) would apply to other asset dispositions referred to in subparagraph 95(2)(f.12)(i) of the Act, i.e. dispositions of excluded property — assets used in an active business and shares of a qualifying foreign affiliate.

[56] There was another reference to subsection 39(2) of the Act in the FAPI rules in 2010. Paragraph 95(2)(g.02) of the Act, in 2010, read as follows:

> in applying subsection 39(2) for the purpose of this subdivision (other than sections 94 and 94.1), the gains and losses of a foreign affiliate of a taxpayer in respect of excluded property are to be computed in respect of the taxpayer separately from the gains and losses of the foreign affiliate in respect of property that is not excluded property.

[57] As noted above, the definition of excluded property is not restricted to foreign currency. It includes, in general, assets used in an active business (which could include foreign currency) and shares of qualifying foreign affiliates. If, as contended by the Crown, the only property to which subsection 39(2) of the Act applied in 2010 was foreign currency, it would be expected

that this provision would have been more narrowly drafted to only apply to foreign currency that was excluded property. Paragraph 95(2)(g.02) of the Act appeared to contemplate that subsection 39(2) of the Act applied to gains and losses from all property that qualified as excluded property, not just gains and losses realized as a result of dispositions of foreign currency.

[58] This broader application of subsection 39(2) of the Act in the foreign affiliate context is reflected in the Technical Notes released by the Department of Finance in conjunction with the addition of paragraph 95(2)(g.02) to the Act in 2007:

> New paragraph 95(2)(g.02) ensures that, in applying subsection 39(2) for the purpose of subdivision i of the Act (except sections 94 to 94.4), foreign exchange gains and losses of a foreign affiliate of a taxpayer in respect of excluded property (as defined in subsection 95(1)) are computed separately from the affiliate's foreign exchange gains and losses in respect of other property. This amendment facilitates the computation of the foreign accrual property income and the tax surpluses and deficits of a foreign affiliate of a taxpayer.

[59] This Technical Note suggests that subsection 39(2) of the Act applied to foreign exchange gains and losses in respect of property generally, and not just to dispositions of foreign currency. Paragraph 95(2)(g.02) of the Act was repealed in 2013 when subsection 39(2) of the Act was amended. The Technical Notes released in conjunction with the repeal of this paragraph stated:

> Paragraph 95(2)(g.02) provides that, in applying subsection 39(2) in the computation of gains and losses of a foreign affiliate, those gains and losses that are in respect of excluded property are to be computed separately from gains and losses in respect of non-excluded property.
>
> Paragraph 95(2)(g.02) is being repealed as a consequence of the amendments to subsection 39(2) which, among other things, will require that each foreign exchange capital gain or loss of a foreign affiliate be determined separately.

[60] All of the Technical Notes released by the Department of Finance appear to be drafted on the premise that subsection 39(2) of the Act (as it read in 2010 and in earlier years) had a broader application than what is proposed by the Crown. The Technical Notes indicate that this version of subsection 39(2) of the Act applied to any disposition of capital property, and not just a disposition of foreign currency.

[61] The interaction of subsection 39(2) of the Act with the other provisions of the Act is part of the context and purpose and is relevant in interpreting this provision. In this particular case, the reference to subsection 39(2) of the Act in the paragraphs dealing with the FAPI rules indicate that it was intended that the section would have a broader application than that proposed by the Crown.

C. *Conclusion with respect to Subsection 39(2) of the Act*

[62] As a result, the textual, contextual and purposive analysis confirms that the Tax Court Judge was correct in his interpretation of subsection 39(2) of the Act as it read in 2010. Therefore, the loss realized by BMO as a result of the disposition of the shares of NSULC was deemed to be a loss from the disposition of a foreign currency.

D. *Subsection 112(3.1) of the Act*

[63] The Crown also argued that, even with this interpretation of subsection 39(2) of the Act, the loss realized by BMO on the disposition of the shares of NSULC would still be reduced

under subsection 112(3.1) of the Act. I do not agree with this interpretation of the Crown. There was nothing in the language of subsection 39(2) of the Act that restricted its application to only section 39 of the Act. Parliament deemed the net gain or loss as determined under this subsection to be a gain or loss from the disposition of a foreign currency. This deeming rule would have been applicable for the purposes of the Act. Since subsection 112(3.1) of the Act only applies to dispositions of shares, this subsection did not apply to reduce the capital loss of BMO that was deemed to be a capital loss from the disposition of a foreign currency.

[64] When Parliament intends to restrict a particular deeming rule to only certain provisions of the Act, it clearly does so. For example, subsection 55(5) of the Act provides certain rules that apply "for the purposes of this section". One such rule, in paragraph 55(5)(e) of the Act, is that brothers and sisters are deemed to deal with each other at arm's length and to not be related to each other. Clearly, while brothers and sisters are related to each other for other purposes of the Act, Parliament has modified this general rule and deemed a different result for the purposes of section 55 of the Act. That this particular rule only applies for the purposes of section 55 of the Act is clear from the opening words of subsection 55(5) of the Act. Since there was no limitation imposed on the deeming rule in subsection 39(2) of the Act, this deeming rule applied for the purposes of the Act.

VI. Conclusion

[65] As a result, the loss realized on the disposition of the shares of NSULC (which arose solely as a result of the change in the exchange rate between the Canadian dollar and the

American dollar) was a loss from the disposition of a foreign currency. This loss would not have been reduced under subsection 112(3.1) of the Act even if only one class of shares had been issued by NSULC and, therefore, no tax benefit was realized in this case.

[66] I would therefore dismiss this appeal with costs.

"Wyman W. Webb"
J.A.

“I agree
D. G. Near J.A.”

“I agree
Anne L. Mactavish J.A.”

APPENDIX

Relevant Provisions of the *Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)*

As of 2010

Subsection 39(1):

Meaning of capital gain and capital loss	Sens de gain en capital et de perte en capital
39(1) For the purposes of this Act,	39(1) Pour l'application de la présente loi :
(a) a taxpayer's capital gain for a taxation year from the disposition of any property is the taxpayer's gain for the year determined under this subdivision (to the extent of the amount thereof that would not, if section 3 were read without reference to the expression "other than a taxable capital gain from the disposition of a property" in paragraph 3(a) and without reference to paragraph 3(b), be included in computing the taxpayer's income for the year or any other taxation year) from the disposition of any property of the taxpayer other than	a) un gain en capital d'un contribuable, tiré, pour une année d'imposition, de la disposition d'un bien quelconque, est le gain, déterminé conformément à la présente sous-section (jusqu'à concurrence du montant de ce gain qui ne serait pas, compte non tenu du passage « autre qu'un gain en capital imposable résultant de la disposition d'un bien », à l'alinéa 3a), et de l'alinéa 3b), inclus dans le calcul de son revenu pour l'année ou pour toute autre année d'imposition), que ce contribuable a tiré, pour l'année, de la disposition d'un bien lui appartenant, à l'exception :
(i) eligible capital property,	(i) d'une immobilisation admissible,
(i.1) an object that the Canadian Cultural Property Export Review Board has determined meets the criteria set out in paragraphs 29(3)(b) and (c) of the Cultural Property Export and Import Act and that has been disposed of,	(i.1) d'un objet dont la conformité aux critères d'intérêt et d'importance énoncés au paragraphe 29(3) de la Loi sur l'exportation et l'importation de biens culturels a été établie par la Commission canadienne d'examen des exportations de biens culturels et qui a été aliéné dans le délai suivant au profit d'un établissement, ou d'une

	administration, au Canada alors désigné, en application du paragraphe 32(2) de cette loi, à des fins générales ou à une fin particulière liée à cet objet :
(A) in the case of a gift to which subsection 118.1(5) applies, within the period ending 36 months after the death of the taxpayer or, where written application therefor has been made to the Minister by the taxpayer's legal representative within that period, within such longer period as the Minister considers reasonable in the circumstances, and	(A) dans le cas d'un don auquel le paragraphe 118.1(5) s'applique, au cours de la période se terminant 36 mois après le décès du contribuable ou, si le représentant légal du contribuable en fait la demande écrite au ministre au cours de cette période, dans tout délai supplémentaire que le ministre estime raisonnable dans les circonstances,
(B) in any other case, at any time,	(B) dans les autres cas, à n'importe quel moment,
to an institution or a public authority in Canada that was, at the time of the disposition, designated under subsection 32(2) of that Act either generally or for a specified purpose related to that object,	
(ii) a Canadian resource property,	(ii) d'un avoir minier canadien,
(ii.1) a foreign resource property,	(ii.1) d'un avoir minier étranger,
(ii.2) a property if the disposition is a disposition to which subsection 142.4(4) or (5) or 142.5(1) applies,	(ii.2) d'un bien ayant fait l'objet d'une disposition à laquelle les paragraphes 142.4(4) ou (5) ou 142.5(1) s'appliquent,
(iii) an insurance policy, including a life insurance policy, except for that part of a life insurance policy in respect of which a policyholder is deemed by paragraph 138.1(1)(e) to have an interest in a related segregated fund trust,	(iii) d'une police d'assurance, y compris une police d'assurance-vie, sauf la partie d'une police d'assurance-vie à l'égard de laquelle un détenteur de police est réputé, en vertu de l'alinéa 138.1(1)e), posséder une participation dans une fiducie créée à l'égard du fonds réservé,
(iv) a timber resource property; or	(iv) d'un avoir forestier;

(v) an interest of a beneficiary under a qualifying environmental trust;

(v) de la participation d'un bénéficiaire dans une fiducie pour l'environnement admissible;

(b) a taxpayer's capital loss for a taxation year from the disposition of any property is the taxpayer's loss for the year determined under this subdivision (to the extent of the amount thereof that would not, if section 3 were read in the manner described in paragraph (a) of this subsection and without reference to the expression "or the taxpayer's allowable business investment loss for the year" in paragraph 3(d), be deductible in computing the taxpayer's income for the year or any other taxation year) from the disposition of any property of the taxpayer other than

b) une perte en capital subie par un contribuable, pour une année d'imposition, du fait de la disposition d'un bien quelconque est la perte qu'il a subie au cours de l'année, déterminée conformément à la présente sous-section (jusqu'à concurrence du montant de cette perte qui ne serait pas déductible, si l'article 3 était lu de la manière indiquée à l'alinéa a) du présent paragraphe et compte non tenu du passage « et des pertes déductibles au titre d'un placement d'entreprise subies par le contribuable pour l'année » à l'alinéa 3d), dans le calcul de son revenu pour l'année ou pour toute autre année d'imposition) du fait de la disposition d'un bien quelconque de ce contribuable, à l'exception :

(i) depreciable property, or

(i) d'un bien amortissable,

(ii) property described in any of subparagraphs 39(1)(a)(i), (ii) to (iii) and (v); and

(ii) d'un bien visé à l'un des sous-alinéas a)(i), (ii) à (iii) et (v);

(c) a taxpayer's business investment loss for a taxation year from the disposition of any property is the amount, if any, by which the taxpayer's capital loss for the year from a disposition after 1977

c) une perte au titre d'un placement d'entreprise subie par un contribuable, pour une année d'imposition, résultant de la disposition d'un bien quelconque s'entend de l'excédent éventuel de la perte en capital que le contribuable a subie pour l'année résultant d'une disposition, après 1977:

(i) to which subsection 50(1) applies, or

(i) soit à laquelle le paragraphe 50(1) s'applique,

(ii) to a person with whom the taxpayer was dealing at arm's length

(ii) soit en faveur d'une personne avec laquelle il n'avait aucun lien de dépendance,

of any property that is

(iii) a share of the capital stock of a small business corporation, or

(iv) a debt owing to the taxpayer by a Canadian-controlled private corporation (other than, where the taxpayer is a corporation, a debt owing to it by a corporation with which it does not deal at arm's length) that is

(A) a small business corporation,

(B) a bankrupt (within the meaning assigned by subsection 128(3)) that was a small business corporation at the time it last became a bankrupt, or

(C) a corporation referred to in section 6 of the Winding-up Act that was insolvent (within the meaning of that Act) and was a small business corporation at the time a winding-up order under that Act was made in respect of the corporation,

exceeds the total of

(v) in the case of a share referred to in subparagraph 39(1)(c)(iii), the amount, if any, of the increase after 1977 by virtue of the application of subsection 85(4) in the adjusted cost base to the taxpayer of the share or of any share (in this subparagraph referred to as a "replaced share") for which the share or a replaced share was substituted or exchanged,

(vi) in the case of a share referred to in subparagraph 39(1)(c)(iii) that was issued before 1972 or a share (in this

d'un bien qui est :

(iii) soit une action du capital-actions d'une société exploitant une petite entreprise,

(iv) soit une créance du contribuable sur une société privée sous contrôle canadien (sauf une créance, si le contribuable est une société, sur une société avec laquelle il a un lien de dépendance) qui est :

(A) une société exploitant une petite entreprise,

(B) un failli, au sens du paragraphe 128(3), qui était une société exploitant une petite entreprise au moment où il est devenu un failli pour la dernière fois,

(C) une personne morale visée à l'article 6 de la Loi sur les liquidations qui était insolvable, au sens de cette loi, et qui était une société exploitant une petite entreprise au moment où une ordonnance de mise en liquidation a été rendue à son égard aux termes de cette loi,

sur le total des montants suivants :

(v) dans le cas d'une action visée au sous-alinéa (iii), le montant de l'augmentation, après 1977, en vertu de l'application du paragraphe 85(4), du prix de base rajusté, pour le contribuable, de l'action ou de toute action (appelée une « action de rechange » au présent sous-alinéa) pour laquelle l'action ou une action de rechange a été remplacée ou échangée,

(vi) dans le cas d'une action visée au sous-alinéa (iii) et émise avant 1972 ou d'une action (appelée « action de

subparagraph and subparagraph 39(1)(c)(vii) referred to as a "substituted share") that was substituted or exchanged for such a share or for a substituted share, the total of all amounts each of which is an amount received after 1971 and before or on the disposition of the share or an amount receivable at the time of such a disposition by

remplacement » au présent sous-alinéa et au sous-alinéa (vii)) qui a remplacé cette action ou une action de remplacement ou qui a été échangée contre l'une ou l'autre, l'ensemble des montants dont chacun représente un montant reçu après 1971, mais avant la disposition de l'action ou lors de cette disposition, ou un montant à recevoir au moment de cette disposition, à titre de dividende imposable sur l'action ou sur toute autre action pour laquelle l'action est une action de remplacement, par :

(A) the taxpayer,

(A) le contribuable,

(B) where the taxpayer is an individual, the taxpayer's spouse or common-law partner, or

(B) son époux ou conjoint de fait si le contribuable est un particulier,

(C) a trust of which the taxpayer or the taxpayer's spouse or common-law partner was a beneficiary

(C) une fiducie dont le contribuable ou son époux ou conjoint de fait était bénéficiaire;

as a taxable dividend on the share or on any other share in respect of which it is a substituted share, except that this subparagraph shall not apply in respect of a share or substituted share that was acquired after 1971 from a person with whom the taxpayer was dealing at arm's length,

toutefois le présent sous-alinéa ne s'applique pas à une action ou action de remplacement acquise après 1971 auprès d'une personne ave qui le contribuable n'avait aucun lien de dépendance,

(vii) in the case of a share to which subparagraph 39(1)(c)(vi) applies and where the taxpayer is a trust referred to in paragraph 104(4)(a), the total of all amounts each of which is an amount received after 1971 or receivable at the time of the disposition by the settlor (within the meaning assigned by subsection 108(1)) or by the settlor's spouse as a taxable dividend on the share or on any other share in respect of which it

(vii) dans le cas d'une action à laquelle le sous-alinéa (vi) s'applique et lorsque le contribuable est une fiducie visée à l'alinéa 104(4)a), le total des montants dont chacun est un montant reçu après 1971 ou recevable au moment de la disposition par l'auteur (au sens du paragraphe 108(1)) ou par l'époux ou conjoint de fait de l'auteur à titre de dividende imposable sur l'action ou sur toute autre action à l'égard de laquelle elle

is a substituted share, and	est une action de remplacement,
(viii) the amount determined in respect of the taxpayer under subsection 39(9) or 39(10), as the case may be.	(viii) le montant calculé à l'égard du contribuable en vertu du paragraphe (9) ou (10), selon le cas.

Subsection 39(2):

Capital gains and losses in respect of foreign currencies	Gains et pertes en capital relatifs aux monnaies étrangères
(2) Notwithstanding subsection (1), where, by virtue of any fluctuation after 1971 in the value of the currency or currencies of one or more countries other than Canada relative to Canadian currency, a taxpayer has made a gain or sustained a loss in a taxation year, the following rules apply:	(2) Malgré le paragraphe (1), lorsque, par suite de toute fluctuation, postérieure à 1971, de la valeur de la monnaie ou des monnaies d'un ou de plusieurs pays étrangers par rapport à la monnaie canadienne, un contribuable a réalisé un gain ou subi une perte au cours d'une année d'imposition, les règles suivantes s'appliquent :
(a) the amount, if any, by which	a) est réputé être un gain en capital du contribuable pour l'année, tiré de la disposition de la monnaie d'un pays étranger, gain en capital qui est le montant déterminé en vertu du présent alinéa, l'excédent éventuel :
(i) the total of all such gains made by the taxpayer in the year (to the extent of the amounts thereof that would not, if section 3 were read in the manner described in paragraph (1)(a) of this section, be included in computing the taxpayer's income for the year or any other taxation year)	(i) du total de ces gains réalisés par le contribuable au cours de l'année (jusqu'à concurrence des montants de ceux-ci qui, si l'article 3 était lu de la manière indiquée à l'alinéa (1)a) du présent article, ne seraient pas inclus dans le calcul de son revenu pour l'année ou pour toute autre année d'imposition),
exceeds	sur :

(ii) the total of all such losses sustained by the taxpayer in the year (to the extent of the amounts thereof that would not, if section 3 were read in the manner described in paragraph (1)(a) of this section, be deductible in computing the taxpayer's income for the year or any other taxation year), and

(iii) if the taxpayer is an individual, $200,

shall be deemed to be a capital gain of the taxpayer for the year from the disposition of currency of a country other than Canada, the amount of which capital gain is the amount determined under this paragraph; and

(b) the amount, if any, by which

(i) the total determined under subparagraph (2)(a)(ii),

exceeds

(ii) the total determined under subparagraph (2)(a)(i), and

(iii) if the taxpayer is an individual, $200,

shall be deemed to be a capital loss of the taxpayer for the year from the disposition of currency of a country other than Canada, the amount of which capital loss is the amount determined under this paragraph.

(ii) le total des pertes subies par le contribuable au cours de l'année (jusqu'à concurrence des montants de celles-ci qui, si l'article 3 était lu de la manière indiquée à l'alinéa (1)a) du présent article, ne seraient pas déductibles dans le calcul de son revenu pour l'année ou pour toute autre année d'imposition),

(iii) si le contribuable est un particulier, 200 $;

b) est réputé être une perte en capital du contribuable pour l'année, résultant de la disposition de la monnaie d'un pays étranger, perte en capital qui est le montant déterminé en vertu du présent alinéa, l'excédent éventuel :

(i) du total déterminé en vertu du sous-alinéa a)(ii),

sur :

(ii) le total déterminé en vertu du sous-alinéa a)(i),

(iii) si le contribuable est un particulier, 200 $.

Subsection 40(1):

General rules	Règles générales
40(1) Except as otherwise expressly provided in this Part	40(1) Sauf indication contraire expresse de la présente partie :
(a) a taxpayer's gain for a taxation year from the disposition of any property is the amount, if any, by which	a) le gain d'un contribuable tiré, pour une année d'imposition, de la disposition d'un bien est l'excédent éventuel :
(i) if the property was disposed of in the year, the amount, if any, by which the taxpayer's proceeds of disposition exceed the total of the adjusted cost base to the taxpayer of the property immediately before the disposition and any outlays and expenses to the extent that they were made or incurred by the taxpayer for the purpose of making the disposition, or	(i) en cas de disposition du bien au cours de l'année, de l'excédent éventuel du produit de disposition sur le total du prix de base rajusté du bien, pour le contribuable, calculé immédiatement avant la disposition, et des dépenses dans la mesure où celles-ci ont été engagées ou effectuées par lui en vue de réaliser la disposition,
(ii) if the property was disposed of before the year, the amount, if any, claimed by the taxpayer under subparagraph 40(1)(a)(iii) in computing the taxpayer's gain for the immediately preceding year from the disposition of the property,	(ii) en cas de disposition du bien avant l'année, du montant éventuel dont le contribuable a demandé la déduction en vertu du sous-alinéa (iii) dans le calcul de son gain pour l'année précédente, tiré de la disposition de ce bien,
exceeds	sur :
(iii) subject to subsection 40(1.1), such amount as the taxpayer may claim	(iii) sous réserve du paragraphe (1.1), le montant dont il peut demander la déduction, dans le cas d'un particulier — à l'exclusion d'une fiducie —, sur le formulaire prescrit présenté avec la déclaration de revenu prévue à la présente partie pour l'année et, dans les autres cas, dans la déclaration de revenu produite en vertu de la présente partie pour l'année, jusqu'à concurrence du moins élevé des montants suivants :

(A) in the case of an individual (other than a trust) in prescribed form filed with the taxpayer's return of income under this Part for the year, and

(A) un montant raisonnable à titre de provision à l'égard de toute partie du produit de disposition du bien qui lui est payable après la fin de l'année et qu'il est raisonnable de considérer comme une partie du montant déterminé en vertu du sous-alinéa (i) pour ce bien,

(B) in any other case, in the taxpayer's return of income under this Part for the year,

as a deduction, not exceeding the lesser of

(B) le produit de 1/5 de l'excédent déterminé en vertu du sous-alinéa (i) pour ce bien et de l'excédent éventuel de 4 sur le nombre d'années d'imposition antérieures du contribuable qui se terminent après la disposition du bien;

(C) a reasonable amount as a reserve in respect of such of the proceeds of disposition of the property that are payable to the taxpayer after the end of the year as can reasonably be regarded as a portion of the amount determined under subparagraph 40(1)(a)(i) in respect of the property, and

(D) an amount equal to the product obtained when 1/5 of the amount determined under subparagraph 40(1)(a)(i) in respect of the property is multiplied by the amount, if any, by which 4 exceeds the number of preceding taxation years of the taxpayer ending after the disposition of the property; and

(b) a taxpayer's loss for a taxation year from the disposition of any property is,

b) la perte d'un contribuable résultant, pour une année d'imposition, de la disposition d'un bien est :

(i) if the property was disposed of in the year, the amount, if any, by which the total of the adjusted cost base to the taxpayer of the property immediately before the disposition and any outlays and expenses to the

(i) en cas de disposition du bien au cours de l'année, l'excédent éventuel du total du prix de base rajusté du bien, pour le contribuable, immédiatement avant la disposition, et des dépenses dans la mesure où celles-

extent that they were made or incurred by the taxpayer for the purpose of making the disposition, exceeds the taxpayer's proceeds of disposition of the property, and	ci ont été engagées ou effectuées par lui en vue de réaliser la disposition sur le produit de disposition du bien qu'il en a tiré,
(ii) in any other case, nil.	(ii) dans les autres cas, nulle.

Subsection 95(1) – Definition of "Excluded Property"

Excluded Property	bien exclu
excluded property, at a particular time, of a foreign affiliate of a taxpayer means any property of the foreign affiliate that is	Est un bien exclu d'une société étrangère affiliée d'un contribuable à un moment donné tout bien de celle-ci :
(a) used or held by the foreign affiliate principally for the purpose of gaining or producing income from an active business carried on by it,	a) soit qu'elle utilise ou détient principalement en vue de tirer un revenu provenant de son entreprise exploitée activement;
(b) shares of the capital stock of another foreign affiliate of the taxpayer where all or substantially all of the fair market value of the property of the other foreign affiliate is attributable to property, of that other foreign affiliate, that is excluded property,	b) soit qui consiste en actions du capital-actions d'une autre société étrangère affiliée du contribuable si la totalité ou la presque totalité de la juste valeur marchande des biens de cette autre société étrangère affiliée est attribuable à des biens de celle-ci qui sont des biens exclus;
(c) property all or substantially all of the income from which is, or would be, if there were income from the property, income from an active business (which, for this purpose, includes income that would be deemed to be income from an active business by paragraph (2)(a) if that paragraph were read without reference to subparagraph (v)), or	c) soit qui consiste en biens dont la totalité ou la presque totalité du revenu est ou serait, si les biens produisaient un revenu, un revenu provenant d'une entreprise exploitée activement (lequel revenu comprend, à cette fin, un revenu qui serait réputé, par l'alinéa (2)a), être un revenu provenant d'une entreprise exploitée activement s'il n'était pas tenu compte

	du sous-alinéa (2)a)(v));
(c.1) property arising under or as a result of an agreement that	c.1) soit qui consiste en biens découlant d'une convention :
(i) provides for the purchase, sale or exchange of currency, and	(i) d'une part, qui prévoit l'achat, la vente ou l'échange de monnaie,
(ii) either	(ii) d'autre part, qu'il est raisonnable de considérer comme ayant été conclue par la société affiliée en vue de réduire le risque que présentent pour elle les fluctuations suivantes :
(A) can reasonably be considered to have been made by the affiliate to reduce its risk, with respect to an amount that was receivable under an agreement that relates to the sale of excluded property or with respect to an amount that was receivable and was a property described in paragraph (c), of fluctuations in the value of the currency in which the amount receivable was denominated, or	(A) dans le cas d'une somme qui était à recevoir aux termes d'une convention concernant la vente de biens exclus ou d'une somme à recevoir qui était un bien visé à l'alinéa c), les fluctuations de la valeur de la monnaie dans laquelle la somme à recevoir était libellée,
(B) can reasonably be considered to have been made by the affiliate to reduce its risk, with respect to any of the following amounts, of fluctuations in the value of the currency in which that amount was denominated:	(B) dans le cas des sommes ci-après, les fluctuations de la valeur de la monnaie dans laquelle la somme était libellée :
(I) an amount that was payable under an agreement that relates to the purchase of property that (at all times between the time of the acquisition of the property and the particular time) is excluded property of the affiliate,	(I) toute somme qui était payable aux termes d'une convention concernant l'achat de biens qui sont des biens exclus de la société affiliée tout au long de la période commençant au moment de l'acquisition des biens et se terminant au moment donné,
(II) an amount of indebtedness, to the extent that the proceeds derived from the issuance or incurring of the indebtedness can reasonably be considered to have been used to	(II) toute dette, dans la mesure où il est raisonnable de considérer que le produit provenant de l'émission ou de la constitution de la dette a servi à acquérir des biens qui sont des biens

acquire property that (at all times between the time of the acquisition of that property and the particular time) is excluded property of the affiliate, or

exclus de la société affiliée tout au long de la période commençant au moment de l'acquisition des biens et se terminant au moment donné,

(III) an amount of indebtedness, to the extent that the proceeds derived from the issuance or incurring of the indebtedness can reasonably be considered to have been used to repay the outstanding balance of

(III) toute dette, dans la mesure où il est raisonnable de considérer que le produit provenant de l'émission ou de la constitution de la dette a servi à rembourser le solde impayé de l'une des sommes suivantes :

1. an amount that, immediately before the time of that repayment, is described by subclause (I),

1. toute somme qui, immédiatement avant le moment du remboursement, est visée à la subdivision (I),

2. an amount of indebtedness of the affiliate that, immediately before the time of that repayment, is described by subclause (II), or

2. toute dette de la société affiliée qui, immédiatement avant le moment du remboursement, est visée à la subdivision (II),

3. an amount of indebtedness of the affiliate that, immediately before the time of that repayment, is described by this subclause,

3. toute dette de la société affiliée qui, immédiatement avant le moment du remboursement, est visée à la présente subdivision.

and, for the purposes of the definitions foreign affiliate in this subsection and direct equity percentage in subsection 95(4) as they apply to this definition, where at any time a foreign affiliate of a taxpayer has an interest in a partnership,

En outre, pour l'application de la définition de société étrangère affiliée au présent paragraphe et de celle de pourcentage d'intérêt direct au paragraphe (4) dans le cadre de la présente définition, dans le cas où une société étrangère affiliée d'un contribuable a une participation dans une société de personnes à un moment donné :

(d) the partnership shall be deemed to be a non-resident corporation having capital stock of a single class divided into 100 issued shares, and

d) la société de personnes est réputée être une société non-résidente dont le capital-actions est composé de 100 actions émises d'une catégorie donnée;

(e) the affiliate shall be deemed to own at that time that proportion of the issued shares of that class that

e) la société affiliée est réputée être propriétaire à ce moment de la fraction des actions émises de cette catégorie

	représentée par le rapport entre :
(i) the fair market value of the affiliate's interest in the partnership at that time	(i) d'une part, la juste valeur marchande de sa participation dans la société de personnes à ce moment,
is of	
(ii) the fair market value of all interests in the partnership at that time;	(ii) d'autre part, la juste valeur marchande de l'ensemble des participations dans la société de personnes à ce moment.

Paragraph 95(2)(f.12):

(f.12) a foreign affiliate of a taxpayer shall determine each of the following amounts using its calculating currency for a taxation year:	f.12) toute société étrangère affiliée d'un contribuable est tenue de déterminer chacune des sommes ci-après au moyen de sa monnaie de calcul pour une année d'imposition :
(i) subject to paragraph (f.13), each capital gain, capital loss, taxable capital gain and allowable capital loss of the foreign affiliate for the taxation year from the disposition, at any time, of a property that, at that time, was an excluded property of the foreign affiliate,	(i) sous réserve de l'alinéa f.13), chacun de ses gains en capital, pertes en capital, gains en capital imposables et pertes en capital déductibles pour l'année provenant de la disposition, à un moment donné, d'un bien qui était son bien exclu à ce moment,
(ii) its income or loss for the taxation year from each active business carried on by it in the taxation year in a country, and	(ii) son revenu ou sa perte pour l'année provenant de chaque entreprise exploitée activement par elle au cours de l'année dans un pays,
(iii) its income or loss that is included in computing its income or loss from an active business for the taxation year because of paragraph (a);	(iii) son revenu ou sa perte qui est inclus, par l'effet de l'alinéa a), dans le calcul de son revenu ou de sa perte provenant d'une entreprise exploitée activement pour l'année;

Paragraph 95(2)(f.15) :

(f.15) for the purpose of applying subparagraph (f.12)(i), the reference in subsection 39(2) to "the currency or currencies of one or more countries other than Canada relative to Canadian currency" is to be read as a reference to "one or more currencies other than the calculating currency relative to the calculating currency" and the references in that subsection to "of a country other than Canada" are to be read as references to "other than the calculating currency";	f.15) pour l'application du sous-alinéa f.12)(i), le passage « la valeur de la monnaie ou des monnaies d'un ou de plusieurs pays étrangers par rapport à la monnaie canadienne » au paragraphe 39(2) est remplacé par « la valeur d'une ou de plusieurs monnaies autres que la monnaie de calcul par rapport à la monnaie de calcul » et le passage « de la monnaie d'un pays étranger » dans ce paragraphe est remplacé par « d'une monnaie autre que la monnaie de calcul »;

Paragraph 95(2)(g.02):

(g.02) in applying subsection 39(2) for the purpose of this subdivision (other than sections 94 and 94.1), the gains and losses of a foreign affiliate of a taxpayer in respect of excluded property are to be computed in respect of the taxpayer separately from the gains and losses of the foreign affiliate in respect of property that is not excluded property;	g.02) pour l'application du paragraphe 39(2) dans le cadre de la présente sous-section (sauf les articles 94 et 94.1), les gains et les pertes d'une société étrangère affiliée d'un contribuable relativement à des biens exclus sont calculés relativement au contribuable séparément des gains et pertes de la société affiliée relativement aux biens qui ne sont pas des biens exclus;

Subsection 112(3.1):

Loss on share held by partnership	Perte sur une action détenue par une société de personnes
(3.1) Subject to subsections (5.5) and (5.6), where a taxpayer (other than a	(3.1) Sous réserve des paragraphes (5.5) et (5.6), la part qui revient à un

partnership or a mutual fund trust) is a member of a partnership, the taxpayer's share of any loss of the partnership from the disposition of a share that is held by a particular partnership as capital property is deemed to be that share of the loss determined without reference to this subsection minus,

contribuable (sauf une société de personnes et une fiducie de fonds commun de placement) de toute perte subie par une société de personnes dont il est un associé, lors de la disposition d'une action détenue par une société de personnes donnée à titre d'immobilisation, est réputée égale à cette part de la perte, déterminée compte non tenu du présent paragraphe, moins :

(a) where the taxpayer is an individual, the lesser of

a) dans le cas où le contribuable est un particulier, le moins élevé des montants suivants :

(i) the total of all amounts each of which is a dividend received by the taxpayer on the share in respect of which an election was made under subsection 83(2) where subsection 83(2.1) does not deem the dividend to be a taxable dividend, and

(i) le total des montants représentant chacun un dividende que le contribuable a reçu sur l'action et qui a fait l'objet du choix prévu au paragraphe 83(2), dans le cas où le dividende n'est pas réputé par le paragraphe 83(2.1) être un dividende imposable,

(ii) that share of the loss determined without reference to this subsection minus all taxable dividends received by the taxpayer on the share;

(ii) cette part de la perte déterminée compte non tenu du présent paragraphe moins l'ensemble des dividendes imposables reçus par le contribuable sur l'action;

(b) where the taxpayer is a corporation, the total of all amounts received by the taxpayer on the share each of which is

b) dans le cas où le contribuable est une société, le total des montants qu'il a reçus sur l'action représentant chacun :

(i) a taxable dividend, to the extent of the amount of the dividend that was deductible under this section or subsection 115(1) or 138(6) in computing the taxpayer's taxable income or taxable income earned in Canada for any taxation year,

(i) un dividende imposable, jusqu'à concurrence de la fraction du dividende qui était déductible selon le présent article ou les paragraphes 115(1) ou 138(6) dans le calcul de son revenu imposable, ou de son revenu imposable gagné au Canada, pour une année d'imposition,

(ii) a dividend in respect of which an

(ii) un dividende qui a fait l'objet du

election was made under subsection 83(2) where subsection 83(2.1) does not deem the dividend to be a taxable dividend, or

(iii) a life insurance capital dividend; and

(c) where the taxpayer is a trust, the total of all amounts each of which is

(i) a taxable dividend, or

(ii) a life insurance capital dividend

received on the share and designated under subsection 104(19) or 104(20) by the trust in respect of a beneficiary that was a corporation, partnership or trust.

choix prévu au paragraphe 83(2), dans le cas où le dividende n'est pas réputé par le paragraphe 83(2.1) être un dividende imposable,

(iii) un dividende en capital d'assurance-vie;

c) dans le cas où le contribuable est une fiducie, le total des montants représentant chacun un dividende imposable ou un dividende en capital d'assurance-vie reçu sur l'action et attribué par la fiducie en application des paragraphes 104(19) ou (20) à un bénéficiaire qui était une société, une société de personnes ou une fiducie.

Amendments made in 2013

Subsection 39(1.1) was added to the Act:

Foreign currency dispositions by an individual

(1.1) If, because of any fluctuation after 1971 in the value of one or more currencies other than Canadian currency relative to Canadian currency, an individual (other than a trust) has made one or more particular gains or sustained one or more particular losses in a taxation year from dispositions of currency other than Canadian currency and the particular gains or losses would, in the

Dispositions de monnaie étrangère effectuées par un particulier

(1.1) Si, par suite de toute fluctuation, postérieure à 1971, de la valeur d'une ou de plusieurs monnaies (sauf la monnaie canadienne) par rapport à la monnaie canadienne, un particulier autre qu'une fiducie a fait un ou plusieurs gains donnés ou subi une ou plusieurs pertes données au cours d'une année d'imposition en raison de la disposition d'une monnaie autre que la monnaie canadienne, lesquels gains

absence of this subsection, be capital gains or losses described under subsection (1)

ou pertes seraient, en l'absence du présent paragraphe, des gains en capital ou des pertes en capital visés au paragraphe (1), les règles ci-après s'appliquent :

(a) subsection (1) does not apply to any of the particular gains or losses;

a) le paragraphe (1) ne s'applique ni aux gains donnés ni aux pertes données;

(b) the amount determined by the following formula is deemed to be a capital gain of the individual for the year from the disposition of currency other than Canadian currency:

b) la somme obtenue par la formule ci-après est réputée être un gain en capital du particulier pour l'année, tiré de la disposition d'une monnaie autre que la monnaie canadienne :

A – (B + C)

A – (B + C)

where

où :

A is the total of all the particular gains made by the individual in the year,

A représente le total des gains donnés faits par le particulier au cours de l'année,

B is the total of all the particular losses sustained by the individual in the year, and

B le total des pertes données subies par le particulier au cours de l'année,

C is $200; and

C 200 $;

(c) the amount determined by the following formula is deemed to be a capital loss of the individual for the year from the disposition of currency other than Canadian currency:

c) la somme obtenue par la formule ci-après est réputée être une perte en capital du particulier pour l'année, résultant de la disposition d'une monnaie autre que la monnaie canadienne :

D – (E + F)

D – (E + F)

where

où :

D is the total of all the particular losses sustained by the individual in the year,

D représente le total des pertes données subies par le particulier au cours de l'année,

E is the total of all the particular gains made by the individual in the year, and	E le total des gains donnés faits par le particulier au cours de l'année,
F is $200.	F 200 $.

Subsection 39(2) was amended:

Foreign exchange capital gains and losses	Gains et pertes en capital de change
(2) If, because of any fluctuation after 1971 in the value of a currency other than Canadian currency relative to Canadian currency, a taxpayer has made a gain or sustained a loss in a taxation year (other than a gain or loss that would, in the absence of this subsection, be a capital gain or capital loss to which subsection (1) or (1.1) applies, or a gain or loss in respect of a transaction or event in respect of shares of the capital stock of the taxpayer)	(2) Si, par suite de toute fluctuation, postérieure à 1971, de la valeur d'une monnaie (sauf la monnaie canadienne) par rapport à la monnaie canadienne, un contribuable a fait un gain ou subi une perte au cours d'une année d'imposition (sauf un gain ou une perte qui, en l'absence du présent paragraphe, serait un gain en capital ou une perte en capital auquel s'applique le paragraphe (1) ou (1.1) et sauf un gain ou une perte relatif à une opération ou à un événement concernant des actions du capital-actions du contribuable), les règles ci-après s'appliquent :
(a) the amount of the gain (to the extent of the amount of that gain that would not, if section 3 were read in the manner described in paragraph (1)(a), be included in computing the taxpayer's income for the year or any other taxation year), if any, is deemed to be a capital gain of the taxpayer for the year from the disposition of currency other than Canadian currency; and	a) le montant du gain, jusqu'à concurrence du montant de celui-ci qui, si l'article 3 était lu de la manière indiquée à l'alinéa (1)a), ne serait pas inclus dans le calcul du revenu du contribuable pour l'année ou pour toute autre année d'imposition, est réputé être un gain en capital du contribuable pour l'année, tiré de la disposition d'une monnaie autre que la monnaie canadienne;
(b) the amount of the loss (to the extent of the amount of that loss that	b) le montant de la perte, jusqu'à concurrence du montant de celle-ci

would not, if section 3 were read in the manner described in paragraph (1)(a), be deductible in computing the taxpayer's income for the year or any other taxation year), if any, is deemed to be a capital loss of the taxpayer for the year from the disposition of currency other than Canadian currency.

qui, si l'article 3 était lu de la manière indiquée à l'alinéa (1)a), ne serait pas déductible dans le calcul du revenu du contribuable pour l'année ou pour toute autre année d'imposition, est réputé être une perte en capital du contribuable pour l'année, résultant de la disposition d'une monnaie autre que la monnaie canadienne.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED SEPTEMBER 12, 2018, CITATION NO. 2018 TCC 187 (DOCKET NO. 2016-445 (IT)G)

DOCKET:	A-337-18
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. BANK OF MONTREAL
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 6, 2020
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	NEAR J.A. MACTAVISH J.A.
DATED:	MAY 4, 2020

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