

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230504

Docket: A-305-21

Citation: 2023 FCA 91

**CORAM: WEBB J.A.
LASKIN J.A.
GOYETTE J.A.**

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on December 13, 2022.

Judgment delivered at Ottawa, Ontario, on May 4, 2023.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**LASKIN J.A.
GOYETTE J.A.**

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This appeal focuses on the application of subsections 39(2) and 40(3.6) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the ITA) in relation to a loss realized on a redemption of shares in 2007. The loss was attributable to a fluctuation in the value of a foreign currency.

In particular, the issue in this appeal is whether subsection 39(2) of the ITA applied to deem this

loss to be a capital loss from the disposition of foreign currency before subsection 40(3.6) of the ITA deemed this loss to be nil.

[2] The parties submitted the following question for determination by the Tax Court of Canada under Rule 58 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a:

Whether paragraph 40(3.6)(a) of the [ITA] applies to deem CIBC's loss from the disposition of Class B Shares of CIBC Delaware Holdings Inc. to be nil.

[3] The Tax Court answered this question in the affirmative (2021 TCC 71, *per* Owen J.).

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

I. Agreed Facts

[5] The parties agreed on the facts submitted to the Tax Court in relation to the Rule 58 question.

[6] On November 8, 2006, the Canadian Imperial Bank of Commerce (CIBC) subscribed for shares of CIBC Delaware Holdings Inc. (DHI) for US\$1 billion. All of the shares of DHI were held, directly or indirectly, by CIBC. When CIBC acquired the shares of DHI, US\$1 billion was equivalent to \$1.13 billion Canadian.

[7] On September 25, 2007, DHI redeemed the shares held by CIBC for US\$1 billion. At that time, the Canadian dollar equivalent of US\$1 billion was \$1,003,600,000. CIBC reported, in its 2007 income tax return, an allowable capital loss of \$63,200,000:

Adjusted Cost Base:	\$1,130,000,000
Minus: Proceeds of Disposition:	<u>- \$1,003,600,000</u>
Equals: Loss:	= \$126,400,000
Capital Loss:	\$126,400,000
Allowable Capital Loss (50% of the Capital Loss):	\$63,200,000

[8] The Minister of National Revenue denied CIBC's claim for an allowable capital loss.

II. Decision of this Court in *Canada v. Bank of Montreal*, 2020 FCA 82 (*BMO*)

[9] The decision of this Court in *BMO* played a dominant role in the decision of the Tax Court and in the arguments of CIBC in this appeal. The main issue in *BMO* was whether subsection 39(2) of the ITA (as it was worded in the taxation year in issue) applied when a loss realized on a disposition of shares was attributable to a fluctuation in the value of foreign currency.

[10] This Court in *BMO* decided that subsection 39(2) of the ITA applied to a disposition of shares when the loss arose by virtue of a fluctuation in the value of foreign currency. Under this subsection, the gains and losses made and sustained by virtue of any fluctuation in the value of foreign currency were aggregated. The net result (subject to a deduction of \$200 for individuals) was deemed to be a capital gain or capital loss from the disposition of foreign currency. In *BMO*,

there was one loss from the disposition of shares referenced in the agreed facts. Since, in *BMO*, the loss on the disposition of the shares was attributable to a fluctuation in the value of foreign currency, this loss was deemed to be a capital loss from the disposition of foreign currency.

[11] In *BMO*, the relevant stop-loss provision was subsection 112(3.1) of the ITA.

This subsection deems a corporate taxpayer's share of a loss allocated to it by a partnership to be the amount of such loss reduced by the amount of certain dividends received by that taxpayer.

As discussed more fully below, since, in *BMO*, subsection 39(2) of the ITA deemed the loss to be a capital loss from the disposition of foreign currency, there was no loss from the disposition of shares to which subsection 112(3.1) of the ITA could have applied.

[12] In this appeal the relevant stop-loss provision is subsection 40(3.6) of the ITA.

This subsection only applies if there is a disposition of shares of a particular corporation to that corporation (which will be referred to as a redemption of shares) and the taxpayer is affiliated with that corporation immediately after the redemption of shares. There was no redemption of shares in *BMO* and therefore subsection 40(3.6) of the ITA was not relevant in *BMO*.

[13] Nonetheless, CIBC argued that *BMO* supported its position that it had a capital loss from the disposition of foreign currency in the amount of \$126.4 million as a result of the application of subsection 39(2) of the ITA before the application of subsection 40(3.6) of the ITA. In CIBC's view, there was, therefore, no loss from the disposition of shares to which subsection 40(3.6) of the ITA could apply. The Crown argued that *BMO* supported its position that the loss was deemed to be nil under subsection 40(3.6) of the ITA and therefore, there was no loss to which

the provisions of subsection 39(2) of the ITA could apply. Neither party focused on the different wording of subsection 112(3.1) of the ITA (the relevant stop-loss rule in *BMO*) and subsection 40(3.6) of the ITA (the relevant stop-loss rule in this appeal).

III. Decision of the Tax Court

[14] The Tax Court Judge devoted a significant portion of his reasons to his argument that subsection 39(2) of the ITA, in 2007, did not apply to a disposition of shares. As was noted in paragraph 31 of *BMO*, subsection 39(2) of the ITA was amended and subsection 39(1.1) of the ITA was added in 2013. Therefore, the issue of whether subsection 39(2) of the ITA, as it was previously drafted, would apply to a disposition of shares to the extent the loss was attributable to a change in the value of a foreign currency, would only be relevant for losses realized in a taxation year that began before August 19, 2011.

[15] Even though the Tax Court Judge expressed his opinion that the version of subsection 39(2) of the ITA in effect in 2007 did not apply to a disposition of shares, he adopted the interpretation of subsection 39(2) of the ITA as found in *BMO*. He then concluded that the provisions of subsection 40(3.6) of the ITA applied to determine the loss before the application of section 39(2) of the ITA. Therefore, the loss realized by CIBC on the redemption of shares was deemed to be nil.

IV. Relevant provisions of the ITA

[16] The provisions of the ITA relevant to the outcome in this appeal are subsections 39(2), 40(3.6) and 112(3.1). The full text of these provisions (as they read in 2007) is set out in the Appendix to these reasons.

V. Issue and Standard of Review

[17] Although the Tax Court Judge devoted a significant portion of his reasons to the question of whether subsection 39(2) of the ITA (as it was written in 2007) applied to a loss arising from a disposition of shares, neither party pursues this issue in this appeal. The only issue raised by the parties is whether, based on the decision of this Court in *BMO*, subsection 39(2) of the ITA applied before subsection 40(3.6) of the ITA. CIBC's argues that subsection 39(2) of the ITA applied first to deem the loss arising on the redemption of shares to be a capital loss from the disposition of foreign currency. As a result, CIBC's argument is that for the purposes of subsection 40(3.6) of the ITA, there was no loss arising from a redemption of shares. The Crown argues that subsection 40(3.6) of the ITA applied to deem the loss realized by CIBC to be nil before subsection 39(2) of the ITA applied.

[18] Since the issue in this case is the interpretation of the relevant provisions of the ITA and, therefore, is a question of law, the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33).

VI. Analysis

[19] The Supreme Court of Canada, in *Canada Trustco Mortgage Co. v. The Queen*, 2005 SCC 54, [2005] 2 S.C.R. 601, set out the approach to be adopted in interpreting statutory provisions:

[10] It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[20] As noted by the Supreme Court, "[w]hen the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process". The importance of considering the words chosen by Parliament and the dominant role that "precise and unequivocal" language plays in the interpretation of the provisions of the ITA was reinforced by the Supreme Court in *Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51, at paragraph 41.

[21] In this appeal, CIBC argues that the structure it adopted was similar to the structure employed by the Bank of Montreal in *BMO* and, therefore, the result under the ITA should be the same – the loss realized on the redemption of shares should not be deemed to be nil. However, tax implications are based on the wording of the provisions of the ITA that are applicable to the particular transactions completed by a taxpayer. The stop-loss provision engaged in this appeal (subsection 40(3.6) of the ITA) is not the same stop-loss provision engaged in *BMO* (subsection 112(3.1) of the ITA). Different stop-loss rules were engaged because the transactions were different.

[22] As noted above, subsection 40(3.6) of the ITA only applies if there is a redemption of shares by a particular corporation and the taxpayer (whose shares were redeemed) is affiliated with that corporation immediately after the redemption of shares. There was no discussion in *BMO* concerning whether the provisions of subsection 40(3.6) of the ITA would apply to deem the loss to be nil before subsection 39(2) would apply because subsection 40(3.6) of the ITA was not relevant in *BMO* – there was no redemption of shares in *BMO*.

[23] Instead, in *BMO* the relevant stop-loss provision was subsection 112(3.1) of the ITA. The issue raised by the Crown in *BMO* (and addressed in the reasons of this Court) was whether there was a conflict between subsections 39(2) and 40(1) of the ITA, not whether there was a conflict between subsections 39(2) and 112(3.1) of the ITA.

[24] Although the wording of the relevant stop-loss provisions (subsection 112(3.1) of the ITA in *BMO* and subsection 40(3.6) of the ITA in this case) is an important consideration in

determining how subsection 39(2) of the ITA will interact with each provision, neither party addressed the wording of subsection 112(3.1) in their memoranda. The wording of subsection 112(3.1) and in particular, the reference to “that share of the loss determined without reference to this subsection” was raised by this Court. Since neither party had considered this wording in their memoranda, the parties made additional written submissions following the hearing. The parties filed their additional submissions on January 16, 2023, February 13, 2023 and February 27, 2023.

A. *Gain or Loss; Capital Gain or Capital Loss; Taxable Capital Gain or Allowable Capital Loss*

[25] It is important, in this appeal, to review the different terms used by Parliament in relation to a gain or loss arising on the disposition of a capital property:

- **Gain or loss** – Subsection 40(1) of the ITA sets out the general formula for determining a gain or loss. A gain is the amount by which the proceeds of disposition exceeds the adjusted cost base and related expenses (paragraph 40(1)(a) of the ITA). A loss is the amount by which the adjusted cost base and related expenses exceeds the proceeds of disposition (paragraph 40(1)(b) of the ITA). The amount determined by this formula will not be the gain or loss if another provision of Part I of the ITA expressly provides otherwise.
- **Capital gain or capital loss** – Subsection 39(1) of the ITA and paragraph (b) of the definition of “capital property” in section 54 of the ITA provide, in essence, that the capital gain or capital loss from the disposition of property is the gain or loss arising from the disposition of a capital property. Subsection 39(1) of the ITA excludes the gain or loss realized from the disposition of certain properties from the definition of

capital gain or capital loss. Subsection 39(2) of the ITA, as discussed above, addressed the gains and losses made or sustained by virtue of any fluctuation in the value of foreign currency and deemed the net result to be a capital gain or a capital loss from the disposition of foreign currency.

- **Taxable capital gain or allowable capital loss** – Section 38 of the ITA sets out the general rules to determine the amount of a taxable capital gain or an allowable capital loss – a taxable capital gain is one-half of the capital gain (paragraph 38(a) of the ITA) and an allowable capital loss is one-half of the capital loss (paragraph 38(b) of the ITA). Taxable capital gains and allowable capital losses are the relevant terms used in paragraph 3(b) of the ITA in determining a taxpayer’s income.
- **Business investment loss and allowable business investment loss** - Certain capital losses are also designated as business investment losses under paragraph 39(1)(c) of the ITA. Paragraph 38(c) of the ITA provides that an allowable business investment loss is one-half of the business investment loss. The terms “business investment loss” and “allowable business investment loss” are not relevant in this appeal.

[26] When Parliament refers to a gain or loss, a capital gain or capital loss, or a taxable capital gain or allowable capital loss, the presumption is that Parliament meant what it said and, therefore, intended to refer to the particular term that it used in a particular provision in the ITA. Since the terms have different meanings, the expressions are not interchangeable.

B. *Interaction of subs. 39(2) and 112(3.1) of the ITA*

[27] In *BMO*, the question was whether subsection 39(2) of the ITA applied to a loss arising on the disposition of shares where the loss was attributable to a fluctuation in the value of foreign

currency. In *BMO*, this Court addressed the Crown's argument that there was a conflict between subsections 39(2) and 40(1) of the ITA:

[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.

[28] As stated, there was no conflict between these two provisions. Paragraph 40(1)(b) of the ITA sets out the general formula for the determination of the amount of a loss:

40 (1) Except as otherwise expressly provided in this Part

...

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

(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 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

40 (1) Sauf indication contraire expresse de la présente partie :

[...]

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

(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-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.

[29] The opening words of subsection 40(1) of the ITA provide that the gain (determined under paragraph 40(1)(a) of the ITA) or the loss (determined under paragraph 40(1)(b) of the ITA) will be the amount determined in accordance with the provisions of these paragraphs, unless another provision in Part I of the ITA expressly provides otherwise. It is important to note that subsection 40(1) of the ITA provides for the determination of the gain or loss, not the capital gain or capital loss. Therefore, in order for another provision to expressly provide otherwise, that other provision must specify or affect the amount of the gain or loss, not the amount of any capital gain or capital loss.

[30] As noted in *BMO*, subsection 39(2) of the ITA was premised on the assumption that the amount of the loss had already been determined. The opening words of subsection 39(2) of the ITA were clear:

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 ...

[emphasis added]

[31] A taxpayer could only have sustained a loss if the loss had been determined under another provision of the ITA. There was no formula set out in subsection 39(2) of the ITA that would have applied to determine the amount of the loss, nor did subsection 39(2) of the ITA deem the amount of a loss to be any particular amount.

[32] Rather, subsection 39(2) of the ITA required a taxpayer to add together all of the gains and losses made or sustained by virtue of any fluctuation in the value of foreign currency and then deemed the net result (subject to an adjustment of \$200 for individuals) to be a capital gain or a capital loss from the disposition of foreign currency. The amount of the gain or loss must have been determined under another provision of the ITA, otherwise there would not have been an amount from which the \$200 deduction for individuals could have been taken. It should also be noted that subsection 39(2) of the ITA deemed the result to be a capital gain or a capital loss, it did not deem the result to be a gain or a loss.

[33] There were two implications arising from the application of the deeming rule in subsection 39(2) of the ITA. One implication was that the total net amount of the gains and losses attributable to any fluctuation in the value of foreign currency became a capital gain or a capital loss, not a gain or loss. The other implication was that the property that gave rise to such capital gain or capital loss was deemed to be foreign currency. In *BMO*, a loss was realized on the disposition of shares. That loss was attributable to a fluctuation in the value of foreign currency. The application of the deeming rule in subsection 39(2) of the ITA resulted in the loss from the disposition of shares becoming a capital loss from a disposition of foreign currency, *i.e.* the original loss from the disposition of shares was no longer a loss (it was deemed to be a

capital loss) and the property the disposition of which resulted in the capital loss was foreign currency (not shares).

[34] The application of subsection 39(2) of the ITA resulted in the loss that was otherwise realized on a disposition of shares ceasing to be a loss from a disposition of shares. If not, the loss arising from the disposition of shares would still have become a capital loss under subsection 39(1) of the ITA and then an allowable capital loss under section 38 of the ITA.

It could not have been intended that a taxpayer would have been entitled to two deductions for an allowable capital loss on the disposition of a particular property – one related to the disposition of the property actually disposed of and the other related to the deemed capital loss from the disposition of foreign currency.

[35] As a result, the tax consequences, if subsection 39(2) of the ITA applied, would have been determined solely on the basis that the net gains and losses attributable to a fluctuation in the value of foreign currency were deemed to be a capital gain or capital a loss (subject to the \$200 deduction for individuals) from the disposition of foreign currency. This capital gain or capital loss would then have been used to determine the taxable capital gain or allowable capital loss of the taxpayer.

[36] Subsection 112(3.1) of the ITA, as it applies to a corporate taxpayer, requires that taxpayer to reduce its share of a loss allocated to it by a partnership by the amount of certain dividends received by that taxpayer. The loss, before any deduction is made under subsection

112(3.1) of the ITA, is the loss from a disposition of shares determined without reference to subsection 112(3.1) of the ITA:

... 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 ...

[emphasis added]

[37] The reference to “the loss determined without reference to this subsection” means that the loss from a disposition of shares is first determined as if the ITA did not include subsection 112(3.1). The loss reduction provision of subsection 112(3.1) of the ITA is only applied after the application of any other provision of the ITA that could change either:

- (a) the amount of the loss; or
- (b) the characterization of what would otherwise be a loss from the disposition of shares.

[38] Subsection 39(2) of the ITA was a provision that deemed the net total of all gains and losses arising by virtue of any fluctuation in the value of foreign currency (subject to a \$200 deduction for individuals) to be a capital gain or a capital loss from the disposition of foreign currency.

[39] In *Novopharm Limited v. Her Majesty the Queen*, 2003 D.T.C. 5195, this Court stated:

[13] ... A deeming provision is a statutory fiction that replaces or modifies reality; it cannot be ignored.

[40] The deeming provision in subsection 39(2) of the ITA in *BMO* altered reality by deeming the loss realized by the Bank of Montreal (of which there was only one loss in issue) to be a capital loss from the disposition of foreign currency. Therefore, once the loss was determined without reference to subsection 112(3.1) of the ITA, not only was there no longer a loss in *BMO* (the rule in subsection 39(2) of the ITA deemed the loss attributable to a fluctuation in the value of foreign currency to be a capital loss) but also the net result was deemed to be a capital loss from the disposition of foreign currency.

[41] As a result, subsection 39(2), paragraph 40(1)(b) and subsection 112(3.1) of the ITA worked together in *BMO* as follows: the amount of the loss was determined using the formula as set out in paragraph 40(1)(b) of the ITA and this amount was then deemed by subsection 39(2) of the ITA to be a capital loss from the disposition of foreign currency. Since in *BMO* (as a result of the application of subsection 39(2) of the ITA) the Bank of Montreal did not have a loss from the disposition of shares, there was no loss from the disposition of shares to which subsection 112(3.1) of the ITA could have applied.

C. *Interaction of subs. 39(2) and 40(3.6) of the ITA*

[42] In this appeal, as noted above, the issue is the interaction of subsections 39(2) and 40(3.6) of the ITA. Subsection 40(3.6) of the ITA provides that any loss arising from a redemption of shares by a corporation that is affiliated with the taxpayer immediately after the redemption of shares is deemed to be nil. There is no wording to indicate that the loss (that is deemed to be nil) is to be determined without reference to subsection 40(3.6) of the ITA.

[43] CIBC, in its written submissions addressing the phrase “the loss determined without reference to this subsection” found in subsection 112(3.1) of the ITA, states that “[a] similar phrase is also used within subsection 40(3.6), with the same function”. In paragraph 40(3.6)(b) of the ITA, the words “the amount of the taxpayer’s loss from the disposition (determined without reference to paragraph 40(2)(g) and this subsection)” appear. However, it is important to consider these words in context and not in isolation:

(3.6) Where at any time a taxpayer disposes, to a corporation that is affiliated with the taxpayer immediately after the disposition, of a share of a class of the capital stock of the corporation (other than a share that is a distress preferred share as defined in subsection 80(1)),

(a) the taxpayer’s loss, if any, from the disposition is deemed to be nil; and

(b) in computing the adjusted cost base to the taxpayer after that time of a share of a class of the capital stock of the corporation owned by the taxpayer immediately after the disposition, there shall be added the proportion of the amount of the taxpayer’s loss from the disposition (determined without reference to paragraph 40(2)(g) and this subsection) that

(i) the fair market value, immediately after the disposition, of the share

is of

(3.6) Dans le cas où un contribuable dispose, en faveur d’une société qui lui est affiliée immédiatement après la disposition, d’une action d’une catégorie du capital-actions de la société, sauf une action privilégiée de renflouement au sens du paragraphe 80(1), les règles suivantes s’appliquent :

a) la perte du contribuable résultant de la disposition est réputée nulle;

b) est à ajouter dans le calcul du prix de base rajusté, pour le contribuable après la disposition, d’une action d’une catégorie du capital-actions de la société qui appartenait au contribuable immédiatement après la disposition le produit de la multiplication du montant de sa perte résultant de la disposition, déterminé compte non tenu de l’alinéa (2)g) et du présent paragraphe, par le rapport entre :

(i) d’une part, la juste valeur marchande de l’action immédiatement après la disposition,

(ii) the fair market value, immediately after the disposition, of all shares of the capital stock of the corporation owned by the taxpayer.

(ii) d'autre part, la juste valeur marchande, immédiatement après la disposition, de l'ensemble des actions du capital-actions de la société appartenant au contribuable.

[emphasis added]

[Non souligné dans l'original.]

[44] Paragraph 40(3.6)(b) of the ITA only applies to the computation of the adjusted cost base of other shares still held by the taxpayer immediately after the redemption of shares. The phrase “determined without reference to paragraph 40(2)(g) and this subsection” is in paragraph (b) and, therefore, only affects the calculation of the adjusted cost base of those other shares held by the taxpayer. It simply ensures that the amount added to the adjusted cost base of those other shares held by the taxpayer is the amount of the loss before such loss is deemed to be nil under paragraph 40(3.6)(a) of the ITA or paragraph 40(2)(g) of the ITA. It does not affect the loss for the purposes of paragraph 40(3.6)(a) of the ITA as it does not require the determination of the loss for the purposes of this paragraph without reference to subsection 40(3.6) of the ITA. Therefore, it does not have the same implication as the similar phrase found in subsection 112(3.1) of the ITA.

[45] There is nothing in subsection 40(3.6) of the ITA that would require the application of subsection 39(2) of the ITA before the loss realized on the redemption of shares is deemed to be nil by subsection 40(3.6) of the ITA. As subsection 40(3.6) of the ITA is a provision that expressly provides for the determination of the amount of the loss, it overrides subsection 40(1) of the ITA. As a result, the loss realized by CIBC on the redemption of shares is deemed to be nil

and, therefore, there is no loss that could have been deemed to be a capital loss under subsection 39(2) of the ITA.

[46] The wording of the relevant provisions of the ITA is precise and unequivocal and, therefore, the ordinary meaning of these words plays a dominant role in interpreting these provisions. The wording of subsections 40(3.6) and 112(3.1) of the ITA provided that, in 2007, all other provisions of the ITA affecting the loss (including subsection 39(2), as it was then worded) applied before subsection 112(3.1) of the ITA applied and that subsection 40(3.6) of the ITA applied before subsection 39(2) of the ITA applied.

D. *Context and Purpose*

[47] With respect to the context and purpose, the parties refer to the net effect of the stop-loss provisions (subsections 40(3.6) and 112(3.1) of the ITA). While subsection 40(3.6) of the ITA deems the loss to be nil, subsection 112(3.1) reduces the loss by the amount of certain dividends received. Any loss reduced by subsection 112(3.1) of the ITA cannot be later recovered.

However, the loss deemed to be nil by subsection 40(3.6) of the ITA can be recovered on a subsequent disposition of any remaining shares held by the taxpayer in the corporation whose shares were redeemed (as a result of the addition of the loss to the adjusted cost base of the remaining shares). Although CIBC argues that it suffered a loss on the redemption of shares in 2007, the loss that was deemed to be nil increased its adjusted cost base in the other shares of DHI held by CIBC. An addition to the adjusted cost base of a particular capital property would reduce the amount of a gain or increase the amount of a loss on a disposition on that property.

[48] This different treatment of a loss deemed to be nil under 40(3.6) of the ITA and a loss reduced under subsection 112(3.1) of the ITA could explain why a loss attributable to foreign currency fluctuations (which are beyond the control of the taxpayer) was not subject to an adjustment under subsection 112(3.1) of the ITA but did not alter the deeming of the loss to be nil under subsection 40(3.6) of the ITA.

[49] The Crown submits that, under the ITA, a taxpayer's income is determined under Division B (which, in 2007, included subsections 39(2) (as it was then written) and 40(3.6) of the ITA) before a taxpayer's taxable income is determined under Division C (which includes subsection 112(3.1) of the ITA). There is support for this argument in subsection 2(2) of the ITA:

(2) The taxable income of a taxpayer for a taxation year is the taxpayer's income for the year plus the additions and minus the deductions permitted by Division C.

(2) Le revenu imposable d'un contribuable pour une année d'imposition est son revenu pour l'année plus les ajouts prévus à la section C et moins les déductions qui y sont permises.

[50] However, subsection 112(3.1) of the ITA does not provide for an addition or a deduction in computing the taxable income of a taxpayer. Rather, it deems the loss realized by the taxpayer to be the loss determined without reference to that subsection, minus certain dividends. The result of the deeming rule is that the taxpayer has the loss from the disposition of shares as deemed by this subsection.

[51] The amount of a taxpayer's loss arising from the disposition of shares held as capital property is not used in computing income. Rather, the amount of a taxpayer's allowable capital loss is the relevant amount for computing income under section 3. An allowable capital loss is one-half of a capital loss. Therefore, once the loss is deemed to be a certain amount under subsection 112(3.1) of the ITA, it is still necessary to apply the provisions of subsection 39(1) and section 38 of the ITA (which are in Division B) to produce the relevant amount used in determining income – the allowable capital loss. Therefore, Division B and Division C are not two separate self-contained parts with the consequence that once income is determined under Division B it is not altered by any provision of Division C. As subsection 112(3.1) illustrates, it may be necessary to reapply the provisions of Division B to redetermine a taxpayer's income once a particular provision in Division C is applied.

[52] However, the interpretation of the phrase “the loss determined without reference to this subsection” as found in subsection 112(3.1) of the ITA, as stated above, results in all of the provisions of Division B being applied to determine the loss (if any) from the disposition of shares before subsection 112(3.1) is applied to reduce that loss. This interpretation is consistent with the general principle enunciated in subsection 2(2) of the ITA that the provisions of Division B apply before the provisions of Division C.

[53] The context and the purpose of the relevant provisions do not alter or change the interpretation based on the text of these provisions.

VII. Conclusion

[54] As a result, the Tax Court did not err in concluding that paragraph 40(3.6) of the ITA applies to deem CIBC's loss from the disposition of Class B Shares of DHI to be nil. I would therefore dismiss the appeal with costs.

“Wyman W. Webb”

J.A.

“I agree.

J.B. Laskin J.A.”

“I agree.

Nathalie Goyette J.A.”

APPENDIX**Relevant Provisions of the *Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) as of 2007*****Subsection 39(2):****Capital gains and losses in respect of foreign currencies**

(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:

(a) the amount, if any, by which

(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)

exceeds

(ii) the total of all such losses sustained by the taxpayer in the year (to the extent of the amounts

Gains et pertes en capital relatifs aux monnaies étrangères

(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) 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) 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),

sur :

(ii) le total des pertes subies par le contribuable au cours de l'année (jusqu'à concurrence des

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.

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(3.6):

(3.6) Where at any time a taxpayer disposes, to a corporation that is affiliated with the taxpayer immediately after the disposition, of a share of a class of the capital stock of the corporation (other than a share that is a distress preferred share as defined in subsection 80(1)),

(a) the taxpayer's loss, if any, from the disposition is deemed to be nil; and

(b) in computing the adjusted cost base to the taxpayer after that time of a share of a class of the capital stock of the corporation owned by the taxpayer immediately after the disposition, there shall be added the proportion of the amount of the taxpayer's loss from the disposition (determined without reference to paragraph 40(2)(g) and this subsection) that

(i) the fair market value, immediately after the disposition, of the share

is of

(ii) the fair market value, immediately after the disposition, of all shares of the capital stock of the corporation owned by the taxpayer.

(3.6) Dans le cas où un contribuable dispose, en faveur d'une société qui lui est affiliée immédiatement après la disposition, d'une action d'une catégorie du capital-actions de la société, sauf une action privilégiée de renflouement au sens du paragraphe 80(1), les règles suivantes s'appliquent :

a) la perte du contribuable résultant de la disposition est réputée nulle;

b) est à ajouter dans le calcul du prix de base rajusté, pour le contribuable après la disposition, d'une action d'une catégorie du capital-actions de la société qui appartenait au contribuable immédiatement après la disposition le produit de la multiplication du montant de sa perte résultant de la disposition, déterminé compte non tenu de l'alinéa (2)g) et du présent paragraphe, par le rapport entre :

(i) d'une part, la juste valeur marchande de l'action immédiatement après la disposition,

(ii) d'autre part, la juste valeur marchande, immédiatement après la disposition, de l'ensemble des actions du capital-actions de la société appartenant au contribuable.

Subsection 112(3.1):**Loss on share held by partnership**

(3.1) Subject to subsections (5.5) and (5.6), where a taxpayer (other than a 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,

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

(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

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

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

Perte sur une action détenue par une société de personnes

(3.1) Sous réserve des paragraphes (5.5) et (5.6), la part qui revient à un 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) dans le cas où le contribuable est un particulier, le moins élevé des montants suivants :

(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) 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) 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,

(ii) a dividend 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, 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.

(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) un dividende 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,

(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.

FEDERAL COURT OF APPEAL

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