Docket: 2014-4290(IT)G

BETWEEN:

BAREJO HOLDINGS ULC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motions dealt with by way of written submissions.

By: The Honourable Justice Patrick Boyle

ORDER

Upon application by the parties pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)* for the determination of a question of mixed fact and law;

And upon hearing from counsel for the parties;

IT IS ORDERED THAT:

1. The Court determines that, for purposes of the Appellant's two appeals, the two Notes held by SLT constitute debt for purposes of paragraph 94.1(1)(*a*) of the *Act*.

2. Costs are left to the trial judge, subject to the Court exercising its discretion if written submissions requesting otherwise are received from the parties within 30 days from the date of this Order.

Signed at Vancouver, British Columbia this 4th day of October 2018.

"Patrick Boyle"

Boyle J.

Citation: 2018 TCC 200
Date: 20181004
Docket: 2014-4290(IT)G

BETWEEN:

BAREJO HOLDINGS ULC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

REASONS FOR ORDER

Boyle J.

[1] The parties have jointly referred a further question to the Court pursuant to Rule 58, which question is a follow-up question to the Rule 58 question determined in *Barejo Holdings ULC v. Her Majesty the Queen* 2015 TCC 274 ("Barejo 2015").

The Initial 2015 Question

[2] The Appellant instituted its appeals in 2014. In 2014 the parties jointly referred the following question (the "Initial Question") to the Court:

> Whether the two Contracts held by SLT, a non-resident entity, constitute debt for purposes of the *Income Tax Act*.

[3] The Court answered the Initial Question in Barejo 2015 as follows:

> The Court has determined that for purposes of [these two appeals], the two Notes held by SLT constituted debt for purposes of the *Income Tax Act*.

The reasons for that answer are set out in Barejo 2015.

[4] The Appellant appealed the decision in Barejo 2015 to the Federal Court of Appeal. That Court dismissed the appeal on procedural grounds without addressing the substantive merits of Barejo 2015 – see *Barejo Holdings ULC v. Her Majesty the Queen* 2016 FCA 304 ("Barejo FCA")

[5] The Appellant's leave application to the Supreme Court of Canada from the decision of the Federal Court of Appeal was dismissed without reasons in June 2017.

The 2018 Follow-Up Question

[6] In 2018 the parties jointly referred the following question (the "Follow-Up Question") to the Court for determination:

> As a follow-up to the Rule 58 determination in [Barejo 2015], do the two Contracts held by SLT, a non-resident entity, constitute debt for purposes of paragraph 94.1(1)(*a*) of the *Income Tax Act*?

The only difference between the Initial Question and the Follow-Up Question is that the Follow-Up Question specifies that it is to be answered with respect to paragraph 94.1(1)(*a*) of the *Act*, whereas the Initial Question did not include the words "of paragraph 94.1(1)(*a*)."

[7] The parties jointly asked that the Follow-Up Question be determined on the basis of the Court record in Barejo 2015. In the first stage of the 2018 section 58 reference, the Court allowed the Follow-Up Question to proceed to be considered and answered. In the second stage of this reference, the parties chose not to file any additional agreed facts or other evidence for the Court to consider in answering the Follow-Up Question. Neither party suggested that Barejo 2015 was decided upon any misunderstanding of the facts, relationships and the provisions of the Notes or any related documents, nor that reconsideration for any other reason was warranted now. The parties did not wish to make any oral argument, and did not file any further written submissions nor supplement their 2015 written arguments.[1] The parties did not refer to any court decisions since Barejo 2015 was decided.

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[1] The Appellant's 2015 Notes of Argument only mentions section 94.1 once, to point out that it "contains no definition of "debt" [and] that expression must take its commercial law meaning." The Respondent's Memorandum of Fact and Law (Rule 58) from 2015 does not reference section 94.1. In argument in 2015 the Appellant did not make any argument specific to the provisions of section 94.1. The Respondent had raised just one - the observation that the wording of subsection 94.1(1) contemplates that the value of a

[8] Neither party's position in his Court has changed in the intervening three years. Had the parties wanted to ask a Follow-Up Question focusing on paragraph 94.1(1)(*a*), they could have returned to this Court directly following Barejo 2015.

[9] The parties are content to have me answer the Follow-Up Question in the same manner and for the same reasons as the Initial Question, and to specify in my answer and my reasons that it is for purposes of paragraph 94.1(1)(*a*), as this will allow them to have the reasons for my decision reviewed by the Federal Court of Appeal. I am prepared to oblige them.

Jurisdiction/Res Judicata/Issue Estoppel/Abuse of Process

[10] This Court's answer to the Initial Question was that, for purposes of the Appellant's two particular appeals, the Notes in issue were debt for purposes of the *Income Tax Act*. Questions thus arise whether it is now open to, or appropriate for, this Court to decide otherwise with respect to any particular provision in that statute. It is not at all clear to me that I can or should decide that something that has been determined by this Court to be debt for purposes of the *Act*, is not debt for the purposes of a particular provision of that *Act*. This concern is only increased by the fact that paragraph 94.1(1)(*a*) actually uses the word "debt" and neither party has provided any additional evidence, law or argument to support a different answer to the Follow-Up Question than the Initial Question. There is no specific argument before me from the Appellant that addresses the particular text, context or purpose of paragraph 94.1(1)(*a*).

[11] This concern was raised with the parties during the first stage of this reference, before deciding to allow the Follow-Up Question to proceed. The parties' shared position was that "it is open for this Court to decide whether the word "debt" for purposes of paragraph 94.1(1)(*a*) has the same meaning as that ascribed to the word "debt" for purposes of the *Act* as a whole."

[12] The parties' position is a possible interpretation of the combined effects of the decisions and reasons of this Court and the Federal Court of Appeal. Without considering much less deciding this question, I am prepared to proceed to answer the Follow-Up Question on the assumption that the parties shared position prevails.

Analysis

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debt can be derived from other assets - but then expressly confirmed that the Initial Question was not to be answered with respect to section 94.1 but the *Act* as a whole.

[13] Since this is a follow-up question to Barejo 2015, the reasons therein necessarily form an integral part of the analysis and reasons herein, and are incorporated herein by reference in their entirety. The defined terms in Barejo 2015 are also used herein with the same meanings.

[14] The analysis of the Follow-Up Question starts with my complete adoption of this Court's reasons, analysis, conclusion and answer in Barejo 2015, that the Notes constitute debt for purposes of the *Act*, and are Appendix A hereto. I confirm that my answer to the issue of the meaning of the term debt for purposes of the *Act* remains my complete answer for the reasons given in Barejo 2015.

[15] Paragraphs 94.1(1)(*a*) and (*b*) of the *Act* read as follows:

Offshore investment fund property

94.1 (1) If in a taxation year a taxpayer holds or has an interest in property (referred to in this section as an "offshore investment fund property")

(a) that is a share of the capital stock of, an interest in, or a debt of, a non-resident entity (other than a controlled foreign affiliate of the taxpayer or a prescribed non-resident entity) or an interest in or a right or option to acquire such a share, interest or debt, and

(b) that may reasonably be considered to derive its value, directly or indirectly, primarily from portfolio investments of that or any other non-resident entity in

(i) shares of the capital stock of one or more corporations,

(ii) indebtedness or annuities,

(iii) interests in one or more corporations, trusts, partnerships, organizations,

Bien d'un fonds de placement non-résident

94.1 (1) Lorsque, au cours d'une année d'imposition, un contribuable détient un bien ou a un droit sur un bien (appelé « bien d'un fonds de placement non-résident » au présent article) qui répond aux conditions suivantes :

a) il est une action du capital-actions d'une entité non-résidente (autre qu'une société étrangère affiliée contrôlée du contribuable ou une entité non-résidente visée par règlement) ou une participation dans une tell entité, ou une créance sur elle, ou un droit sur une telle action, participation ou créance ou un droit ou une option d'achat d'une telle action, participation ou créance;

b) sa valeur peut raisonnablement être considérée comme découlant principalement, directement ou indirectement, de placements de portefeuille de cette même entité ou de toute autre entité non-résidente :

funds or entities,	**(i)** en actions du capital-actions d'une ou de plusieurs sociétés,
(iv) commodities,	**(ii)** en créances ou en rentes,
(v) real estate,	**(iii)** en participations dans un ou plusieurs fonds ou organismes ou dans une ou plusieurs sociétés, fiducies, sociétés de personnes ou entités,
(vi) Canadian or foreign resource properties,	**(iv)** en marchandises,
(vii) currency of a country other than Canada,	**(v)** en biens immeubles,
(viii) rights or options to acquire or dispose of any of the foregoing, or	**(vi)** en avoirs miniers canadiens ou étrangers,
(ix) any combination of the foregoing,	**(vii)** en monnaie autre que la monnaie canadienne,
…	**(viii)** en droits ou options d'achat ou de disposition de l'une des valeurs qui précèdent,
	(ix) en toute combinaison de ce qui précède,
	…

The full text of subsection 94.1(1) is Appendix B hereto.

[16] Lastly, I turn specifically to whether or not the Notes should be characterized differently for purposes of paragraph 94.1(1)(*a*) than for the *Act* as a whole.

[17] As noted in paragraph 125 of Barejo 2015:

> Paragraphs 94.1(1)(*a*) and (*b*) expressly contemplate that a "debt" may derive its value primarily from investments of the issuer or another person in other securities, commodities, real estate or currency. This is consistent with the concept of derivatives. A debt can be a derivative as can many other securities

> and obligations, including hybrid financial instruments. The concepts of debt and derivatives are not mutually exclusive.

[18] Paragraphs 126, 127 and 128 go on to address other provisions of the *Act* that recognize a derivative investment, being a financial asset the value of which is derived from the value of other property, can be debt for purposes of the *Act*.

[19] It is hard to read the offshore investment fund provision in subsection 94.1(1) otherwise.[2]

[20] The Appellant has not made any submissions in this reference, nor in the 2015 reference, that are specific to why the use of the term debt in paragraph 94.1(1)(*a*) should be different from the meaning of debt for purposes of the *Act* as a whole as set out in Barejo 2015. They have not argued that the text of section 94.1 even suggests otherwise. They have not argued that the relevant context of 94.1(1)(*a*) might be different than the *Act* as a whole. By adopting and solely relying on the record of Barejo 2015 in this second reference, both parties are treating the whole *Act* as potentially relevant context. The Appellant has not put forward any purpose of section 94.1 or the offshore investment fund rules which might warrant a different analysis. If there is any such argument to be made relating to the text, context or purpose of section 94.1 the offshore investment fund rules or the FAPI régime, it is not obvious to me from reading that section within the OIF rules and the FAPI régime.

[21] The Appellant has not provided any evidence of its intention at the time of acquiring the Notes, nor the intentions of the issuers or SLT's intention, even though the parties' intentions can be relevant to a proper characterization analysis.

[22] Had the Court been informed which iteration(s) of the draft offshore investment fund legislation were current when the transactions involving the Notes were being structured and when the Notes were issued and acquired, an inference might be made as to the intended characterization of the Notes as either debt or not debt by the persons issuing them or acquiring them.

[23] The Court is tempted to draw an adverse inference against the Appellant given the absence of evidence of intention of the issuers of the Notes, the noteholder SLT, or the Appellant. The potential relevance of the parties' intentions when issuing and acquiring the Notes and of the then "applicable" draft legislation were highlighted in Barejo 2015, as well as in the first stage of the motion for this

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[2] In arguing Barejo 2015, the Appellant described the Notes as being in substance derivatives. (Transcript, Volume III, page 172)

Follow-Up Question. Presumably, if the intentions were helpful to the Appellant, it would be content to succeed on the basis those intentions were considered.

[24] However, while the Respondent may not be able to provide evidence of the subjective intentions of SLT, the Appellant or the issuers of the Notes, it could have informed the Court which was the current iteration of the draft legislation those parties were dancing around when the Notes were issued. As noted above, this might well make it clear whether SLT and/or the Appellant intended debt or non-debt characterization for the Notes. If the Respondent does not want to succeed on the basis of the other parties' intentions being considered, I will not force them to by making an adverse inference against the Appellant.[3]

[25] In conclusion, no attempt has been made to show the Court that there is any reason to give the term "debt" when used in paragraph 94.1(1)(*a*) of the *Act* any different meaning than its meaning for purposes of the *Act* as a whole as determined in Barejo 2015.

Answer to the Follow-Up Question

[26] The Court determines that, for purposes of the Appellant's two appeals, the two Notes held by SLT constitute debt for purposes of paragraph 94.1(1)(*a*) of the *Act*.

Costs

[27] Costs are left to the trial judge, subject to the Court exercising its discretion if written submissions requesting otherwise are received from the parties within 30 days.

Signed at Vancouver, British Columbia, this 4th day of October 2018.

"Patrick Boyle"

Boyle J.

[3] I recognize it is entirely possible that the Appellant and the Respondent know something that has not been shared with the Court that would lead any such evidence or information to be an unhelpful windmill for the Court to be tilting.

Appendix A

Tax Court of Canada  Cour canadienne de l'impôt

Docket: 2014-4290(IT)G

BETWEEN:

BAREJO HOLDINGS ULC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on April 21 and 22, 2015 and May 20, 2015 at Ottawa, Canada.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Guy Du Pont Brandon D. Wiener John J. Lennard
Counsel for the Respondent:	Simon Petit Philippe Dupuis Marie-Andrée Legault

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ORDER

Upon application by the parties pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)* for the determination of a question of mixed fact and law;

And upon hearing from counsel for the parties;

IT IS ORDERED THAT:

1. The Court has determined that for purposes of Appeal *2014-4290(IT)G* and Appeal *2014-353(IT)G*, the two Notes held by SLT constituted debt for purposes of the *Income Tax Act*.

2. Costs are left to the trial judge, subject to the Court exercising its discretion if written submissions requesting otherwise are received from the parties within 30 days from the date of this Order.

Signed at Ottawa, Canada, this 4th day of November 2015.

"Patrick Boyle"

Boyle J.

Tax Court of Canada  Cour canadienne de l'impôt

Docket: 2014-353(IT)G

BETWEEN:

BAREJO HOLDINGS ULC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on April 21 and 22, 2015 and May 20, 2015 at Ottawa, Canada.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Guy Du Pont Brandon D. Wiener John J. Lennard
Counsel for the Respondent:	Simon Petit Philippe Dupuis Marie-Andrée Legault

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ORDER

Upon application by the parties pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure)* for the determination of a question of mixed fact and law;

And upon hearing from counsel for the parties;

IT IS ORDERED THAT:

1. The Court has determined that for purposes of Appeal *2014-4290(IT)G* and Appeal *2014-353(IT)G*, the two Notes held by SLT constituted debt for purposes of the *Income Tax Act*.

2. Costs are left to the trial judge, subject to the Court exercising its discretion if written submissions requesting otherwise are received from the parties within 30 days from the date of this Order.

Signed at Ottawa, Canada, this 4th day of November 2015.

"Patrick Boyle"

Boyle J.

Tax Court of Canada

Cour canadienne de l'impôt

Citation: 2015 TCC 274
Date: 20151104
Dockets: 2014-4290(IT)G
2014-353(IT)G

BETWEEN:

BAREJO HOLDINGS ULC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Boyle J.

I. The Referred Question

[1] The question referred to the Court by the parties pursuant to Rule 58 is whether two contracts, entitled Notes and issued for US $998 million by affiliates of two Canadian banks and guaranteed by those banks, which are held by St. Lawrence Trading Inc. ("SLT"), an open-ended investment fund incorporated under the laws of the British Virgin Islands, constitute debt for purposes of the *Income Tax Act* (the "*Act*").

[2] This question was referred to the Court by joint application of the parties. The parties were each of the view that the determination of this question prior to a full hearing and trial could dispose of all or part of their dispute, or result in a substantially shorter hearing or in a substantial savings of costs. It appears clear that this question is a mixed question of law and fact, which is permitted under Rule 58. The evidence in this Rule 58 reference went in by way of an Agreed Statement of Facts ("ASF"), a copy of which is attached, together with two

volumes of Joint Documentary Evidence, the Table of Contents of which is attached.[1]

[3] The Appellant advocates a negative answer to the question; the Respondent is seeking an affirmative answer.

II. Contextual Background

The Appeals:

[4] The Appellant's appeals are in respect of its 2004 through 2010 taxation years. By way of broader background context only, the issue raised by the Notices of Appeal that are relevant to this reference concern whether Barejo is required to include its share of SLT's foreign accrual property income or FAPI pursuant to the section 94.1 offshore investment fund or OIF rules or the subsection 95(1) deemed interest accrual rules for "prescribed debt obligations" by virtue of SLT being a "controlled foreign affiliate" of Barejo. These provisions can apply only if the Notes in question constitute "debt obligations" in the case of subsection 95(1) or "debt" in the case of section 94.1. The French version of the *Act* uses the word "créance" for both of these terms. Prior to the hearing of this reference motion, the Crown abandoned its subsection 95(1)/12(3)/12(9)/Regulation 7000 prescribed debt obligation argument. It is understood that there are also a number of other Canadian shareholders in SLT with significant ongoing tax disputes which are proceeding separately from the Appellant's tax appeals.

Constraints, Limitations and Qualifications:

[5] The Court's answer will only address whether the Notes in question are debt for the purposes of the *Act*. There are certain limitations, constraints and qualifications which need to be clearly set out before continuing.

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[1] During the hearing, several additional documents relating to the EAO Notes referenced in the principal Notes in question were also provided to the Court jointly by the parties.

[6] The key constraint, limitation or qualification on the Court's ability to answer the reference question as framed is that it asks if the Notes are debt for purposes of the *Act*.

[7] Firstly, to answer such a broad question it would be necessary to presume or to be satisfied that the word debt, and similar words such as indebtedness, debtor, debt obligation, et cetera, has the same meaning in each of the many provisions of the *Act* in which it is used without being defined. That is not necessarily the case. It is certainly possible that there may be some differences to the meaning of the term, depending upon the surrounding text and overall context of a particular provision or régime in the *Act*. The Court does not herein propose to preclude that as a possibility.

[8] Secondly, as a general principal, the provisions of the *Act* apply to transactions, contracts and relationships that are most often the subject of provincial legislative jurisdiction. The proper characterization of a commercial, contractual, business, work, or family relationship for purposes of the application of the federal Act will generally need to be determined in accordance with, or least after considering, the provincial law applicable to the relationship or transactions.

[9] This limitation is compounded by the fact that Canada is a bijural common-law/civil law country and, in this case, the Appellant has some direct or indirect connections to the province of Quebec.

[10] It is not clear that there is a federal meaning of the concept of debt, and neither of the parties asked the Court to adopt one. There is arguably some support in the Supreme Court of Canada decision in *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.* [1999] 1 S.C.R. 10[2] for the proposition that a common-law term used in the *Act*, like "charity" in that case, could or should perhaps be recognized to have a uniform federal meaning that may not accord precisely with provincial meanings. I was not asked to and do not propose to take that route in this reference.

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[2] See Justice Gonthier's dissenting reasons at paragraph 28.

[11] The Court's answer to the question therefore does not preclude the possibility that in different or more particularized circumstances, the characterization of an obligation or relationship as debt could be further influenced by applicable provincial law.

[12] This last limitation would be even further compounded by the fact that, in this particular case, the Notes themselves are expressly to be governed by and interpreted and enforced in accordance with the laws of England, as are the two Note Purchase Agreements. No expert evidence was provided to the Court on the English law applicable to the Notes or other agreements, or their interpretation or enforcement. This generally means that the Court is to assume that English law thereon is the same as Canadian law.[3]

[13] In short, the Court in this case is answering the particular question referred to it as best it can. However, the general meaning ascribed to the term debt herein will not necessarily apply in all cases. In the hearing of any other particular case, this Court may give a somewhat different or more nuanced meaning to the term debt depending upon the text and context of a particular provision or régime in the *Act*, specific provincial or other applicable laws that are relevant to the interpretation of a contract or the characterization of a relationship, or the possible relevance of purpose, objective or intention to the application of the provision or the interpretation or characterization of the contract or relationship, among other things.

The FAPI and OIF Rules:

[14] A brief general summary of the contextual background for the existence of the Notes should be set out as this will assist the parties and other readers to situate this reference within the pantheon of Canadian legislation, jurisprudence and ongoing litigation involving offshore investment income.

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[3] To the extent that applicable Canadian law might be Quebec provincial law, it can be noted that Article 1425 of the Civil Code of Quebec suggests that in interpreting a contract, the common intention of the parties may be more significant than adherence to the literal meaning of the words of the contract chosen by the parties.

[15] The taxation years in question were all during the decade in Canada in which the Canadian tax rules relating to foreign-sourced income was in a most unsettled and unclear state. Changes to the *Act*'s approach to the taxation of foreign sourced non-business income were announced, released in draft, revised, and replaced, sometimes with and sometimes without full grandfathering rules, and sometimes seemingly retroactively – or at least retrospectively. Indeed, witty tax observers were known to note that the announced rules in some form or another might become statute-barred in advance of being passed by Parliament. Others would observe that this did not reflect well on Canada and might be more expected of a banana republic or a tin-pot dictatorship than a first world G7 OECD parliamentary democracy. At times, it appeared that the necessary clarity, consistency and predictability of Canadian tax legislation might fall victim to seemingly inexplicable machinations, contortions and disingenuities.[4]

The Reorganization:

[16] The Appellant was a shareholder in GAM Diversity Inc. ("GAM Diversity"), a British Virgin Islands open-ended investment company, along with other Canadian and non-resident investors. The assets of GAM Diversity consisted primarily of interests in hedge funds and mutual funds. GAM Diversity's investment manager was Global Asset Management ("GAM"), an independent third party Bermuda corporation.

[17] GAM Diversity was reorganized in anticipation of announced Canadian tax changes to come into effect in 2002 that would have had substantial adverse tax consequences for Canadian shareholders of GAM Diversity, and which could in turn have led to redemption and liquidity issues for the fund itself as Canadians held approximately 49% of its shares.

[18] In essence, in late 2001 the non-Canadian shareholders of GAM Diversity exchanged their shares for shares of a new similar investment company which ended up holding the non-resident shareholders' pro-rata share of GAM Diversity's underlying assets. GAM Diversity was left wholly-owned by Canadians and continued to hold the Canadian shareholders' pro-rata share of

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[4] Greater cynics posited that another possible contributor to this saga was the fact that the failure to pass a fiscal or money bill by Parliament could be considered a motion of confidence.

GAM Diversity's underlying assets. GAM Diversity was then renamed St. Lawrence Trading Inc.

[19] SLT then sold all of its assets to non-resident affiliates of The Bank of Nova Scotia ("BNS") and The Toronto-Dominion Bank ("TD"). Each of Scotiabank (Ireland) Limited and TD Global Finance purchased one-half undivided co-ownership interests in SLT's assets.

[20] SLT then used the sales proceeds of US $996 million[5] to purchase one of the Notes from each of two other non-resident affiliates of BNS and TD, Bank of Nova Scotia International Limited and Toronto Dominion International Inc. TD and BNS guaranteed the obligations of their affiliates under the Notes.

[21] As described in greater detail below and in the ASF, the Notes purchased by SLT from the TD and BNS affiliates remained very much intertwined, legally and economically, with the former SLT asset pool sold to the other TD and BNS affiliates. Further, the former SLT asset pool was required by the agreements entered into between SLT, the Canadian banks[6] and the bank affiliates, to continue to be managed by GAM.

[22] This reorganization summary is set out only by way of background factual and contextual history to the transactions giving rise to the Notes. While it may or may not be relevant if the appeals proceed to trial, it is not directly relevant to the Court's answer to the reference question.

[23] Since the reorganization, the Notes have been SLT's principal, and only material, assets.

III. The Notes and the Former SLT Assets

[24] The two Notes each bear the same features, terms and conditions.

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[5] It can be noted this would have been the equivalent of approximately CAD $1.5 billion at that time. It can also be noted that between that time and the end of the years in question, the value of the Canadian dollar to the US dollar ranged remarkably.

[6] One or more of the Canadian banks' affiliates may themselves have been a foreign bank.

[25] Each Note was issued pursuant to a Note Purchase Agreement between SLT and the bank affiliate issuer of the Note, and the Notes are cross-defaulted to the Note Purchase Agreements. In the Note Purchase Agreement, SLT represents and warrants that the reconstruction of GAM Diversity (SLT) (which included the reorganization described above, the sale of the SLT assets to the bank affiliates, and the issuance and purchase of the Notes) had been duly completed in the manner set forth in the Circular issued by GAM Diversity (SLT) proposing and recommending it. That Circular describes the Notes as Total Return Linked Notes. A Term Sheet for the Notes is attached thereto. It describes the issue price of the Notes[7] as their Principal Amount. It specifies that no interest will be payable (except in the case of default); it does not carry on to specify that no other forms of distributions will be made. It specifies that the Notes are to rank *pari passu* with all unsecured obligations of the issuer.[8] The Circular describes the amount payable to settle the Notes upon maturity or termination as the value (or realized proceeds) of the underlying pool of assets acquired by the other bank affiliate from SLT upon the reorganization. The Circular called for both a Note and a Note Indenture to be part of the closing documents. Note Indentures were not put in, or addressed in, evidence on this reference.[9]

[26] The terms of the Notes themselves describe them as Notes "issued" that the bank affiliate "issuer" "promises to settle". Unlike the Circular and the term sheet for the Notes, the Notes do not refer to a Principal Amount but to an Issuance Amount. The provision in the Notes allowing for Additional Notes refers to "additional principal being available under the Notes and Additional Notes". The Notes specify that no interest is payable prior to maturity or default; they do not use any non-debt language respecting the absence of distributions.

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[7] The Notes' issue price varies somewhat in amount between the Circular and the Notes themselves, which appears to reflect changes in values of SLT's underlying assets during the interim period.

[8] The 2004 SLT Prospectus in evidence similarly describes the Notes' non-interest bearing nature and *pari passu* ranking.

[9] The Circular also required SLT's counsel to provide a legal opinion to the banks and their affiliates that "in its reasonable judgment, the primary purpose of the transaction is not a scheme to illegally avoid paying tax".

[27] The Notes specify that they rank *pari passu* with the issuers' "other unsecured obligations". The definition of *pari passu* in the Notes only deals with debts and the word "debt" is used six times in that definition.

[28] The Notes are by their terms to be "guaranteed" by the banks themselves as "guarantors". Under the terms of the Guarantee Agreements, the guarantor "will be liable ... as if it were the sole principal debtor and not merely as surety". The Guarantee Agreement provides an indemnity in addition to the Guarantee, which indemnity provides that if any amount is not recoverable under the Guarantee it will "nevertheless be recoverable from [the Guarantor] as if it were the sole principal debtor". The Guarantor's obligations are to rank *pari passu* with the Guarantor's other unsecured and unsubordinated obligations; and *pari passu* is given the same meaning in the Guarantee Agreements as its definition in the Notes themselves.

[29] The Canadian banks had capital adequacy regulatory concerns with respect to the possibility of the underlying reference assets including investments in any single fund exceeding specified percentages. The transactions did not impose a blanket restriction but set out a parallel work-around structure integrated into the transactions that involved another special purpose entity becoming the excluded assets owner. For these purposes, the terms of the Notes define the excluded assets owner's parallel notes as EAO Notes, being "a debt obligation issued by" that entity. The workaround transaction agreements described the parallel notes as a "debt obligation, the value of which is linked to the reference assets acquired and held by" the special purpose entity. They also title any parallel note as an equity-linked note and describe it as having a principal amount that reflects underlying asset values.

[30] The Notes include specific provisions that give the bank affiliate issuers of the Notes early termination rights that may be triggered upon any direction from the Office of the Superintendent of the Financial Institutions (OSFI) or other bank regulatory authority directing the banks, the issuers, or the bank affiliate holding the assets to adopt a capital treatment for the transaction that is different than that the bank and their affiliates intended. It is not known by the Court how these transactions were recorded for bank regulatory purposes. For financial statement purposes, the issuers recorded them on their balance sheet under current liabilities as equity-linked notes. In the notes to these financial statements, they

are further described as non-interest bearing equity-linked notes issued by the bank affiliate.[10]

[31] SLT, in its financial statements, records the Notes under assets on its balance sheet. In the first year following the reorganization, they are recorded as Notes.[11] In the later years' financial statements in evidence, they are described as available for sale investments.

[32] The Notes have a maturity date of November 30, 2016, 15 years after their issue. Maturity could be earlier in the event of termination events. SLT had the right to terminate at any time for any reason whatsoever, however, that was only upon 367 days' notice. The other early termination rights of the issuers and SLT were triggered by adverse changes which included, in the case of the issuers, the value of the reference assets dropping below specified tolerances, and included in the case of SLT, the other issuer's Note being terminated early. These other early termination rights when exercised, subject to thirty-day cure periods for issuer-triggered terminations, resulted in an immediate early maturity date requiring settlement of the Notes. The Notes and related agreements also had limited redemption rights, put rights and a line a credit to provide a limited degree of liquidity to SLT.

[33] There is no stated or fixed amount payable when the Notes are to be settled upon maturity or termination. Nor is there a formula or a method set out for ascertaining the amount payable when due to be settled upon maturity or termination that can produce an ascertainable amount prior to those events happening. The method for fixing the amount payable by the issuer of the Notes to SLT as purchaser and holder of the Notes to settle the Notes is, in essence, simply the value of the underlying Reference Assets. Under the relevant agreements, the Reference Asset value is required to be calculated and communicated to SLT weekly. Appellant's counsel acknowledged that, in accordance with the provisions of the Notes and related agreements, the amount payable to settle the Notes will be wholly ascertainable and able to be precisely

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[10] It goes on to disclose that this is hedged with a total return swap with its affiliate that holds the assets. The total return swaps and related documents are not in evidence.

[11] The notes to these financial statements describe the reorganization and describe the Notes as consideration paid for the transferred assets.

determined by arithmetic calculation whenever payment of the Notes may be required.[12]

[34] The Notes and relevant related agreements are clearly and expressly designed to track the value of the underlying assets transferred from SLT at the outset as those assets effectively remain an investment fund that continues to be actively managed by GAM. The make-up of these Reference Assets is not any way fixed or static; they are actively managed, and their make-up and their value can be expected to differ significantly, but not predictably, upon maturity or other payment obligation arising as compared with the assets originally transferred from SLT to the issuers' affiliates when the Notes were issued.

[35] The terms of the Notes are such that they derive their value throughout from the performance of the underlying Reference Assets (and of course the creditworthiness of the two Canadian banks involved). The amounts payable under the Notes are clearly directly derived from and directly linked to the performance and values of the underlying Reference Assets.

[36] The Notes require that, until the Notes' maturity, the Reference Assets shall be managed by GAM (or its successor appointed by SLT) in accordance with the Reference Assets Management Agreement ("RAMA"). The Notes and the RAMA permit the investment manager to dispose of Reference Assets and acquire new Reference Assets. While there are certain specific restrictions on permitted investments, the investment manager generally has broad discretionary scope to trade the Reference Assets. The Reference Assets could be described as a multi-manager fund with GAM investing in other managed investment funds.

[37] The composition of the Reference Assets would therefore constantly fluctuate over time. The value of the Reference Assets will also constantly fluctuate depending upon the performance of the individual funds comprising the Reference Assets from time to time.

[38] The Notes specify how the value of the Reference Assets is calculated for this purpose and requires GAM to calculate that amount each Monday throughout

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[12] However, it was the Appellant's position that the obligations under the Notes only "crystallized" as debt once payment was actually due.

the term of the Notes and on any maturity date. This is presumably used for a number of purposes including the manager's fees, the banks' fees, monitoring compliance with investment restrictions and potential events of default, and considering put rights and termination rights. Most importantly it is used to determine the amount payable to settle the Notes.

[39] The Notes provide that the amount payable by the issuers to settle the Notes upon maturity (including early maturity arising from termination) is cash in an amount effectively reflecting either (i) the value of the Reference Assets at that time, or (ii) in certain cases, the sale proceeds of an orderly disposition of the Reference Assets.

IV. Analysis

[40] The question posed jointly in this Rule 58 reference motion is:

> Whether the two contracts held by SLT, a non-resident entity, constitute debt for the purposes of the *Income Tax Act*?[13]

[41] It is clear from the terms of the Notes and related documents that these Notes evidence what can be called a hybrid investment and the Notes to be characterized are themselves hybrid contracts or obligations.[14] They have some of the characteristics of debt, such as a stipulated interest rate which in this case is nil. At the same time, the amount payable or repayable upon maturity to the Note holders is described in terms that are quite far along the continuum of what one might generally expect in a common debt instrument. The Notes' value is, like most contracts, including debt, dependent upon the creditworthiness of the counter-party issuers as well as the guarantors. Distinct from credit or performance risk, the value of the Notes at any time clearly derives from the value of the underlying Reference Assets. The value of the Reference Assets is calculated weekly. However, one cannot compute the value of the Notes at any time other than scheduled or early maturity directly by reference to the underlying asset values. SLT's assets prior to the reorganization giving rise to the Notes were its investments in a GAM-managed fund of funds, or more

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[13] The two contracts referred to are the Notes. SLT is St. Lawrence Trading Inc.

[14] It was acknowledged that the Court could take judicial notice of the existence of hybrids and derivatives in capital markets.

specifically a GAM-managed fund of multi-manager funds. The reorganization gave rise to the Notes which, from an economic investment perspective, appear to create a synthetic GAM-managed fund of funds.

[42] It is not at all immediately clear that the Notes constitute a debt obligation in the way a typical or traditional bond, debenture or promissory note does. The Notes require further review analysis and consideration.

[43] The Notes are carefully crafted documents in a complicated, complex series of steps or transactions. One would think that there was a desire and intention that the Notes either be debt or be something other than debt. It could also be possible that it was intentionally unclear. I do not know from the evidence on this reference. Similarly, one might think that under whatever variation of the then-proposed new tax changes, it might have been important to be debt or to not be debt and thus perhaps be able to infer an intention not provided. However, the information regarding which iteration or variation of the proposed tax changes, or which ones, were announced to be applicable or under consideration at the time of the SLT reorganization was not provided to the Court, nor was such a position put forward by either party.

[44] The question is therefore left to be answered by first identifying what the general meaning of debt is when used in the *Act* without being defined. The second step will be to decide whether the Notes sufficiently meet that meaning or definition.

The Interpretation of Undefined Terms in the *Act*:

[45] The first step in this analysis should begin with identifying the essential elements of the established and accepted legal meaning of the term debt under applicable Canadian law.

[46] The Supreme Court of Canada in *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36 wrote:

> 28 From the legislative material accompanying the manufacturing and processing incentives, it is clear that Parliament's objective was to encourage the manufacturing and processing sector's ability to address foreign competition in

the domestic and international markets and foster increased employment in that sector of the Canadian economy. Furthermore, it is clear that Parliament did not wish to define exhaustively the scope of manufacturing or processing, words which do not have distinct legal meanings, but left it to the courts to interpret this language according to common commercial use. The language in Hansard is not helpful as to the meaning which Parliament intended to subscribe to the words "for sale or lease". It neither dictates, nor precludes, the application of common law sale of goods distinctions.

29 Notwithstanding this absence of direction, the concepts of a sale or a lease have settled legal definitions. As noted in Crown Tire and Hawboldt Hydraulics, Parliament was cognizant of these meanings and the implication of using such language. It follows that the availability of the manufacturing and processing incentives at issue must be restricted to property utilized in the supply of goods for sale and not extended to property primarily utilized in the supply of goods through contracts for work and materials.

30 It is perhaps true, as Will-Kare submitted and as noted in Halliburton, supra, at p. 5338, that the use of sale of goods law distinctions sometimes yields the anomalous result that the provision of services in connection with manufactured and processed goods will disqualify property that would, but for the services, qualify for the incentives. Nevertheless, it remains that in drafting the manufacturing processing incentives to include reference to sale or lease, Parliament has chosen to use language that imports relatively fine private law distinctions. Indeed, the Act is replete with such distinctions. Absent express direction that an interpretation other than that ascribed by settled commercial law be applied, it would be inappropriate to do so.

31 To apply a "plain meaning" interpretation of the concept of a sale in the case at bar would assume that the Act operates in a vacuum, oblivious to the legal characterization of the broader commercial relationships it affects. It is not a commercial code in addition to a taxation statute. Previous jurisprudence of this Court has assumed that reference must be given to the broader commercial law to give meaning to words that, outside of the Act, are well-defined. See Continental Bank Leasing Corp. v. Canada, [1998] 2 S.C.R. 298. See also P. W. Hogg, J. E. Magee and T. Cook, Principles of Canadian Income Tax Law (3rd ed. 1999), at p. 2, where the authors note:

> The Income Tax Act relies implicitly on the general law, especially the law of contract and property. ... Whether a person is an employee, independent contractor, partner, agent, beneficiary of a trust or shareholder of a corporation will usually

> have an effect on tax liability and will turn on concepts contained in the general law, usually provincial law.

32 Referring to the broader context of private commercial law in ascertaining the meaning to be ascribed to language used in the Act is also consistent with the modern purposive principle of statutory interpretation. As cited in E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, 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 Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 21. The modern approach to statutory interpretation has been applied by this Court to the interpretation of tax legislation. See 65302 British Columbia Ltd. v. Canada, [1999] 3 S.C.R. 804, at para. 5, per Bastarache J., and at para. 50, per Iacobucci J.; Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536, at p. 578.

33 The technical nature of the Act does not lend itself to broadening the principle of plain meaning to embrace popular meaning. The word sale has an established and accepted legal meaning.

34 Will-Kare's submissions essentially advocate the application of an economic realities test to the interpretation of what constitutes a sale for the purpose of the manufacturing and processing incentives. However, as noted above, in the absence of express legislative direction to the contrary, I view the incentives' reference to the concepts of sale and lease as importing private law distinctions. As such, the provisions at issue are clear and unambiguous and reference to economic realities is not warranted. See Shell Canada Ltd. v. Canada, [1999] 3 S.C.R. 622, at para. 40.

35 It would be open to Parliament to provide for a broadened definition of sale for the purpose of applying the incentives with clear language to that effect. Given, however, the provisions merely refer to sale, it cannot be concluded that a definition other than that which follows from common law and sale of goods legislation was envisioned.

[Emphasis added]

[47] Further, the Supreme Court of Canada wrote the following year in *Backman v. Canada*, 2001 SCC 10:

> 17 The term "partnership" is not defined in the Act. Partnership is a legal term derived from common law and equity as codified in various provincial and territorial partnership statutes. As a matter of statutory interpretation, it is presumed that Parliament intended that the term be given its legal meaning for the purposes of the Act: N. C. Tobias, *Taxation of Corporations, Partnerships and Trusts* (1999), at p. 21. We are of the view that, where a taxpayer seeks to deduct Canadian partnership losses through s. 96 of the Act, the taxpayer must satisfy the definition of partnership that exists under the relevant provincial or territorial law. This is consistent with Interpretation Bulletin IT-90, "What is a Partnership?" dated February 9, 1973. It is also consistent with the approach taken to the interpretation of the Act by a majority of this Court in *Will-Kare Paving & Contracting Ltd. v. Canada*, [2000] 1 S.C.R. 915, 2000 SCC 36, at para. 31. It follows that even in respect of foreign partnerships, for the purposes of s. 96 of the Act, the essential elements of a partnership that exist under Canadian law must be present: for a similar approach, see *Economics Laboratory (Canada) Ltd. v. M.N.R.*, 70 D.T.C. 1208 (T.A.B.).
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> [Emphasis added]

The Appellant's position:

[48] The Appellant's principal position is that the generally accepted commercial law meaning of debt is (i) an obligation to pay a sum certain or sum reducible to a certainty, and (ii) that a debt cannot exist unless and until the amount to be paid is certain or can be made certain from facts which are known or knowable.

[49] There is considerable support for the first part of the Appellant's position. While helpful, it is not determinative. The supporting case law developed out of procedural rules not substantive concerns, namely whether an amount claimed in the court was an action for liquidated damages, sometimes referred to as an action for debt, or required an assessment of damages and was therefore an action in damages. That is, these cases largely characterize claims under contracts and do not characterize contracts. It can be noted in the case of the Notes in question that it is very clear that, at any time that a payment obligation could arise upon maturity, termination or default, or that an action for payment could be taken by the holder against the issuer, the amount payable under the terms of the Notes was ascertainable and would not require any further assessment by a Court.

[50] As described below, some of this case law is capable of being read in a manner that is unhelpful to the Appellant.

[51] The Court does not find the Appellant's arguments in support of its position well-supported or persuasive. There was little persuasive support put forward by the Appellant for the second proposition that a debt cannot exist until the amount payable is ascertainable to a specific amount. In the circumstances of these Notes, if the Appellant's position is correct, it would mean that the Notes are not debt prior to maturity even though they would clearly be debt for purposes of this test upon maturity. There is little to no support for an instrument, obligation or contract that is not debt prior to maturity becoming debt upon maturity. This is different than a claim under a contractual obligation that is not a debt being a claim in debt. None of the cases referred to by the Appellant, including the tax cases, set out or applied the rule in such circumstances or to such an extent.

[52] In *Noble v. Lashbrook,* [1918] SJ No. 98, 40 DLR 93 (Sask CA) the Court was characterizing the action as being a debt or an action in damages for purposes of determining whether, after finding for the claimant provider of a threshing machine in respect of its use by a farmer prior to return, the judge was correct to have awarded costs using the Court's Small Debt Scale rather than the greater District Court scale. It was not characterizing the note issued by the farmer in payment of the threshing machine; indeed that note was invalid which is what gave rise to the claim of compensation for use of the machine. The authors and cases relied upon by the Saskatchewan Court of Appeal are also only addressing the characterization of actions before a court. In paragraph 14, the Court wrote:

> A sum is considered certain when it can be made certain. By this, I take it, is meant where it can be determined by computation. If, for instance, the contract of the parties furnishes a specific mode or rule of payment, or if its terms furnish the means of ascertaining the exact amount due, an action for debt will lie. But where no specific sum is claimed, and neither the contract nor the averments furnish data from which the defendant can determine the amount he owes, the action, in my opinion, cannot be said to be for a "debt," within r. 4.

[53] In *Shoemaker v. Olson*, [1942] 4 DLR 430 (Sask CA), the trial judge hearing an action on an assigned loan held that the assigned obligation was not a

loan but an amount recoverable by the assignee by reason of the defendant's failure to supply the assignor, in accordance with the terms of their agreement, the horses and equipment to work six acres of land once it was cleared and broken. The Court of Appeal's decision turned solely on the fact that the assignment in question was only an assignment of debt and that the trial judge was incorrect to allow it to operate as an assignment of the claim for damages notwithstanding that a claim for damages was a chose in action that was capable of being assigned. The Court of Appeal wrote:

> In the present case however it is to be observed that the language of the above assignment is directed only to a debt and in my opinion is not sufficiently apt to convey to the plaintiff the assignor's right of action arising out of the defendant's breach of contract, for as Lord Davey says in Ogdens Ltd. v. Weinberg, (1906), 95 L.T. 567, "I desire, however, to say that in my opinion the word 'debts,' no doubt, means something recoverable by an action for debt, and nothing can be recovered in an action for debt except what is ascertained or can be ascertained. A claim for an amount which is uncertain, and cannot be adjusted in an account, cannot, I think, be justly called a 'debt'.
>
> [Emphasis added]

[54] Indeed, in this case, the broad words of Lord Davey may be read in an unhelpful manner to the Appellant as a claim under the Notes whether upon default, termination or maturity would be recoverable by way of an action for an amount which was ascertained or could then be ascertained.

[55] The Supreme Court of Canada decision in *Diewold v. Diewold*, [1941] SCR 35 does not go any further. It arose subsequent to an action on, among other things, unpaid amounts of principal and interest owing by the purchaser of an $8,000 Saskatchewan farm. The trial judge ordered possession of the farm to revert to the vendor, and provided the defaulted purchaser with the right to restore his position as purchaser upon payment of the arrears along with the right to acquire the land upon payment of the balance. The defaulted purchaser thereafter had his former debt reduced under the *Farmers' Creditors Arrangements Act* to $3,000 by the relevant tribunal. The Supreme Court of Canada was called upon to decide whether, at the time of the decision under the *Farmers' Creditors Arrangements Act,* there remained a debt to be compromised or rearranged under that Act. The Supreme Court held there was not, with the result that the decision under that Act subsequent to the trial judgment was of no

effect in the event the purchaser sought to restore his rights as purchaser in accordance with the trial judgment. The Supreme Court of Canada wrote:

> The word "debt" is not defined by the Farmers' Creditors Arrangement Act or the Bankruptcy Act, but subsection 2 of section 2 of the Farmers' Creditors Arrangement Act provides that expressions in the Act shall be given the same meaning as in the Bankruptcy Act, unless it is otherwise provided or the context otherwise requires. The word "debt" is defined in Stroud's Judicial Dictionary as "a sum payable in respect of a liquidated money demand, recoverable by action," and I think that this definition can be accepted as applicable here.

Note again, the breadth of the quoted definition in the last sentence can be read as accurately describing the Notes, as it appears that virtually any sum payable under the Notes would be recoverable by way of an action for a liquidated money demand. There is no timeframe necessarily implied in this passage that takes the reader to a point in time prior to an action for recovery.

[56] In *R. v. Bowen* 2013 BCPC 0322, which is the Appellant's "modern era" case, the Court was called on to decide whether an action by the Province of British Columbia for overpayments of disability benefits to the individual was a claim for a debt for purposes of the Court's small claims rules relating to default orders. In finding that it was, the Court wrote:

> 12 The apposite definition of "debt" provided by the *Canadian Oxford Dictionary* is "... a sum of money owed ...". The word has been judicially defined as: "... a sum payable in respect of a liquidated money demand, recoverable by action ...": *Diewald vs Diewald* [1941] SCR 35; *Walsh Estate vs British Columbia (Minister of Finance)* [1979] 4 WWR 161; 13 BCLR 255. Unless the claimant alleges that a specific sum of money, capable of arithmetic calculation, is owing, the claim is not one for a debt.

This decision does not add anything to the above and is again clearly addressing the characterization of a claim for an amount owing as a debt for purposes of the rules of the small claims court.

[57] All of these cases concern the characterization of claims for recovery of an amount owing under contracts, not the contracts themselves. None of them apply the approach to characterize the contract prior to, or absent, the court action. Nor

does their language necessarily suggest that the same characterization analysis should or would apply to the contract prior to the court claim.

[58] In *Québec (Deputy Minister of Revenue) v. Technologies Industrielles SNC Inc.*, 2002 CanLII 41088(QC CA) the Quebec Court of Appeal reviewed a decision of the Cour du Québec addressing whether bankers' acceptances constituted debts, loans or advances included in taxable capital for purposes of the province's capital tax. In contrasting the meanings of bankers' acceptances with debt, the Court referred to the definition referred to in *Diewold* as comparing favourably to the civil law definition of "dette" before them. The Quebec Court of Appeal went on to overturn the Cour du Québec's decision and held that bankers' acceptances gave rise to a debtor/lender relationship. None of the eight reasons set out for doing so even suggested any application or reliance on the *Diewold* passage or approach or on the civil law definition of "dette".

[59] The Appellant was able to point to two federal tax cases which refer favourably to the *Diewold* passage above. In *Beament v. M.N.R.*, 69 DTC 5016 (reversed 70 DTC 6130 (SCC)), the Exchequer Court considered whether, for federal estate tax purposes, valuable shares had a lesser value at death as a result of contractual obligations which required them to be converted into substantially less cash. One argument considered by President Jackett was whether the resulting difference in value constituted a debt or encumbrance as those two types of obligations were permitted statutory deductions in computing the aggregate net value of an estate. The Exchequer Court held that these contractual obligations with the deceased's children, which limited the amount the deceased would receive for the shares, to be neither a debt nor an encumbrance. In reversing the Exchequer Court, the then Chief Justice of the Supreme Court of Canada wrote in the majority reasons that the contractual obligations reduced the arm's length value of the shares themselves. Both the majority reasons and Pigeon J.'s concurring reasons specify that it was not even argued before the Supreme Court of Canada that the obligations were either a debt or an encumbrance.

[60] In *Fingold v. M.N.R.*, 92 DTC 2011, Rip J. had to decide whether amounts advanced to, or paid to third parties for the benefit of, the shareholders were loans to which subsection 80.4(1) applied, or were advances against future reductions of capital. In the course of deciding that they were not amounts advanced or paid in respect of reductions of capital, the judge wrote:

> A debt is a sum payable in respect of a liquidated money demand. It does not include an unliquidated claim for damages.

He then footnoted *Diewold*. Rip J. paraphrases *Diewold* by reference only to liquidated demands and unliquidated claims. He did not consider, or need to consider, the issue any further as there were no terms to the advances and, if they were to be recovered at any point in time, it would have been by way of a demand or claim for the specific sum advanced.

[61] Reference was also made by the Appellant to the decision of this Court in *James McTamney & Co. Ltd. v. M.N.R.*, [1989] 1 C.T.C. 2318. *McTamney* equates the terms "debt obligation" and "créance" in Regulation 7000 with an obligation to pay a debt. It does not provide any helpful substantive guidance to the question in this reference as it was decided on the basis that no interest could accrue for tax purposes in respect of the stated interest rate on an amount loaned under a pledge that was a pawn covered by the *Pawn Brokers Act* of Ontario. Given the Ontario statutorily mandated pawn régime, this Court began from the premise that the transaction was a sum lent with interest charged therefor. The only question before the Court was how Regulation 7000 applied to such a loan at interest, if at all.

[62] In conclusion on the Appellant's principal submission, I am of the view that upon a fair reading of *Diewold* and the other cases referred to above,[15] Justice Bowlby of the Ontario Divisional Court in *Rocovitis v. Argerys Estate*, 63 OR (2d) 755 (SCJ) and Justice Houlden of the Ontario High Court in *Pizzolati & Chittaro Manufacturing Co. Ltd. v. May et al.*, [1971] 3 OR 768 (HCJ) accurately summarize the correct legal proposition which *Diewold* and similar cases support. In *Rocovitis*, Justice Bowlby wrote:

> 12 The cases advanced by counsel for the bank appear to me to establish conclusively that "debt" is a term which has a well- established judicial meaning in Canada that does not include an unliquidated claim for damages. For example, in the case of *Diewold v. Diewold*, [1941] 1 D.L.R. 561 at p. 564, [1941] S.C.R. 35, 22 C.B.R. 329, cited in Master Peppiatt's decision, Hudson

[15] As well as the other cases relied on by the Appellant at the hearing: *207053 Alberta Ltd. (Re)*, 1998 ABQB 757; *Gillette Canada Inc. v. The Queen*, 2001 DTC 895 (TCC); *GRH Ventures v. De Neve*, [1987] 37 DLR (4th) 155 (Man. CA); and *Reano v. Jennie W. (The Ship)*, [1997] FCJ No. 1719 (FCA).

> J. adopts the definition of "debt" found in Stroud's Judicial Dictionary as "a sum payable in respect of a liquidated money demand, recoverable by action". In *Pizzolati v. May*, [1971] 3 O.R. 768 at p. 770, 21 D.L.R. (3d) 656 (H.C.J.), Houlden J. states that "[t]he word 'debt' has a well-defined judicial meaning as a sum payable in respect of a liquidated money demand. It does not include an unliquidated claim for damages ...". [Emphasis added]

[63] Properly understood as such, this line of cases and reasoning cannot help the Appellant since, once the right to payment arises under the Notes, the amount owing thereon is a debt from then on. This was acknowledged by the Appellant's counsel.

[64] It can be noted that if the Appellant's position were correct, reduced to its simplest form, a Canadian dollar denominated loan of the CAD $ equivalent of US $1,000 on the advance date, requiring payment on maturity in CAD $ of the then CAD $ equivalent of US $1,000 would not be a debt. The example is not extreme; the Appellant's position is.

The Courts' Approach and Analysis:

[65] There is not a single all purpose, all encompassing, and all limiting or circumscribing legal definition of debt in Canada. Nor does one appear to be either necessary or desirable. See Dunlop, C.R.B, *Creditor-Debtor Law in Canada*, Toronto: 2nd ed., Carswell, 1995, Chapter 2 especially at pages 11 through 16, discussed below in greater detail.

[66] Similarly, when considering a hybrid financial instrument that has a duality of characteristics, some typically features or indicia of debt and others typically features or indicia of capital or equity or investment, Canadian courts have been able to decide whether it in substance reflects a debt relationship or another relationship, such as equity, whose features it also exhibits. In approaching a hybrid instrument in this manner, it is not necessary to deny its hybrid nature and decide it is wholly and solely a particular type of relationship between the parties, say debt or equity. Rather, the Court is to look to and weigh the language chosen by the parties, the parties' intentions, the surrounding circumstances, and the legislative régime in order to identify the characterization in favour of which the balance clearly tilts as being the substance or main thrust of the transaction to which the contrary indicia remain only incidental or secondary in nature. As

discussed in greater detail below, this is the approach to characterizing hybrids expressly set out in the unanimous Supreme Court of Canada in *Canada Deposit Insurance Corporation v. Canadian Commercial Bank* [1992] 3 S.C.R. 558. This was followed and applied by the B.C. Court of Appeal in *Coast Capital Savings Credit Union v. British Columbia*, 2011 BCCA 20 in deciding when "non-equity shares" were evidences of indebtedness "of the credit union", not an equity interest therein. A similar approach was essentially adopted by the Quebec Court of Appeal in *La Senza Inc. v. Deputy Minister of Revenue of Québec,* 2007 QCCA 1335 in deciding that a taxpayer's obligations under a sale-leaseback financing transaction could be characterized as a form of debt included in taxable capital for provincial capital tax purposes even though not yet due and payable.

[67] Moreover, in trying to reconcile references to derivatives in fiscal legislation with the specifics of a particular derivative entered into by a taxpayer, the Supreme Court of Canada in *Ontario (Minister of Finance) v. Placer Dome Canada Ltd.*, 2006 SCC 20 unanimously endorsed first analyzing the legislative régime, the meaning of the particular derivative (a hedge in that case) in business and accounting, and the terms of the specific derivative contract the taxpayer entered into.

[68] Dunlop in *Creditor-Debtor Law in Canada* begins by usefully trying to define what is meant by the term "debt". Five pages later, he concludes:

> The above discussion indicates that the word "debt" is not today a term of art with a clear, never changing denotation. Instead of trying to define a core meaning, it would seem better to agree with the editors of the *Corpus Juris Secundum* "[the word] takes shades of meaning from the occasion of its use, and colour from accompanying use, and it is used in different statutes and constitutions and senses varying from a very restricted to a very general one.
>
> [Emphasis added]

[69] Dunlop is unable to set out a common core Canadian meaning.

[70] In *Canadian Commercial Bank*, Justice Iacobucci writing for the Court wrote at page 588:

> 51 As in any case involving contractual interpretation, the characterization issue facing this Court must be decided by determining the intention of the parties to the support agreements. This task, perplexing as it sometimes proves to be, depends primarily on the meaning of the words chosen by the parties to reflect their intention. When the words alone are insufficient to reach a conclusion as to the true nature of the agreement, or when outside support for a particular characterization is required, a consideration of admissible surrounding circumstances may be appropriate.

And at page 589:

> 53 It is evident from reviewing the agreements in question that characteristics associated with both debt and equity financing are present. The most obvious examples are, on the one hand, ss. 8 and 13 of the Participation Agreement pertaining to CCB's indemnity towards the Participants and their ranking in the event of a winding-up and, on the other hand, the provisions of the Equity Agreement concerning the warrants granted by CCB to the Participants. Such a duality is apparently quite common in loan participation agreements. ...

And at page 590:

> 54 As I see it, the fact that the transaction contains both debt and equity features does not, in itself, pose an insurmountable obstacle to characterizing the advance of $255 million. Instead of trying to pigeonhole the entire agreement between the Participants and CCB in one of two categories, I see nothing wrong in recognizing the arrangement for what it is, namely, one of a hybrid nature, combining elements of both debt and equity but which, in substance, reflects a debtor-creditor relationship. Financial and capital markets have been most creative in the variety of investments and securities that have been fashioned to meet the needs and interests of those who participate in those markets. It is not because an agreement has certain equity features that a court must either ignore these features as if they did not exist or characterize the transaction on the whole as an investment. There is an alternative. It is permissible, and often required, or desirable, for debt and equity to co-exist in a given financial transaction without altering the substance of the agreement. Furthermore, it does not follow that each and every aspect of such an agreement must be given the exact same weight when addressing a characterization issue. Again, it is not because there are equity features that it is necessarily an investment in capital. This is particularly true when, as here, the equity features are nothing more than supplementary to and not definitive of the essence of the transaction. When a court is searching for the substance of a particular transaction, it should not too

> easily be distracted by aspects which are, in reality, only incidental or secondary in nature to the main thrust of the agreement.
>
> [Emphasis added]

[71] In conclusion on the characterization question, Justice Iacobucci wrote at 598:

> ... While indicia supporting both conclusions are present, the overall balance clearly tilts in favour of the characterization put forward by the respondents.

[72] Justice Iacobucci considered the words chosen by the parties in their agreements, the surrounding circumstances to the agreements, features or indicia or characteristics supporting a particular characterization, the wording of the specific statute in question, and the accounting treatment for the transactions.[16] He does not even consider the *Diewold v. Diewold* approach advocated by the Appellant as it principal position.

[73] In *Placer Dome* Justice LeBel wrote about the proper interpretation of tax statutes in deciding what was meant by a statutory reference to "hedging" in paragraphs 21 through 24. In looking at the taxpayer's particular hedging transaction, the Court wrote in paragraph 29:

> The transactions at issue in the present case are financial derivatives. Generally speaking, financial derivatives are contracts whose value is based on the value of an underlying asset, reference rate or index.

The Court continues on to describe the reasons parties enter into financial derivative contracts.[17]

[74] With respect to business and accounting understandings he wrote at paragraph 49:

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[16] Although in the particular case he chose not to place as much weight on the accounting treatment, he specifically went on to confirm there may be other cases where the accounting treatment could be helpful in determining the nature of a given transaction.

[17] A very good discussion of the derivatives and their nature and uses can be found in Boyle, P. *et al*, Derivatives: The Tool that Changed Finance, London: Risk Books, 2001, beginning at p. xi, and again beginning at p.1.

> It is certain that well accepted business and accounting principles are not rules of law. They should not be used to displace rules of law, as legislatures are not bound by them and may modify them as they see fit for tax purposes. They must therefore play a subsidiary role to clear rules of law. However, this Court has readily acknowledged that "it would be unwise for the law to eschew the valuable guidance offered by well-established business principles" where statutory definitions are absent or incomplete. See *Canderel Ltd. v. Canada* [1998] 1 S.C.R 147 at paragraph 35.

[75] Finally, the Court rejected the argument that the absence of a bright line test for identifying hedging transactions for purposes of the *Mining Tax Act* would lead to intolerable uncertainty and taxpayers' inability to effectively predict their tax situations and order their affairs intelligently as not compelling because taxpayers can and do make such determinations on a principled basis.

[76] In *Coast Capital Savings Credit Union,* the BC Court of Appeal specifically relied upon the Supreme Court Canada's approach in *Canadian Commercial Bank.* It noted that the Ontario Court of Appeal did the same in *Royal Bank of Canada v. Central Capital Corp.*, (1996) 27 OR (3d) 494, and had similarly determined the substance of the relationship in accordance with *Canadian Commercial Bank.*

[77] In *Coast Capital* the BC Court of Appeal wrote:

> 54 The term "indebtedness" and its root "debt" may be used narrowly or broadly. Thus whether they appear in the BIA (*Interclaim Holdings v. Down* 2001 BCCA 65 at paras. 29-32), the *Companies' Creditors Arrangement Act* (*Re Canadian Airlines Corp.* (2001) 92 Alta. L.R. (3d) 140 at paras. 20-27), the Treaties of Peace Act, S.C. 1919 (2nd sess.), c. 30, (*The Custodian v. Passavant* [1928] S.C.R. 242 at 249-54), or the *Court Order Enforcement Act*, (*Taxsave Consultants Ltd. v. Pacific Lamp Corp.* (1990) 52 B.C.L.R. (2d) 128 at 132-33) to name but a few, they will be given meaning consistent with their context: see *Barrette v. Crabtree Estate* [1993] 1 S.C.R. 1027 at 1048-9.
>
> [Emphasis added]

[78] The Court in *Coast Capital* looks at the legislation in question and follows the *Canadian Commercial Bank* mandated approach in determining the transaction's legal substance.

[79] In *La Senza*, the Quebec Court of Appeal looked at the use of the words loans and advances in the definition of taxable capital from a unified textual, contextual and teleological approach. The Court specifically looked to the objective of the tax on taxable capital (described in the literature as the total internal and external financing of the company) in interpreting the phrase loans and advances extended directly or indirectly to the company. The Court looked at thirteen pages of dictionary and legal dictionary definitions of the terms.[18]

V. The Undefined Use of the Term Debt or Debt Obligation et cetera in the *Act*

[80] The *Act* does not contain a general definition of debt for purposes of the *Act*. Counsel for both parties each referred to a number of specific provisions of the *Act* which use debt-related terms. Consistent with the existing Canadian approach to determining whether an apparently hybrid financial instrument[19] meets the meaning of a term used in a statute, in answering the reference question I will begin by considering the use of debt and debt-related terms in the *Act*.

[81] However, answering the reference question requires a consideration of the meaning of debt for purposes of the *Act* as a whole. The text of the definitions of debt-related terms for specific purposes or a specific provision can only be of

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[18] Another Supreme Court of Canada decision was relied upon by the Respondent. In *Reference re Securities Act*, 2011 SCC 66 at paragraph 40 the Court wrote: The term "securities" designates a class of assets that conventionally includes shares in corporations, interests in partnerships, debt instruments such as bonds and financial derivatives ... ." In French; Le terme "valeurs mobilières" désigne une classe d'actifs qui comprend, par convention, les actions de sociétés, les intérêts dans des sociétés par actions, les titres de créance comme les obligations et les instruments financiers dérivé ... ." The Respondent urged the Court to treat the phrase "debt instruments such as bonds and financial derivatives", in French "les titres des créances comme les obligations et les instruments financiers dérivés", as a statement by the Supreme Court of Canada that financial derivatives are debt instruments just as much as bonds are. The Court is not prepared to answer the reference question based on the prevalence or acceptance of the "Oxford comma" by the Supreme Court of Canada, certainly not absent a clear style guide mandating or negating its use, and certainly without an understanding of the Oxford comma issue in written French, whatever it may be called in that language.

[19] Which a derivative can be: see Boyle *et al.* Derivatives, above, Footnote 17 at page 1 paragraph 1.

some assistance. It can be noted most of these specific provisions use the concept of debt, debtor or indebtedness in the definition and thus raise the same question.

[82] The proper context for the Court to consider in interpreting the use of the term debt in the *Act* must logically be the *Act* as a whole. Thus, the nature of the reference question essentially largely melds the textual and contextual analysis, and the Court will look to the texts and context of the provisions of the *Act* which use debt-related terms. Similarly, the purposes of the *Act* are many and range from raising revenue to implementing particular economic or social policies. A purposive analysis can largely only be done in a helpful way when considering specific provisions or régimes within the *Act* and does not lend itself very practically to the broad scope and mandate of the reference question.

[83] A review of the provisions of the *Act* for the terms debt, indebtedness, principal (used as a noun), principal amount, interest (used as a return not a holding) and note turns up literally hundreds of uses.

Indebtedness:

[84] There are numerous provisions of the *Act* which use the term indebtedness. It is most often used in a very broad sense.

[85] The phrase "loan or any other form of indebtedness" appears in paragraph 96(2.2)(*d*) dealing with partnership at-risk amounts and in subsections 143.2(2) and (9) dealing with tax shelters and limited-recourse debt.

[86] The phrase "loan or other indebtedness" is used in subsection 91(4.4) dealing with series of transactions for FAPI purposes in section 94 dealing with non-resident trusts in the definition of "resident portion", and in subsection 146.2(4) dealing with tax-free savings accounts or TFSAs.

[87] Paragraph 135.1(4)(*b*) dealing with cooperatives and section 206.3 dealing with disability savings plans both refer to "indebtedness of any kind".

[88] The use of the term "indebtedness" in subsection 122.1(1) dealing with "qualified REIT property" is clearly broad enough to include bankers' acceptance financings.

[89] There are several sections of the *Act* which use "indebtedness" to describe an unpaid purchase price or other extension of credit, in contrast to a loan describing an advance of money. See for example, section 207.05 *et seq* dealing with advantages extended by financial institutions. While the *Act* generally speaks of indebtedness being "issued", as in subparagraph 88(1)(c.4)(ii) dealing with amalgamations, when used in this more distinctive fashion indebtedness "arises" or "is incurred": see subsection 40(3.13) dealing with artificial transactions and subsection 90(8) dealing with foreign affiliate loans.

[90] Indebtedness has a "principal amount" in subparagraph 53(2)(*c*)(1.3) dealing with the adjusted cost base (acb) of partnership interests, and in subsection 248(34) dealing with limited-recourse debt.

Principal/Principal Amount:

[91] It appears from a review of the *Act* that, with limited exceptions, the words "principal amount" and "principal" are only ever used in connection with circumstances involving debts.

[92] As mentioned above, paragraph 53(2)(*c*) and subsection 248(34) refer to the "principal amount" of "indebtedness". In addition, subsections 143.2(7), (11) and (13) dealing with tax shelters and limited recourse debts refer to the "principal of an indebtedness" , and subsection 143.2(9) refers to both the "principal amount" of an "indebtedness" and the "principal amount" of a "loan or any other form of indebtedness". Subsection 111(12) refers to the "principal" owed under a "foreign currency debt" with respect to the computation of capital losses.

[93] Subsections 16(2) and (3) dealing with original issue discounts refer to the "principal amount" of a "bond, debenture, bill, note, mortgage or similar obligations".

[94] Paragraph 20(1)(*f*) dealing with the deductibility of shallow discounts, and subsection 214(8) dealing with Part XIII non-resident withholding tax on interest, refer to the "principal amount" of any "bond, debenture, bill, note, mortgage, hypothecary claim or similar obligation" .

[95] Subsection 47(2) dealing with identical properties refers to the "principal amount" of identical "bonds, debentures, bills, notes or similar obligations".

[96] Section 51.1 dealing with convertible debt obligations refers to the "principal amount" of a "bond, debenture or note".

[97] Section 80.1 dealing with expropriations refers to the "principal amount" of "bonds, debentures, mortgages, hypothecary claims, notes or similar obligations".

[98] Paragraphs 137.1(1)(*b*) and (3)(*b*) and subparagraph (*a*)(v) of the definition of "investment property", as well as section 137.2, all dealing with deposit insurance corporations, refer to the "principal amount" of "bonds, debentures, mortgages, hypothecary claims, notes or other similar obligations".

[99] The limited exceptions in which the *Act* refers to the principal amount of something other than a debt are:

(i) with respect to distress preferred shares, which are generally treated like debt and not equity in the context of the *Act*, in section 61.3 and section 80.02. It can be noted that paragraph 80.02(2)(*a*) deems the amount for which the share was issued to be its principal amount; that is, the share is not otherwise presumed to have a principal amount;

(ii) subparagraph 94(15)(*c*)(ii), part of an anti-avoidance provision for non-resident trusts (NRTs), refers to the "principal amount outstanding" of a "liability of the trust". It can be noted that in French this provision refers to "le principal impayé ... d'une dette de la fiducie"; and

(iii) subparagraph (*d*)(iii)(B) of the definition of "testamentary trust" in section 108 of the *Act* refers to the "principal amount" of a trust's "debt or other obligation"; however it is clear from subparagraph (A) that such a debt or other obligation had to arise because of a payment made on behalf of the trust by the person to whom the debt or other obligation is owed.

[100] It is clear from the *Act*'s use of the terms "principal" and "principal amount" that their use in an obligation is highly suggestive and indicative of a debt obligation for purposes of the *Act*.

Interest:

[101] It does not appear that the *Act* uses the term "interest", or "interest payable", or "interest on" to describe a distribution or return except in provisions dealing with debt relationships, or deemed to be debt-like relationships such as the term preferred share provisions, or with respect to amounts payable or owing under the *Act*. These terms are used in a large number of provisions of the *Act* in precisely such contexts.[20]

[102] The only exceptions appear to be:

(i) with respect to "any interest" payable on "any life insurance policy dividends" in the definition of a policy's "cash surrender value" in subsection 148(9) as a function of policy loans and policy dividends. It can be noted that insurance policy dividends are a unique form of dividend and a particular type of obligation, and that once declared a dividend is a debt; and

(ii) in recognizing that amounts may be paid as, on account of, or in lieu of, interest on "debts or obligations" owed to a non-resident under paragraph 212(1)(*b*) of Part XIII of the *Act* dealing with non-resident withholding tax. This appears to contemplate the possibility that foreign financial instruments other than debt might provide for interest or something akin to interest.

[103] It is clear from the *Act*'s use of the terms "interest", "interest on" and "interest payable" that an interest provision in an obligation is highly suggestive and indicative of a debt obligation for purposes of the *Act*.

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[20] It can also be observed from the definition of "participating debt interest" in subsection 212(3) for purposes of Part XIII non-resident withholding tax and interest paid by Canadians to non-residents that interest under the *Act* is not limited to amounts described as a percentage rate return on the principal amount of the debt. Interest on debt can, in fact, track any number of things and can be a function of the price of a commodity or dividends paid to shareholders.

Notes:

[104] The term "note" as a noun appears only to ever be used in the *Act* to denote debt. It appears many, many times throughout the provisions of the *Act*. It is first used in section 14 and its final use is in section 260, the very last provision of the *Act*. It is most commonly used in a string with two or more other debt-related terms. In several provisions a "note" is expressly considered indebtedness or a debt obligation. Where it so appears elsewhere and otherwise, the listing appears to denote "note" as *ejusdem generis* with other forms of indebtedness – bonds, bills, debenture, mortgages *et cetera*.

[105] It is occasionally used as part of a longer string that includes the word "shares" at the start and at times includes "units". This appears to be an intentional distinction between a listing of a broader range of securities than just debt securities. This appears from those provisions to be intentional. When used in such provision, the word "note" is within the listing of debt securities.

[106] The *Act* also refers to "promissory notes" as particular "evidences of indebtedness".[21] There is no suggestion that the Notes are promissory notes evidencing indebtedness (however, as noted above, Note Indentures separate from the Notes were to be part of the reorganization but none were put in evidence).

[107] Paragraph 18(13)(*e*) dealing with money lenders refers to "or a loan, bond, debenture, mortgage, hypothecary claim, note, agreement for sale or any other indebtedness".

[108] Paragraph (*a*) of the definition of "fully exempt interest" in subsection 212(3) for purposes of Part XIII non-resident withholding tax on interest refers to "a bond, debenture, note, mortgage, hypothecary claim or similar debt obligation".

[109] Paragraph (*d*) of the definition of "scientific research and experimental development tax credit" in subsection 127.3(2) refers to "a bond, debenture, bill,

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[21] Subsection 144.1(8) dealing with employee life and health trusts.

note, mortgage or similar obligation (in this section referred to as a "debt obligation")".

[110] Paragraph (*a*) of the definition of "specified debt obligation" in the mark-to-market rules refers to "a loan, bond, debenture, mortgage, hypothecary claim, note, agreement of sale or any other similar indebtedness".

[111] Paragraph 181.2(3)(*d*) dealing with capital tax on large corporations refers to "the amount of all indebtedness of the corporation at the end of the year represented by bonds, debentures, notes, mortgages, hypothecary claims, bankers' acceptances or similar obligations".

[112] The definition of "lending assets" in section 248(1) for purposes of the *Act* refers to "a bond, debenture, mortgage, hypothecary claim, note, agreement of sale or any other indebtedness".

[113] The phrase "bonds, debentures, or notes" is used in paragraph 51(1)(*b*) dealing with convertible property, in section 51.1 dealing with convertible debt, in paragraph (*b*) of the definition of "excluded security" in subsection 80(1) dealing with debt forgiveness, and in subsection 212.3(18) dealing with convertible debt upon a foreign affiliate reorganization.[22]

[114] The phrase "bonds, debentures, notes or similar obligations" is used in the definition of "eligible Canadian indebtedness" in subsection 95(2.43) dealing with FAPI of bank affiliates, in subparagraph 139.1(18)(*b*)(iii) dealing with acquisitions of control, in the definition of "debt obligation" in section 204 dealing with revocation tax on deferred profit sharing plans (DPSPs), and in the definition of "qualified security" in section 260 dealing with securities lending.

[115] The phrase "bond, debenture, bill, note or similar obligation issued by a debtor" is used in subsection 248(12) dealing with identical properties.

[116] The phrase "bond, debenture, bill, note, mortgage or similar obligation" appears in subsections 16(2) and 16(3) dealing with original issue discounts.

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[22] I am treating the singular and plural of the terms as the same, and ignoring the ordering of types of obligations in lists.

Subparagraph 81(1)(*m*) dealing with certain non-taxable income amounts refers to "interest ... on bonds, debentures, bills, notes, mortgages or similar obligations".

[117] The phrase "the principal amount of any bond, debenture, bill, note, mortgage, hypothecary claim or similar obligation ... on which interest was calculated to be payable ..." appears in paragraph 20(1)(*f*) dealing with original issue discounts. Paragraph 53(1)(*g*) dealing with adjustments to adjusted cost base (acb) lists the same obligations, "bond, debenture, bill, note, mortgage, hypothecary claim or similar obligation" and refers to the principal amount thereof. The same listing of obligations is used in subsection 80.1(1) dealing with expropriation assets, in subsection 87(6) and subsection 87(6.1) dealing with corporate amalgamations, in paragraph 116(6)(*d*) dealing with non-resident purchaser clearance certificates, in section 137.2 dealing with deposit insurance corporations, and in subsection 214(7) dealing with Part XIII non-resident withholding tax on the sale of debts with accrued interest. Subsection 214(6) refers to "interest ... on a bond, debenture, bill, note, mortgage, hypothecary claim or similar obligation". Subsection 214(15) refers to the "principal amount of a bond debenture, bill, note, mortgage, hypothecary claim or similar obligation".

[118] The phrase "principal amount ... of a bond, debenture, mortgage, hypothecary claim, note or other similar obligation" is used in subparagraph 137.1(1)(*b*)(ii) dealing with deposit insurance corporations. The same listing of obligations appears in subparagraph 137.1(1)(*b*)(i) and in paragraph 137.1(3)(*b*). The same listing of obligations "bond, debenture, note, mortgage, hypothecary claim or similar obligation" is used in paragraph 181.2(4)(*c*) dealing with the investment allowance for large corporation tax (LCT) purposes.

[119] Subparagraph 181.2(4)(d.1) refers to "a loan or advance to, or a bond debenture note, mortgage, hypothecary claim or similar obligation". Paragraph 181.2(6) uses the phrase "any bond, debenture, note, mortgage, hypothecary claim or similar obligation" twice. Subsection 212(15) refers to "interest on a bond, debenture, note, mortgage, hypothecary claim or similar obligation" in the exemption from Part XIII non-resident withholding tax for interest on CDIC insured obligations.

[120] Paragraph (l) of the definition of "disposition" in subsection 248(1) uses the phrase "bond, debenture, note, certificate, mortgage or hypothecary claim".

[121] The definition of "qualified debt obligation" in subsection 15.2(3) dealing with interest on small business development bonds (SBDBs) refers to "a bill, note, mortgage, hypothecary claim or similar obligation" and refers to the principal amount of such obligations.

[122] The definition of "qualified debt obligation" in subsection 15.1(3) dealing with interest on SBDBs refers to "a bond, debenture, bill, note, mortgage, hypothecary claim or similar obligation" and refers to the "principal amount" of such obligations.

[123] In contrast, when such debt-related terms appear together with the word shares, as they do in paragraph 14(5)(*f*), paragraph 18(13)(*e*), subsection 39(6), article 204.4(2)(*a*)(viii)(B) and in paragraph (*b*) of the definition of "disposition" in subsection 248(1), it is clear either from the express text or apparent from the context, that this is where the *Act* is describing a broader group of securities and including reference to debt securities as well as equity, or where the *Act* is distinguishing between debt securities and other securities. See, for example, paragraph 18(13)(*e*) which uses the phrase "the particular property is a share, or a loan, bond, debenture, mortgage, hypothecary claim, note, agreement for sale or any other indebtedness" in which this is clearly expressed. It is also clear from the definition of "Canadian security" in subsection 39(6) which refers to "a security ... that is a share of the capital stock of a corporation ..., a unit of a mutual fund trust or a bond, debenture, bill, note, mortgage, hypothecary claim or similar obligation ..."

[124] It appears clear from the *Act's* use of the term "note" that a note is used to describe a form of debt or indebtedness:

Debt and Derivatives:

[125] Paragraphs 94.1(1)(*a*) and (*b*) expressly contemplate that a "debt" may derive its value primarily from investments of the issuer or another person in other securities, commodities, real estate or currency. This is consistent with the concept of derivatives. A debt can be a derivative as can many other securities

and obligations, including hybrid financial instruments. The concepts of debt and derivatives are not mutually exclusive.

[126] The use of the concept of "limited recourse debt" in section 143.2, 237.1 and subsection 248(34) of the *Act* confirms that the amount payable to satisfy a debt obligation may be less than the amount advanced.[23] This appears to have been the case with the debt in *Canadian Commercial Bank*.

[127] The definition of "tracking property" in subsection 142.2(1) for purposes of the mark-to-market rules is property the value of which is determined primarily by reference to other property owned by another person. There is nothing that would exclude debt owned by a financial institution from being such tracking property.

[128] In contrast, it can be seen in the definition of "qualified investment" in section 204, that the *Act* for that purpose specifically excludes certain "derivative investments" from being qualified securities.

VI. Conclusions

[129] Having reviewed the Canadian jurisprudence on the meaning of debt and indebtedness, and having reviewed the use of debt and debt-related terms in the provisions of the *Act*, the Court concludes that the core essential characteristics of debt generally for purposes of the *Act* are:

(i) an amount or credit is advanced by one party to another party;

(ii) an amount is to be paid or repaid by that other party upon demand or at some point in the future set out in the agreement in satisfaction of the other party's obligation in respect of the advance;[24]

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[23] It is similarly not uncommon for a lender, under the terms of the loan and the related documents, to not get fully repaid depending upon what the other party does with the money, unless it has other assets from which to make repayment. An example of this would be a financing transaction of a special purpose entity to acquire a single leveraged asset.

[24] This amount may be payable to that other party or to a successor, assignee or bearer. That there is the possibility that the amount once ascertained may be a nil amount need not disqualify the obligation.

(iii) the amount described in (ii) is fixed or determinable or will be ascertainable when payment is due; and

(iv) there is an implicit, stipulated, or calculable interest rate (which can include zero).

[130] All of these core essentials may not need to be perfectly met in particular circumstances. A weighing of the degree to which these characteristics are exhibited is appropriate and may be required in particular circumstances.

[131] Other evidence such as supportive or contradictory wording or intention is very much part of the overall weighing process when considering hybrid or special purpose financial instruments. A provision in respect of interest, the use of the term principal or principal amount, and/or security rankings relative to other debt liabilities will generally be indicative of a debt.

[132] As stated at the outset, it is possible that the meaning of debt in a particular provision of the *Act* may textually and contextually identify other aspects of the term for purposes of that section.[25] However, the reference question does not ask about any specific sections; it asks for purposes of the *Act* as a whole.

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[25] For example, the Respondent has dropped its claim that in applying subsection 95(1), subsections 12(3) and (9) and Regulations 7000 apply to the Notes. I can therefore use these interest accrual rules as an example where it would appear to be reasonable to conclude that a particular provision requires something further to be debt for the specific purposes of that provision. Regulations 7000(1)(a) and 2(a) make it clear that the debt that those provisions will apply to contemplate that the amount to be repayable on maturity must be somehow ascertainable before maturity. Though, importantly, Regulation 7000 does contemplate debt whose amount payable upon final maturity is not fixed and may not be known with certainty or precision prior to reaching maturity. It just does not contemplate anything quite this broad, ranging through all positive numbers from zero through infinity. In contrast, for other provisions, a particular provision may well work without that earlier ascertainability if the provision would be workable by substituting the amount advanced, or the amount payable if it were matured at the particular relevant time, or some other amount relating to the debt. Still other provisions may not require one to turn their mind to the amount payable on maturity prior to the year of maturity. This will depend upon the textual, contextual and purposive review of particular provisions.

[133] In the case of the Notes, the reference question must be answered in the affirmative – that the Notes are debt for purposes of the *Act*:

(i) They are entitled Notes. In the *Act* the word notes is described as a debt obligation or indebtedness. It is also used *ejusdem generis* as a type of debt such as bonds, debentures and notes *et cetera*. A note is commonly used to describe a debt in business, commercial and financial markets.

(ii) They have a maturity which can be triggered early in the event of default or at the Note holder's option. Upon maturity there is a payment obligation that relates clearly, though in a complex fashion, to the amount for which the Notes were issued, and this payment satisfies the obligation in respect of the issue price.

(iii) The documents giving rise to and referred to in the Notes describe the amount for which they are issued as a Principal Amount that is the amount advanced by the Note holder to purchase the Note from the issuer in each case, being US $499 million.

(iv) At maturity, however and whenever triggered, that is whenever payment is required to be made, the amount payable by the issuer under the Notes to the Note holder is readily ascertainable with exact precision. Not only is the method of arriving at the amount clear and certain, the person responsible to the parties for arriving at that precise figure is also clearly set out.

(v) The interest rate is stipulated in the Notes as it was in the Term Sheets. It is reasonable to consider zero to be an amount for these purposes; loans are often described as "no interest" or "interest-free". This was presumably set out to make it clear to the parties that there would be no current returns earned or payable. However, the parties did not choose to describe this by reference to distributions of any sort, but limited it to interest.

(vi) The parties agreed in the Notes that they were to rank *pari passu* with other debt. The Notes evidence that the parties' intention was

that this be treated like other debt of the issuers. The Notes do not describe this ranking to apply only upon maturity of the Notes.

(vii) The EAO Notes, which are also equity-linked notes, are acknowledged in the Notes to be debt for purposes of permitted investments in Reference Assets.

(viii) The Guarantees provide that the Guarantors would be liable as if they were the primary debtors. The Notes and related agreements do not suggest this is only effective upon maturity of the Notes.

VII. Answer

[134] The Court determines for purposes of these two appeals that the two Notes held by SLT constitute debt for purposes of the *Act*.

VIII. Costs

[135] Costs are left to the trial judge, subject to the Court exercising its discretion if written submissions requesting otherwise are received from the parties within 30 days.

Signed at Ottawa, Canada, this 4th day of November 2015.

"Patrick Boyle"

Boyle J.

APPENDIX A

2014-353(IT)G

TAX COURT OF CANADA

BETWEEN:

BAREJO HOLDINGS INC.

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

AGREED STATEMENT OF FACTS

The parties agree, through their undersigned counsel, for the purposes of this motion only, to admit the truth of the following facts and the authenticity of the following documents mentioned herein.

A. THE APPELLANT

1. At all relevant times, the Appellant was a Canadian-controlled private corporation for purposes of the *Income Tax Act*[1] and the sole shareholder of Vêtements Peerless inc. / Peerless Clothing Inc., a corporation carrying on a men's clothing manufacturing business.

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[1] RSC 1985 (5th Supp), c 1 (the "***ITA***"). Unless otherwise stated, all statutory references in this document refer to the *ITA*.

2. St. Lawrence Trading ("**SLT**") is an open-ended investment company, organised in a similar manner to an open-ended unit trust or mutual fund, incorporated under the laws of the British Virgin Islands ("**BVI**").[2]

3. The Appellant first became a shareholder of a predecessor corporation of SLT on 30 September 1997.

4. At the end of SLT's taxation years ending on 31 December, 2003, 2004, 2005, 2006, 2007 and 2008, the Appellant directly held 190,589.93 shares in SLT. The Appellant also had a 0.01% interest in ASP Partners LP, through which, as at the end of SLT's 2006, 2007 and 2008 taxation years, it indirectly held an additional 2.935 shares in SLT.

5. SLT is a non-resident of Canada and was a "foreign affiliate" and a "controlled foreign affiliate" of the Appellant within the meaning of those terms as defined in subsection 95(1) at the end of each of SLT's taxation years ending in the Appellant's taxation years under appeal, namely 30 September 2004, 2005, 2006, 2007, 2008 and 2009.

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[2] Prospectus of St. Lawrence Trading for 2004, JDE, **Vol. I, Exhibit 6 li., p. 187.**

B. SLT AND ITS HISTORY

6. Global Asset Management ("**GAM**") is a corporation governed by the laws of Bermuda carrying on an independent, active investment management business.[3]

7. GAM Diversity Inc. ("**GD**")[4] was an open-ended investment company, organised in a similar manner to an open-ended unit trust or mutual fund, governed by the laws of the BVI.[5] The assets owned by GD were managed by GAM and consisted primarily of interests in hedge funds or mutual funds.[6]

8. On 30 October 2001, GD recommended to its shareholders proposals for its reorganization for the following reasons:[7]

   (a) legislative changes in Canada were scheduled to come into effect in 2002 which would have, in principle, rendered Canadian shareholders of GD, as it was constituted, subject to substantial Canadian taxes with respect to post-2001 operations of GD;

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3 Excerpt from GAM website, JDE, **Vol. I, Exhibit 1, p. 1.**

4 On 1 January 1995, two funds managed by GAM, GAMCAN Limited and GAM Multi-Global US$ Fund Inc., merged to become GAM Multi-Global US$ Fund Inc. On 15 November 1995, GAM Multi-Global US$ Fund Inc. changed its name to GD.

5 Prospectus of GAM Diversity for 1996, JDE, **Vol. 1, Exhibit 3 i., p. 29**; Prospectus of GAM Diversity for 2001, JDE, **Vol. 1, Exhibit 3 ii., pp. 54-55**.

6 Financial Statements of GAM Diversity Inc. for the year ended on 30 September 2001, JDE, **Vol. 1, Exhibit 4, p. 100, Note 1(c)**.

7 Circular of GAM Diversity Inc.: Recommended Proposals for the Reconstruction of the Company, JDE, **Vol. 1, Exhibit 5, p. 115**.

(b) as at 30 October 2001, Canadian shareholders held approximately 49% of GD's common shares; and

(c) GD may have been subject to potential pecuniary disadvantage if there were significant redemptions by Canadian shareholders, requiring a large portion of the underlying portfolio to be disposed of, which would have possible consequences for the net asset value of GD.

9. Pursuant to the recommended proposals, GD underwent a reorganization (the "**Reorganization**"). As part of the Reorganization on 30 November 2001:

(a) Non-Canadian shareholders exchanged their shares in GD for shares in a new corporation, GAM Global Diversity Inc. ("**Global**"), thereby leaving GD with only Canadian shareholders. The GD assets notionally attributable to the common shares held by non-Canadian shareholders were transferred to Global[8] which had similar characteristics and investment objectives to GD prior to the reorganization.[9]

(b) GD's name was changed to SLT.

(c) SLT sold a one-half undivided co-ownership interest in the remaining assets (the "**Residual Pool-Related Assets**") to each of Scotiabank (Ireland) Limited ("**SIL**"), a non-resident affiliate of The Bank of Nova Scotia ("**BNS**"),

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8 Global reclaimed the name of "GAM Diversity Inc.", under which it is known to this day.

9 Circular of GD, Recommended Proposals for the Reconstruction of the Company, JDE, **Vol. 5, Exhibit 5, pp. 115-116**.

and TD Global Finance ("**TDGF**"), a non-resident affiliate of The Toronto-Dominion Bank ("**TD**").[10]

(d) Using the proceeds of the aforementioned sale, SLT acquired two instruments, styled by the parties as "Notes": one from each of Bank of Nova Scotia International Limited, a non-resident subsidiary of BNS ("**BNSI**")[11] and Toronto Dominion International Inc., a non-resident subsidiary of TD ("**TDII**")[12] (each an "**Issuer**") (each a "**Note**"[13]).

(e) Each Note was purchased for a price of USD 498 million for a total of USD 996 million, representing the Reference Assets Net Asset Value, as defined below, on 30 November 2001.[14] The Reference Assets, as defined below, as at that date were those identified in the Reference Assets Schedule to each Note.[15]

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10 Transfer Agreement, JDE, **Vol. 1, Exhibit 7, p. 230, par. 1.1.1**.

11 Note Purchase Agreement between BNSI and SLT, JDE, **Vol. 1, Exhibit 10, p. 329, ss. 2.1**.

12 Note Purchase Agreement between TDII and SLT, JDE, **Vol. II, Exhibit 11, p. 415, ss. 2.1**.

13 BNSI Note, JDE, **Vol. 1, Exhibit 8, pp. 237 and ff.**; TDII Note, JDE, **Vol. 1, Exhibit 9, pp. 279 and ff.**.

14 Note Purchase Agreement between BNSI and SLT, JDE, **Vol. 10, Exhibit 1, p. 329, ss. 2.2**; Note Purchase Agreement between TDII and SLT, JDE, **Vol. II, Exhibit 11, p. 415, ss. 2.2**.

15 BNSI Note, JDE, **Vol. 1, Exhibit 8, pp. 255-256, par. 4.1(1) and pp. 277-278**, Schedule 4.1; TDII Note, JDE, **Vol. 1, Exhibit 9, pp. 297-298, par. 4.1(1) and pp. 319-320, Schedule 4.1**.

10. SLT, as successor of GD, remained an open-ended investment company, organised in a similar manner to an open-ended unit trust or mutual fund, governed by the laws of the BVI.

C. THE NOTES

11. Since the Reorganization, SLT's principal assets have been the two Notes.[16]

12. Each Note bears the same features, terms and conditions. The Issuer under each Note is required to settle all obligations on the "Maturity Date"[17] in either of the manners described at subsection 2.7 of the Note, elected at its sole discretion.[18]

13. More specifically, the Issuer may elect to settle all obligations under a Note (i) by payment to SLT of an amount in cash equal to the Reference Assets Net Asset Value of the Note[19] or (ii) by payment to SLT of an amount realized in connection with an actual liquidation of the Reference Assets.[20]

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16 Financial Statements of SLT for 2002, JDE, **Vol. II, Exhibit 12** i., **p. 501**; Financial Statements of SLT for 2005, JDE, Vol. II, **Exhibit 12** ii., **p. 510**; Financial Statements of SLT for 2009, JDE, **Vol. II, Exhibit 12 iii., p. 528**.

17 BNSI Note, JDE, **Vol. I, Exhibit 8, p. 242, par. 1.1(2)** "Maturity Date"; TDII Note, JDE, **Vol. I, Exhibit 9, p. 284, par. 1.1(2)** "Maturity Date".

18 BNSI Note, JDE, **Vol. I, Exhibit 8, pp. 253-254, ss. 2.7**; TDII Note, JDE, **Vol. I, Exhibit 9, pp. 295-296, ss. 2.7**.

19 BNSI Note, JDE, **Vol. I, Exhibit 8, p. 253, s.par. 2.7(a)(i)**; TDII Note, JDE, **Vol. I, Exhibit 9, p. 295, s.par. 2.7(a)(i)**.

20 BNSI Note, JDE, **Vol. I, Exhibit 8, p. 253, s.par. 2.7(a)(ii) and pp. 273-274, Schedule 2.7(a)(ii)**; TDII Note, JDE, **Vol. I, Exhibit 9, p. 295, s.par. 2.7(a)(ii) and pp. 315-316, Schedule 2.7(a)(ii)**.

14. The "Reference Assets" comprise a group of professionally-managed hedge fund investments employing a variety of investment techniques and strategies. The Reference Assets are identified in the Reference Assets Schedule to each Note, as amended from time to time by GAM to reflect adjustments to the Reference Assets.[21] The initial Reference Assets Schedule reflected the Residual Pool-Related Assets.[22]

15. The Reference Assets, regardless of the actual owner thereof, are required to be managed by GAM[23] pursuant to the terms of a "Reference Assets Management Agreement"[24] dated 30 November 2001 between BNSI, SIL, TDII, TDGF and GAM (the "**RAMA**").

16. In essence, the "Reference Assets Net Asset Value" is equal to the amount by which the actual value of the Reference Assets exceeds certain specified liabilities, which are chargeable against the Reference Assets. There is no stated minimum or maximum Reference Assets Net Asset Value.

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21 BNSI Note, JDE, **Vol. I, Exhibit 8, pp. 255-256, par. 4.1(1)** and **pp. 277-278, Schedule 4.1**; TDII Note, JDE, **Vol. I, Exhibit 9, pp. 297-298, par. 4.1(1)** and **pp. 319-320, Schedule 4.1**.

22 Schedule A of the Transfer Agreement, JDE, **Vol. I, Exhibit 7, pp. 235-236**.

23 BNSI Note, JDE, **Vol. I, Exhibit 8, pp. 255-256, par. 4.1(1)**; TDII Note, JDE, **Vol. I, Exhibit 9, pp. 297-298, par. 4.1(1)**.

24 Reference Assets Management Agreement, JDE, **Vol. II, Exhibit 15, pp. 628 and ff.**

17. GAM calculates the Reference Assets Net Asset Value on each Monday, with the exception of public holidays, on an aggregate and per investment basis.[25]

18. The obligations of the Issuer under each Note are guaranteed, respectively, by BNS and TD (the "**Guarantors**").[26]

19. As defined in each Note,[27] the "Maturity Date" of each Note is the "Stated Maturity Date" of 30 November 2016 or, if applicable, the "Early Termination Date".[28]

20. The "Early Termination Date" is the date on which any cure period, notice period or extension period expires in connection with an "Early Termination Event", being certain prescribed circumstances when either SLT or the Issuer have the right to terminate the Note.

21. For example:

    (a) SLT may, upon providing not less than 367 days prior written notice to the Issuer, terminate the Note.[29]

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25 Reference Assets Management Agreement, JDE, **Vol. II, Exhibit 15, pp. 632, par. 1.1.33 and p. 634, par. 5.1.1, p. 651, Exhibit B of RAMA, ss. 1.1 and ss. 2.1**. Example of a Crillon Report, JDE, **Vol. II, Exhibit 18, p. 679**.

26 Guarantee Agreement of BNS, JDE, **Vol. II, Exhibit 16, p. 664, s. 2**; Guarantee Agreement of TD, JDE, **Vol. II, Exhibit 17, p. 672, s. 2**.

27 BNSI Note, JDE, **Vol. I, Exhibit 8, p. 242, s. 1.1(2)** "Maturity Date"; TDII Note, JDE, **Vol. I, Exhibit 9, p. 284, s. 1.1(2)** "Maturity Date".

28 BNSI Note, JDE, **Vol. I, Exhibit 8, pp. 250-253, ss. 2.5** for Early Termination by BNSI and **ss. 2.6** for Early Termination by SLT; TDII Note, JDE, **Vol. I, Exhibit 9, pp. 292-295, ss. 2.5** for Early Termination by TDII and **ss. 2.6** for Early Termination by SLT.

29 BNSI Note, JDE, **Vol. I, Exhibit 8, pp. 252-253, par. 2.6(1)** for Early Termination by SLT; TDII Note, JDE, **Vol. I, Exhibit 9, pp. 294-295, par. 2.6(1)** for Early Termination by SLT.

(b) The Issuer may terminate the Note if, at any time, the Reference Assets Net Asset Value less the "Purchaser Put Shares Value" is less than USD 300 million according to four consecutive weekly reports.[30]

In each such case, the Issuer must fulfill its obligations under section 2.7 of the Note as described above as at the date on which the relevant notice period expires.

22. Under the terms of each Note,

(a) SLT may redeem portions of the Note to fund its operating expenses, payable within thirty (30) days of SLT's request, provided that in any twelve-month period, the cumulative amount of all redemptions does not exceed 0.2% of the "Reference Assets Net Asset Value";[31]

(b) SLT may subscribe additional amounts in respect of the Note. Amounts so paid by SLT are added to the Reference Assets;[32] and

(c) treasury issuances of shares by SLT may result in additional subscriptions to the Notes.[33]

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30 BNSI Note, JDE, **Vol. I, Exhibit 8, p. 251-252, par. 2.5(2)**; TDII Note, JDE, **Vol. I, Exhibit 9, p. 293-294, par. 2.5(2)**.

31 BNSI Note, JDE, **Vol. I, Exhibit 8, pp. 254-255, ss. 3.1**; TDII Note, JDE, **Vol. I, Exhibit 9, pp. 296-297, ss. 3.1**.

32 BNSI Note, JDE, **Vol. I, Exhibit 8, pp. 254-255, s. 3**; TDII Note, JDE, **Vol. I, Exhibit 9, pp. 296-297, s. 3**.

33 Note Purchase Agreement between BNSI and SLT, JDE, **Vol. I, Exhibit 10, pp. 330-331, 338, s.par. 3.2(2)(iii) and ss. 8.3**; Note Purchase Agreement between TDII and SLT, JDE, **Vol. II, Exhibit 11, pp. 416-417, 424, s.par. 3.2(2)(iii) and ss. 8.3**.

23. At no time did SLT receive any amounts in respect of the Notes, other than amounts needed to fund certain operating expenses.

24. Each Issuer accounts for its respective Note as a liability on its financial statements.[34]

25. Since 2005, SLT has classified the Notes for financial statement purposes as available for sale ("**AFS**") investments. AFS investments are intended to be held for an indefinite period of time and may be sold in response to needs for liquidity or changes in interest rates, exchange rates or equity prices.[35]

26. The Notes are not transferable and neither SLT nor the Issuer shall sell, transfer, pledge, assign, or otherwise dispose of all or any portion of its obligations or rights in or under the Notes, without the prior written consent of the other party.[36]

D. THE RAMA

27. Pursuant to the RAMA, SIL and TDGF (and any future owner of the Reference Assets) appoint GAM to actively manage the Reference Assets and maintain the

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34 Consolidated Financial Statements of BNSI for 2002, JDE, **Vol. II, Exhibit 13 i., p. 546**; Non-Consolidated Financial Statements of BNSI for 2009, JDE, **Vol. II, Exhibit 13 ii., p. 576**; Non-Consolidated Financial Statements of TDII for 2002, JDE, **Vol. II, Exhibit 14 i., p. 598**; Non-Consolidated Financial Statements of TDII for 2009, JDE, **Vol. II, Exhibit 14 ii., p. 610**.

35 Financial Statements of SLT for 2005, JDE, **Vol. II, Exhibit 12 ii., p. 514 and 516**; Financial Statements of SLT for 2009, JDE, **Vol. II, Exhibit 12 iii., p. 532**.

36 BNSI Note, JDE, **Vol. I, Exhibit 8, p. 250, ss. 2.4**; TDII Note, JDE, **Vol. I, Exhibit 9, p. 292, ss. 2.4**.

Reference Assets schedule,[37] with the overall objective of achieving long-term capital appreciation together with diversification of risk.[38]

28. The composition of the Reference Assets constantly fluctuates over time, reflecting, *inter alia*, dispositions and acquisitions of hedge fund investments by GAM. The Reference Assets Net Asset Value, in turn, constantly fluctuates over time, depending on both the composition and the performance of the individual hedge fund investments.

29. There can be no assurance that appreciation will occur or that losses will not be realised in respect of the Reference Assets.

30. SLT has no right to direct or otherwise influence the composition of the Reference Assets under any of the governing instruments.

31. The Issuers are not required to own any of the Reference Assets under any of the governing instruments and SLT has no claim on the Reference Assets.

32. In order to maintain liquidity for the shareholders of SLT as if the Reorganization had not taken place,[39] SIL provides the shareholders with a put facility as follows:[40]

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37 Reference Assets Management Agreement, JDE, **Vol. II, Exhibit 15, pp. 632-633, s. 3.**

38 Prospectus of St. Lawrence Trading 2004, JDE, **Vol. I, Exhibit 6 ii., p. 187.**

39 In a bundle, request and decision relating to the Application for Exemptive Relief Pursuant to the Mutual Reliance Review System for Exemptive Relief Application, JDE, **Vol. II, Exhibit 19, pp. 685-686, par. 32 and 38.**

40 Reference Assets Management Agreement, JDE, **Vol. II, Exhibit 15, pp. 638-640, s. 11.**

(a) On the last Monday of every month, a SLT shareholder may require SIL to purchase all or a portion of its shares.

(b) The purchase price of the shares payable by SIL is equal to the net asset value of SLT determined on a per share basis, calculated for the applicable "dealing date", according to a formula set out in the RAMA.

(c) The proceeds are payable to the shareholder in USD.

DATED IN MONTRÉAL, this 8 August 2014

DAVIES WARD PHILLIPS & VINEBERG LLP

Guy Du Pont, Ad.E.
Stephen S. Ruby
John J. Lennard

Counsel for the Appellant

DATED IN TORONTO, this 8 August 2014

THORSTEINSSONS LLP

Brandon D. Wiener

Counsel for the Appellant

DATED IN MONTRÉAL, this 8 August 2014

William F. Pentney
Deputy Attorney General of Canada

Marie-Andrée Legault
Simon Petit
Philippe Dupuis
Valerie Messore

Counsel for the Respondent

APPENDIX B

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COURT FILE NOS.:	2014-4290(IT)G; 2014-353(IT)G
STYLE OF CAUSE:	BAREJO HOLDINGS ULC AND THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 21 and 22, 2015 and May 20, 2015
REASONS FOR ORDER BY:	The Honourable Justice Patrick Boyle
DATE OF ORDER:	November 4, 2015

APPEARANCES:

Counsel for the Appellant:	Guy Du Pont Brandon D. Wiener John J. Lennard
Counsel for the Respondent:	Simon Petit Philippe Dupuis Marie-Andrée Legault

COUNSEL OF RECORD:

For the Appellant:

Name:	Guy Du Pont Brandon D. Wiener John J. Lennard
Firms:	Davies Ward Phillips & Vineberg LLP Thorsteinssons LLP
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada

Appendix B

Offshore investment fund property

94.1 (1) If in a taxation year a taxpayer holds or has an interest in property (referred to in this section as an "offshore investment fund property")

(a) that is a share of the capital stock of, an interest in, or a debt of, a non-resident entity (other than a controlled foreign affiliate of the taxpayer or a prescribed non-resident entity) or an interest in or a right or option to acquire such a share, interest or debt, and

(b) that may reasonably be considered to derive its value, directly or indirectly, primarily from portfolio investments of that or any other non-resident entity in

(i) shares of the capital stock of one or more corporations,

(ii) indebtedness or annuities,

(iii) interests in one or more corporations, trusts, partnerships, organizations, funds or entities,

(iv) commodities,

(v) real estate,

(vi) Canadian or foreign resource properties,

Bien d'un fonds de placement non-résident

94.1 (1) Lorsque, au cours d'une année d'imposition, un contribuable détient un bien ou a un droit sur un bien (appelé « bien d'un fonds de placement non-résident » au présent article) qui répond aux conditions suivantes :

a) il est une action du capital-actions d'une entité non-résidente (autre qu'une société étrangère affiliée contrôlée du contribuable ou une entité non-résidente visée par règlement) ou une participation dans une tell entité, ou une créance sur elle, ou un droit sur une telle action, participation ou créance ou un droit ou une option d'achat d'une telle action, participation ou créance;

b) sa valeur peut raisonnablement être considérée comme découlant principalement, directement ou indirectement, de placements de portefeuille de cette même entité ou de toute autre entité non-résidente :

(i) en actions du capital-actions d'une ou de plusieurs sociétés,

(ii) en créances ou en rentes,

(iii) en participations dans un ou plusieurs fonds ou organismes ou dans une ou

(vii) currency of a country other than Canada,

(viii) rights or options to acquire or dispose of any of the foregoing, or

(ix) any combination of the foregoing,

and it may reasonably be concluded, having regard to all the circumstances, including

(c) the nature, organization and operation of any non-resident entity and the form of, and the terms and conditions governing, the taxpayer's interest in, or connection with, any non-resident entity,

(d) the extent to which any income, profits and gains that may reasonably be considered to be earned or accrued, whether directly or indirectly, for the benefit of any non-resident entity are subject to an income or profits tax that is significantly less than the income tax that would be applicable to such income, profits and gains if they were earned directly by the taxpayer, and

(e) the extent to which the income, profits and gains of any non-resident entity for any fiscal period are distributed in that or the immediately following fiscal period,

that one of the main reasons for the taxpayer acquiring, holding or having the interest in such property was to derive a benefit from portfolio investments in assets described in any

plusieurs sociétés, fiducies, sociétés de personnes ou entités,

(iv) en marchandises,

(v) en biens immeubles,

(vi) en avoirs miniers canadiens ou étrangers,

(vii) en monnaie autre que la monnaie canadienne,

(viii) en droits ou options d'achat ou de disposition de l'une des valeurs qui précèdent,

(ix) en toute combinaison de ce qui précède,

et que l'on peut raisonnablement conclure, compte tenu des circonstances, y compris :

c) la nature, l'organisation et les activités de toute entité non-résidente, ainsi que les formalités et les conditions régissant la participation du contribuable dans toute entité non-résidente ou les liens qu'il a avec une telle entité;

d) la mesure dans laquelle les revenus, bénéfices et gains qu'il est raisonnable de considérer comme ayant été gagnés ou accumulés, directement ou indirectement, au profit de toute entité non-résidente sont assujettis à un impôt sur le revenu ou sur les bénéfices qui est considérablement moins élevé que l'impôt sur le revenu dont ces revenus, bénéfices et gains seraient frappés s'ils étaient gagnés directement par le

of subparagraphs 94.1(1)(b)(i) to 94.1(1)(b)(ix) in such a manner that the taxes, if any, on the income, profits and gains from such assets for any particular year are significantly less than the tax that would have been applicable under this Part if the income, profits and gains had been earned directly by the taxpayer, there shall be included in computing the taxpayer's income for the year the amount, if any, by which

(f) the total of all amounts each of which is the product obtained when

(i) the designated cost to the taxpayer of the offshore investment fund property at the end of a month in the year

is multiplied by

(ii) 1/12 of the total of

(A) the prescribed rate of interest for the period that includes that month, and

(B) two per cent

exceeds

(g) the taxpayer's income for the year (other than a capital gain) from the offshore investment fund property determined without reference to this subsection.

contribuable;

e) la mesure dans laquelle les revenus, bénéfices et gains de toute entité non-résidente pour un exercice donné sont distribués au cours de ce même exercice ou de celui qui le suit,

que l'une des raisons principales pour le contribuable d'acquérir, de détenir ou de posséder un droit sur un tel bien était de tirer un bénéfice de placements de portefeuille dans des biens visés à l'un des sous-alinéas b)(i) à (ix) de façon que les impôts sur les revenus, bénéfices et gains provenant de ces biens pour une année donnée soient considérablement moins élevés que l'impôt dont ces revenus, bénéfices et gains auraient été frappés en vertu de la présente partie s'ils avaient été gagnés directement par le contribuable, celui-ci doit inclure dans le calcul de son revenu pour l'année l'excédent éventuel du total visé à l'alinéa f) sur le montant visé à l'alinéa g):

f) le total des montants dont chacun est le produit de la multiplication du montant visé au sous-alinéa (i) par le quotient visé au sous-alinéa (ii):

(i) le coût désigné, pour le contribuable, du bien d'un fonds de placement non-résident à la fin d'un mois donné de l'année,

(ii) 1/12 du total des pourcentages suivants :

(A) le taux d'intérêt prescrit pour la période comprenant ce mois,

(B) deux pour cent;

g) le revenu du contribuable pour l'année (autre qu'un gain en capital) tiré d'un bien d'un fonds de placement non-résident et déterminé compte non tenu du présent paragraphe.

CITATION:	2018 TCC 200
COURT FILE NO.:	2014-4290(IT)G
STYLE OF CAUSE:	BAREJO HOLDINGS ULC v. THE QUEEN
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DATE OF ORDER:	October 4, 2018

REPRESENTATIVES:

Counsel for the Appellant:	Guy Dupont, Anne Sophie Villeneuve and Brandon D. Wiener
Counsel for the Respondent:	Simon Petit, Philippe Dupuis and Julian Hohlhuter

COUNSEL OF RECORD:

For the Appellant:	Guy Dupont & Anne Sophie Villeneuve
Firm:	Davies Ward Phillips and Vineberg
For the Appellant:	Brandon D. Wiener
Firm:	Thorsteinssons LLP
For the Respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada