Docket: 2020-175(IT)G

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by videoconference
on July 5, 2021 at Ottawa, Ontario

Before: The Honourable Justice John R. Owen

Participants:

Counsel for the Appellant:	Monica Biringer Al Meghji Chris Sheridan
Counsel for the Respondent:	Natalie Goulard Christopher M. Bartlett

---

ORDER

UPON the Appellant and the Respondent bringing a motion for determination, before hearing, of the following question (the "Question") pursuant to section 58 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules"):

> "Whether paragraph 40(3.6)(a) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.), as amended, applies to deem CIBC's loss from the disposition of Class B Shares of CIBC Delaware Holdings Inc. to be nil."

AND UPON having read the materials filed and having heard the submissions of counsel;

IN ACCORDANCE with the attached Reasons for Order, it is ordered that:

1. the Question is answered in the affirmative; and

2. each party shall bear its own costs of this motion under section 58 of the Rules.

Signed at Ottawa, Canada, this 2nd day November 2021.

"J.R. Owen"

Owen J.

Citation: 2021 TCC 71
Date: 20211102
Docket: 2020-175(IT)G

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Owen J.

I. Background

[1] By letter dated May 11, 2021, the parties to this appeal made a joint application to the Court for the determination of the following question (the "Question") under section 58 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules"):

> Whether paragraph 40(3.6)(a) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.), as amended, applies to deem CIBC's loss from the disposition of Class B Shares of CIBC Delaware Holdings Inc. to be nil.

[2] By order dated May 14, 2021 (the "Order"), a Tax Court judge ordered that the Question be determined before the hearing of the appeal pursuant to section 58 of the Rules (the "Rule 58 Hearing"). The Order further provided for the submission of an agreed statement of facts and written argument in advance of the Rule 58 Hearing.

II. The Facts

[3] Paragraphs 1 through 15[1] of the Agreed Statement of Facts for the Rule 58 Hearing state:

> 1. The Appellant ("CIBC") is a corporation governed by the *Bank Act* and is a taxable Canadian corporation and a public corporation for purposes of the *Income Tax Act* (the "Act").
>
> 2. CIBC uses the Canadian dollar to determine its "Canadian tax results" (as defined in subsection 261(1) of the Act).
>
> 3. CIBC had a taxation year beginning on November 1, 2006 and ending on October 31, 2007 (the "2007 Taxation Year").
>
> 4. CIBC Delaware Holdings Inc. ("DHI") is a corporation governed by the laws of Delaware. At all relevant times DHI was a wholly-owned direct or indirect subsidiary of CIBC.
>
> 5. At all relevant times, DHI was a non-resident of Canada for purposes of the Act.
>
> 6. On November 8, 2006, CIBC subscribed for 1,000 shares of Class B Common Stock of DHI (the "DHI Class B Shares") for an aggregate subscription price of US$1 billion.
>
> 7. The spot exchange rate on November 8, 2006 was US$1 = C$1.1300.
>
> 8. The Canadian dollar equivalent of the US$1 billion subscription price of the DHI Class B Shares was C$1,130,000,000.
>
> 9. CIBC's adjusted cost base for the DHI Class B Shares was C$1,130,000,000.
>
> 10. On September 25, 2007, DHI redeemed the DHI Class B Shares and paid CIBC US$1 billion.
>
> 11. The spot exchange rate on September 25, 2007 was US$1 = C$1.0036.
>
> 12. The Canadian dollar equivalent of the US$1 billion redemption proceeds for the DHI Class B Shares was C$1,003,600,000.

---

[1] I have omitted paragraphs 16 to 20 of the Agreed Statement of Facts, which describe the procedural history.

> 13. The Appellant realized a foreign exchange loss of C$126,400,000 on the redemption of the DHI Class B Shares as a result of the US dollar weakening relative to the Canadian dollar.
>
> 14. Immediately after the redemption of the DHI Class B Shares, CIBC owned, directly or indirectly, the remaining shares of DHI.
>
> 15. In its tax return for the 2007 Taxation Year, CIBC reported an allowable capital loss of C$63,200,000 (the "Loss").

[Boldface, footnotes and headings omitted.]

[4] No evidence was presented at the Rule 58 Hearing and therefore the determination of the Question is based solely on the law, and the facts contained in the Agreed Statement of Facts. I will refer to the facts described in the Agreed Statement of Facts as the "Circumstances".

III. The Statutory Provisions

[5] The positions of the parties primarily address the interpretation and interaction of four statutory provisions in the *Income Tax Act* (the "Act")[2] as they existed during the Appellant's 2007 taxation year: subsections 39(1), 39(2), 40(1) and 40(3.6).[3] The version of those provisions in existence at that time is set out in Appendix A.

IV. The Positions of the Parties

[6] Both parties rely on the decision of the Federal Court of Appeal in *R. v. Bank of Montreal*.[4] However, each party has a different interpretation of paragraph 41 of *BMO* (the "Paragraph"), which states:

> Subsection 39(2) of the Act, in 2010, did not address how a gain or loss was to be calculated, but rather only addressed the source of that gain or loss. The gain or loss arising as a result of a disposition of a particular property was (and still is) determined under subsection 40(1) of the Act. There was no conflict between subsections 40(1) and 39(2) of the Act with respect to the computation of the

---

[2] Unless otherwise noted, all statutory references are to the Act.

[3] Unless otherwise noted, all references to subsection 39(2) are to that subsection prior to its amendment in 2013 by 2013, c. 34, s. 59, with application to gains made and losses sustained in taxation years that begin after August 19, 2011 (the "2013 amendment"). A separate transitional rule applied the new rule in determining the capital gain or capital loss of a foreign affiliate of a taxpayer in respect of taxation years of the foreign affiliate that end after August 19, 2011, subject to an election to instead have the new rule apply in respect of taxation years of all foreign affiliates of the taxpayer that end after June 2011.

[4] 2020 FCA 82 ("*BMO*").

> amount of a gain. Subsection 39(2) of the Act was premised on the assumption that the gain or loss had already been determined. The question for subsection 39(2) of the Act was: why did the taxpayer realize the particular gain or sustain the particular loss? If it was because of a change in the value of Canadian currency relative to a foreign currency, then the condition for the application of the subsection was satisfied.

A. The Position of the Appellant

[7] The Appellant relies on *BMO* for the position that the loss realized by the Appellant in the Circumstances is deemed by subsection 39(2) to be a capital loss of the Appellant from a disposition of currency of a country other than Canada[5] and therefore is excluded from the application of subsection 40(3.6), which applies only to a loss from the disposition of a share.

[8] The Appellant submits, however, that the statement of the Federal Court of Appeal in the Paragraph to the effect that for the purposes of subsection 39(2) a gain or loss on a disposition of property is and has always been determined under subsection 40(1) (the "Statement") is *obiter dictum* and, if not *obiter dictum*, with respect is wrong.

[9] Citing paragraph 29 of *Bernier v. R.*,[6] the Appellant submits that subsection 39(2) is a self-contained rule that is an exception to the rules normally applicable to the calculation of capital gains and capital losses.[7] Consequently, the loss identified in the opening words of the subsection should be determined using the general approach adopted by the Federal Court of Canada - Appeal Division in *MacMillan Bloedel Ltd. v. R*:[8]

> According to the plain wording of subsection 39(2) the taxpayer is only required to have sustained a loss by virtue of a currency fluctuation in order to claim a capital loss, if the amount is not otherwise included in computing income. In this case, there is no dispute with respect to the effect of the currency fluctuation; the only question is whether the share redemption payment here falls within the meaning of "loss". According to the common understanding of "loss", the respondent's payment to the shareholders clearly qualifies. That is, in Canadian dollar terms the

---

[5] The Appellant's argument correctly recognizes that the deeming rule in subsection 39(2) applies to a net amount determined at the end of a taxation year. For the sake of clarity and brevity, I am describing the effect of subsection 39(2) in the Circumstances as if the loss in issue is the only gain or loss identified in subsection 39(2) for the Appellant's taxation year ending October 31, 2007.

[6] 2004 TCC 376 ("*Bernier*").

[7] The Appellant also cites two principles of statutory interpretation: the presumption of consistent expression and the presumption against tautology.

[8] [1999] 3 CTC 652, 243 N.R. 388 ("*MacMillan Bloedel*").

> respondent paid more to redeem the shares than it had initially received. The circumstances here are not unlike those in *Tahsis Co. v. R.*, wherein the Federal Court Trial Division interpreted subsection 39(2) as providing relief to a debtor with respect to payments owed on a loan. There, currency fluctuations forced the taxpayer to pay more Canadian dollars in order to meet his U.S. dollar loan payments. Both that taxpayer and the respondent here sustained what would ordinarily be understood to be a loss. There is nothing in subsection 39(2) to limit the meaning of "loss" such that it would not cover this otherwise straightforward result.[9]

[10] The Appellant submits that even if the Statement is accepted as part of the *ratio decidendi* of the decision in *BMO* and as correct, the Statement references only subsection 40(1) and does not reference the remaining rules in Part I, Division B, Subdivision c of the Act ("Subdivision c"). Consequently, for purposes of subsection 39(2), subsection 40(3.6) is not incorporated into the calculation of the loss under subsection 40(1).

[11] Finally, the Appellant submits that even if subsection 40(3.6) applied to the determination of the loss under subsection 39(2), it would have no effect.

[12] If subsection 40(3.6) is applied before subsection 39(2) then it deems a loss from a disposition of shares to be nil but does not deem a loss sustained by virtue of the fluctuation of a currency other than Canadian currency to be nil. Consequently, subsection 40(3.6) would have no impact on the determination of the loss under subsection 39(2).

[13] If subsection 40(3.6) is applied after subsection 39(2) then the latter would already have deemed the loss to be a capital loss from the disposition of foreign currency and the condition for the application of subsection 40(3.6) that the loss result from a disposition of a share in an affiliated corporation would not be met.

[14] The Appellant submits that the Respondent is in effect applying the current version of subsection 39(2), applicable to taxation years that begin after August 19, 2011, to the Circumstances, which occurred in the Appellant's 2007 taxation year.

B. The Position of the Respondent

---

[9] *Ibid.*, paragraph 8 (CTC).

[15] The Respondent submits that the starting point for determining a gain or loss on a disposition of property is subsection 40(1). The Respondent submits that where there is a disposition of property for the purposes of determining a gain or loss identified in the introductory words of subsection 39(2), the Paragraph requires the application of subsection 40(1).

[16] The Respondent submits that in the Circumstances the calculation under subsection 40(1) proceeds as follows:

> A. Determine in Canadian dollars[10] the adjusted cost base to the Appellant of the redeemed shares using the foreign exchange rate at the time the shares were acquired by the Appellant, which is Cdn$1,130,000,000.
>
> B. Determine in Canadian dollars the outlays and expenses made or incurred by the Appellant for the purposes of making the disposition of the redeemed shares, which is nil.
>
> C. Determine in Canadian dollars the proceeds of disposition to the Appellant of the redeemed shares using the foreign exchange rate at the time the shares were redeemed, which is Cdn$1,003,600,000.
>
> D. Calculate the gain or loss on the disposition of the redeemed shares by subtracting from the proceeds of disposition the sum of the adjusted cost base and the outlays and expenses, which yields a loss of Cdn$126,400,000.
>
> E. Determine if another provision in Part I of the Act provides for a different result.

[17] With respect to letter E., above at paragraph 16, the Respondent submits that subsection 40(3.6) provides for a different result by reducing the loss of the Appellant otherwise determined under subsection 40(1) to nil and adding that loss to the adjusted cost base of the Appellant's remaining shares in Delaware Holdings Inc.

[18] The Respondent submits that the cases cited by the Appellant[11] in support of a more general interpretation of "gain" or "loss" in the opening words of subsection 39(2) do not address a disposition of property but rather the repayment of debt

---

[10] The Respondent cites *Gaynor v. R.*, [1991] FCJ No 348, [1991] 1 CTC 470 (FCA) ("*Gaynor*"), affirming [1988] FCJ No 629; [1988] 2 CTC 163 (FCTD) and subsection 261(2) for the requirement to convert adjusted cost base, outlays and expenses and proceeds of disposition into Canadian dollars.
[11] That is *Tahsis Company Ltd. v. The Queen*, [1980] 2 FC 269 ("*Tahsis*"), *MacMillan Bloedel* and *Bernier*.

denominated in a foreign currency. Consequently, these cases do not justify ignoring the extensive statutory structure in Subdivision c of the Act for determining the gain or loss on a disposition of property.

[19] The Respondent submits that the approach taken to subsection 112(3.1) in *BMO* is not applicable to subsection 40(3.6). Subsection 112(3.1) is a loss denial rule in Division C of Part I, which addresses the computation of taxable income after income has been determined under Division B, whereas subsection 40(3.6) is a loss deferral rule in Division B of Part I, which addresses the computation of income. The Respondent submits that the placement of subsection 40(3.6) in the Act supports the Respondent's position regarding the role of subsection 40(3.6) in determining gain or loss under subsection 39(2).

V. Analysis

A. Is the Statement *Obiter Dictum*?

[20] The *Canadian Law Dictionary*[12] defines *obiter dictum* as:

> A statement made or a decision reached in a court opinion that is not essential for disposition of the case.

[21] The Supreme Court of Canada states in *Henry v. R.*[13] in discussing its own decisions:

> All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative.[14]

[22] The position of the Appellant that the Statement is *obiter dictum* is not supported by the content of the Paragraph as a whole, nor by its place in the reasons of the Federal Court of Appeal as part of the analysis of the context and purpose of subsection 39(2).

[23] In my view, the Paragraph is an essential part of the *ratio decidendi* of the Federal Court of Appeal because it is the only paragraph in *BMO* that addresses—

---

[12] Steve Coughlan, *Canadian Law Dictionary*, 7th ed. (New York, Barron's, 2013).
[13] 2005 SCC 76.
[14] *Ibid.*, paragraph 57.

albeit in summary fashion—the potential conflict between subsection 39(2) and subsection 40(1), which is an important aspect of the contextual analysis of the subsection. Since the Statement is in turn an essential part of the Court's conclusion that there is no conflict between subsections 39(2) and 40(1), it is also not *obiter dictum*.

B. Is the Statement Wrong?

[24] The position of the Appellant that the Statement is wrong is not a matter this Court can act upon because I am bound by the decision of the Federal Court of Appeal in *BMO*, which necessarily includes the reasoning by which that decision is reached. However, I can express my agreement or disagreement with the position of the Appellant and explain my reasons for that position. I believe that is consistent with the approach suggested by Rothstein J. in *R. v. Craig*:[15]

> But regardless of the explanation, what the court in this case ought to have done was to have written reasons as to why *Moldowan* was problematic, in the way that the reasons in *Gunn* did, rather than purporting to overrule it.[16]

[25] The issue raised by the Appellant is whether for the purposes of the introductory text of subsection 39(2), subsection 40(1) applies to the computation of the gain or loss realized on a disposition of property. In the Paragraph, the Federal Court of Appeal states that it does and further states that there is no conflict between the two subsections because subsection 39(2) is only concerned with why the taxpayer realized the particular gain or sustained the particular loss.

[26] As with all questions of statutory interpretation, the interpretive approach mandated by the Supreme Court of Canada must be followed. Recently, the Supreme Court succinctly summarized the correct approach in *Bell Canada v. Canada (Attorney General)*:[17]

> The scope of the CRTC's authority under s. 9(1)(h) is to be determined by interpreting that provision in accordance with the modern approach to statutory interpretation. As this Court has reiterated on numerous occasions, this approach requires that the words of the statute be read "in their entire context and in their

[15] 2012 SCC 43.
[16] *Ibid*., paragraph 21.
[17] 2019 SCC 66.

> grammatical and ordinary sense harmonious with the scheme of the Act, the object of the Act, and the intention of Parliament" . . .[18]

[27] In *Canada Trustco Mortgage Co. v. R.*,[19] the Supreme Court addressed statutory interpretation in the context of the Act:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": . . . . The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, **but in all cases the court must seek to read the provisions of an Act as a harmonious whole**.[20]
>
> . . .
>
> The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently. . . . [21]

[Emphasis added.]

[28] In *Lipson v. R.*,[22] the Supreme Court of Canada emphasized that the text, context and purpose of a provision is used to determine the intention of the legislator:

> In determining the purpose of the relevant provision(s) of the Act, a court must take a unified textual, contextual and purposive approach to statutory interpretation (*Canada Trustco*, at para. 47). This approach is, of course, not unique to the GAAR. As this Court confirmed in *Kaulius*, the approach to statutory interpretation is the same for provisions of the ITA as for those of any other statute: **it is necessary "to determine the intention of the legislator by considering the text, context and purpose of the provisions at issue"** (para. 42; see also *Placer Dome Canada Ltd.*

---

[18] *Ibid.*, paragraph 41.
[19] 2005 SCC 54 ("*Canada Trustco*").
[20] *Ibid.*, paragraph 10.
[21] *Ibid.*, paragraph 12.
[22] 2009 SCC 1.

> *v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, at paras. 21-23).[23]

[Emphasis added.]

[29] Finally, in *Attorney General of Canada and Darryl Zelisko v. Stevan Utah*,[24] the Federal Court of Appeal emphasized that provisions must be considered in their proper context:

> The key provision in this case is paragraph 3(1)(*a*) of Alberta's *Limitations Act*. It tells us when the two-year limitation period started. Our task is to determine the authentic meaning of paragraph 3(1)(*a*) and apply it to the facts before us.
>
> We determine the authentic meaning of paragraph 3(1)(*a*) by taking the plain meaning of its words, **seeing them in their proper context**, and keeping front of mind the purposes the provision is to serve . . . We do this neutrally, dispassionately and objectively . . . . [25]

[Emphasis added.]

[30] To address the correctness of the Statement, I must consider the text of subsections 39(1), (2) and (3)[26] and 40(1) and their interaction with other provisions in Subdivision c and elsewhere in the Act at the time Subdivision c was introduced into the Act in 1972. This represents the original context of subsection 39(2) and is therefore the proper starting point for determining the intent of Parliament in enacting subsection 39(2).

[31] The text of subsections 39(1), (2) and (3) and 40(1) immediately following their enactment in 1972 is reproduced in Appendix B.

[32] The Respondent observes that Subdivision c was added to the Act in 1972 to address the Report of the Royal Commission on Taxation.[27] The Carter Commission Report was followed in 1969 by a government paper titled "Proposals for Tax Reform",[28] which outlined the government's proposed course of action in response

---

[23] *Ibid.*, paragraph 26.
[24] 2020 FCA 224.
[25] *Ibid.*, paragraphs 8 and 9.
[26] I have included subsection 39(3) because it is an important part of the original context of subsections 39(1) and (2) and 40(1).
[27] *Report of the Royal Commission on Taxation* (Ottawa, Queen's Printer, 1966) (the "Carter Commission Report").
[28] *Proposals for Tax Reform* (Ottawa, Queen's Printer, 1969) (the "White Paper").

to the Carter Commission Report. Neither document assists in the interpretation of subsection 39(2).

[33] Prior to the enactment of Subdivision c, the Act did not tax gains and did not recognize losses arising from dispositions of property held on capital account. Subdivision c therefore introduced an entirely new scheme into the Act that addressed the taxation of such gains and losses.[29] As had been the case prior to the enactment of Subdivision c, such gains and losses were referred to as capital gains and capital losses. The taxable or deductible portion of such gains and losses were called taxable capital gains and allowable capital losses, respectively.

[34] Subject to the exclusion of dispositions of specified properties,[30] paragraph 39(1)(a) stated that "a taxpayer's capital gain for a taxation year from the disposition of any property is his gain for the year determined under [Subdivision c]" to the extent not otherwise included in income. Similarly, paragraph 39(1)(b) stated that "a taxpayer's capital loss for a taxation year from the disposition of any property is his loss for the year determined under [Subdivision c]" to the extent not otherwise deductible in computing income.

[35] Consistent with the text of subsection 39(1), most of the new computational rules in Subdivision c were focussed on a disposition of property by a taxpayer and ultimately the determination of the gain or loss resulting from that disposition. However, subsections 39(2) and 39(3) were different in that each of these subsections had its own rules for determining a taxpayer's capital gain or capital loss in specified circumstances.

[36] Subsection 39(3) applied "[w]here a taxpayer has issued any bond, debenture or similar obligation and has at any subsequent time in a taxation year and after 1971 purchased the obligation in the open market, in the manner in which any such obligation would normally be purchased in the open market by any member of the public".

[37] When it applied, subsection 39(3) deemed the taxpayer to realize a capital gain or a capital loss from the disposition of capital property to the extent that the amount paid by the taxpayer for the obligation was less than or more than the amount

---

[29] Chapter 3 of the White Paper states in general terms the government's position with respect to the taxation of capital gains and capital losses.
[30] The excluded properties are described in subparagraphs 39(1)(a)(i) to (iii) and 39(1)(b)(i) and (ii) of the 1972 version of subsection 39(1).

for which the obligation was issued. The deeming rule in subsection 39(3) applied on an obligation-by-obligation basis.

[38] Subsection 39(2) commenced with the words “Notwithstanding subsection [39](1)” and applied “where, by virtue of any fluctuation after 1971 in the value of the currency or currencies of one or more countries other than Canada relative to Canadian currency, a taxpayer has made a gain or sustained a loss in a taxation year”.

[39] When it applied, subsection 39(2) aggregated all such gains and losses in a taxation year that were on capital account and, subject to the reduction of the net amount by $200 if the taxpayer was an individual, deemed the net amount to be a capital gain or a capital loss for the year from the disposition of currency of a country other than Canada (i.e., from the disposition of foreign currency).

[40] Unlike subsection 39(3), subsection 39(2) applied its deeming rule to a net amount computed by the formula in the subsection and not to an amount resulting from a particular event. The net amount could be comprised of the foreign exchange result from a single event during the taxation year or from multiple events during the taxation year each having different foreign exchange consequences (i.e., different amounts of gain or loss).

[41] The aggregation of gains and losses mandated by subsection 39(2) was necessary to apply the $200 reduction when determining the net gain or loss of an individual. This approach was a material departure from the property-by-property approach and the obligation-by-obligation approach in subsections 39(1) and 39(3), respectively, highlighting the uniqueness of subsection 39(2).

[42] In lieu of requiring a disposition of any property, subsection 39(2) asks whether the taxpayer has “made a gain” or “sustained a loss” because of a fluctuation in the value of a foreign currency vis-à-vis the Canadian dollar. This requires both a determination that a gain or loss has been made/sustained and identification of the reason[31] for that gain or loss.

[43] Unlike subsection 39(1), subsection 39(2) did not require that the gain or loss to which the subsection applied be determined under Subdivision c. Rather, as with subsection 39(3), subsection 39(2) had its own terminology for determining the gain

---

[31] The phrase “by virtue of” may be equated with the phrases “as a result of” or “because of”.

or loss implying that Parliament intended a different approach than taken in subsection 39(1):

> It is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design. The legislature does not include unnecessary or meaningless language in its statutes; it does not use words solely for rhetorical or aesthetic effect; it does not make the same point twice. This is what is meant when it is said that the legislature does not speak in vain.[32]

[44] The phrases chosen by Parliament were not unique in the history of the pre-1972 Act. In *MNR v. Consolidated Glass Limited*,[33] the Supreme Court of Canada had interpreted the phrases "capital profits or gains made" and "capital losses sustained" used in paragraph 73A(1)(a) of the 1950 version of the *Income Tax Act*, which stated in subparagraph 73A(1)(a)(iii):

> the amount by which all capital losses sustained by the corporation in those years before the 1950 taxation year exceeds all capital profits or gains made by the corporation in those years before the 1950 taxation year,

[45] Rand J. (writing for two other judges and with whom two further judges concurred on this point) stated:

> "Losses sustained" and "profits and gains made" are clearly correlatives and of the same character, but how can profits and gains be considered to have been made in any proper sense of the words otherwise than by actual realization? This is no inventory valuation feature in relation to capital assets. That the words do not include mere appreciation in capital values is, in my opinion, beyond controversy.

[46] Eleven years later in *D.W.S. Corp. v. MNR*,[34] Thurlow J. used the repayment of a debt to identify the point in time that a foreign exchange loss was "sustained" by the taxpayer on a trade debt owed by the taxpayer.[35] The Supreme Court of Canada affirmed the decision in 1969 without reasons.[36]

[47] Hence, prior to the enactment of Subdivision c, the Supreme Court of Canada had interpreted language very similar to that used in subsection 39(2) as capturing

---

[32] Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016) ("Sullivan") at page 43.
[33] [1957] SCR 167 ("*Consolidated Glass*").
[34] [1968] 2 Ex CR 44, [1968] CTC 65, 68 DTC 5045 ("*D.W.S. Corp.*").
[35] *Ibid.*, pages 75 - 77 (CTC).
[36] [1969] SCR v, 69 DTC 5203 (SCC).

gains and losses on capital account realized by a taxpayer but not necessarily because of a disposition of property.

[48] Parliament is presumed to have been aware of the law when it enacted subsection 39(2) and it is therefore reasonable to infer that, in using in subsection 39(2) terminology very similar to that that had been accorded a meaning in the jurisprudence, Parliament intended to adopt the approach to the determination of a taxpayer's gain or loss taken in that jurisprudence.[37]

[49] The prominent tax commentators of the day were quick to recognize the unique implication of the words "made a gain" and "sustained a loss" used in subsection 39(2). For example, in a 1972 National Tax Conference article, the (to be) Honourable Murray Mogan observed:

> . . . where amounts are borrowed on a long-term basis to provide fixed capital, fluctuations in foreign exchange can produce capital gains or losses to the borrower.
>
> . . .
>
> Assuming that a foreign exchange profit is, in fact, a capital profit and not income, section 39(2) of the new Act deems the amount to be a capital gain from the disposition of foreign currency; and individuals are given a $200 free zone for both gains and losses.[38]

[50] In paragraph 9 of Interpretation Bulletin IT-95 dated March 15, 1973 ("IT-95"), the revenue authorities recognized that there may be "a capital gain or capital loss on the discharge of" a capital debt obligation and in *Tahsis*, the Federal Court - Trial Division accepted without question the application of subsection 39(2) to the repayment of foreign currency denominated debt on capital account owed by the taxpayer.

[51] In *MacMillan Bloedel*, the Federal Court of Canada - Appeal Division applied subsection 39(2) to a redemption of shares by the issuing corporation. In doing so, the Court recognized the unique implication of the words "sustained a loss". The Court also held that the word "loss" in subsection 39(2) should be given its commonly understood meaning:

---

[37] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at paragraph 45.

[38] Murray Mogan, "Taxability of Receipts", 1972 CR 121–126 at 124. See, also, David A. Ward, "Tax Considerations Relating to the Purchase of Assets of a Business," in Corporate Acquisitions, Reorganizations and Liquidations, 1972 Corporate Management Tax Conference 22–50.

> According to the plain wording of subsection 39(2) the taxpayer is only required to have sustained a loss by virtue of a currency fluctuation in order to claim a capital loss, if the amount is not otherwise included in computing income. . . . According to the common understanding of "loss", the respondent's payment to the shareholders clearly qualifies. . . . [39]

[52] Although *Tahsis* and *MacMillan Bloedel* did not address a disposition of property, nothing in the text of subsection 39(2) read in context suggests that the meaning of the phrases "made a gain" and "sustained a loss" differs depending on whether there is a disposition of property. It runs counter to the presumption of linguistic competence[40] and to the interpretive principle adopted by the Supreme Court of Canada in *Canada Trustco*[41] that emphasizes consistency, predictability and fairness to afford different meanings to the words of a provision depending on the circumstances to which they apply.

[53] Parliament recognized that with respect to a disposition of property that fell within the intended scope of subsection 39(2) there was a potential conflict between subsections 39(1) and 39(2) and expressly addressed that conflict with the words "Notwithstanding subsection (1)". These words gave paramountcy to subsection 39(2):

> In the complete statute book of a jurisdiction, whether federal, provincial, or municipal, there is inevitably a significant potential for conflict between provisions. Part of the job of legislative drafters is to search out such conflicts and seek instruction on how to deal with them — by repeal perhaps, or by designating one of the provisions to be paramount. **The latter is conventionally rendered by introducing the paramount provision with words like "notwithstanding (or despite) section xx" or introducing the subordinate provision with words like "subject to section yy."** Sometimes general notwithstanding clauses are included that make certain provisions or an entire Act paramount over anything else that might conflict with it.[42]

[Emphasis added.]

[54] The paramountcy afforded subsection 39(2) ensured that subsection 39(2) would apply instead of subsection 39(1) to a disposition of property by a taxpayer if the gain made or loss sustained by the taxpayer because of that disposition was "by virtue of any fluctuation after 1971 in the value of the currency or currencies of one

---

[39] *MacMillan Bloedel*, paragraph 8 (CTC).
[40] Sullivan, pages 40 and 41.
[41] *Canada Trustco*, paragraph 12.
[42] Sullivan, page 326.

or more countries other than Canada relative to Canadian currency". Since subsection 39(1) did not apply to such a disposition of property because of the notwithstanding clause in subsection 39(2), the requirement in subsection 39(1) to determine the gain or loss under subdivision c also did not apply.

[55] I therefore agree with the Appellant's position that subsection 39(2) is a stand-alone provision that when it applies to a disposition of property replaces subsection 39(1) and the rules in Subdivision c adopted by that subsection. Consistent with the approach adopted by the Federal Court of Canada - Appeal Division in *MacMillan Bloedel*, whether a gain is made, or a loss is sustained, for the purposes of subsection 39(2) is determined by reference to the commonly understood meaning of the words "gain" and "loss" and not by reference to the computational rules elsewhere in Subdivision c.

[56] With respect, the conclusion in the Paragraph that if there is a disposition of property the gain or loss referred to in subsection 39(2) must be determined under subsection 40(1) is tantamount to reading into subsection 39(2) the rule in subsection 39(1) that the gain or loss is to be "determined under this subdivision".

C. How Does Subsection 39(2) Function as a Stand-Alone Provision?

(1) Did Parliament Intend Subsection 39(2) to Apply to Dispositions of Any Property?

[57] It is apparent that subsection 39(2) applies to transactions that do not involve a disposition of property such as the transactions addressed in *Tahsis* and in *MacMillan Bloedel* as well as to transactions that do involve a disposition of property. The latter transactions gave rise to the need for the notwithstanding clause at the beginning of subsection 39(1).

[58] As others have recognized, however, the text of subsection 39(2) does not explicitly define the scope of the provision when it comes to dispositions of property.[43] Moreover, the notwithstanding clause in and of itself provides no insight into the intended scope of subsection 39(2) when Parliament enacted the provision in 1972. However, when the text of subsection 39(2) is considered within the broader context in which it was placed in 1972, only one interpretation is harmonious with that broader context and with the Act read as a whole.

---

[43] *The Bank of Montreal v. R.*, 2018 TCC 187.

[59] I start my analysis with the point that for the purposes of the Act, income, gains and losses must be measured in Canadian dollars because that is the only currency known to Canadian law.[44] I will refer to this requirement as the "Currency Principle".

[60] By 1972, there were several Supreme Court of Canada cases that reflected the Currency Principle even if not stated in such terms.[45] For example, in *Eli Lilly*, the majority of the Supreme Court of Canada stated:

> The cost of exchange arising out of fluctuations in foreign currency is an ordinary expense in relation to foreign trade and has been so recognized and treated in the computation of income tax. … The language of Jenkins J. is appropriate:
>
> > . . . where a British company in the course of its trade engages in a trading transaction such as the purchase of goods abroad, which involves, as a necessary incident of the transaction itself, the purchase of currency of the foreign country concerned, then any profit resulting from an appreciation or loss resulting from a depreciation of the foreign currency embarked in the transaction as compared with sterling will *prima facie* be a trading profit or a trading loss for Income Tax purposes **as an integral part of the trading transaction**.[46]

[Emphasis added.]

[61] As well, paragraphs 6 through 11 of IT-95 indicate that the Currency Principle was well recognized by the revenue authorities around the time Subdivision c was enacted. With respect to transactions on capital account, paragraph 9 of IT-95 states, in part:

---

[44] Section 3 of the *Currency Act*. The Canadian dollar has been the only legal tender in Canada since the enactment of the *Uniform Currency Act* in 1871.

[45] At the time Parliament enacted Subdivision c in 1972, the courts had applied the Currency Principle to amounts in a foreign currency paid or received in respect of property held on income account, to amounts in a foreign currency received for the provision of services and to the incurrence and repayment of foreign currency denominated debt on income account: *Eli Lilly and Company (Canada) Limited v. Minister of National Revenue*, [1955] SCR 745 ("*Eli Lilly*"), *Tip Top Tailors Ltd. v. Minister of National Revenue*, [1957] SCR 703, *Aluminium Union Ltd. v. MNR*, [1960] CTC 206, 60 DTC 1138 (Ex. Ct.) (affirmed without additional reasons, [1963] SCR v., 63 DTC 1254), *Canadian General Electric Co. Ltd. v. Minister of National Revenue*, [1962] SCR 3, *D.W.S. Corp.* (affirmed without reasons, [1969] SCR v., 69 DTC 5203), *Alberta Gas Trunk Line Co. v. MNR*, [1972] SCR 498 and *Alberta Natural Gas Co. v. MNR*, [1972] SCR 490.

[46] *Eli Lilly*, page 750.

> Whichever of the above methods is used in respect of transactions of an income nature, the purchase or sale of a capital asset is expressed in Canadian dollars at the rate prevailing at the time of the transaction.

[62] This understanding of the effect of the earlier case law on transactions on income account is confirmed by the majority of the Supreme Court of Canada in *Imperial Oil Ltd. v. Canada; Inco Ltd. v. Canada*.[47] In that case, the majority reviewed several of the earlier decisions addressing foreign exchange and trading transactions and stated:

> In my view, the above cases stand for the proposition that foreign exchange gains and losses incurred in relation to foreign trade **cannot be separated from** the underlying transaction such that the foreign exchange gain or loss would be on capital account while the underlying transaction would be on income account. **In such a case, the foreign exchange gain or loss is <u>an intrinsic element of the price received or paid for a company's goods</u> and must be included in the computation of income.**[48]

[Emphasis and double emphasis added.]

[63] The majority also affirmed the Federal Court of Appeal's decision in *Gaynor* to apply the Currency Principle to the determination of a gain or loss under subsection 40(1) but held that *Gaynor* did not establish a general principle that all elements of a statutory formula in the Act had to be converted into Canadian dollars.[49] The minority of the Court disagreed on this latter point.

[64] In 2007 and again in 2009, the Currency Principle was codified for all taxation years[50] by the enactment of subsection 261(2) and the definition of "Canadian tax results" in subsection 261(1). Subject to minor exceptions, these rules require the use of Canadian dollars when determining amounts under the Act unless the taxpayer makes a functional currency election. Paragraph 2 of the Agreed Statement of Facts states that the Appellant determined its Canadian tax results in Canadian dollars.

[65] With this background in mind, there is no doubt that subsection 39(2) was intended to apply to dispositions of foreign currency on capital account. This

---

[47] 2006 SCC 46, [2006] 2 SCR 447 ("*Imperial Oil*").
[48] *Imperial Oil*, paragraph 45. With respect to the intrinsic element point in the context of foreign currency denominated debt, see *R. v. Canadian Pacific Limited*, [2002] 2 CTC 197, 2002 DTC 6742 (FCA) at paragraph 23 and *Saskferco Products ULC v. R.*, 2008 FCA 297 at paragraphs 28 and 32.
[49] *Imperial Oil*, paragraph 52.
[50] S.C. 2007, c. 35, subsection 67(2) and S.C. 2009, c. 2, subsection 80(3). Paragraph 261(2)(b) was amended in 2016 to change "subsection 79(7)" to "subsections 20(14.2) and 79(7)" effective January 1, 2017.

application is the only obvious explanation for the aggregation of all gains and losses for a taxation year and the reduction of the net gain or loss of individuals by $200 as explained in Paragraph 5 of IT-95. The same approach is seen in current subsection 39(1.1).

[66] Gains and losses realized on a disposition of foreign currency are unique in the sense that the only possible reason for a gain or loss for Canadian income tax purposes is the fluctuation in the value of the foreign currency vis-à-vis the Canadian dollar. Consequently, such gains and losses are always solely "by virtue of any fluctuation after 1971 in the value of the currency or currencies of one or more countries other than Canada relative to Canadian currency". This distinguishes dispositions of foreign currency from dispositions of other property.

[67] For property other than foreign currency, foreign currency fluctuations are an aspect of determining the change in value of the property in Canadian dollars, which is required to determine a taxpayer's gain or loss for purposes of the Act. This change in value may result from any number of factors.

[68] In a 1993 article, David Broadhurst observed:

> Subsection 39(2) provides rules that apply when a taxpayer makes a gain or sustains a less "by virtue of any fluctuation" of a foreign currency relative to Canadian currency. There is some uncertainty about how subsection 39(2) should be interpreted relative to the other provisions of the Act. From its position in subdivision c, one might infer that subsection 39(2) was intended to deal only with gains and losses "made" on foreign currency liabilities. Subsection 39(1) deals with capital gains on the disposition of property. Any foreign currency fluctuation inherent in the difference between proceeds (translated into Canadian dollars at current exchange rates) and cost (translated at historic rates) would be included in the computation of gain or loss under subsection 39(1) without reliance on subsection 39(2). However, subsection 39(1) is limited to dispositions of "property." Therefore, a rule is needed to deal with foreign currency gains and losses on liabilities. Subsection 39(2) fulfils this purpose. It deems a foreign currency gain or loss that is made on a liability to be a gain or loss from the disposition of foreign currency. The fact that the next subsection, subsection 39(3), deals with other gains and losses realized on liabilities may support that approach.
>
> Whatever the intent, subsection 39(2) is not expressly limited to the gains and losses made on liabilities. However, it is difficult to apply when dealing with the disposition of assets. . . .
>
> . . .

[69] Parliament is assumed to have had knowledge of the law and of the implication of its application to the computational rules in Subdivision c when it enacted Subdivision c.[51] Considering this and the ensuing widely recognized application of the Currency Principle to amounts determined under subsection 40(1), one might reasonably ask why in 1972 Parliament would choose to adopt a separate foreign exchange rule that applied to dispositions of property other than foreign currency?

[70] Subsection 39(2) was required to address the economic gain or loss that could result from borrowing and repaying an amount denominated in a foreign currency because subsection 39(1) and the computational rules in Subdivision c did not apply to such transactions. Subsection 39(3) was enacted for a similar reason to address purchases by a taxpayer of its own debt in the open market.

[71] Subsection 39(2) was also required for Parliament to provide a $200 exemption to individuals exchanging foreign currency. This exemption was subsequently provided to such transactions by subsection 39(1.1).

[72] However, subsection 39(2) was not required to address foreign currency fluctuations associated with acquisitions and dispositions of property other than foreign currency because subsection 40(1) read with due regard to the need to convert the amounts identified in that subsection into Canadian dollars already addressed such fluctuations and integrated them into the gain or loss computed under subsection 40(1).

[73] I respectfully suggest that this fact and the fact recognized by Broadhurst in 1993 that extending subsection 39(2) to dispositions of property other than foreign currency raises difficult issues together strongly suggest that Parliament did not intend that subsection 39(2) apply to dispositions of property other than foreign currency.

[74] The issues suggested by Broadhurst are illustrated by the following example. XCo, a Canadian resident taxpayer that has not made a functional currency election,[52] acquires 10 US dollar denominated shares for US$100 each at a time when the exchange rate is US$1 = CAN$1.35. Under the Currency Principle, the adjusted cost base of the shares to XCo is CAN$1,350, or CAN$135 per share.

---

[51] Sullivan at page 42, paragraph E. 3).
[52] This election was available prior to the 2013 amendment of subsection 39(2).

[75] One year later, XCo sells the shares for US$120 each when the exchange rate is US$1 = CAN$1.15. Under the Currency Principle, the proceeds of disposition received by XCo are CAN$1,380, or CAN$138 per share.

[76] XCo therefore realizes a gain of CAN$30, or CAN$3 per share as determined under subsection 40(1) in accordance with the Currency Principle.

[77] If the US dollar had remained at a constant value in Canadian dollars during the period XCo owned the shares, XCo's gain would have been CAN$270 instead of only CAN$30. The reduction of CAN$240 reflects the devaluation of the US dollar during that period.

[78] Importantly, the result is the same as if XCo purchased the shares for CAN$1,350 (the value of the shares in Canadian dollars at the time of purchase) and a year later sold the shares for CAN$1,380 (the value of the shares in Canadian dollars at the time of sale). Consequently, subsection 40(1) is neutral in terms of the gain or loss in Canadian dollars, which is the gain or loss that is relevant under the Act.[53]

[79] If subsection 39(2) is applied to characterize the CAN$240 foreign exchange loss as a capital loss from the disposition of foreign currency, how is this addressed by subsection 40(1)?[54] Under the rules in that subsection, the gain to XCo is still CAN$30 but XCo also has a capital loss under subsection 39(2) of CAN$240. In the absence of a specific rule, to avoid double counting, one would have to rely on subsection 4(4).[55]

[80] One might reasonably suggest that if subsection 39(2) was intended to apply to dispositions of property other than foreign currency Parliament would have included at least some guidance in Subdivision c that addressed the adjustments required in this not uncommon example.

[81] When Subdivision c was enacted there was no shortage of adjustments such as to the adjusted cost base of a property.[56] There was even a proportioning rule that

---

[53] Of course, this is also true for dispositions of foreign currency but addressing dispositions of foreign currency in a separate rule did not raise issues because there could be only one reason for a gain or loss on a disposition of foreign currency: a fluctuation in the value in Canadian dollars of that currency.
[54] This question arises regardless of whether subsection 39(2) is applied before or after subsection 40(1) and regardless of whether or not the subsection is a stand-alone rule.
[55] A revised version of this rule is now in subsection 248(28).
[56] Subsections 53(1) and (2).

addressed property used in part to earn income and in part for some other purpose.[57] Yet Subdivision c was silent regarding how to address a manifestly obvious computational conundrum caused by the interaction of subsection 39(2) and 40(1) if the former applies to dispositions of property other than foreign currency?

[82] It has been suggested that Parliament did not think it was necessary to include a statutory rule to address the overlap of subsection 39(2) and 40(1) when the former is applied to dispositions of property other than foreign currency.[58] With respect, Parliament does not deliberately leave gaps in income tax legislation but does addresses the possibility of unintended consequences. As stated by the Federal Court of Appeal in *Imperial Oil Limited v. R.*:[59]

> Subsection 248(28) (like its predecessor, subsection 4(4), now repealed) was enacted because Parliament recognized that, in a statute involving as many complex computations as the *Income Tax Act*, a transaction may fall literally within the scope of two separate provisions and so be counted twice as an income inclusion, a deduction or a tax credit. Subsection 248(28) is intended to avoid such double counting unless the *Income Tax Act* clearly compels such a result.[60]

[83] I respectfully suggest that a much more plausible explanation for the absence of specific rules in Subdivision c is that Parliament did not contemplate the need for rules integrating subsection 40(1) with the effect of the broad interpretation of subsection 39(2) because in 1972 Parliament did not contemplate the application of subsection 39(2) to dispositions of property other than foreign currency.

[84] It has also been suggested that it would not be particularly difficult to separate a taxpayer's gain or loss on an underlying asset from the taxpayer's foreign exchange gain or loss in most situations.[61] With respect, Broadhurst, a tax specialist, states in his 1993 article that it is difficult to apply subsection 39(2) to dispositions of property other than foreign currency.[62]

[85] This difficulty exists not just in the mathematical computation of each component of a gain or loss but in which order to apply the statutory provisions and

---

[57] Paragraph 45(1)(b).
[58] *The Bank of Montreal v. R.*, 2018 TCC 187 at paragraph 47.
[59] 2004 FCA 361.
[60] *Ibid.*, paragraph 68.
[61] *The Bank of Montreal v. R.*, 2018 TCC 187 at paragraph 47.
[62] Broadhurst, *supra*.

in how and where to report the result of the separation of the foreign currency component of a gain or loss on a disposition of property.

[86] With respect, these issues are not simple matters that Parliament would purposefully leave for taxpayers to sort out. The complexity of the issues is seen clearly in the decision in *BMO* and in the issues raised in this Rule 58 Hearing.

[87] The fact that when Parliament enacted Subdivision c it took no steps to address the manifest issues raised by the broad interpretation and the fact that the double counting that often results from the broad interpretation can only be remedied by subsection 248(28), or its predecessor subsection 4(4), strongly suggest that the consequences of the broad interpretation were unforeseen and unintended.

[88] In addition to the interaction of subsection 39(2) and 40(1), the broad interpretation raises questions about how to apply subsection 39(2) to other provisions enacted at the same time as subsection 39(2) such as the loss rules in paragraphs 40(2)(d) (applicable to bonds or debentures disposed of by a corporation), 40(2)(e) (applicable to property disposed of by a corporation to a controlling shareholder or to another corporation controlled by such a person) and 40(2)(g) (applicable to superficial losses, losses on debt not acquired to earn income and losses on personal-use property) and subsection 112(3).[63] These issues were subsequently compounded by the enactment after 1972 of a myriad of additional rules such as subsection 40(3.6).

[89] The difficulties raised by the application of subsection 39(2) to modify the application of original subsection 112(3) are illustrative. At the time subsection 39(2) was enacted, subsections 112(3) and (4) were added to the Act to address losses on shares on which dividends had been received. Subject to threshold requirements regarding percentage ownership and period of ownership,[64] both rules reduced a loss on a share to the extent a dividend identified in the provision had been received on the share.

[90] Subsection 112(3) applied to a loss on a share held by a corporate shareholder that was not a trader or dealer in securities if three conditions were satisfied: a taxable

[63] The subsequent addition to the Act of a myriad of stop-loss rules such as subsection 40(3.6) in 1997 (applicable to dispositions after April 26, 1995) only compounds this complexity and in my respectful view leads to highly anomalous results.

[64] The subsections applied if the shareholder in issue owned the share for less than 365 days, or at the time the dividend was received, owned more than 5% of the issued shares of any class in the corporation paying the dividend.

dividend had been received on the share; the dividend was deductible under subsection 112(1) or 138(6); and, tax was not paid on the dividend under Part VII.

[91] Subsection 112(4) applied to a loss on a share of a person that was a trader or dealer in securities if a dividend had been received on the share.

[92] Under the broad interpretation, a foreign exchange loss is excluded from the application of subsection 112(3) but not from the application of subsection 112(4). This is a patently anomalous result. I can think of no rational policy or other reason why Parliament would intend such a result.

[93] This is not the only issue that the broad interpretation raises with subsection 112(3). To determine the amount by which a loss on a share subject to subsection 112(3) was reduced, under the Currency Principle any foreign currency dividend received on the share would have to be converted to Canadian dollars. Consequently, foreign exchange is included in computing the reduction of a loss on the share under subsection 112(3) but, under the broad interpretation of subsection 39(2), not in computing the loss on the disposition of the share.

[94] The broad interpretation of subsection 39(2) has the same anomalous impact on other loss rules introduced in 1972 in paragraphs 40(2)(d), (e) and (g). If Parliament intended to carve out from these rules a foreign exchange loss on a disposition of property other than foreign currency,[65] it would have been a simple matter to say so rather than relying solely on the three words "Notwithstanding subsection (1)" to achieve this result. Such an oblique approach to the drafting of a provision in the Act is not in keeping with the approach taken by Parliament in the remainder of the Act. As stated by the Supreme Court of Canada in *Canada Trustco*, the Act is "an instrument dominated by explicit provisions dictating specific consequences".[66]

[95] In contrast to the myriad issues raised by the broad interpretation, if subsection 39(2) is interpreted to apply only to dispositions of foreign currency and to transactions that do not involve a disposition of property (the "narrow interpretation") then none of these issues arise.

---

[65] In *Bernier* at paragraphs 29 to 31, the Tax Court refused to apply subparagraph 40(2)(g)(ii) to a foreign exchange loss on the repayment of a debt because the repayment was not a disposition of property but gave rise to a capital loss on foreign currency at the time the debt was repaid.
[66] *Canada Trustco*, paragraph 13.

[96] Specifically, there is no overlap of subsection 39(2) and subsection 40(1) because: (i) subsections 39(1) and 40(1) do not apply to transactions that do not involve a disposition of property; and (ii) a gain or loss on a disposition of foreign currency includes only the gain or loss from the fluctuation in the value of the currency vis-à-vis the Canadian dollar and the full amount of that gain or loss is addressed by the deeming rule in subsection 39(2).

[97] In the face of two interpretations—one that accords with the Currency Principle codified for all taxation years by subsection 261(2) and that does not raise anomalous results when subsection 39(2) interacts with other provisions in the Act and one that has no support in the text of Subdivision c beyond the words "Notwithstanding subsection (1)" and that gives rise to myriad illogical consequences—the former is the preferred interpretation. In *Charlebois v. Saint John (City)*,[67] the majority of the Supreme Court of Canada stated:

> . . . Two competing interpretations are put before the Court. On the one hand, as the appellants contend, did the Legislature intend to advance judicial bilingualism by extending the application of s. 22 to all municipalities regardless of the minority language population? Of course, that legislative choice was open. On the other hand, as the City contends, did the Legislature choose to extend its application only to those listed bodies under the s. 1 definition of "institution", leaving it up to municipalities to opt in pursuant to s. 37 if they so choose? That legislative choice was also open. Whether or not the latter choice is constitutional is a separate issue, and precisely the question that is *not* before us on this appeal. **There is no doubt, however, as a matter of statutory interpretation, that the more restrictive approach was open to the Legislature and, in this case, it is the only interpretation that creates no illogical or incoherent consequences when read in the context of the statute as a whole**.[68]

[Emphasis added.]

[98] The Federal Court of Appeal concludes in *BMO* that rules in Subdivision i of Division B of Part I of the Act ("Subdivision i") in existence *circa* 2007 or later and technical notes accompanying the addition or amendment of those rules supports the broad interpretation.

[99] Subdivision i was enacted at the same time as Subdivision c but in 1972 was considerably less complex than it was in 2007. In 1972, section 91 required a

---

[67] *Charlebois v. Saint John (City)*, 2005 SCC 74, [2005] 3 SCR 563 ("Charlebois").
[68] *Charlebois* at paragraph 21.

taxpayer resident in Canada to include in income the taxpayer's proportionate share of the foreign accrual property income ("FAPI") of a foreign affiliate of the taxpayer.

[100] The definition of FAPI, then in paragraph 95(1)(a), included taxable capital gains and allowable capital losses of a foreign affiliate from dispositions of property other than tangible property used exclusively for the purpose of gaining or producing income from an active business carried on by the foreign affiliate.[69]

[101] In 1975, subsection 95(2) was retroactively amended to incorporate into paragraphs in the subsection a series of new rules governing the determination of certain components of FAPI.[70] As a result of this amendment, the original text of subsection 95(2) was placed in new paragraph 95(2)(f) with one modification.[71]

[102] In 1980, paragraph 95(2)(f) was amended to add a reference to new paragraph 95(2)(g).[72]

[103] Paragraph 95(2)(g) applied if by virtue of a foreign currency fluctuation relative to the Canadian dollar a foreign affiliate of a taxpayer had realized a taxable capital gain or an allowable capital loss on the settlement of debt owed to or by another foreign affiliate of the taxpayer. The rule deemed any such gain or loss to be nil for the purposes of computing FAPI.

[104] In 1981, paragraph 95(2)(f) was amended to add a reference to new paragraph (h) and to modify the language that excepted gains or losses that accrued prior to the last time the foreign affiliate became a foreign affiliate.[73]

[105] Paragraph 95(2)(h) applied if by virtue of a foreign currency fluctuation relative to the Canadian dollar a foreign affiliate of a taxpayer had realized a taxable capital gain or an allowable capital loss on certain transactions in its own issued

---

[69] Subparagraphs 95(1)(a)(ii) and (iv).
[70] Subsection 95(2) was amended by 1974–75, c. 26, S. 59(1), applicable to the 1972 and subsequent taxation years.
[71] Paragraph 95(2)(f) was identical to former subsection 95(2) except that the introductory words "For the purposes of paragraph 1(a)" were replaced with the words "except as provided in paragraphs (c), (d) and (e),".
[72] Paragraph 95(2)(f) was amended by 1979, c. 5, S. 32(1) by adding the reference to paragraph (g), applicable to the 1976 and subsequent taxation years. Paragraph 95(2)(g) was added by 1979, c. 5, S. 32(1), applicable to the 1976 and subsequent taxation years.
[73] Paragraph 95(2)(f) was amended by 1980–81, c. 48, S. 51(1), applicable with respect to any gain or loss on the disposition of property occurring after December 11, 1979, except that the addition of the reference to paragraph (h) in paragraph 95(2)(f) was applicable to the 1976 and subsequent taxation years. Paragraph 95(2)(h) was added by 1980–81, c. 48, S. 51(2), applicable to the 1976 and subsequent taxation years subject to an election by the taxpayer not to apply to taxable capital gains realized or allowable capital losses incurred by the taxpayer before December 12, 1979.

shares or in the shares of another foreign affiliate of the taxpayer. The rule deemed any such gain or loss to be nil for the purposes of computing FAPI.

[106] The original text of subsection 95(2) and the amendments to that subsection in 1975, 1980 and 1981 do not reference subsection 39(2) and therefore are of no assistance in the interpretation of that subsection. Although there were many subsequent amendments to Subdivision i, a serious question arises as to the interpretive value of amendments more than ten years after the enactment of subsection 39(2) absent very clear guidance in those subsequent amendments.

[107] In 1983, several amendments were made to Subdivision i including the following.

[108] First, a definition of "excluded property" was added as paragraph 95(1)(a.1) applicable after November 12, 1981.[74] The two main components of the new definition were property of a foreign affiliate used or held principally for the purpose of gaining or producing income from an active business, and shares held in another foreign affiliate all or substantially all of the property of which was excluded property.

[109] Second, paragraph 95(2)(i) was added to Subdivision i with application to dispositions after November 12, 1981.[75] Paragraph 95(2)(i) stated:

> (i) any gain or loss of a foreign affiliate of a taxpayer from the settlement or extinguishment of a debt that related at all times to the acquisition of excluded property **shall be deemed to be a gain or loss from the disposition of excluded property**.

[Emphasis added.]

[110] Lastly, paragraph 95(2)(f) was amended with application after November 12, 1981[76] primarily to clarify the currency in which a foreign affiliate was to compute taxable capital gains and allowable capital losses.[77] Following this amendment, paragraph 95(2)(f) stated:

---

[74] S. 95(1)(a.l) was added by 1980-81-82-83, c. 140, S. 57(1).
[75] Paragraph 95(2)(i) was added by 1980–81–82–83, c. 140, S. 57(13), applicable with respect to dispositions occurring after November 12, 1981.
[76] Paragraph 95(2)(f) was amended by 1980–81–82–83, c. 140, S. 57(10).
[77] A 1982 technical note addressing this amendment stated that paragraph (f) "is amended to clarify the currency in which capital gains and losses of foreign affiliates are to be calculated".

> (f) except as otherwise provided in this subsection, each taxable capital gain and each allowable capital loss of a foreign affiliate of a taxpayer from the disposition of property shall be computed in accordance with Part I, read without reference to section 26 of the *Income Tax Application Rules, 1971*, as though the affiliate were resident in Canada
>
> > (i) where such gain or loss is the gain or loss of a controlled foreign affiliate from the disposition of property other than excluded property, **in Canadian currency**, and
> >
> > (ii) in any other case, on the assumption that the currency of the country in which the affiliate is resident or such other currency as is reasonable in the circumstances (hereinafter referred to as the "calculating currency") were the currency of Canada and, **where subsection 39(2) is applicable**, on the further assumptions that
> >
> > > (A) the reference in that subsection to "the currency or currencies of one or more countries other than Canada relative to Canadian currency" were read as a reference to "one or more currencies other than the calculating currency relative to the calculating currency", and
> > >
> > > (B) the references therein to "of a country other than Canada" were read as references to "of a country other than the country of the calculating currency", . . .

[111] The opening words of paragraph 95(2)(f) still required that the taxable capital gains and allowable capital losses of a foreign affiliate from dispositions of property were to be computed in accordance with Part I of the Act as though the affiliate were resident in Canada. Such taxable capital gains and allowable capital losses included the taxable portion of capital gains and the allowable portion of capital losses deemed by subsection 39(2) to be from a disposition of foreign currency.[78]

[112] Subparagraphs 95(2)(f)(i) and (ii) specified the currency in which the taxable capital gains and allowable capital losses of the foreign affiliate were to be computed.

[113] Subparagraph 95(2)(f)(i) applied to taxable capital gains and allowable capital losses from dispositions of property other than excluded property—that is, to dispositions of property relevant to the computation of FAPI—and required that such gains and losses be computed in Canadian currency. The explicit requirement in

---

[78] Subsequent amendments to paragraph 95(2)(i) reviewed later in the judgment made this abundantly clear.

subparagraph 95(2)(f)(i) to use Canadian currency integrated any foreign exchange component of a gain or loss on a disposition of property into the calculation of FAPI.

[114] New subparagraph 95(2)(f)(ii) applied to taxable capital gains and allowable capital losses from dispositions of excluded property and required that such gains and losses be computed in the foreign affiliate's calculating currency. The calculating currency was the currency of the country in which the foreign affiliate was resident or of such other currency as was reasonable in the circumstances.

[115] New subparagraph 95(2)(f)(ii) referenced subsection 39(2) but only to provide modifications to the text of that subsection if it applied. These modifications were required to address the requirement in subparagraph 95(2)(f)(ii) that the foreign affiliate use its calculating currency.

[116] New paragraph 95(2)(i) applied to deem a gain or loss on a settlement or extinguishment of certain debt to be a gain or loss from a disposition of excluded property.

[117] In a 1986 text addressing the taxation of foreign affiliates,[79] the authors explain in chapter 17 the application of the foreign affiliate regime to foreign exchange. With respect to dispositions by a foreign affiliate of property that is not excluded property and therefore gives rise to FAPI (i.e., transactions to which subparagraph 95(2)(f)(i) applied), the FA Book states:

> Capital gains or losses sustained by a controlled foreign affiliate from dispositions of property, **other than excluded property**, are calculated in Canadian currency. Dispositions of such property give rise to gains or losses that are included in the determination of FAPI. **The cost of property is determined by converting its cost in foreign currency to Canadian currency at the date of acquisition and proceeds are converted to Canadian currency at the date of disposition**. The difference, measured in Canadian dollars, is the capital gain or loss that enters into the determination of FAPI.[80]

[Emphasis added.]

[118] With respect to dispositions of excluded property, the FA Book states:

---

[79] K.J. Dancey, R.A. Friesen and D.Y. Timbrell, *Canadian Taxation of Foreign Affiliates*, 4th ed. (Don Mills, Ont: CCH Canadian Limited, 1986) (the "FA Book").
[80] FA Book page 127–128.

> Where the property disposed of is excluded property . . . capital gains or losses are to be computed in the currency of the country in which the affiliate is resident or such other currency as is reasonable in the circumstances. This currency is referred to in subparagraph 95(2)(*f*)(ii) as the "calculating currency". **Thus, in cases where there is no attribution of FAPI, all capital gains and losses are determined in the calculating currency.** For surplus accounting purposes, similar provisions apply by virtue of Regulation 5907(5).
>
> Subsection 39(2) applies to foreign affiliates so that capital gains and losses from fluctuations in the value of foreign currencies, **other than those arising on dispositions of property**, are treated as capital gains from the disposition of foreign currency. **Subparagraph 95(2)(*f*)(ii) makes appropriate amendments to subsection 39(2) so that such gains and losses are calculated by reference to the calculating currency**.[81]

[Emphasis added.]

> . . .
>
> Gains or losses of a foreign affiliate from the settlement or extinguishment of a debt that related at all times to the acquisition of excluded property **are deemed to be gains or losses from the disposition of excluded property**. Thus, there is no attribution of FAPI resulting from such gains. The full amount of such gains or losses enters into the calculation of exempt earnings (loss) . . . . It should be noted that paragraph 95(2)(*i*) applies only to amounts owing by an affiliate and not to amounts receivable by it.[82]

[Emphasis added.]

[119] While as already stated there were numerous amendments to Subdivision i after 1983, with respect to the reference to subsection 39(2) in subparagraph 95(2)(f)(ii), the version of paragraph 95(2)(f) applicable to the Appellant's 2007 taxation year was in substance the same as described above.[83]

[120] However, *circa* early 2001, a tax practitioner raised a concern with the Department of Finance regarding the interaction of subsection 39(2) and paragraph 95(2)(f). The response from the Department of Finance is in a letter dated February 12, 2001, which states:

---

[81] FA Book page 129.
[82] FA Book page 130.
[83] Subject to the Appellant electing otherwise as described below.

> You have requested that the relationship between subsection 39(2) and paragraph 95(2)(f) of the Act be clarified.
>
> **Where subsection 39(2) applies, it deems the taxpayer to have a gain or loss from the disposition of "currency"**. **You point out that it is not clear how paragraph 95(2)(f) applies in respect of such a gain, since it is not clear that the "currency" referred to in subsection 39(2) would be regarded as excluded property**. Paragraph 95(2)(i) deems any gain or loss of a foreign affiliate from the settlement or extinguishment of a debt that related to the acquisition of excluded property to be a gain or loss from the disposition of excluded property. **Subsection 39(2) and paragraph 95(2)(i) could both apply to the same transaction.**
>
> You have requested that we amend the Act to require a separate calculation of foreign exchange gains or losses with respect to excluded property.
>
> **We are prepared to recommend an amendment to paragraph 95(2)(i) that would deem any gain or loss of a foreign affiliate arising under subsection 39(2) to be a gain or loss from the disposition of excluded property** where the gain or loss is from the settlement or extinguishment of a debt related to excluded property or of related hedging agreements. **We are also prepared to recommend a new paragraph in subsection 95(2) that would require a separate determination of foreign exchange gains and losses under subsection 39(2) for excluded property and other property**.

[Emphasis added.]

[121] Two amendments to paragraph 95(2)(i) were subsequently implemented by subsections 26(14) and 26(28) of the *Budget and Economic Statement Implementation Act, 2007*.[84] Under subsection 26(28) of the 2007 BESIA, for taxation years of foreign affiliates that began after December 20, 2002, paragraph 95(2)(i) was amended to read:

> (i) **any gain or loss determined in accordance with subsection 39(2) of a foreign affiliate of a taxpayer is deemed to be a gain or loss, as the case may be, from the disposition of an excluded property** if the gain or loss is
>
> > (i) derived from the settlement or extinguishment of a debt all or substantially all of the proceeds from which were used at all times to acquire excluded property or to earn income from an active business or for a combination of those uses, or
> >
> > (ii) derived under or as a result of an agreement that provides for the purchase, sale or exchange of currency and that can reasonably be

---

[84] S.C. 2007, c. 35 (the "2007 BESIA").

> considered to have been made by the affiliate to reduce its risk, with respect to a debt referred to in subparagraph (i), of fluctuations in the value of the currency in which the debt was denominated;

[Emphasis added.]

[122] This version of paragraph 95(2)(i) applied to settlements and extinguishments of debt that occurred before October 2, 2007. The rule made clear that any gain or loss determined in accordance with subsection 39(2) was deemed to be a gain or loss from the disposition of excluded property if it met the requirements in subparagraph 95(2)(i)(i) or (ii). The rule assumed that it was subsection 39(2) that deemed the existence of a capital gain or capital loss from a disposition of property (foreign currency) and deemed that gain or loss to be from a disposition of excluded property.

[123] In accordance with the last paragraph of the letter, subsection 26(13) of the 2007 BESIA added paragraph 95(2)(g.02) with application to the taxation years of a foreign affiliate that began after December 20, 2002. Paragraph 95(2)(g.02) stated:

> (g.02) in applying subsection 39(2) for the purpose of this subdivision (other than sections 94 and 94.1), the gains and losses of a foreign affiliate of a taxpayer **in respect of excluded property** are to be computed in respect of the taxpayer separately from the gains and losses of the foreign affiliate **in respect of property that is not excluded property**;

[Emphasis added.]

[124] Paragraph 95(2)(g.02) recognized that because of the aggregating mechanism in subsection 39(2), the net gain or loss determined under subsection 39(2) could be comprised of gains and losses in respect of debt associated with excluded property and gains and losses in respect of debt associated with other property. Paragraph 95(2)(g.02) was repealed with the amendment of subsection 39(2) in 2013 because new subsection 39(2) no longer aggregated gains and losses to determine the deemed capital gain or capital loss from a disposition of foreign currency.

[125] For settlements and extinguishments of debt after October 2, 2007, paragraph 26(13) of the 2007 BESIA amended paragraph 95(2)(i) to expand the circumstances to which it applied and to remove the reference to subsection 39(2) (this latter change is explained below).

(i) any income, gain or loss of a foreign affiliate of a taxpayer or of a partnership of which a foreign affiliate of a taxpayer is a member (which foreign affiliate or partnership is referred to in this paragraph as the "debtor"), for a taxation year or fiscal period of the debtor, as the case may be, **is deemed to be income, a gain or a loss, as the case may be, from the disposition of an excluded property of the debtor, if the income, gain or loss is**

(i) derived from the settlement or extinguishment of a debt of the debtor all or substantially all of the proceeds from which

(A) were used to acquire property, if at all times after the time at which the debt became debt of the debtor and before the time of that settlement or extinguishment, the property (or property substituted for the property) was property of the debtor and was, or would if the debtor were a foreign affiliate of the taxpayer be, excluded property of the debtor,

(B) were used at all times to earn income from an active business carried on by the debtor, or

(C) were used by the debtor for a combination of the uses described in clause (A) or (B),

(ii) derived from the settlement or extinguishment of a debt of the debtor all or substantially all of the proceeds from which were used to settle or extinguish a debt referred to in subparagraph (i) or in this subparagraph, or

(iii) derived under or as a result of an agreement that provides for the purchase, sale or exchange of currency and that can reasonably be considered to have been made by the debtor to reduce its risk, with respect to a debt referred to in subparagraph (i) or (ii), of fluctuations in the value of the currency in which the debt was denominated;

[126] This version of paragraph 95(2)(i) applied at the time paragraph 95(2)(f) was amended by subsection 25(2) of the *Budget Implementation Act, 2009*[85] to replace paragraph 95(2)(f) with paragraphs 95(2)(f) to (f.15) for taxation years that began after October 2, 2007.[86] Following this amendment, paragraphs 95(2)(f), (f.12), (f.14) and (f.15) stated, respectively:

(f) except as otherwise provided in this subdivision and except to the extent that the context otherwise requires, a foreign affiliate of a taxpayer is deemed to be at all

[85] S.C. 2009, c. 2 (the "2009 BIA").

[86] The date of application of the new rules was subject to the taxpayer electing in writing in respect of all foreign affiliates that the new rules apply from one of three earlier dates: paragraph 25(6) of the 2009 BIA.

times resident in Canada for the purposes of determining, in respect of the taxpayer for a taxation year of the foreign affiliate, each amount that is the foreign affiliate's

(i) capital gain, capital loss, taxable capital gain or allowable capital loss from a disposition of a property, or

(ii) income or loss from a property, from a business other than an active business or from a non-qualifying business;

. . .

(f.12) a foreign affiliate of a taxpayer shall determine each of the following amounts using its calculating currency for a taxation year:

(i) subject to paragraph (f.13), each capital gain, capital loss, taxable capital gain and allowable capital loss of the foreign affiliate for the taxation year from the disposition, at any time, of a property that, at that time, was an excluded property of the foreign affiliate, . . . [subparagraphs (ii) and (iii) omitted]

. . .

(f.14) a foreign affiliate of a taxpayer shall determine using Canadian currency each amount of its income, loss, capital gain, capital loss, taxable capital gain or allowable capital loss for a taxation year, other than an amount to which paragraph (f.12) or (f.13) applies;

(f.15) for the purpose of applying subparagraph (f.12)(i), the reference in subsection 39(2) to "the currency or currencies of one or more countries other than Canada relative to Canadian currency" is to be read as a reference to "one or more currencies other than the calculating currency relative to the calculating currency" and the references in that subsection to "of a country other than Canada" are to be read as references to "other than the calculating currency";

[127] Subparagraph 95(2)(f)(i) deemed a foreign affiliate to be a resident of Canada for the purposes of determining its capital gain, capital loss, taxable capital gain or allowable capital loss from a disposition of a property. As a deemed resident of Canada, the capital gain or capital loss of a foreign affiliate from a disposition of a property would include any capital gain or capital loss deemed by subsection 39(2) to be from the disposition of foreign currency. Consequently, the application of subsection 39(2) was now clear and it was no longer necessary to have a reference to subsection 39(2) in paragraph 95(2)(i).

[128] Subparagraph 95(2)(f.12)(i) required among other things that a foreign affiliate use its calculating currency to determine each capital gain or capital loss from the disposition of a property that was an excluded property. Paragraph 95(2)(f.15) adjusted the language of subsection 39(2) to reflect this requirement. Neither paragraph 95(2)(f.12) nor paragraph 95(2)(f.15) addressed when subsection 39(2) was applicable.

[129] The technical notes that addressed the amendment of paragraph 95(2)(f) stated, in part:

> The currency rules [in existing paragraph 95(2)(f)] provide that the computation of such a gain or loss is to be in the currency determined by subparagraph 95(2)(f)(i) or (ii), as the case may be. As part of the currency rules, subparagraph 95(2)(f)(ii) includes a rule with respect to the reading of subsection 39(2) of the Act.
>
> . . .
>
> New paragraph 95(2)(f.15) is a reading rule for subsection 39(2) of the Act that replaces the reading rule contained in current subparagraph 95(2)(f)(ii). Subsection 39(2) sets out rules that apply when a taxpayer realizes a gain or loss because of a fluctuation in currency exchange rates.[87]

[130] In summary, the foreign affiliate rules up to the amendment of subsection 39(2) in 2013 recognized that subsection 39(2) deemed a capital gain or capital loss from a disposition of property (foreign currency) and treated certain such gains and losses as from a disposition of excluded property for the purposes of paragraph 95(2)(f). The foreign affiliate rules did not address or provide clear insight into whether subsection 39(2) applied to dispositions of property other than foreign currency. However, the requirement in subparagraph 95(2)(f)(i) (and later in paragraph 95(2)(f.14)) to use Canadian currency for certain dispositions of property would, under the broad interpretation, create the same issues as exist between subsection 39(2) and 40(1).

[131] With respect to the amendment of subsection 39(2) itself, the Federal Court of Appeal has previously held that technical notes cannot be used to interpret a statutory provision prior to its amendment. In *R. v. Oxford Properties Group Inc.*, the Court stated:[88]

---

[87] Explanatory (Technical) Notes Relating to Bill C-10, *Budget Implementation Act*, *2009*, clause 25.
[88] 2018 FCA 30 ("Oxford Properties").

> Whether an amendment clarifies the prior law or alters it **turns on the construction of the prior law and the amendment itself**. As explained, the *Interpretation Act* prevents any conclusion from being drawn as to the legal effect of a new enactment on the prior law on the sole basis that Parliament adopted it. Keeping this limitation in mind, **the only way to assess the impact of a subsequent amendment on the prior law is to <u>first determine the legal effect of the law as it stood beforehand</u> and then determine whether the subsequent amendment alters it or clarifies it**.[89]

[Emphasis and double emphasis added.]

[132] As well, any statement in technical notes regarding the meaning of a statutory provision prior to its amendment is an inadmissible opinion on a question of law.[90]

[133] As noted in *Oxford Properties*, subsection 45(2) of the *Interpretation Act* emphasizes that the fact that subsection 39(2) was amended in 2013 is not in and of itself any indication that Parliament intended a change of the law:

> The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

[134] The 2013 amendments divided subsection 39(2) into subsections 39(1.1) and (2). The effect of these two new provisions is essentially identical to the effect of the narrow interpretation of subsection 39(2) prior to the 2013 amendments.[91]

[135] Given that the scope of subsection 39(2) prior to the amendment was subject to considerable uncertainty, it is reasonable to conclude based on the foregoing analysis of subsection 39(2) that the 2013 amendments were intended to remove that uncertainty and replace it with certainty.

[136] Finally, in *Imperial Oil* the majority of the Supreme Court of Canada reproduced subsection 39(2) at paragraph 19 of their reasons and stated that the subsection "includes express rules for the treatment of gains and losses resulting from currency fluctuations". However, notwithstanding a review of the facts in *Gaynor* and a detailed analysis of the implications of the decision in that case, neither the majority nor the minority of the Court suggests anywhere in their reasons that

---

[89] *Ibid.*, paragraph 86.
[90] *Michael Syrek v. R.*, 2009 FCA 53, paragraph 28.
[91] The one exception is that amended subsection 39(2) does not apply to the circumstance addressed by the Federal Court of Canada - Appeal Division in *MacMillan Bloedel*.

subsection 39(2) had to be applied or even considered in the context of a disposition of property such as the securities purchased and sold in US dollars that were addressed in *Gaynor*.

[137] In conclusion, with respect to those who hold a contrary view, subsection 39(2) as it read in 2007 was a stand-alone provision but Parliament did not intend that the subsection apply to dispositions of property other than foreign currency. Consequently, in my view, the conclusion that subsection 39(2) is a stand-alone provision does not assist the Appellant.

D. What is the Answer to the Question Under the Decision in *BMO*?

[138] The foregoing observations and comments are, of course, of no moment in answering the Question because I am bound by the decision in *BMO*. I provide these observations and comments solely to address the position put forth by the Appellant in as complete a fashion as possible.

[139] I have already concluded that the comments of the Federal Court of Appeal in the Paragraph, which includes the Statement, are not *obiter dicta* but are part of the *ratio decidendi* of the decision. These comments mandate that when dealing with the disposition of a property, the gain or loss resulting from the disposition of that property must be determined under subsection 40(1) before subsection 39(2) is applied to determine the reason for the gain or loss.

[140] The Appellant submits that even if the Statement in the Paragraph is accepted as part of the *ratio decidendi* of the decision in *BMO* and as correct, the Statement references only subsection 40(1) and does not reference the remaining rules in Subdivision c. Consequently, for purposes of subsection 39(2), subsection 40(3.6) is not incorporated into the calculation of the loss under subsection 40(1).

[141] The introductory words of subsection 40(1) state "Except as otherwise expressly provided in this Part". These words give paramountcy to the result under other rules in Subdivision c such as subsection 40(3.6).[92]

[142] Where a loss on a disposition of a share has been determined under subsection 40(1) in circumstances to which subsection 40(3.6) applies, paragraph 40(3.6)(a)

---

[92] Sullivan at page 326.

states that “the taxpayer’s loss, if any, from the disposition [of the share] is deemed to be nil”. This determination replaces the determination under subsection 40(1).

[143] Judges are presumed to know the law,[93] which in this case includes the introductory words of subsection 40(1). Consequently, the introductory words of subsection 40(1) must be considered when determining the import of the Statement.

[144] In my view, when the Statement is read with the introductory words of subsection 40(1) in mind, the only reasonable conclusion is that the determination of a loss under subsection 40(1) must reflect the application of any other rules in Subdivision c that provide for a different result than under subsection 40(1) read in isolation. Since subsection 40(3.6) deems the loss otherwise determined under subsection 40(1) to be nil, this becomes the result under subsection 40(1) for the purposes of subsection 39(2).

[145] The Appellant submits that even if subsection 40(3.6) applied to the determination of the loss to which subsection 39(2) applies, it would have no effect.

[146] First, the Appellant submits that if subsection 40(3.6) is applied before subsection 39(2) then it deems a loss from a disposition of shares to be nil but does not deem a loss sustained by virtue of the fluctuation of a currency other than Canadian currency to be nil. Consequently, subsection 40(3.6) would have no impact on the determination of the loss under subsection 39(2).

[147] Second, the Appellant submits that if subsection 40(3.6) is applied after subsection 39(2) then it would already have deemed the loss to be a capital loss from the disposition of foreign currency and the condition for the application of subsection 40(3.6) that the loss result from a disposition of a share in an affiliated corporation would not be met.

[148] The first circumstance addressed by the Appellant highlights one of the difficult issues raised if subsection 39(2) displaces the Currency Principle when dealing with dispositions of property other than foreign currency.

[149] The source of the loss computed under subsection 40(1) is by the terms of that subsection the disposition by the Appellant of the shares it held in CIBC Delaware

---

[93] See, for example, *R. v. Burns*, [1994] 1 SCR 656 at page 664, *Ranjibar v. R.*, 2016 FCA 116 at paragraphs 10 and 11 and *Canada (Attorney General) v. Long Plain First Nation*, 2015 FCA 177 at paragraph 143. While the comments in these cases are made in respect of trial judges, the presumption must also apply to appellate judges who are charged with ensuring trial judges are correct in their interpretation of the law.

Holdings Inc. ("DHI") and the fact that in the Circumstances the loss results from the translation of US dollars to Canadian dollars does not alter that basic fact. The currency translation required when applying subsection 40(1) to the disposition of the shares in DHI is an integral component of the determination in Canadian dollars of the gain or loss resulting from the disposition of the shares in DHI.

[150] The loss from the disposition of the shares in DHI is deemed to be nil by subsection 40(3.6) and as already stated, that nil amount is the loss under subsection 40(1) by virtue of the introductory words of that subsection. If a loss under subsection 40(1) is nil, then how can it be said that there is still a loss by virtue of a fluctuation in the value of a foreign currency relative to the Canadian dollar? There simply is no loss.

[151] The Appellant submits in effect that the loss because of foreign currency fluctuations that must be identified for the purposes of subsection 39(2) remains but I am unable to reconcile this with the Paragraph, which requires that the loss referred to in subsection 39(2) be determined under subsection 40(1). The opening words of subsection 40(1) subject this determination to the overriding rule in subsection 40(3.6).

[152] I also note that regardless of the effect of subsection 39(2), paragraph 40(3.6)(b) adds the loss from the disposition of the Appellant's shares in DHI to the adjusted cost base of other shares in DHI still owned by the Appellant. However, there is no rule in Subdivision c to indicate what happens if subsection 39(2) also applies to deem a capital loss from a disposition of foreign currency. Consequently, under the Appellant's interpretation there is a possibility of double counting that could only be remedied by subsection 248(28). In my view, an interpretation of the approach required by *BMO* that avoids such a result is to be preferred.

[153] For the foregoing reasons, I reject the submission of the Appellant summarized in paragraph 146 above.

[154] With respect to the position of the Appellant summarized in paragraph 147 above, I have already concluded that in the Circumstances the loss under subsection 40(1) is nil. Since the Paragraph states that subsection 39(2) is applied to the loss determined under subsection 40(1), I conclude that based on the approach mandated by the Paragraph subsection 39(2) cannot apply before subsection 40(3.6).

VI. Conclusion

[155] For the foregoing reasons, the Question is answered in the affirmative. For greater certainty, in the Circumstances paragraph 40(3.6)(a) applies to deem the Appellant's loss from the disposition of Class B Shares of CIBC Delaware Holdings Inc. to be nil and subsection 39(2) does not apply to deem the Appellant to realize a capital loss from the disposition of currency of a country other than Canada.

[156] Since the parties jointly submitted the Question and proceeded on agreed facts, each party shall bear its own costs of this motion under section 58 of the Rules.

Signed at Ottawa, Canada, this 2nd day of November 2021.

"J.R. Owen"

Owen J.

Appendix A

39(1) **Meaning of capital gain and capital loss** — For the purposes of this Act,

(*a*) a taxpayer's capital gain for a taxation year from the disposition of any property is the taxpayer's gain for the year determined under this subdivision (to the extent of the amount thereof that would not, if section 3 were read without reference to the expression "other than a taxable capital gain from the disposition of a property" in paragraph 3(*a*) and without reference to paragraph 3(*b*), be included in computing the taxpayer's income for the year or any other taxation year) from the disposition of any property of the taxpayer other than

(i) eligible capital property,

(i.1) an object that the Canadian Cultural Property Export Review Board has determined meets the criteria set out in paragraphs 29(3)(b) and (c) of the *Cultural Property Export and Import Act* and that has been disposed of,

(A) in the case of a gift to which subsection 118.1(5) applies, within the period ending 36 months after the death of the taxpayer or, where written application therefor has been made to the Minister by the taxpayer's legal representative within that period, within such longer period as the Minister considers reasonable in the circumstances, and

(B) in any other case, at any time,

to an institution or a public authority in Canada that was, at the time of the disposition, designated under subsection 32(2) of that Act either generally or for a specified purpose related to that object,

(ii) a Canadian resource property,

(ii.1) a foreign resource property,

(ii.2) a property to the disposition of which subsection 142.4(4) or (5) or 142.5(1) applies,

(iii) an insurance policy, including a life insurance policy, except for that part of a life insurance policy in respect of which a policyholder is deemed by paragraph 138.1(1)(*e*) to have an interest in a related segregated fund trust,

(iv) a timber resource property, or

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

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

(i) depreciable property, or

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

. . .

39(2) **Capital gains and losses in respect of foreign currencies** — Notwithstanding subsection (1), where, by virtue of any fluctuation after 1971 in the value of the currency or currencies of one or more countries other than Canada relative to Canadian currency, a taxpayer has made a gain or sustained a loss in a taxation year, the following rules apply:

(*a*) the amount, if any, by which

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

exceeds

(ii) the total of all such losses sustained by the taxpayer in the year (to the extent of the amounts thereof that would not, if section 3 were read in the manner described in paragraph

(1)(*a*) of this section, be deductible in computing the taxpayer's income for the year or any other taxation year), and

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

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

(*b*) the amount, if any, by which

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

exceeds

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

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

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

40(1) **General rules** — Except as otherwise expressly provided in this Part

(*a*) a taxpayer's gain for a taxation year from the disposition of any property is the amount, if any, by which

(i) if the property was disposed of in the year, the amount, if any, by which the taxpayer's proceeds of disposition exceed the total of the adjusted cost base to the taxpayer of the property immediately before the disposition and any outlays and expenses to the extent that they were made or incurred by the taxpayer for the purpose of making the disposition, or

(ii) if the property was disposed of before the year, the amount, if any, claimed by the taxpayer under subparagraph (iii) in computing the taxpayer's gain for the immediately preceding year from the disposition of the property,

exceeds

(iii) subject to subsection (1.1), such amount as the taxpayer may claim

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

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

as a deduction, not exceeding the lesser of

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

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

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

(i) if the property was disposed of in the year, the amount, if any, by which the total of the adjusted cost base to the taxpayer of the property immediately before the disposition and any outlays and expenses to the extent that they were made or incurred by the taxpayer for the purpose of making the disposition, exceeds the taxpayer's proceeds of disposition of the property, and

(ii) in any other case, nil.

40(3.6) **Loss on shares** — Where at any time a taxpayer disposes, to a corporation that is affiliated with the taxpayer immediately after the disposition, of a share of a class of the capital stock of the corporation (other than a share that is a distress preferred share as defined in subsection 80(1)),

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

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

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

is of

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

Appendix B

39. **Meaning of capital gain and capital loss**

(1) For the purposes of this Act,

(*a*) a taxpayer's capital gain for a taxation year from the disposition of any property is his gain for the year determined under this subdivision (to the extent of the amount thereof that would not, if section 3 were read without reference to the expression "other than a taxable capital gain from the disposition of a property" in paragraph (*a*) thereof and without reference to paragraph (*b*) thereof, be included in computing his income for the year or any other taxation year) from the disposition of any property of the taxpayer other than

(i) eligible capital property,

(ii) property, any amount receivable by the taxpayer for the disposition of which is required to be included in computing his income for the year by virtue of section 59, or

(iii) a life insurance policy within the meaning of section 138 (except an annuity contract); and

(*b*) a taxpayer's capital loss for a taxation year from the disposition of any property is his loss for the year determined under this subdivision (to the extent of the amount thereof that would not, if section 3 were read in the manner described in paragraph (*a*) of this subsection, be deductible in computing his income for the year or any other taxation year) from the disposition of any property of the taxpayer other than

(i) depreciable property, or

(ii) property described in subparagraph (*a*)(i), (ii) or (iii).

(2) **Capital gains and losses in respect of foreign currencies.** Notwithstanding subsection (1), where, by virtue of any fluctuation after 1971 in the value of the currency or currencies of one or more countries other than Canada relative to Canadian currency, a taxpayer has made a gain or sustained a loss in a taxation year, the following rules apply:

(*a*) the amount, if any, by which

(i) the aggregate of all such gains made by the taxpayer in the year (to the extent of the amounts thereof that would not, if section 3 were read in the manner described in paragraph (1)(*a*) of this section, be included in computing his income for the year or any other taxation year)

exceeds

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

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

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

(*b*) the amount, if any, by which

(i) the aggregate determined under subparagraph (*a*)(ii),

exceeds

(ii) the aggregate determined under subparagraph (*a*)(i), and

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

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

(3) **Gain in respect of purchase of bonds, etc., by issuer.** Where a taxpayer has issued any bond, debenture or similar obligation and has at any subsequent time in a taxation year and after 1971 purchased the obligation in the open market, in the manner in which any such obligation would normally be purchased in the open market by any member of the public,

(*a*) the amount, if any, by which the amount for which the obligation was issued by the taxpayer exceeds the purchase price paid or agreed

to be paid by the taxpayer for the obligation shall be deemed to be a capital gain of the taxpayer for the taxation year from the disposition of a capital property; and

(*b*) the amount, if any, by which the purchase price paid or agreed to be paid by the taxpayer for the obligation exceeds the greater of the principal amount thereof and the amount for which it was issued by the taxpayer shall be deemed to be a capital loss of the taxpayer for the taxation year from the disposition of a capital property,

to the extent of the amount of the capital gain or capital loss, as the case may be, that would not, if section 3 were read in the manner described in paragraph (1)(*a*) of this section, be included or be deductible, as the case may be, in computing the taxpayer's income for the year or any other taxation year.

40 **General rules.**

(1) Except as otherwise expressly provided in this Part

(*a*) a taxpayer's gain for a taxation year from the disposition of any property is the amount, if any, by which

(i) if the property was disposed of in the year, the amount, if any, by which his proceeds of disposition exceeds the aggregate of the adjusted cost base to him of the property immediately before the disposition and any outlays and expenses to the extent that they were made or incurred by him for the purpose of making the disposition, or

(ii) if the property was disposed of before the year, the amount, if any, claimed by him under subparagraph (iii) in computing his gain for the immediately preceding year from the disposition of the property,

exceeds

(iii) such amount as he may claim, not exceeding a reasonable amount as a reserve in respect of such of the proceeds of disposition of the property that are not due to him until after the end of the year as may reasonably be regarded as a portion of the amount determined under subparagraph (i) in respect of the property; and

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

(i) if the property was disposed of in the year, the amount, if any, by which the aggregate of the adjusted cost base to him of the property immediately before the disposition and any outlays and expenses to the extent that they were made or incurred by him for the purpose of making the disposition, exceeds his proceeds of disposition of the property, and

(ii) in any other case, nil.

CITATION:	2021 TCC 71
COURT FILE NO.:	2020-175(IT)G
STYLE OF CAUSE:	CANADIAN IMPERIAL BANK OF COMMERCE AND THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	July 5, 2021
REASONS FOR ORDER BY:	The Honourable Justice John R. Owen
DATE OF ORDER:	November 2, 2021

PARTICIPANTS:

Counsel for the Appellant:	Monica Biringer Al Meghji Chris Sheridan
Counsel for the Respondent:	Natalie Goulard Christopher M. Bartlett

COUNSEL OF RECORD:

For the Appellant:

Name:	Monica Biringer Al Meghji Chris Sheridan
Firm:	Osler, Hoskin & Harcourt LLP Toronto, Ontario
For the Respondent:	François Daigle Deputy Attorney General of Canada Ottawa, Canada