Docket: 2017-1458(IT)G

BETWEEN:

S. ROBERT CHAD,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on June 20-23, 2022, June 27-30, 2022, July 4-7, 2022, at Vancouver, British Columbia; on August 16-19, 2022, at Ottawa, Ontario; on August 22-25, 2022, at Toronto, Ontario; on January 20, 2023, virtually by Zoom; on January 23-26, 2023, at Vancouver, British Columbia; on April 18-19, 2023, virtually by Zoom; on May 15-18, 2023, at Calgary, Alberta; and on August 21-24, 2023, at Vancouver, British Columbia.

Before: The Honourable Justice Don R. Sommerfeldt

Representatives:

Counsel for the Appellant:	Justin Kutyan Dov Whitman Kelly Ng Shara Sullivan
Counsel for the Respondent:	Charles Camirand Shubir (Shane) Aikat Grant Nash Larissa Benham Gerard Westland

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JUDGMENT

Having considered the evidence and the submissions presented by the parties, and in accordance with the attached Reasons for Judgment (the "Reasons"),

IT IS ADJUDGED THAT:

1. The Appeal is dismissed, with costs, subject to paragraphs 186 and 187 of the attached Reasons and paragraph 2 of this Judgment.

2. Costs in respect of the Respondent's recusal motion, which was heard on December 7, 2022, are awarded to the Appellant.

3. The parties shall have 30 days from the date of this Judgment to reach an agreement on costs and to so advise the Court, failing which each party shall have a further 30 days to file written submissions in respect of the costs awarded to that party, and each party shall have an additional 30 days thereafter (i.e., 90 days from the date of this Judgment) to file a written response to the other party's initial submissions. Any submissions in support of a party's claim for costs shall be limited to seven pages in length, and any party's response to the other party's claim for costs shall be limited to five pages in length. If, within the applicable time limits, the parties do not advise the Court that they have reached an agreement and no submissions are received from the parties, costs shall be awarded to the respective parties in accordance with the Tariff.

Signed at Ottawa, Canada, this 25th day of October 2024.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2024 TCC 142
Date: 20241025
Docket: 2017-1458(IT)G

BETWEEN:

S. ROBERT CHAD,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] In late 2011, Robert Chad, with the assistance of a broker (Timothy Hodgins), commenced to trade in foreign-exchange ("FX") forward contracts, using a straddle-trading strategy that resulted in significant losses (the "Losses") being realized in 2011, and significant gains being realized in 2012. Mr. Chad deducted some of the Losses in computing his income for 2011. Subsequently, the Minister of National Revenue (the "Minister"), as represented by the Canada Revenue Agency (the "CRA"), reassessed the tax payable by Mr. Chad for that year. Mr. Chad objected to that reassessment (the "Reassessment"), and eventually appealed to this Court.

II. **BACKGROUND**

[2] Mr. Chad is a successful businessman who lives in Calgary. While Mr. Chad has diverse business interests, the principal focus of his business endeavors in 2011 and 2012 was oil and natural gas. His primary oil-and-gas entity was Signalta Resources Limited ("Signalta"), which had been started by his father in 1976. While completing a graduate degree at MIT, and due to his father's terminal illness in 1985, Mr. Chad was thrust into the leadership of Signalta earlier than he had anticipated.

[3] Mr. Chad learned about the straddle-trading tax-deferral strategy from the law firm of Olson Lemons, who, in June 2022 (when Mr. Chad testified), had been his legal counsel for more than 30 years. While Mr. Chad confirmed that Olson Lemons had introduced him to the prospect of FX trading and had referred him to Mr. Hodgins, Mr. Chad declined, on the ground of solicitor-client privilege, to disclose the name of the lawyer who had introduced that strategy to him. However, Mr. Chad did acknowledge that, in September 2011, he had communications with Bruce Lemons and Debbie Bryden, both of whom were lawyers with Olson Lemons.[1] As well, in a Response to Request to Admit, Mr. Chad's counsel admitted that Mr. Chad "was introduced to Tim Hodgins by Tom Olson and/or Bruce Lemons."[2]

[4] Mr. Hodgins was a self-employed FX broker, who had a revenue-splitting contractual arrangement with Velocity Trade International Limited ("Velocity"),[3] which was an FX brokerage company in London (UK).[4]

[5] Mr. Hodgins and his father, Arthur John Hodgins, owned all the shares of HFX Markets Ltd. ("HFX"),[5] which carried on a Canadian brokerage business.

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[1] Exhibit A-1; Transcript, vol. 1 (June 20, 2022), p. 254, lines 23-26; vol. 2 (June 21, 2022), p. 252, line 24 to p. 255, line 17; and vol. 5 (June 27, 2022), p. 761, line 21 to p. 762, line 23.

[2] Exhibit R-1, fact #1. Exhibit R-1 contains the Crown's Request to Admit, dated May 27, 2022, and the Response to Request to Admit signed by counsel for Mr. Chad on June 13, 2022. In facts #22 and #25 respectively of the same exhibit, Mr. Chad's counsel also admitted that "Velocity or Tim Hodgins used an intermediary to attract the appellant", and that "[t]he intermediary was either Bruce Lemons, Tom Olson or a related entity."

[3] Transcript, vol. 9 (July 4, 2022), p. 1321, line 9 to p. 1322, line 13. Mr. Hodgins explained that "a common industry standard way of doing things" in London was for an individual self-employed broker and a brokerage house to split gross commissions. Thus, in exchange for a share of the broker's gross commissions or other revenue, the brokerage house handled the broker's "regulatory cover, and administrative requirements…." The brokerage house did not pay a salary to the broker. See Transcript, vol. 9 (July 4, 2022), p. 1318, line 3 to p. 1319, line 19, particularly p. 1318, lines 10-11.

[4] Exhibit A-7, p. 3, ¶1.1.

[5] Although the evidence is not clear, it is possible that the full name of HFX might have been "Hodgins Foreign Exchange Markets Ltd." See Transcript, vol. 9 (July 4, 2022), p. 1320, line 21 to p. 1321, line 5. During his direct examination, Mr. Hodgins stated that "HFX" stood for "Hodgins Foreign Exchange", and seemed to imply that "HFX Markets" was perhaps a trade name. However, fact #9 in the Crown's Request to Admit shows the corporate name as "HFX Markets LTD" [*sic*]. During his cross-examination of Mr. Chad, counsel for the Crown referred

HFX had a contractual arrangement with Velocity, pursuant to which they "split revenues." As well, HFX had a share earnout, entitling it to acquire up to 5% of the issued shares of Velocity.[6] It is not clear whether Mr. Hodgins and HFX each had a separate contractual arrangement with Velocity, or whether the contractual arrangements referred to in this paragraph and the preceding paragraph were one and the same.

[6] Mr. Chad testified that, in undertaking his FX trading activities (the "FX Activities"), his purposes were to speculate, to profit, to gain market access, to hedge (so as to control his FX exposure), to learn, to develop tools, strategies and concepts that he could use in his FX and other business concerns, to engage in tax planning, and to defer income from 2011 to 2012.[7] In the above-mentioned Response to Request to Admit, counsel for Mr. Chad admitted that "[o]ne of the purposes for arranging and undertaking the Foreign Exchange Transactions was to reduce, avoid or defer the appellant's tax payable under the *Income Tax Act*."[8]

[7] In the Response to Request to Admit, counsel for Mr. Chad also admitted the following facts (as well as others):

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to that corporation as "HFX Markets Limited"; see Transcript, vol. 6 (June 28, 2022), p. 865, lines 5-6. Thus, I am not certain as to the precise name of that corporation, but I do not think that any issue in this Appeal is directly or significantly affected by the uncertainty in respect of that corporate name.

[6] Transcript, vol. 9 (July 4, 2022), p. 1320, line 18 to p. 1322, line 17 (where Tim Hodgins states that his father's name is "Arthur John Hodgins"); and Exhibit R-1, facts #8 & #9. It appears that Tim Hodgins' father goes by "John".

[7] Transcript, vol. 2 (June 21, 2022), p. 257, line 12 to p. 258, line 12; p. 280, line 18 to p. 281, line 1; vol. 3 (June 22, 2022), p. 336, line 12 to p. 337, line 27; vol. 4 (June 23, 2022), p. 543, line 20 to p. 544, line 1; p. 601, line 2 to p. 602, line 28; vol. 5 (June 27, 2022), p. 715, line 4 to p. 717, line 6; p. 764, lines 11-18; vol. 6 (June 28, 2022), p. 849, line 10 to p. 850, line 5; p. 856, line 21 to p. 857, line 1; p. 872, lines 13-27; vol. 7 (June 29, 2022), p. 907, lines 6-12; p. 954, lines 5-9; p. 956, lines 7-9; p. 960, lines 4-26; p. 999, lines 2-8; p. 1010, lines 24-26; vol. 10 (July 5, 2022), p. 1350, lines 7-13; and p. 1351, lines 3-9.

[8] Exhibit R-1, fact #29. The Request to Admit indicates that the term "Foreign Exchange Transactions" is defined in paragraph 23 of the Crown's Fresh Amended Reply. That definition incorporates by reference the various Trades that are itemized in paragraphs 19, 20, 21 and 22 of that pleading. It is my understanding that the term "Trades" (as defined in paragraph 13 of these Reasons) and the term "Foreign Exchange Transactions" (as used in fact #10 of the Request to Admit and as defined in paragraph 23 of the Fresh Amended Reply) are synonymous.

> 11. The appellant contacted Tim Hodgins prior to the commencement of the Foreign Exchange Transactions.
>
> 15. Prior to the Foreign Exchange Transactions, the appellant provided to Mr. Hodgins a target loss amount for 2011.
>
> 18. The initially agreed upon target loss was $20M.
>
> 20. The target loss was later changed to $22 M [*sic*].[9]

[8] During cross-examination, Mr. Chad said the following about his initial meeting with Mr. Hodgins, on October 6, 2011:

> … I … described to Tim my desire for a loss, … or a deferral, to create the deferral. I would've described to him at that point that my target is $20 million.[10]

[9] Although the target loss for 2011 was initially set at $20,000,000, subsequently, in mid-December 2011, as a result of further discussions about Mr. Chad's potential tax liability, the target loss was, as noted above, increased to $22,000,000.[11]

[10] The amount of the fee initially charged by Velocity to Mr. Chad for brokering the Trades was $200,000.[12] On November 24, 2022, Mr. Chad arranged for $300,000 to be wired to Velocity.[13] The wired amount included an additional $100,000, which was paid by Mr. Chad to Velocity to cover the required margin

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[9] Exhibit R-1, facts #11, #15, #18 & #20.

[10] Transcript, vol. 5 (June 27, 2022), p. 719, lines 23-27. Based on many of the statements made by Mr. Chad about his purposes in undertaking the FX Activities, as cited in footnote 7 above, and as noted in the above quotation, it seems that Mr. Chad sometimes (but not always) used the term "tax deferral" to refer to the FX straddle-trading strategy of realizing a large loss in a particular year and a large gain in the next year. Several times during the cross-examination, when counsel for the Crown asked about the agreed-upon target loss, if Mr. Chad's response echoed the term "target loss", shortly thereafter he sometimes corrected himself to say "target deferral". See Transcript, vol. 5 (June 27, 2022), p. 718, lines 15-22. Other times, when counsel for the Crown used the term "target loss", Mr. Chad made no effort to use a different term.

[11] Transcript, vol. 5 (June 27, 2022), p. 718, line 25 to p. 719, line 16.

[12] Exhibit A-11; Transcript, vol. 3 (June 22, 2022), p. 355, line 17 to p. 356, line 26; and vol. 6 (June 28, 2022), p. 814, lines 7-10.

[13] Exhibits A-13, A-14 & A-15.

amount.[14] It appears that, initially, Velocity held the $200,000 fee, as well as the $100,000 margin amount, in the account that Velocity maintained for Mr. Chad.

[11] When the target loss was increased to $22,000,000 in mid-December 2011, the amount of Velocity's fee was increased from $200,000 to $240,000. The additional $40,000 was taken from the margin amount, which then fell to $60,000. Thereafter, the amount of the margin account (i.e., $60,000) remained constant throughout the remainder of the time period that is relevant for this Appeal.

[12] The $240,000 fee was allocated between 2011 and 2012. In December 2011, $166,666.67 of that amount was paid by Mr. Chad to Velocity, as the fee for 2011.[15] The remaining $73,333.33 was paid on February 27, 2012, as a fee for 2012.[16]

[13] Mr. Chad began to trade with Velocity on November 30, 2011, in the over-the-counter ("OTC") market, and not on an institutional exchange. Between November 30, 2011 and March 26, 2012, Mr. Chad entered into 34 FX forward contracts (the "FX Contracts"), in respect of the trades (the "Trades") described in Schedule A. Velocity was the counterparty in each of Mr. Chad's Trades. Mr. Chad traded only in US currency, and always entered into forward contracts in pairs,[17] one long (agreeing to buy a particular amount of US dollars on a future date), and the other short (agreeing to sell the same amount of US dollars on a slightly different future date).[18] Twenty-two of the Trades occurred in 2011, and twelve of the Trades occurred in 2012.

[14] Each of the Trades, when made, was paired with another, largely offsetting, Trade. For instance, in Mr. Chad's first Trade, which was transacted on November

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[14] Exhibit A-11; Transcript, vol. 3 (June 22, 2022), p. 355, line 20; and p. 356, line 27 to p. 357, line 9.

[15] Exhibit A-31, Statements for December 2011, p. 25 & 46; Exhibit A-85, ¶31 & 150; and Transcript, vol. 13 (August 16, 2022), p. 1930, lines 17-26; p. 1997, line 1 to p. 1998, line 15; and p. 1998, line 25 to p. 1999, line 24.

[16] Exhibit A-33, Statements for February 2012, p. 77; and Exhibit A-85, ¶31 & 150. See also the Transcript citations set out in the preceding footnote.

[17] A pair of FX forward contracts is sometimes called an "FX swap". See Exhibit A-85, ¶27 & 64; and paragraphs 27 and 30 below.

[18] In an FX forward contract, the agreed-upon future date on which the foreign currency is to be acquired or delivered is sometimes called the "value date", the "forward date", the "delivery date", the "maturity date", the "expiry date", or the "settlement date".

30, 2011,[19] he agreed to sell USD 200,000,000 on September 12, 2012, for a price of CAD 204,799,200.[20] In his second Trade, also transacted on November 30, 2011, he agreed to buy USD 200,000,000 on September 19, 2012, for a price of CAD 204,818,600.[21] Since the notional amounts in the two Trades (i.e., USD 200,000,000) were the same, and since the value dates (i.e., September 12, 2012 and September 19, 2012) were only a week apart, the two Trades largely (but not precisely) offset one another.

[15] While the long leg and the short leg in each pair of Mr. Chad's Trades almost offset one another, a complete set-off did not occur, given that there was always a slight difference between the value date of the long leg and the value date of the short leg. Consequently, there was a positive or negative difference, at any particular time, between the value of the long leg and the value of the short leg.

[16] In his direct examination, Mr. Chad explained his understanding of the tax-deferral plan and straddle-trading strategy, in this manner:

> So the tax deferral plan was the potential, identify a target for deferral where certain loss, potentially, could be created and realized in the current year, in '11. That would allow shelter of income in '11. But the flip side of that, and the necessity of the trading is the gain would be recognized in '12. So there's no getting away from that. The deferral -- or, sorry, the losses created in '11 has to be repaid in '12. And that is -- so you are earning interest, essentially, on deferring or delaying your tax liability.[22]

[17] When cross-examined, Mr. Chad reiterated the above concept, and also mentioned the "virtually offsetting" nature of his Trades:

> Q. Okay, but the deferral would be first a target loss in 2011?

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[19] The date on which a trade is entered into is sometimes called the "trade date", the "transaction date", or the "origination date".

[20] When setting out the US currency and Canadian currency amounts of specific Trades, I will use the standard abbreviations that are common in the FX industry, i.e., USD and CAD respectively. If a monetary amount appears elsewhere in these Reasons, without either of the just-mentioned currency abbreviations, that amount is expressed in Canadian currency, except for the profit/loss amounts, which are expressed (without being so designated) in US currency. See footnotes 247 and 248 below.

[21] Exhibit A-31, Statement for 05 Dec 2011, p. 7.

[22] Transcript, vol. 3 (June 22, 2022), p. 352, lines 2-12.

> A. The mechanism is to potentially create a target loss, or to target a loss, to take in '11, and then the result of that would be a gain that would be taken in '12, that is virtually offsetting the loss.[23]

[18] Mr. Chad did not hold any of his FX Contracts to maturity (which would have required him to take (in the case of a purchase), or to deliver (in the case of a sale), the contracted-for amount of US dollars, in exchange for the contracted-for amount of Canadian dollars. Rather, he arranged for each FX Contract to be closed out before its value date. The closing-out of a particular FX Contract, with a particular position, was implemented by Mr. Chad and Velocity entering into a new FX Contract, with an equal and offsetting position (i.e., the notional amount and the value date of the new FX Contract were the same as those of the particular FX Contract).[24] The closing-out of the particular FX Contract took effect when the new FX Contract was made.

[19] As December 2011 progressed, Mr. Hodgins determined which legs were in a loss position and which were in a gain position. From time to time in December, he recommended new Trades, which would close out certain of the loss legs of previous Trades, and Mr. Chad instructed that those new Trades be made. By the end of December, all of the loss legs had been closed out, thus crystallizing the Losses. The aggregate of the Losses that were crystallized in 2011 was $22,017,400.[25]

[20] In the first quarter of 2012, Mr. Chad entered into additional Trades, so as to close out the gain legs, which resulted in aggregate crystallized gains in 2012 in the amount of $22,023,600.[26] The amount by which the crystallized gains exceeded the crystallized losses was $6,200.[27]

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[23] Transcript, vol. 5 (June 27, 2022), p. 715, lines 14-20.

[24] To close out an FX Contract with a long position, Mr. Chad entered into a new FX Contract with a short position, and *vice versa*.

[25] Exhibit A-63, p. 24.

[26] Exhibit A-67, p. 17.

[27] Mr. Chad's solicitors describe that amount as a "net profit" in the amount of $6,200; see Appellant's Written Submissions, dated August 8, 2023 ("Mr. Chad's Submissions"), p. 17, ¶67. However, that amount is only partially net, as it does not take into account the $240,000 fee that Mr. Chad paid to Velocity, nor does it take into account some minor banking charges that were incurred by Mr. Chad in respect of the FX Activities.

[21] When asked, during his direct examination, to discuss the results of the Trades, Mr. Chad said that his "profit" was "pretty mediocre, small" and that the "profit wasn't huge."[28] In evaluating the result of his tax plan, he stated, "yes, we itemized the target and we were very close to that target."[29]

[22] In the above-mentioned Response to Request to Admit, counsel for Mr. Chad also admitted the following facts (as well as others):

> 30. In his 2011 income tax return, the appellant:
>
> a. claimed a business loss of $22,184,109 in respect of the Foreign Exchange Transactions; and
>
> b. deducted no less than $9,610,068 of that claimed business loss against income from other sources for the 2011 tax year.
>
> 33. The appellant claimed a non-capital loss carryover (the "non-capital loss carryover") for the portion of the business loss of $22,184,109 that was not used to reduce the appellant's income for the 2011 tax year.
>
> 34. The amount of the non-capital loss carryover claimed by the appellant was approximately $13,800,000.
>
> 35. The appellant used approximately $4,900,000 of the non-capital loss carryover as a deduction against taxable income for his 2013 taxation year and 2014 taxation year.[30]

III. ISSUES

[23] The issues in this Appeal are:

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[28] Transcript, vol. 4 (June 23, 2022), p. 601, lines 3-9; and p. 602, lines 15 & 22. While both Mr. Chad and his solicitors, as well as Mr. Hodgins, used the word "profit" to describe the closed net amount of $6,200 that was the result of the Trades, I disagree with that characterization, because it ignores the expenses incurred by Mr. Chad in respect of the FX Activities, particularly the fee (in the evidence, sometimes referred to as a commission) that Mr. Chad paid to Velocity.

[29] Transcript, vol. 4 (June 23, 2022), p. 602, lines 23-24. In Mr. Chad's statement, I think the word "target" refers to the target loss that Mr. Chad and Mr. Hodgins were endeavoring to realize for 2011.

[30] Exhibit R-1, facts #30, #33, #34 and #35. The 2013 and 2014 taxation years are not in issue in this Appeal.

(a) Were the Trades shams?

(b) Were the Trades legally effective?

(c) Did the Trades constitute a source of income, particularly for the purposes of paragraph 3(a) of the *Income Tax Act* (the "ITA")[31]?

(d) Were the Trades executed before their value dates?

(e) Did Mr. Chad use the proper accounting method to report the Trades?

(f) Was the fee paid by Mr. Chad to Velocity in 2011 properly deductible?

(g) Does the general anti-avoidance rule ("GAAR") apply?

IV. EXPERT EVIDENCE

[24] During the trial of this Appeal, seven expert witnesses were called, four by Mr. Chad, and three by the Crown.

A. Simon Bird

[25] Simon Bird, a resident of the United Kingdom, who, in 2022, had worked in the financial services sector for 35 years, was qualified as an expert in FX instruments, as well as FX markets and trading.[32]

[26] When retained by counsel for Mr. Chad, Mr. Bird was asked by them to provide expertise "in industry norms with respect to forwards that were traded in the over-the-counter ("OTC") FX market in London, UK for the period from 2011 to 2012".[33] During his testimony, Mr. Bird provided an overview of the OTC FX market in the UK. Several portions of his report are summarized in the next few paragraphs.

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[31] *Income Tax Act*, RSC 1985, c. 1 (5th Supplement), as amended.

[32] Transcript, vol. 13 (August 16, 2022), p. 1919, lines 8-10; and p. 1923, lines 13-19.

[33] Expert Report of Simon Bird, dated March 21, 2022, and entered as Exhibit A-85, vol. 1, tab 1, p. 7, ¶14. Volume 1 of Exhibit A-85 has two consecutive tabs that are each labelled as "1". Unless otherwise stated, any reference in these Reasons to tab 1 of volume 1 of Exhibit A-85 is a reference to the first of those two identically labelled tabs.

[27] As indicated by Mr. Bird, an FX forward is an FX product that allows two parties "to exchange a pair of underlying currencies at a set exchange rate on a pre-determined date in the future". An FX swap is generally "a combination of two FX forwards … [whose] price … is based on the difference between two countries' interest rates." Based on Mr. Bird's understanding of the Trades, he opined that "[a]ll the trading and positions" that are the subject of this Appeal were "ultimately FX swaps", and that he "did not see any FX forwards that were not part of an FX swap."[34]

[28] Mr. Bird explained that an FX broker, when dealing with a client, may act in the capacity of either an agent or a principal. A broker acting as an agent deals with its client as an intermediary and passes the client's order to another counterparty. A broker acting as a principal retains the trade on its own account, and is itself the counterparty to the trade. Based on Mr. Bird's reading of the account-opening document governing the relationship between Velocity and Mr. Chad,[35] Velocity (as distinct from Mr. Hodgins) acted as a principal, i.e., Velocity was the counterparty to Mr. Chad's Trades.[36]

[29] Mr. Bird stated that, if a client fails to meet its broker's demand for payment of money owed by the client to the broker, the broker typically has the right to charge interest.[37] However, the broker has the discretion not to enforce a claim for interest, and may choose not to insist on the payment of interest, so as to maintain a good client relationship.[38]

[30] Mr. Bird described some of the characteristics of an FX swap in these terms:

> 64. An FX swap is a contract to exchange two FX contracts on two different dates in the future (i.e. it is made up of two FX forward contacts). There is an initial exchange of two currencies on a near date and at the same time an agreement to exchange the same two currencies in the reverse direction on a date sometime in the future, the far date. It is a contract in which one party borrows one currency from and simultaneously lends another to the second party.

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[34] Exhibit A-85, vol. 1, tab 1, p. 11, ¶27.

[35] See Exhibit A-7, p. 5, ¶6.1(a).

[36] Exhibit A-85, vol. 1, tab 1, p. 12, ¶29.

[37] For example, see Exhibit A-7, p. 5, ¶5.4.

[38] Exhibit A-85, vol. 1, tab 1, p. 15, ¶33.

> 65. The FX swap can be viewed as risk-free collateralised borrowing/lending. The repayment far leg is viewed as collateral. For example, CAD may be bought in the near leg and USD sold and in the reverse leg CAD will be sold and the USD bought. Essentially, an FX swap is the combination of a spot FX (or FX forward) plus a further dated FX forward, agreed at the same time. An FX swap is generally less risky than a single FX forward and will therefore be cheaper to trade, requiring less margin. This is because its price will vary (and thus its potential for a profit or a loss) based on the interest rate differential of the 2 underlying currencies. It is essentially an interest rate position rather than [a] foreign exchange position and therefore has a lower intrinsic risk than an FX spot or an FX forward.
>
> 66. To put that important point another way, an FX swap requires a larger nominal value than an FX spot or an FX forward position to achieve a similar risk profile.
>
> 67. An FX swap contract effectively results in no net exposure to the prevailing spot FX rate, since although the first leg opens up spot FX risk, the second leg of the swap immediately closes it down. So, the only exposure is to the interest rate differential between the two currencies.[39]

[31] Mr. Bird provided the following comments in respect of a technique used by traders to close FX swaps before their respective expiry dates, the volatility of FX swaps, and the risks associated with FX swaps:

> 75. Invariably, FX swaps, when used as instruments to speculate on future interest rate movements, can be unwound by trading another FX swap with the same terms but in an opposite direction before the expiry date.[40]
>
> 76. The volatility of an FX swap is generally lower than the volatility of its underlying currencies. This is because:
>
> > a) Interest rates are intrinsically less volatile than the corresponding currency; and

[39] Exhibit A-85, vol. 1, tab 1, p. 27-28, ¶64-67.

[40] This is the technique that was used by Mr. Hodgins and Mr. Chad to close out the Trades before their respective expiry dates.

b) As discussed above, an FX swap is the differential between 2 countries' interest rates. If these countries have similar economies, are geographically close by and have similar levels of interest rate[s], then it is very likely there will be a high correlation between these interest rates and thus, the FX swap will have a low volatility because it is unlikely there will be a large movement in one interest rate independent of the other.

77. Additionally, if the time between the expiry dates of the 2 FX forwards that make up the FX swap is short (i.e. less than a week) then there will be less impact on the implied borrowing and lending rates than [there] would be if the time period was say, for a year. For example:

- If we have a nominal amount of USD 100,000,000 on deposit earning an interest rate of 1.2%
    - Over 1 year we will receive USD 1,200,000
    - Over 1 week we will receive 1/52 of that, i.e., USD 23,077
- If USD rates increase by 50 bpts[41] to 1.7% then
    - Over 1 year we will receive USD 1,700,000, an uplift of 0.5% of the nominal
    - Over 1 week we will receive USD 32,692, an uplift of 0.0096% of the nominal or almost 1bpt

78. The above example illustrates 2 points:

a) When dealing in FX swaps for time periods of around 1 week the potential profit or loss is relatively small in comparison to the nominal value of the FX swap.

b) Even when dealing in FX swaps for time periods around 1 week, there is still potential for a profit or loss to be made. In other words, there is risk associated with the structure.

[41] "bpt" is the abbreviation for basis point. 1 basis point (bpt) is equivalent to 1/100 of 1%. See Exhibit A-85, p. 32, fn. 26.

> 79. Mr. Chad traded USD/CAD FX swaps by buying and selling FX forwards with typically less than 1 week between them.[42] [*Footnote omitted*.]

[32] Concerning any liability that arose when some of the Trades were closed out in December 2011, Mr. Bird stated:

> 156. Any monies that were owed by Mr. Chad to Velocity in 2011 with the closing out of FX swaps for losses were covered by the unrealised profits from open positions in the remaining FX swaps and the cash in the account, which when added up, created the positive Excess Margin (Net Equity). …
>
> 204. … realised losses can be left in the client's account without the client having need to settle these if there are sufficient unrealised profits and/or collateral held in the account.
>
> 205. In 2011, when FX forward legs of the FX swap positions were rolled[43] by Mr. Chad[,] losses were realised[,] but there was no need for him to settle these amounts. This is because the open FW swaps, when valued at the prevailing market prices (i.e. they were marked-to-market) had unrealised profits. In other words, these unrealised profits in 2012 collateralised the realised losses from 2011.[44]

B. Uwe Wystup

[33] Professor Uwe Wystup, a resident of Germany, who holds a Ph.D. in mathematical finance, is a consultant in (among other things) financial engineering, FX and equity derivatives operations, and quantitative asset management. He is also a professor of financial option price modeling and FX derivatives at the University of Antwerp. He was qualified as an expert in the field of FX markets and trading.[45]

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[42] Exhibit A-85, vol. 1, tab 1, p. 31-32, ¶75-79. Given the nature of Mr. Chad's Trades, his potential for profit or loss was relatively small compared to the nominal values of the Trades.

[43] In subparagraph 213(b) of his report, Mr. Bird explained that "rolling a position", commonly called "trading a time spread", means partially closing or cancelling an existing position, by cancelling one FX forward leg of an existing FX swap and creating a new FX forward leg with a different value date. See Exhibit A-85, vol. 1, tab 1, p. 80, ¶213(b).

[44] Exhibit A-85, vol. 1, tab 1, p. 59 & 77, ¶156 & 204-205.

[45] Transcript, vol. 15 (August 18, 2022), p. 2282, lines 1-3; and p. 2290, lines 9-19.

[34] Professor Wystup had been asked by counsel for Mr. Chad to address the issue of whether the Trades (which Professor Wystup described as foreign-exchange forward contracts) were consistent with market conditions prevailing in 2011 and 2012 (which Professor Wystup called the "Relevant Period").[46] In response to that inquiry, Professor Wystup, in his report, stated:

> 16. Based upon the facts and assumptions discussed in this Report, as well as my professional experience and expertise, it is my opinion that the Trades were consistent with market conditions prevailing during the Relevant Period.
>
> 17. Indeed, as explained below, the parameters of the Trades:
>
> > (a) are reflective of what would have been available on the OTC (over the counter) market during the Relevant Period; and
> >
> > (b) are such that they carried the possibility of profit as well as the risk of loss for Mr. Chad.[47]

C. Sydney Broer

[35] Sydney Broer, a resident of Toronto, holds a bachelor of commerce degree and a master of business administration degree. He worked in the Canadian banking and credit union industry, as a trader, market maker and portfolio manager, from the mid-1980s to 2013, when he became a consultant to several financial institutions. On August 19, 2022, Mr. Broer was qualified as an expert in the field of FX markets and trades,[48] with that expertise having been acquired in a Canadian commercial banking context.[49]

[36] Mr. Broer had been asked by counsel for Mr. Chad to consider whether the Trades carried a potential for profit and a risk of loss to Mr. Chad.[50] In response to

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[46] Expert Report of Professor Dr. Uwe Wystup, dated October 27, 2020, and entered as Exhibit A-87, vol. 1, p. 1, ¶1.

[47] Exhibit A-87, vol. 1, p. 4, ¶16-17.

[48] Transcript, vol. 16 (August 19, 2022), p. 2641, lines 22-24; and p. 2646, lines 7-14.

[49] Transcript, vol. 30 (May 17, 2023), p. 4901, lines 4-12.

[50] Expert Report of Sydney Broer, dated October 2020, and entered as Exhibit A-88, vol. 1, p. 1, ¶1(a). Both printed and digital copies of Mr. Broer's report (including Appendix B) were provided to the Crown.

that question, he opined that "the Trades carried a potential for profit and risk of loss to Mr. Chad."[51]

[37] Mr. Broer stated that the FX forward market had been extremely volatile from September 2007 to June 2010, with some continued volatility up to September 2011. He also stated that, after a credit crisis in August 2011 in the Canadian provincial and corporate bond market, the volatility in the FX forward market had declined markedly by the end of 2011.[52]

[38] Given the delivery dates that had been chosen for the Trades, Mr. Broer inferred that the Trades had been set up to be influenced by meetings of the Federal Open Market Committee ("FOMC"), which were scheduled, well in advance, for March 13, 2012 and September 13, 2012, and at which the US Federal Reserve had been scheduled to announce its updated interest rate policy. As well, the Bank of Canada had interest rate decision meetings scheduled for March 8, 2012, April 17, 2012 and September 5, 2012. The markets could be expected to move daily before each of those meetings, which would factor into FX trading strategies and decisions.[53]

[39] Using data from Bloomberg Finance L.P. ("Bloomberg") for the closing prices of FX forwards and the spot CAD/USD FX rate, Mr. Broer calculated the daily mark-to-market value of the Trades. He set out that data and his methodology in Appendix B to his report.[54]

[40] During his testimony, Mr. Broer noted that, when investors begin to trade in FX forwards, they cannot foresee the future, and thus, due to market volatility, they do not know in advance whether the market will be relatively stable during the respective terms of their trades, or whether there might be significant fluctuations in value, which could potentially result in substantial profits or large losses.[55] Consequently, with a view to ascertaining what might have happened if some unusual event or condition were to have occurred during the terms of Mr. Chad's Trades, Mr. Broer used the same methodology as mentioned in the preceding

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[51] Exhibit A-88, vol. 1, p. 3, ¶18(a).

[52] Exhibit A-88, vol. 1, p. 8, ¶38-40.

[53] Exhibit A-88, vol. 1, p. 8-9, ¶38-42.

[54] Exhibit A-88, vol. 1, p. 9, ¶43-44.

[55] Transcript, vol. 17 (August 22, 2022), p. 2685, line 17 to p. 2687, line 2; p. 2695, line 9 to p. 2696, line 4; p. 2708, line 8 to p. 2709, line 20; p. 2718, line 12 to p. 2719, line 1; and p. 2741, line 24 to p. 2742, line 25.

paragraph to calculate "what the daily mark-to-market values of Mr. Chad's portfolio would have been if the Trades were held during [the financial crisis of] 2008-2009 as opposed to 2011-2012."[56] The Bloomberg data and the methodology that Mr. Broer used for those calculations were set out in Appendix B to his report.

[41] During cross-examination on August 22, 2022, Mr. Broer explained that, in performing this hypothetical analysis, he had kept Mr. Chad's configuration of trades, the same prices, the same trade dates and the same sequence of trades, but, in order to catch the market fluctuations that were occurring in 2008 and 2009, he had applied those fluctuations to his calculations.[57] He went on to explain that he had calculated what would have happened to Mr. Chad's portfolio if the implied FX forward rate were to have moved in 2011-2012 by the same amount as it had moved in 2008-2009.[58] Mr. Broer also explained that he had repeated that exercise, but this time using data from November 29, 2019 to March 25, 2020 (i.e., the lead-up to the Covid 19 pandemic), and had set out that data and methodology in Appendix B to his report.[59]

[42] During the cross-examination of Mr. Broer, counsel for the Crown advised the Court that they and one of their expert witnesses had attempted to replicate Mr. Broer's calculations, but had encountered difficulty, as it seemed that Mr. Broer's report did not set out all of the elements of the methodology that he had used. Therefore, counsel for the Crown asked Mr. Broer, with the use of a laptop, to walk through his methodology, calculations and data.[60] After about a 40-minute recess, during which Mr. Broer attempted to reconstruct his calculations, counsel for Mr. Chad advised the Court that Mr. Broer had not been able to do so, as the data in the report was in static form, specifically a printed PDF document.[61] Consequently, Mr. Broer was invited to spend some time that evening, reviewing his calculations, and then to return in the morning with workable data and an explanation of his methodology.[62]

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[56] Exhibit A-88, vol. 1, p. 10-11, ¶46.

[57] Transcript, vol. 17 (August 22, 2022), p. 2734, line 19 to p. 2736, line 18.

[58] Transcript, vol. 17 (August 22, 2022), p. 2743, line 8 to p. 2744, line 9.

[59] Exhibit A-88, vol. 1, p. 12, ¶48.

[60] Transcript, vol. 17 (August 22, 2022), p. 2781, line 3 to p. 2784, line 12; and p. 2788, lines 11-20.

[61] Transcript, vol. 17 (August 22, 2022), p. 2785, lines 9-16.

[62] Transcript, vol. 17 (August 22, 2022), p. 2792, line 18 to p. 2794, line 7.

[43] When the trial resumed the next morning (i.e., August 23, 2022), Mr. Broer advised the Court that he had discovered that, while he had backup data for many of his calculations, he did not have backup data for 2008-2009 and 2019-2020, which he needed in order to redo his hypothetical calculations. That data was available only through Bloomberg (to which he no longer had access), and it was too expensive for him to subscribe anew. Accordingly, the Court granted additional time to Mr. Broer to find an economical way to access the Bloomberg data and to redo his calculations.[63]

[44] It took Mr. Broer a couple of days to obtain the Bloomberg data and redo the calculations. When he returned to the courtroom on August 25, 2022 and his cross-examination was resumed, he said that he was not able to "give the exact calculations" of the "values that are listed on page 179 [of his report], or those generally shown on Figures 2 and 3" of that report. He also said that the reason for not being able to re-create those values was that, when he had performed his initial calculations, "there was an overlay of data[,] that [he] had brought the data in from one of [his] worksheets into the main calculation, and the data got corrupted and, as a result, the numbers that [he] saw afterwards were not correct."[64]

[45] Consequently, Mr. Broer acknowledged that, although his formula and calculations were correct, the values shown in his initial report were incorrect and unreliable, because his calculations had used data that was corrupted, distorted and wrong.[65] Therefore, Mr. Broer had brought a revised report with him. However, in a *voir dire* concerning the admissibility of the revised report, it became apparent that it too contained errors and was unreliable. Furthermore, the digital copy of the spreadsheets provided to the Crown did not contain the syntax (i.e., the equations) for the cells. Consequently, as we were nearing a hiatus in the trial schedule, I provided Mr. Broer with an opportunity to make further revisions and corrections to his report.

[46] A few weeks later, Mr. Broer provided the Crown with a revised two-volume report,[66] which became the subject of cross-examination, when the trial resumed on January 20, 2023. During the cross-examination, it became apparent that:

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[63] Transcript, vol. 18 (August 23, 2022), p. 2815, line 11 to p. 2817, line 3.

[64] Transcript, vol. 20 (August 25, 2022), p. 3217, lines 3-16.

[65] Transcript, vol. 20 (August 25, 2022), p. 3219, line 19 to p. 3220, line 17.

[66] Revised Expert Report of Sydney Broer, dated September 5, 2022, and entered as Exhibit A-93.

(a) To create the spreadsheets that he used in his analysis, Mr. Broer had copied and pasted information from a Bloomberg data download file.[67]

(b) Some of the numbers that Mr. Broer copied from the Bloomberg file were pasted into the spreadsheets in reverse chronological order.[68]

(c) When interpolating, to ascertain an unknown number between two known numbers, sometimes the interpolated number used by Mr. Broer was outside the bounds set by the two known numbers.[69]

(d) On at least one occasion, Mr. Broer, when performing a calculation, "referenced the wrong cell."[70]

(e) In paragraph 2 of Appendix B to his revised report, Mr. Broer stated that, in conducting his analysis, he had "assumed a linear interpolation to identify the price between [the] specific time dates that are published by Bloomberg…." In paragraph 3 of the same appendix, he stated, "When there is a known important event taking place within those dates, such as an FOMC meeting, the linear interpolation is reduced to shorter periods between dates."[71] However, during cross-examination, Mr. Broer acknowledged that he did not actually do what he had said (in paragraph 3 of the appendix) that he had done (i.e., he had not reduced the linear interpolation to shorter periods), "because it [was] too onerous to do…."[72]

(f) When interpolating between two data points, Mr. Broer often selected one data point from a particular date and the other data point from the subsequent date, rather than selecting the pair of data points from the same

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[67] Transcript, vol. 21 (January 20, 2023), p. 3414, line 22 to p. 3415, line 7.

[68] Transcript, vol. 21 (January 20, 2023), p. 3424, line 26 to p. 3427, line 1; and p. 3428, line 28 to p. 3441, line 1. Mr. Broer stated on January 23, 2023 that his methodology was to "superimpose the numbers … in a [chronological] order"; see Transcript, vol. 22, (January 23, 2023), p. 3533, lines 24-25, which shows the bracketed word as "chorological", which seems to be a typographical error.

[69] Transcript, vol. 21 (January 20, 2023), p. 3453, line 8 to p. 3464, line 27.

[70] Transcript, vol. 21 (January 20, 2023), p. 3455, lines 19-21.

[71] Exhibit A-93, tab B, p. 20, ¶2-3.

[72] Transcript, vol. 21 (January 20, 2023), p. 3465, line 27 to p. 3468, line 24.

date. Mr. Broer insisted that this was to account for weekends, even though some of the pairs of data points were in the middle of the week.[73]

(g) To create figures 1, 2 and 3 of his revised report, Mr. Broer first created three Excel files, which were described as spreadsheets, and which were referred to as Versions 1, 2 and 3 during the trial.[74] When Mr. Broer copied information from Bloomberg and pasted it in the second spreadsheet (i.e., Version 2),[75] in most of the columns (other than columns I and J) in the spreadsheet, the data for September 15, 2006 was entered on row 11. However, in columns I and J, the data for September 15, 2006 was entered on row 12. This misalignment of the data in columns I and J continued all the way to row 872, where the data for January 4, 2010 was shown in all columns (including columns I and J), even though row 871 had shown data for December 31, 2009 in columns I and J, but data for January 1, 2010 in all other columns. Mr. Broer could not explain the misalignment of data in rows 12 through 871, nor the correction in row 872. He conceded that the misalignment of data may explain the one-day shift discussed in the preceding subparagraph, although he maintained (without any explanation) that the misalignment would not have changed anything, and he doubted that it would have affected the spreadsheet (again without giving any reason for that assertion).[76] When cross-examined, Mr. Broer said that the misalignment of data was not done purposely.[77]

(h) Mr. Broer frequently attempted to avoid answering questions posed by counsel for the Crown.[78]

(i) Mr. Broer was reluctant to acknowledge obvious errors in his reports and his calculations.

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[73] Transcript, vol. 22 (January 23, 2023), p. 3508, line 22 to p. 3511, line 16; p. 3523, line 15 to p. 3541, line 23; p. 3545, line 24 to p. 3550, line 1; and p. 3562, line 25 to p. 3563, line 9. There are several instances in this portion of the transcript where the words "four points" appear; I think that these words were transcribed incorrectly, and that they should have been transcribed as "forward points".

[74] Exhibits R-20, R-21 and R-22, respectively.

[75] Exhibit R-21, second tab (titled FX Forward Prices).

[76] Transcript, vol. 22 (January 23, 2023), p. 3597, line 24 to p. 3601, line 6.

[77] Transcript, vol. 22 (January 23, 2023), p. 3601, line 25 to p. 3602, line 18.

[78] For instance, see Transcript, vol. 21 (January 20, 2023), p. 3461, line 17 to p. 3463, line 10.

[47] By reason of the lengthy list of concerns set out in the preceding paragraph, I do not have confidence in Mr. Broer's calculations. Accordingly, I have not given any weight to the opinions that he expressed.

D. Michael Blair

[48] Michael Blair, a resident of London, England, earned a master of arts degree in law from Clare College Cambridge, a master of arts degree in political science from Yale University, and a master of laws degree from Cambridge.[79] He was called to the English Bar in 1965, and was given the rank of Queen's Counsel *honoris causa* in 1996.[80] From 1966 to 1987, he worked as a barrister employed by the British government, eventually becoming Under Secretary, in charge of the Courts and Legal Services Group in the Lord Chancellor's Department. In 1987, he became General Counsel to the Securities and Investments Board (which regulated the UK's investment business markets), which became the Financial Services Authority (the "FSA") in 1997. He continued as General Counsel to the FSA until 2000, when he began to practise as a self-employed barrister in Commercial Chambers, Gray's Inn, specializing in financial services and financial services regulation.[81] Mr. Blair was qualified as an expert in English law, in respect of financial services and financial services regulation.

[49] As a backdrop to Mr. Blair's evidence, subclause 17.1 of the Terms of Business and Privacy Agreement (the "Terms Agreement") between Mr. Chad and Velocity states, "Governing law: This Agreement shall be governed by and construed in accordance with English law."[82]

[50] Mr. Blair summarized his opinions as follows:

> Based upon the facts discussed in this Report, my opinion, on the issues presented … is that an English court would find that:

[79] Transcript, vol. 12 (July 7, 2022), p. 1792, lines 12-19.

[80] Transcript, vol. 12 (July 7, 2022), p. 1792, lines 22-24.

[81] Expert Report of Michael Blair, dated March 18, 2022, and entered as Exhibit A-90, vol. I, p. 2, ¶5-8.

[82] Exhibit A-7, p. 15, ¶17.1.

> (a) the Trades [which Mr. Blair defined as meaning "the foreign exchange forward contracts … entered into between S. Robert Chad and Velocity Trade International Limited"[83]] were governed by substantive English law;
>
> (b) applying substantive English law,
>
> (i) the Trades were not shams;
>
> (ii) the Trades were legally effective;
>
> (iii) the obligations under the Trades came into existence on formation; and
>
> (iv) the obligations under the Trades were netted with acceleration of the net resulting obligation.[84]

[51] Mr. Blair has opined as to the manner in which an English court, applying substantive English law, would view the Trades. Mr. Blair has (quite properly) not considered the manner in which this Court, for the purposes of the ITA, should view the Trades. Rather, the questions of whether the Trades were shams or were legally ineffective, for the purposes of the ITA, are issues that fall to me to decide.

E. Ilias Tsiakas

[52] Ilias Tsiakas, a resident of Toronto,[85] earned a bachelor of arts degree (honors) in economics and political science from the University of Toronto, a master of arts degree in economics from York University, and a doctor of philosophy degree in economics from the University of Toronto. From 2001 to 2010, he taught in the Warwick Business School at the University of Warwick, initially as an assistant professor of finance, and subsequently as an associate professor. From 2010 to the date of his testimony, Professor Tsiakas taught in the Department of Economics and Finance at the University of Guelph, first as an associate professor, and later as a full professor. In addition, in 2016 and 2017, Professor Tsiakas was a visiting professor, and from 2017 to the date of his testimony, he has been a sessional lecturer, in the Department of Economics at the

[83] Exhibit A-90, p. 1, ¶1(a).
[84] Exhibit A-90, p. 4, ¶13.
[85] Transcript, vol. 23 (January 24, 2023), p. 3613, lines 26-27.

University of Toronto.[86] Professor Tsiakas was qualified as an academic expert in FX transactions.[87]

[53] Key elements of Professor Tsiakas' opinion are set out in the executive summary in his report, as follows:

> In my view, the Appellant implemented a highly sophisticated trading strategy, which was designed to be "well-hedged" (but not perfectly-hedged) against possible sources of risk. In this regard, the nature of the trading strategy was not consistent with taking risks that would justify earning a reasonable profit. In other words, this was a "low-risk low-return" strategy.
>
> … [M]y analysis concludes that the Appellant's activity in relation to foreign currency exchange contracts involved a low level of risk. In my view, since the strategy was "low-risk low-return", it allowed the Appellant to maintain a portfolio whose value at any given point in time was close to zero. Some of the Appellant's positions made a large profit and some made a large loss, but the portfolio was well-hedged so that the value of the portfolio was low and close to zero. At the end of 2011, the Appellant closed certain positions that made a loss, while maintaining positions that made a profit, presumably to crystalize these losses before year end. I have calculated the value of the Appellant's portfolio on the last trading day of 2011 to be approximately $3,000 Canadian dollars (CAD). The reported losses claimed by the Appellant at the end of 2011 were approximately $22 million CAD. The remaining profitable positions in the Appellant's portfolio at the end [of] 2011 also had a value of approximately $22 million CAD. The unrealized profits in the Appellant's portfolio essentially offset the reported losses so that the total value of the Appellant's portfolio at the end of 2011 was approximately $3,000 CAD. Overall, it was possible for the Appellant to maintain a "low-risk low-return" strategy and still execute trades that generated the losses claimed.[88]

F. Daniel B. Thornton

[54] Daniel B. Thornton, a resident of Kingston, Ontario,[89] earned a bachelor of science degree (honors) in mathematics, physics and chemistry from the University of Western Ontario, a master of business administration degree from the Richard Ivey School of Business Administration at the University of Western Ontario, and

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[86] Curriculum Vitae in the Expert Report of Ilias Tsiakas, dated October 26, 2020, and entered as Exhibit R-23, Appendix A, p. 60.

[87] Transcript, vol. 23 (January 24, 2023), p. 3642, lines 9-15.

[88] Exhibit R-23, p. 4, section 3.0.

[89] Transcript, vol. 26 (April 18, 2023), p. 4094, line 13.

a doctor of philosophy degree from the Schulich School of Business at York University. After working as a staff accountant at Clarkson Gordon from 1971 to 1973, he worked as a lecturer in finance at York University in 1973 and 1974. He obtained his chartered accountant designation in Ontario in 1973 and in Alberta in 1989.[90] From 1974 to 1989, he was an assistant, associate and then full professor in the Faculty of Management Studies at the University of Toronto. From 1989 to 1993, Professor Thornton was a professor of accounting at the University of Calgary. From 1993 to 2000 and from 2001 to 2020, he was a professor of financial accounting at Queen's University. In 2000 and 2001, he was a professional accounting fellow at the United States Securities and Exchange Commission.[91] Professor Thornton was qualified as an expert in financial accounting, including the accounting of various transactions.[92]

[55] Professor Thornton provided an executive summary of his opinion, which related to the proper application of generally accepted accounting principles ("GAAP") by Mr. Chad and his sole proprietorship, L Ventures (which he defined as "Chad").[93] The concluding six paragraphs of that summary read as follows:

> 24. … In my opinion, Chad's "realization method" is not representationally faithful (in the vocabulary of GAAP) or accurate (in the vocabulary of [the question put to me]). Mark-to-market accounting and hedge accounting are the only two methods GAAP allows for financial instruments. My analysis implies that Chad did not apply the former and was ineligible to apply the latter; therefore, his accounting did not comply with GAAP.
>
> 25. … By default, GAAP requires financial instruments, including forward and futures contracts, to be fair valued (or to be marked to market) at each financial statement date. All of the resulting changes in fair value must be recognized as accounting income and losses on the income statement, whether or not the contracts are settled in cash.
>
> 26. Under restrictive conditions, GAAP allows the use of hedge accounting to account for financial instruments. After reviewing the materials supplied to me, I concluded that Chad's financial instruments did not qualify for hedge accounting.

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[90] These designations were changed to chartered professional accountant in Ontario in 2012 and in Alberta in 2015.

[91] Curriculum Vitae in the Expert Report of Daniel B. Thornton, dated October 19, 2020, and entered as Exhibit R-29, Appendix 1, p. 62-63.

[92] Transcript, vol. 26 (April 18, 2023), p. 4123, lines 3-7.

[93] Exhibit R-29, p. 1, ¶1.

> 27. Under GAAP, the amount in the "Total" row of the table supplied by [the Department of] Justice [as reproduced in paragraph 5 on page 4 of the report], –7,068.72, would be the fair value of the positions in US dollars at the end of fiscal 2011. Since forwards or futures are originated at a fair value of zero, this would also be the loss on these positions for the fiscal period in US dollars. Multiplying this amount by the exchange rate, $1.0214[,] gives –$7,219.99, the fair value in Canadian dollars. Thus, under GAAP, with respect to these positions, Chad's income statement would show a loss of $7,219.99 for fiscal 2011 and Chad's balance sheet would show a corresponding liability of $7,219.99 as of December 31, 2011.
>
> 28. Under GAAP, the amount in the "Total" row of the table supplied by [the Department of] Justice [as reproduced in paragraph 6 on page 5 of the report], 21,377,091.03, would be the fair value of the positions in US dollars at the end of fiscal 2011. Since forwards or futures are originated at a fair value of zero, this would also be the gain on these positions for the fiscal period ending December 31, 2011 in US dollars. Multiplying this amount by the exchange rate, 1.0214[,] gives $21,834,560.78, the fair value of the gain in Canadian dollars. Thus, with respect to these positions Chad's income statement would show income or profit of $21,834,560.78 for the fiscal year ending December 31, 2011; Chad's balance sheet would show a corresponding asset of $21,834,560.78 as of December 31, 2011. If other positions exhibiting losses existed, this $21,834,560.78 gain would reduce or offset the losses on the income statement and would reduce or offset the liability stemming from those other positions on the balance sheet.
>
> 29. My analysis reveals that the notional amounts of Chad's derivative positions offset one another during 2011-12. (The notional value of a forward or futures currency contract is the underlying amount of currency that an investor has contracted to buy or sell.) Thus, under GAAP, the accounting gains or losses that resulted from fair valuing the derivatives (or marking the derivatives to market) would also offset each other; very little, if any net income or loss from the derivatives positions would be recognized during 2011-12.[94]

[56] I read Professor Thornton's report as containing opinions about accounting questions and principles only, and as not endeavoring to answer legal questions or to opine as to legal principles. I understand that Professor Thornton and all counsel share a similar view. Although the instructions provided by the Crown to Professor Thornton contained the word "accurate", as does his reference to those instructions in paragraph 24 of his report (which is quoted above), Professor Thornton stated that accuracy is not a desirable qualitative characteristic of useful financial information cited in section 1000 of the Handbook of the Canadian Institute of Chartered Professional Accountants. Accordingly, Professor Thornton prefers to

[94] Exhibit R-29, p. 12-14, ¶24-29.

use the terms "reliability" and "representational faithfulness".[95] In particular, the phrase "accurate figure of income/loss", which was the term used by the Crown in its instructions to Professor Thornton,[96] was not intended by either the Crown or Professor Thornton to mean, connote or refer to the terms "accurate picture of profit" or "accurate picture of income", as used by Justice Iacobucci in *Canderel*.[97]

[57] I also read Professor Thornton's report as being confined to accounting matters, and as not venturing into opinions about the legal nature or characteristics of an FX forward or futures contracts,[98] a view with which Professor Thornton and all counsel concur.

G. Richard Poirier

[58] Richard Poirier, a resident of Hatley, Quebec, earned a bachelor of arts degree in finance from Laval University. He also did graduate studies in international business at Hautes Études Commerciales. As well, he completed courses, provided by the Canadian Securities Institute, in Canadian securities (2011) and portfolio management techniques (2019), and he obtained an assistant portfolio manager license from l'Autorité des marchés financiers (Québec, 2017). Mr. Poirier worked from 1993 to 2012 for National Bank of Canada or one of its subsidiaries in a variety of positions, including junior trader, spot desk; intermediate trader, foreign exchange; market maker; senior trader, currency options; market taker; director, treasury; managing director and chief dealer, foreign exchange; and managing director, internal hedge fund. At the time of his testimony, he was working as a consultant.[99] Mr. Poirier was qualified as an industry expert in the field of FX markets and trading for the period 1993 to 2012, with that expertise having been acquired in a Canadian commercial banking context.[100]

[59] Mr. Poirier summarized his opinions as follows:

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[95] Exhibit R-29, p. 21-22, ¶41-42.

[96] Exhibit R-29, p. 3, ¶4.

[97] *Canderel Limited v. The Queen*, [1998] 1 SCR 147, ¶53(3) & (6).

[98] Exhibit R-29, p. 1, ¶2.

[99] Expert Report of Richard Poirier in Rebuttal to Revised Broer Report, dated November 9, 2022, and entered as Exhibit R-31, p. 2-6; and Transcript, vol. 30 (May 17, 2023), p. 4839, line 8; and p. 4844, line 13 to p. 4865, line 6.

[100] Transcript, vol. 30 (May 17, 2023), p. 4901, lines 4-9.

> Crises do not create opportunities for price takers like Mr. Chad, on the contrary, they represent additional transactional costs.
>
> Bloomberg's BGN data are not reliable.
>
> You can't use linear interpolation when you have a "V" FX forward curve shape.[101]

[60] Mr. Poirier's report contains the following conclusion:

> The magnitude of the "V" shapes FX forward curves can't happen in FX forwards. So, if the BGN data are wrong, the results of unrealized profit or loss shown in Mr. Broer's graphs don't reflect the reality.
>
> If the BGN data reflected real market rates, linear interpolation will give results that do not reflect the reality.
>
> Either way, results in Mr. Broer's graphs are not accurate.[102]

[61] Mr. Poirier's report was provided as a rebuttal to Mr. Broer's revised two-volume report dated September 5, 2022.[103] As I have determined not to give any weight to Mr. Broer's opinions, I need not say anything further about Mr. Poirier's opinions.

V. ANALYSIS

A. Sham

1. **Jurisprudence and Submissions**

[62] In *Cameco*, the authorities underlying the doctrine of sham were thoroughly reviewed by Justice Owen, who then summarized the applicable fundamental principles as follows:

> It can be seen from the foregoing authorities that a transaction is a sham when the parties to the transaction present the legal rights and obligations of the parties to

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[101] Exhibit R-31, p. 7, part E. Mr. Poirier used "BGN" as meaning "Bloomberg Generic Composite rate"; see Exhibit R-31, p. 9, s. 2.

[102] Exhibit R-31, p. 13, subpart F-G.8.

[103] Exhibit R-31, p. 2, part A, second paragraph. As noted above, Mr. Broer's revised report was entered as Exhibit A-93.

> the transaction in a manner that does not reflect the legal rights and obligations, if any, that the parties intend to create. To be a sham, the factual presentation of the legal rights and obligations of the parties to the sham must be different from what the parties know those legal rights and obligations, if any, to be. The deceit is the factual representation of the existence of legal rights when the parties know those legal rights either do not exist or are different from the representation thereof.[104]

[63] In the context of the Trades, the legal rights and obligations of Mr. Chad and Velocity were set out, and presented, in various documents, including the FX Contracts, a bundle of documents titled "Velocity Trade — Background and Due Diligence",[105] a letter dated October 7, 2011 from Mr. Chad to the Compliance Department of Velocity[106], an Elective Professional Client Status Verification Form,[107] and a composite document titled "Opening an account with Velocity Trade International Ltd", which also included a document titled "account opening form for private individuals" and the Terms Agreement.[108]

[64] In reassessing Mr. Chad, the Minister made the following assumption, as stated in the Crown's Fresh Amended Reply, dated February 15, 2022:

> The purported trades relating to the foreign exchange transactions were a sham[.][109]

The substantially identical statement was reiterated by the Attorney General of Canada (the "AGC") in the portion of the Fresh Amended Reply that set out the reasons/grounds relied on by the Crown.[110]

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[104] *Cameco Corporation v. The Queen*, 2018 TCC 195, ¶592 (Justice Owen's finding that there was not a sham was not appealed; see 2020 FCA 112, ¶15).

[105] Exhibit A-4.

[106] Exhibit A-5.

[107] Exhibit A-6.

[108] Exhibit A-7. In the Crown's Submissions (as defined below), Exhibits A-4, A-6 and A-7 are collectively referred to as the "Onboarding Documents". Additional relationship documents are referred to below in paragraph 81.

[109] Fresh Amended Reply, ¶15.ww). Although this assumption appears to be a conclusion on a question of mixed fact and law, I will not dwell on that point here, other than to refer the reader to *Stackhouse v. The King*, 2023 TCC 156, ¶12-17, and to *Chad v. The Queen*, 2021 TCC 45, ¶40-44 and the authorities cited in footnotes 47-53 thereof.

[110] Fresh Amended Reply, ¶33.

[65] By the time of oral argument, approaching the conclusion of the trial, it seemed that the Crown may have broadened its position, as seen in the opening paragraph of the Respondent's Written Submissions (the "Crown's Submissions" or "its Submissions"):

> The appellant [i.e., Mr. Chad] and Velocity agreed to enter into forward contracts, the purpose of which was to implement a tax plan for a fee. They agreed to generate a $22 million loss in 2011 and a virtually offsetting gain in the following year for a fee equal to 1% of the loss. The appellant would have the Court believe there was no such agreement. This representation is a sham or a deception to conceal the fact that the appellant's sole purpose was to generate a loss in 2011 for tax purposes.[111]

[66] The word "representation" in the last sentence quoted above appears to refer to an alleged representation (which I will call the "Purported Representation") by Mr. Chad that he and Velocity did not agree "to generate a $22 million loss in 2011 and a virtually offsetting gain in the following year for a fee equal to 1% of the loss."[112] Thus, rather than continuing to emphasize that the Trades were a sham, the Crown seemed to take a revised position that the Purported Representation was a sham.

[67] When discussing the *sham* argument in its Submissions, the Crown described the above alleged agreement between Mr. Chad and Velocity as a straddle agreement, and suggested that such agreement changed the nature of the Trades and other documents, as follows:

> 154. The appellant and Velocity had an overarching straddle agreement very similar to the one described in *Paletta Estate (TCC)*; the appellant was acquiring a target loss in 2011 and an offsetting gain in 2012 for a fee. The appellant in this appeal denies the existence of this agreement. The straddle agreement altered the nature of the parties' relationship particularly in respect of the parties' true intent….
>
> 170. The existence of a straddle agreement was demonstrated in these proceedings. It is unknown whether that agreement was written or oral, explicit or tacit but it has been demonstrated. As such, it materially changes the nature of the 34 transactions, the Onboarding Documents, the standing instructions and correspondence between the parties. The existence of the straddle agreement is

[111] Crown's Written Submissions, filed July 25, 2023 (defined above as the "Crown's Submissions"), p. 1, first paragraph of the Overview.
[112] *Ibid.*

> incompatible with the alleged profit making intent. As such, to the extent of that inconsistency, they are a sham.[113] [*Footnote omitted*.]

[68] The last sentence of the above quotation is ambiguous. It is not clear whether the pronoun "they" refers to "the 34 transactions, the Onboarding Documents, the standing instructions and correspondence between the parties" or to the alleged straddle agreement. The reference in the penultimate sentence of the quotation to the alleged straddle agreement's incompatibility with Mr. Chad's alleged profit-making intent and the phrase "to the extent of that inconsistency" in the last sentence of the quotation might suggest that "they" refers to the straddle agreement. On the other hand, given that "they" is often a plural pronoun, that pronoun might refer to the "34 transactions, the Onboarding Documents, the standing instructions and correspondence between the parties."

[69] As might be expected, Mr. Chad and Velocity did not acknowledge that they had agreed that Velocity would facilitate various Trades in an amount sufficient "to generate a $22 million loss in 2011 … for a fee equal to 1% of the loss."[114] Clearly, there was a contractual relationship between Velocity (as brokerage house) and Mr. Chad (as customer or client), and Mr. Chad agreed to pay a fee to Velocity for its brokerage services. While the initially agreed-upon fee of $200,000, at a time when the target loss was $20,000,000, might suggest that Mr. Chad and Velocity had agreed on a 1% fee, that reasoning does not hold up in the subsequent context, when the target loss was increased to $22,000,000 and the fee was increased, not to $220,000, but rather to $240,000, which was equal to approximately 1.091% of the target loss.

[70] Thus, the evidence does not support the Crown's proposition that there was a fixed predetermined mathematical relationship between the target loss and the fee. At the outset, there might have been such a relationship (which Velocity and Mr. Chad managed to keep under wraps), or it may have simply been coincidental that

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[113] Crown's Submissions, p. 65, ¶154; and p. 77, ¶170. The footnote that I omitted from the above quotation refers to paragraph 71 of the TCC's decision in *Paletta Estate v. The Queen*, 2021 TCC 11. In paragraph 225 of that decision, Justice Spiro held in favor of the Paletta Estate on the issue of *sham*. On appeal to the Federal Court of Appeal (the "FCA"), the Crown in *Paletta Estate* did not advance the *sham* argument; see *Paletta Estate v. The Queen*, 2022 FCA 86, ¶24 & 29.

[114] Crown's Submissions, p. 1, first paragraph of the Overview.

the initially agreed-upon fee happened to be exactly 1.0% of the initially agreed-upon target loss.[115]

[71] Mr. Chad explained the setting of the fee in this matter:

> Q. And how was this fee determined, 200,000?
>
> A. It was a negotiated fee where we went back and forth a little bit based on the expected volume, the expected activity. I was obviously going to be very communicative with him. I was going to be phoning him a bunch, because I wanted to learn. So he would have … looked at that and said, "This is how much bother and involvement and effort that this file is going to require."[116]

[72] The Crown's submission about a 1% fee discounts not only Mr. Chad's testimony, but also Mr. Hodgins' testimony that brokers base their fees on the volume of trading, the amount of activity, and an in-house term that he called "bandwidth" (which seems to reflect or encompass a customer's demands on the particular broker). While Mr. Hodgins acknowledged that some advisors and their clients like to see the fee expressed as a percentage of the target, he also said that brokers do not set their fees in that manner.[117]

[73] Even if there were a "1%-fee agreement," as the Crown submits, I have not seen any evidence or authority to suggest that such an agreement would change the nature of the Trades. In fact, there was no incentive for Mr. Chad and Velocity to change the nature of the Trades, for without the Trades having been implemented as they were, the target loss would not have been realized. The argument made by the Crown in paragraphs 154 and 170 of the Crown's Submissions (as quoted in paragraph 67 above) is better suited to the *source of income* argument than to the *sham* argument. In fact, in paragraph 154 of its Submissions, the Crown submits that Mr. Chad and Velocity entered into "an overarching straddle agreement very similar to the one described in *Paletta Estate (TCC)* …"; yet the Crown in this Appeal seems to have lost sight of the fact that, by the time counsel for the Crown in *Paletta Estate* reached final argument in that trial, they had relegated *sham* to a secondary role in support of the *source* argument,[118] and when the Crown in

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[115] As indicated in the preceding paragraph, the revised fee was greater than 1% of the revised target loss.

[116] Transcript, vol. 3 (June 22, 2022), p. 356, lines 17-26.

[117] Transcript, vol. 10 (July 5, 2022), p. 1381, lines 5-17.

[118] *Paletta Estate* (TCC), *supra* note 113 ¶210; and *Paletta Estate* (FCA), *supra* note 113, ¶29.

Paletta Estate appealed to the FCA, it did not appeal from Justice Spiro's finding that there was no sham.[119]

[74] As indicated above, in its Submissions, as well as during its oral argument, the Crown advanced a *sham* argument (albeit an argument different from that which it had pleaded). However, later in oral argument, counsel for the Crown acknowledged that the Trades themselves constituted real transactions, and were contracts,[120] which is what Mr. Chad and Velocity had represented them to be. As well, in its Submissions, the Crown stated that the Trades were "real transactions with their purported legal effect…."[121] That statement was repeated during oral argument.[122]

[75] In addition, during oral argument, when I asked the Crown to clarify its position in respect of *sham*, counsel for the Crown stated:

> We … did not succeed in achieving the sufficient evidence to prove that these transactions didn't exist, so we're not making an argument … that we cannot support in the evidence….
>
> We don't have the evidence that these transactions never occurred.[123]

[76] As noted above, the Minister assumed, and the AGC pleaded, that the Trades were a sham.[124] However, there was no assumption and no pleading of facts necessary to support the argument that the Purported Representation, the Onboarding Documents or the standing instructions and correspondence between Mr. Chad and Velocity were a sham. Accordingly, the Crown bears the burden of proof in respect of this allegation.

[77] In *AgraCity*, Justice Boyle made the following observation about the nature of the evidence required to support a finding of sham:

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[119] *Paletta Estate* (TCC), *supra* note 113, ¶225; and *Paletta Estate* (FCA), *supra* note 113, ¶24 & 29.

[120] Transcript, vol. 31 (August 23, 2023), p. 5075, line 22 to p. 5076, line 3.

[121] Crown's Submissions, p. 177, ¶414.

[122] Transcript, vol. 31 (August 23, 2023), p. 5075, lines 22-23.

[123] Transcript, vol. 30 (August 22, 2023), p. 4824, lines 15-26.

[124] To the extent that this assumption pleaded assumed facts (as distinct from a conclusion of law), Mr. Chad has demolished the assumption. To the extent that the assumption pleaded a conclusion of law, it was ineffective.

> Sham is a serious allegation requiring convincing evidence to conclude that a Canadian taxpayer was deceitful on a balance of probabilities. Often this may involve circumstantial evidence. This can be expected to require more [than] the Respondent's suspicions.[125]

[78] In determining whether the presentation by Mr. Chad and Velocity of the legal rights and obligations of their relationship was different from what they knew those legal rights and obligations to be, it is helpful to take note of the following statement by Justice Owen in *Cameco*:

> As observed in *Continental Bank*, the factual presentation of the legal rights and obligations of parties to a transaction is not the same as the legal characterization of that transaction. Consequently, a sham does not exist if the parties present the legal rights and obligations to the outside world in a factually accurate manner (i.e., in a manner that reflects the true intentions of the parties) but identify the legal character of the transaction incorrectly.[126]

I have quoted the above statement, not to suggest that Mr. Chad and Velocity identified the legal nature of their transactions incorrectly, but, rather, to emphasize that they presented their mutual legal rights and obligations to the outside world in a factually accurate manner.

[79] In concluding the jurisprudential discussion of *sham*, it is recognized that Mr. Chad acknowledged that one of his reasons for participating in the Trades was tax-related.[127] In particular, Mr. Chad stated that he wanted to defer $20,000,000 (later changed to $22,000,000) of income from 2011 to 2012, by incurring a target loss of $20,000,000 (later $22,000,000) in 2011, and by realizing an offsetting gain in 2022.[128] Nevertheless, the following guidance from *Cameco* is pertinent:

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[125] *AgraCity Ltd. et al. v. The Queen*, 2020 TCC 91, ¶20.

[126] *Cameco*, *supra* note 104, ¶598. The mention of *Continental Bank* in the above quotation is a reference to *Continental Bank Leasing Corp. v. The Queen*, [1998] 2 SCR 298, ¶21.

[127] Exhibit R-1, fact #29; and Transcript, vol. 2 (June 21, 2024), p. 257, lines 16-18; p. 258, lines 11-12; vol. 3 (June 22, 2022), p. 337, lines 16-18; vol. 4 (June 23, 2022), p. 601, lines 20-21; p. 602, lines 23-25; vol. 5 (June 27, 2022), p. 715, lines 12-20; p. 764, line 13; and vol. 6 (June 28, 2022), p. 850, lines 2-3; and p. 856, line 21 to p. 857, line 1.

[128] Transcript, vol. 3 (June 22, 2022), p. 352, lines 2-12; vol. 5, (June 27, 2022), p. 715, lines 14-20; and p. 719, lines 23-27.

> The Appellant's [i.e., Cameco Corporation's] motivation for these arrangements may have been tax-related, but a tax motivation does not transform the arrangements among the Appellant [and its affiliates] into a sham.[129]

Similarly, Mr. Chad's desire to defer income does not transform the transactions between him and Velocity into a sham.

2. **Application**

[80] The Trades were implemented pursuant to the FX Contracts. The evidence shows that the particulars of the Trades coincided with the legal rights and obligations set out in the respective FX Contracts. The most complete presentations of the Trades and the FX Contracts were found in the transactional-confirmation documents emailed by Velocity to Mr. Chad as the Trades were made, and in the account statements emailed by Velocity to Mr. Chad at the end of each trading day.[130] The factual presentations of the legal rights and obligations arising under the FX Contracts and pertaining to the Trades, as set out in those documents, coincided with what Mr. Chad and Velocity knew those right and obligations to be.

[81] The terms and conditions (i.e., the legal rights and obligations) in respect of the trading relationship between Mr. Chad and Velocity (as distinct from the Trades themselves) were set out in a document entitled "Velocity Trade — Background and Due Diligence",[131] Mr. Chad's letter of October 7, 2011 to Velocity's Compliance Department,[132] the Elective Professional Client Status Verification Form,[133] a document entitled "Opening an account with Velocity Trade International Ltd",[134] the Terms Agreement,[135] a list of standing instructions

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[129] *Cameco*, *supra* note 104, ¶605. See also *Paletta v. The Queen*, 2019 TCC 205, ¶129; *Paletta Estate* (TCC), *supra* note 113, ¶227-228; and *AgraCity*, *supra* note 125, ¶19, quoting *Paletta*, 2019 TCC 205, ¶129.

[130] More will be said below about those documents.

[131] Exhibit A-4.

[132] Exhibit A-5.

[133] Exhibit A-6.

[134] Exhibit A-7, p. 1-2.

[135] Exhibit A-7, p. 3-20.

in a letter agreement dated November 30, 2011,[136] and correspondence between the parties (collectively, the "Relationship Documents").[137]

[82] Mr. Chad described the Onboarding Documents as "boilerplate documents" that allowed him to open a trading account with Velocity, and that were "fairly one-sided, and in favour of … the brokerage."[138] In reviewing the documentary evidence and in listening to the testimony of Mr. Chad, Mr. Hodgins and Timothy Pasco (who was Velocity's chief executive officer and managing director), I did not find anything to suggest that the Relationship Documents did not accurately set out the legal rights and obligations that Mr. Chad and Velocity had intended to create.

[83] While the Crown has a suspicion that Mr. Chad and Velocity entered into an overarching straddle agreement to generate a $22,000,000 loss in 2011 and a virtually offsetting gain in 2012, for a fee equal to 1% of that loss, the evidence does not support such a conclusion.

[84] The suggestion that Velocity entered into transactions that were not what they were represented to be is not consistent with Velocity's standing in the financial community. Mr. Bird stated:

> The Velocity Trade group is a global securities brokerage firm (including FX products). It operates in many markets, which require it to be authorised by regulators, giving it a significant amount of credibility and legitimacy in the financial services industry.[139]

[85] Velocity was a recognized and reputable global brokerage house, duly registered with the English regulatory authorities, and a member of the London

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[136] Exhibit A-22, p. 2.

[137] Many of the documents described in paragraph 81 are also mentioned in paragraph 63 above. Four of the documents described above, i.e., Exhibits A-4, A-6 and A-7 (which contains both the account-opening form and the Terms Agreement), are referred to by the Crown as the "Onboarding Documents"; see the Crown's Submissions, p. 14-15, ¶28; and Transcript, vol. 5 (June 27, 2022), p. 769, lines 4-12.

[138] Transcript, vol. 2 (June 21, 2022), p. 288, lines 15-17; and vol. 5 (June 27, 2022), p. 769, lines 5-12.

[139] Exhibit A-85, vol. 1, tab 1, p. 18, ¶39. See also Mr. Blair's report, Exhibit A-90, vol. 1, p. 5, ¶17 & fn. 7 & 8.

Stock Exchange.[140] Velocity was indirectly owned, in part, by BMO Nesbitt Burns Inc. and Macquarie Resource Capital (which was a subsidiary of Macquarie Bank Australia), as well as by partners and staff of Velocity.[141] Velocity had a customer's trading account at Barclays Bank in London; this provided an audit trail and a means whereby Velocity could track funds sent by customers.[142]

[86] Given that Mr. Hodgins acted as Mr. Chad's agent, for the purpose of executing the Trades, Mr. Hodgins could not set the respective prices for those Trades. Rather, he (on behalf of Mr. Chad) had to deal, on an arm's-length basis, at whatever prices were offered by Velocity's trading desk. Velocity and Mr. Chad implemented and documented the Trades in the same manner as that used in respect of Velocity's other clients.

[87] The documents that were prepared by Velocity and Mr. Chad and that were put into evidence indicate that actual transactions were implemented. For instance, Mr. Hodgins generally sent an email to Mr. Chad, recommending a particular Trade. Mr. Chad generally provided written instructions, by email, to Mr. Hodgins to proceed with the Trade.[143] Each Trade was confirmed by a document titled "FX Spot / Forward Confirmation.[144] Each Trade was recorded in a daily statement,[145] which was emailed by Velocity to Mr. Chad at the end of each trading day.

[88] Mr. Chad has met his burden of proving that the Trades were what they purported to be. In other words, the Trades actually occurred in the manner represented by Mr. Chad and Velocity. Mr. Chad and Velocity did not misrepresent their FX forward straddle-trading transactions to be different from what Mr. Chad and Velocity knew them to be. Similarly, the evidence does not

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[140] The regulator was the Financial Services Authority. See Exhibit A-90, vol. 1, p. 2, ¶6; and p. 5, 17; and Transcript, vol. 10 (July 5, 2022), p. 1369, lines 9-14; and vol. 18 (August 23, 2022), p. 2832, lines 6-10. Velocity had offices in London, Toronto, Vancouver and Sydney.

[141] Exhibit A-4, p. 2 & 6; and Transcript, vol. 9 (July 4, 2022), p. 1321, lines 19-21.

[142] Transcript, vol. 10 (July 5, 2022), p. 1383, line 27 to p. 1384, line 10.

[143] There were a few instances where Mr. Hodgins' recommendation and/or Mr. Chad's instructions were given verbally, over the telephone, but that does not negate the effectiveness of the recommendation or the instructions.

[144] Exhibit A-35. Some of the confirmation documents are missing; Transcript, vol. 4 (June 23, 2022), p. 506, lines 2-7; and p. 507, lines 2-16.

[145] Exhibits A-31, A-32, A-33 and A-34. These statement are described further in footnote 242 below. Some of the January statements are missing from Exhibit A-32; Transcript, vol. 3 (June 22, 2022), p. 464, lines 27-28.

support a finding that the Relationship Documents were misrepresented by them as not portraying their actual contractual relationship or the actual transactions that took place between them. Hence, I make no finding of sham.

B. Legal Effectiveness of Trades

[89] In reassessing Mr. Chad, the Minister assumed that the Trades "were not real transactions;"[146] that the Trades "involved entering into purported contracts to purchase and sell foreign currencies;"[147] and that "[t]he purported contracts entered into in the foreign exchange transactions were not legally effective contracts…."[148] The first and third of those three assumptions each contain a conclusion of law.[149] As explained in my decision in respect of Mr. Chad's motion, in 2021,[150] to strike various assumptions and other provisions from what was then the Second Amended Reply, I have disregarded those two assumptions, without endeavoring to extricate any facts that might be contained therein.

[90] Nevertheless, in paragraph 34 of the Fresh Amended Reply (as well as in the corresponding provisions of the previous versions of the Reply), in setting out the grounds on which it was relying,[151] the Crown pleaded, as an alternative argument,

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[146] Fresh Amended Reply, ¶15.ff).

[147] Fresh Amended Reply, ¶15.gg).

[148] Fresh Amended Reply, ¶15.xx).

[149] Concerning the second of the above three assumptions, it is permissible to plead, as an assumption of fact (in the case of a reply), or as a statement of material fact (in the case of a notice of appeal), that two or more persons executed a document titled or otherwise identified as an agreement. However, any statements concerning the validity, legal effect (if any) or interpretation of the agreement should be placed in the portion of the pleading setting out the reasons or grounds on which the party relies. In this regard, in an *obiter* comment about the use of a statement of agreed facts, in *The Queen v. Gillette Canada Inc.*, 2003 FCA 22, ¶16, Justice Décary stated, "Where transactions are documented, the circumstances of the making of the documents is an appropriate subject for an [*sic*] Statement of Agreed Facts, but the legal effect of the documents is not." See also *Bonde v. The Queen*, 2022 FCA 165, ¶9. For recent views about the propriety of the Crown pleading assumptions of mixed fact and law, see *The King v. Preston*, 2023 FCA 178; *The King v. Adboss, Ltd.*, 2023 FCA 201; and *Stackhouse*, *supra* note 109.

[150] *Chad*, *supra* note 109, ¶40-44 & fn. 54.

[151] As was done in paragraph 34 of the Fresh Amended Reply, conclusions of law should be pleaded as reasons or grounds on which the Crown intends to rely (and not as assumptions of fact). See *Canadian Imperial Bank of Commerce v. The Queen*, 2013 FCA 122, ¶92-93; *Strother*

that, "if the purported trades relating to the Foreign Exchange Transactions were not a sham, then they were not legally effective contracts." Accordingly, the question of the legal effectiveness of the FX Contracts, which underlay the Trades, is an issue to be considered in this Appeal.

[91] In its Submissions, the Crown submits that *Paletta Estate* is a binding precedent, and that the analysis in that case is binding on this Court.[152] The Crown also submits that the facts of *Paletta Estate* are materially identical to the facts in this Appeal.[153]

[92] In *Paletta Estate*, the trial judge found that the foreign exchange straddle trades that were the subject of that appeal "were legally effective in accordance with their terms."[154] On the appeal of that decision, the FCA noted that, at trial, it became apparent to the Crown that the *ineffective transactions* argument (as well as the *sham* and *window dressing* arguments) could not be supported, other than in a secondary role. In that appeal to the FCA, the Crown did not advance the *ineffective transactions* argument.[155]

[93] In its Submissions in this Appeal, the Crown does not expressly discuss the *ineffective contracts* or the *ineffective transactions* arguments.

[94] As noted above, subclause 17.1 of the Terms Agreement (which was one of the documents governing the trading relationship between Mr. Chad and Velocity) contains a choice-of-law clause, which states that such Agreement was to be governed by, and construed in accordance with, English law. Subclause 2.1 of the Terms Agreement states that the "Agreement governs each Transaction entered into or outstanding between us … on or after the execution of this Agreement."[156]

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v. The Queen, 2011 TCC 251, ¶32; and *Bemco Confectionery and Sales Ltd. v. The Queen*, 2015 TCC 48, ¶40.

[152] Crown's Submissions, p. 60, heading A and ¶138.

[153] Crown's Submissions, p. 101, heading F.

[154] *Paletta Estate* (TCC), *supra* note 113, ¶255.

[155] *Paletta Estate* (FCA), *supra* note 113, ¶29.

[156] Exhibit A-7, p. 3, preamble and ¶2.1, and p. 15, ¶17.1.

[95] As noted above, Mr. Blair, an English barrister who was qualified as an expert in English law, opined that, under English law, the Trades were legally effective.[157]

[96] Although there is expert evidence to support the finding that the Trades were legally effective under English law, it is also necessary to confirm that the Trades were legally effective for the purposes of the ITA. According to the *Dale* case, this entails an application of the basic principles of the law of contracts, in force in the jurisdiction where the FX Contracts were consummated,[158] which, according to *Black's Law Dictionary*, means completed or fully accomplished.[159]

[97] While it is likely possible to ascertain when the FX Contracts were made (which typically occurs when notice of the offeree's acceptance is communicated to the offeror),[160] there was no specific evidence concerning the place where the FX Contracts were made or where they were completed or fully accomplished. In addition, one textbook has observed that the problem of ascertaining the proper law (or the applicable law) of a contract can be perplexing and controversial, because "there may be a multiplicity of connecting factors: the place where it is made; the place of performance; the domicil [*sic*], nationality or business centre of the parties; the situation of the subject-matter; … and so on …", including the intention of the parties, which might be imprecise and ambiguous, or which might be expressed in a choice-of-law clause.[161] Thus, the place where the FX Contracts were made or performed may be a relevant factor. Yet, from a legal perspective, it may not be easy to determine that location. In this regard, John Falconbridge has

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[157] Exhibit A-90, p. 4, ¶13(b)(ii).

[158] In *Dale v. The Queen*, [1997] 2 CTC 286, 97 DTC 5252 (FCA), ¶13, Justice Robertson stated, "In determining whether a legal transaction will be recognized for tax purposes one must turn to the law as found in the jurisdiction in which the transaction is consummated. Often … the effectiveness of a transaction may depend solely on the proper application of general common law and equitable principles."

[159] Bryan A. Garner, *Black's Law Dictionary*, 12th ed. (St. Paul: Thomson Reuters, 2024), p. 398 "consummate".

[160] Jean E. Côté, *An Introduction to the Law of Contract* (Edmonton: Juriliber Limited, 1974), p. 27-28. See also *Brinkibon Ltd. v. Stahag Stahl et al.*, [1983] 2 AC 34 (HL); *Humble Investments Ltd. v. N.M. Skalbania Ltd., Embassy Estates Ltd. and Cenaiko Enterprises Ltd.*, 1983 CanLII 2564 (SKCA); *Canadian Dyers Association Limited v. Burton*, (1920) 47 OLR 259 (HC); and *Richards Transport Ltd. v. 7367555 Manitoba Ltd. (c.o.b. JRS Industrial Power Solutions)*, [2017] S.J. No. 577 (SKQB).

[161] P.M. North & J.J. Fawcett, *Cheshire and North Private International Law*, 11th ed. (London: Butterworths, 1987), p. 447-449.

stated, "Sometimes … there are inherent difficulties in the ascertainment of the place of making a contract, especially if the transaction is not one into which the parties have entered face to face or is not one which takes place wholly within the limits of a single country."[162]

[98] Thus, there are challenges in selecting the jurisdiction whose contract law should be applied to determine, for the purposes of the ITA and this Appeal, the legal effectiveness of the FX Contracts. The relevant jurisdiction might be England (as Velocity was resident and had an office there, and the choice-of-law clause designated that jurisdiction); it might be Alberta (as Mr. Chad was resident, generally located, and perhaps domiciled, there); or it might be British Columbia, Ontario or Australia (as Velocity also had offices in each of those jurisdictions). Based on my review of Mr. Blair's report,[163] and my understanding of contract law in the common law provinces of Canada, it appears that, insofar as the determination of the legal effectiveness of the FX Contracts is concerned, English contract law and Alberta, British Columbia and Ontario contract law are substantially similar.[164] No evidence was provided in respect of Australian contract law; however, I believe that I may take judicial notice that Australia is a common law jurisdiction. I have concluded that I should follow the guidance from *Dale*, and apply general common law principles,[165] which, insofar as the fundamentals of contract law are concerned, I understand to be similar in the two national and three provincial jurisdictions mentioned above.[166]

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[162] John Delatre Falconbridge, *Essays on the Conflict of Laws*, 2nd ed. (Toronto: Canada Law Book Company Limited, 1954), p. 376.

[163] Exhibit A-90.

[164] Côté, *supra* note 160, p. 1, states, "The law of contracts has been the subject of less legislation than have most areas of the law, and so the greater part of it consists of court decisions. The broad outline of these decisions of necessity comes from the English courts, and in most matters of detail the Canadian courts have freely chosen to follow the English example as well. Therefore, not much difference will be found between the Canadian law of contracts and the law enforced in the courts of England, or indeed of any other common law jurisdiction in the Commonwealth or Eire."

[165] *Dale*, *supra* note 158, ¶13.

[166] G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, a division of Thomson Reuters Canada Limited, 2011), p. 1, states that the principles of contract law have, "[f]or the most part, … been developed judicially, by courts in various common law jurisdictions. Canadian courts have been influenced by decisions in England, as well as in

[99] In this Appeal, as set out more fully in the ensuing paragraphs, the evidence supports the findings that:

> (a) Mr. Chad and Velocity intended to enter into contractual relations with one another for the purpose of implementing the Trades.
>
> (b) For each Trade, an offer was made by Velocity and accepted on behalf of Mr. Chad.
>
> (c) For each Trade, consideration was given by each party to the other.
>
> (d) For each Trade, the parties, property and price were ascertained and agreed upon.[167]

[100] Concerning the manner in which an FX Contract came to be, the evidence indicates that Mr. Hodgins acted on behalf of Mr. Chad, and a market maker acted on behalf of Velocity. Mr. Hodgins was part of Velocity's sales desk, and the market maker was part of Velocity's trading desk. The sales desk and the trading desk were separated from one another, did not have access to each other's information, competed against one another, and had arm's-length roles, with tension between them.[168]

[101] Upon Mr. Chad providing instructions to Mr. Hodgins to execute a particular Trade[169] (which Mr. Hodgins had recommended), Mr. Hodgins requested, from the market maker at Velocity's trading desk, a two-way price,[170] in respect of certain

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Australia, New Zealand and the United States. All these jurisdictions recognize that contractual obligations are legal obligations which arise from contracts as defined by the law."

[167] Concerning the need for consensus about the parties, property and price, see Fridman, *ibid*, p. 14, fn. 3, and the cases cited therein.

[168] Transcript, vol. 9 (July 4, 2022), p. 1336, line 26 to p. 1338, line 9; and vol. 10 (July 5, 2022), p. 1407, line 17 to p. 1408, line 18.

[169] Those instructions were indicative of Mr. Chad's intention to enter into a further contractual relationship with Velocity.

[170] The reason for requesting a two-way price was so that the trading desk would not know whether Mr. Hodgins' client was a buyer or a seller. If dealing with a known buyer, the trading desk might tend to push the price up. If dealing with a known seller, the trading desk might tend to push the price down. As the trading desk did not know whether Mr. Hodgins' client was a buyer or a seller, the two-way price offered by the trading desk tended to be "right in the middle". See Transcript, vol. 10 (July 5, 2022), p. 1410, lines 1-12. Such two-way pricing, together with the operational separation between the sales desk and the trading desk (see paragraph 100 above), were indicative of arm's-length bargaining.

value dates and at a certain notional amount.[171] This may be viewed as an invitation to treat.

[102] If Velocity's trading desk decided to trade,[172] it made an offer, with a tradeable two-way price and the requested parameters, to Mr. Hodgins, who (as Mr. Chad's agent, for the purpose of executing that Trade) verbally accepted the offer on behalf of Mr. Chad. Mr. Hodgins and the trading desk then each prepared a trade ticket, to record the details of the transaction (as they each understood those details), and they each sent their respective trade tickets to Velocity's back office for reconciliation and processing.[173]

[103] In entering into the Trades on behalf of Mr. Chad, Mr. Hodgins frequently dealt with Velocity's trading desk in London, England. However, if it was after business hours in London, and that trading desk was closed, Mr. Hodgins sometimes dealt with Velocity's trading desk in Toronto or in Sydney, Australia. Nevertheless, Velocity (UK) was the counterparty to all of the Trades, even if another trading desk was used.[174]

[104] For each Trade, the parties were Velocity and Mr. Chad. Each Trade involved the sale or purchase of a fixed number of Canadian or US dollars, at a fixed future date, in exchange for a fixed number of dollars of the other currency.

[105] Shortly after the execution of a Trade, Velocity prepared and emailed to Mr. Chad a one-page document titled "FX Spot / Forward Confirmation" (a "Confirmation"), setting out the particulars of the Trade. Fourteen of those Confirmations were put into evidence.[175] The Confirmations sent to Mr. Chad were

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[171] Transcript, vol. 10 (July 5, 2022), p. 1407, line 17 to p. 1408, line 10. See also vol. 18 (August 23, 2022), p. 2883, line 28 to p. 2887, line 25.

[172] That decision to trade was indicative of Velocity's intention to enter into a further contractual relationship with Mr. Chad.

[173] Transcript, vol. 2 (June 21, 2022), p. 290, lines 21-23; p. 297, lines 20-21; and p. 307, lines 5-6; and vol. 10 (July 5, 2022), p. 1407, line 5 to p. 1411, line 17; and p. 1413, line 6 to p. 1416, line 7.

[174] Transcript, vol. 11 (July 6, 2022), p. 1639, line 6 to p. 1640, line 7; vol. 18 (August 23, 2022), p. 2838, lines 3-12; and p. 2853, lines 6-22.

[175] Exhibit A-35. It appears that the other Confirmations have gone missing.

similar in form to those sent by Velocity to its other clients in respect of their trades.[176]

[106] Each trading day, after the close of trading, Velocity emailed to Mr. Chad a daily customer statement report (i.e., a Statement, as defined below),[177] showing the status of his account, regardless of whether Mr. Chad had traded that day or not. The information set out in the Confirmations was also found in the Statements.[178] The Statements sent to Mr. Chad were similar in form to those sent by Velocity to its other clients in respect of their accounts.

[107] Based on the evidence and my understanding of the fundamental common-law principles of contract law, my conclusion in respect of this issue is that, for the purposes of the ITA and this Appeal, the FX Contracts were legally effective, in accordance with their terms.[179]

C. Source of Income

1. **Jurisprudence**

(a) ***Stewart v. The Queen***

[108] In *Stewart*,[180] the Supreme Court of Canada clarified the manner in which a court is to determine whether a particular activity constitutes a business or property source of income. In particular, the Supreme Court stated that the *source* issue should be resolved by the application of a two-stage approach:

> … [T]he following two-stage approach with respect to the source question can be employed:
>
> (i) Is the activity of the taxpayer undertaken in pursuit of profit, or is it a personal endeavour?
>
> (ii) If it is not a personal endeavour, is the source of the income a business or property?...

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[176] Transcript, vol. 18 (August 23, 2022), p. 2912, lines 4-18.

[177] Exhibits A-31, A-32, A-33 and A-34. See also footnotes 242 and 248 below.

[178] Transcript, vol. 18 (August 23, 2022), p. 2912, lines 14-25.

[179] See also paragraphs 74 and 75 above.

[180] *Stewart v. The Queen*, [2002] 2 SCR 645, 2002 SCC 46.

> Equating "source of income" with an activity undertaken "in pursuit of profit" accords with the traditional common law definition of "business", i.e., "anything which occupies the time and attention and labour of a man for the purpose of profit"…. [I]t is logical to conclude that an activity undertaken *in pursuit of profit*, regardless of the level of taxpayer activity, will be either a business or property source of income.[181] [*Citations omitted and emphasis added*.]

[109] The Supreme Court went on to indicate (in a slightly different context)[182] that, where a "venture is undertaken in a *sufficiently* commercial manner, the venture will be considered a source of income for the purposes of the Act [*emphasis added*]."[183] Thus, the commerciality of an activity is a significant factor in determining whether there is a source of income.

[110] In this regard, the exercise of proving the commerciality of a particular activity has both a subjective element and an objective element, as explained by the Supreme Court in these terms:

> It should also be noted that the source of income assessment is not a purely subjective inquiry. Although in order for an activity to be classified as commercial in nature, the taxpayer must have the subjective intention to profit, in addition, as stated in *Moldowan*, this determination should be made by looking at a variety of objective factors. Thus, *in <u>expanded form</u>, the first stage of the above test can be restated as follows: "Does the taxpayer intend to carry on an activity for profit and is there evidence to support that intention?"* This requires the taxpayer to establish that his or her *<u>predominant</u> intention is to make a profit* from the activity and that the activity has been carried out in accordance with objective standards of businesslike behaviour.[184] [*Italicized and underlined emphasis added*.]

In the above statement, the Supreme Court provided an expanded form for the first stage of the source test. That expanded form focuses on a taxpayer's predominant

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[181] *Ibid*, ¶50-51. In ¶38, the Supreme Court confirmed that "anything which occupies the time and attention and labour of a man for the *purpose of profit* is business [*emphasis added*]." The cases cited by the Supreme Court for this traditional common law definition of "business" were *Smith v. Anderson*, (1880) 15 Ch. D. 247 (CA); and *Terminal Dock and Warehouse Co. v. MNR*, [1968] 2 Ex. CR 78, aff'd 68 DTC 5316 (SCC).

[182] By way of context, in the last sentence of ¶52 of its reasons in *Stewart*, *ibid*, the Supreme Court was considering a situation "where the nature of a taxpayer's venture contains elements which suggest that it could be considered a hobby or other personal pursuit…." That is not the situation in Mr. Chad's Appeal.

[183] *Ibid*, ¶52.

[184] *Ibid*, ¶54.

intention. However, my reading of the *Stewart* decision is that the predominant-intention standard applies only where the activity in question has a personal element.[185]

[111] In concluding its discussion of the recommended approach for determining whether an activity is a source of income, the Supreme Court stated:

> In summary, the issue of whether or not a taxpayer has a source of income is to be determined by looking at the commerciality of the activity in question. Where the activity contains no personal element and is *clearly commercial*, no further inquiry is necessary. Where the activity could be classified as a personal pursuit, then it must be determined whether or not the activity is being carried on in a *sufficiently commercial* manner to constitute a source of income.[186] [*Emphasis added.*]

[112] The phrases "clearly commercial" and "sufficiently commercial manner" suggest that, to satisfy the source test, something more than an appearance of commerciality is required.

[113] After enunciating and discussing the source test, the Supreme Court turned to an application of that test to Mr. Stewart's case. The Court began by reiterating some of the principles which it had already enunciated, as follows:

> As stated above, whether or not a taxpayer has a source of income from a particular activity is determined by considering whether the taxpayer *intends to carry on the activity for profit, and whether there is evidence to support that intention*. As well, where an activity is *clearly* commercial and lacks any personal element, there is no need to search further. Such activities are sources of income.[187] [*Emphasis added.*]

[114] It is noteworthy that the above presentation of the first stage of the source test is worded differently than the Court's initial statement of that stage of the test; yet it coincides closely with the expanded form of that stage of the test.[188]

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[185] *Ibid*, ¶63. See also Brian J. Arnold, "The Source of Income – The Source of Much Confusion: The *Brown* Case," *The Arnold Report* (Canadian Tax Foundation), posting 251, February 21, 2023, 15th paragraph.

[186] *Ibid*, ¶60.

[187] *Ibid*, ¶61.

[188] *Ibid*; compare and contrast ¶50, 54 & 61.

[115] Near the end of their reasons in *Stewart*, as Justices Iacobucci and Bastarache were considering whether an anticipated capital gain should be considered when determining whether Mr. Stewart had a reasonable expectation of profit, they stated:

> … we reiterate that the expected profitability of a venture is but one factor to consider in assessing whether the taxpayer's activity evidences *a sufficient level of commerciality* to be considered either a business or a property source of income.[189] [*Italicized and underlined emphasis added.*]

Although the above statement was made in respect of a question that does not arise in this Appeal, it nevertheless implies that there may be more than one level of commerciality.

(b) ***Walls***

[116] In *Walls*, the Supreme Court of Canada confirmed the test to determine whether a taxpayer's activities constitute a source of business or property income, as enunciated in the companion case of *Stewart* (the decisions in both cases having been released on the same day). As well, the Court reiterated that, "Where an activity is *clearly* commercial, the taxpayer is necessarily engaged in the pursuit of profit, and therefore a source of income exists [*emphasis added*]."[190]

(c) ***Paletta Estate***

[117] The facts of *Paletta Estate* and the facts of this Appeal have some elements of similarity, as well as other elements of diversity. For instance, in both appeals the particular taxpayer engaged in straddle trading of FX forward contracts, on margin, in the OTC market. However, while both taxpayers traded forward contracts, Mr. Paletta initially used options to create synthetic forwards, before switching to forward contracts. Both taxpayers used the same broker, Mr. Hodgins. However, Mr. Paletta's trades occurred between 2000 and 2007 inclusive, during which period Mr. Hodgins worked successively with three London-based brokerage firms, other than Velocity (which is the firm with which Mr. Hodgins worked in 2011). Using a straddle-trading strategy, both taxpayers arranged for the

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[189] *Ibid*, ¶68.

[190] *The Queen v. Walls*, 2002 SCC 47, ¶19. Compare with *Stewart*, *supra* note 180, ¶53. See also the analysis of *Walls* undertaken by Chief Justice Noël in *Paletta Estate* (FCA), *supra* note 113, ¶33-50.

loss legs of their respective trades to be closed near the end of a particular year, resulting in the realization of a substantial loss in that year, while the gain legs were closed in the following year, resulting in the realization of a substantial gain in that subsequent year.

[118] Although Mr. Paletta's Estate had been successful at trial,[191] that decision was overturned by the FCA.[192] In that Court's reasons, Chief Justice Noël stated:

> *Stewart* teaches that, in the absence of a personal or hobby element, where courts are confronted with what appears to be a clearly commercial activity and the evidence is consistent with the view that the activity is conducted for profit, they need go no further to hold that a business or property source of income exists for purposes of the Act. However, where as is the case here, the evidence reveals that, *despite the appearances of commerciality, the activity is not in fact conducted with a view to profit*, a business or property source cannot be found to exist.[193] [*Emphasis added*.]

[119] In other words, *Stewart* did not do "away with the pursuit of profit as a prerequisite for the existence of a business…."[194] Rather, the "objective of the *Stewart* test … was to reaffirm 'pursuit of profit' as the decisive consideration in ascertaining the existence of a business…."[195]

(d) ***Brown***

[120] In *Brown*, the FCA revisited the *source of income* test. In so doing, Justice Webb stated:

> In *Canada v. Paletta Estate*, 2022 FCA 86 there was no suggestion that there was any hobby or personal element to the activity in question. This Court confirmed that the activity still had to be carried out in pursuit of profit in order to be a source of income. There are undoubtedly many activities which do not have a hobby or personal element. The person undertaking these activities will not have a

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[191] *Paletta Estate* (TCC), *supra* note 113, ¶272.

[192] *Paletta Estate* (FCA), *supra* note 113, ¶95. Leave to appeal to the Supreme Court of Canada was denied on March 16, 2023.

[193] *Ibid*, ¶36.

[194] *Ibid*, ¶37-38.

[195] *Ibid*, ¶39.

> source of income unless that person is pursuing profit in carrying out these activities.[196]

(e) ***Stackhouse***

[121] In *Stackhouse*, Justice Owen made the following comments, as he reviewed the principles enunciated by the Supreme Court of Canada in *Stewart* and by the FCA in *Paletta Estate*:

> 103. The assumption underlying the test in *Stewart* is that a commercial activity is undertaken for profit. Consequently, unless there is some reason to question this assumption in the circumstances of a particular case, an activity that is on its face clearly a commercial activity as opposed to a personal undertaking is considered a source of income.
>
> 104. In *Paletta*, Noël, C.J. found that because the evidence revealed that there was no pursuit of profit notwithstanding the apparently commercial nature of the transactions there could not be a business source of income.
>
> 105. Noël, C.J. was not proposing an additional layer of inquiry into whether a commercial activity was in pursuit of profit. Rather, Noël, C.J. recognized that the peculiar facts of the *Paletta* case called into question the validity of the assumption underlying the test in *Stewart*. Noël, C.J. simply found that the transactions in *Paletta* had the "appearance" of being commercial but in fact were not "clearly commercial" when one considered all the circumstances.[197] [*Footnote omitted*.]

One of the issues that arises in this Appeal is whether there is some reason to question the validity of the underlying assumption on which the *Stewart* test is based, when applied to the circumstances of Mr. Chad.

(f) ***Tweneboah***

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[196] *Brown v. The King*, 2022 FCA 200, ¶24. In ¶25, Justice Webb went on to rephrase the "approach to be used to determine if a person has a source of income…." That rephrased approach has been the target of criticism; for example, see *Stackhouse*, *supra* note 109; Arnold (Report 251), *supra* note 185, 15th & 18th paragraphs; and Philip Friedlan and Adam Friedlan, "The *Stackhouse* Case: Interpreting *Stewart* in view of *Paletta* and *Brown*," *Tax for the Owner-Manager* (Canadian Tax Foundation, April 2024), vol. 24, no. 2.

[197] *Stackhouse*, *supra* note 109, ¶103-105. The omitted footnote is at the end of the first sentence of ¶103, and is a reference to *Stewart*, *supra* note 180, ¶51.

[122] In *Tweneboah*, while determining whether the taxpayer's two activities were sources of income, Justice Spiro reviewed the decisions in *Stewart*, *Paletta Estate* and *Brown*. He found that both activities had personal elements, but went on, in these terms, to consider what would have been the result if neither activity had had a personal element:

> But even if I found that neither activity had a personal element, I would have concluded that neither was conducted in pursuit of profit as required by *Stewart*, *Paletta* and *Brown*. The question would then have been whether the taxpayer had demonstrated, on a balance of probabilities, that each activity was undertaken in pursuit of profit. In this regard, much depends on the evidence adduced at trial.[198]

(g) ***Preston***

[123] In *Preston*, where there was clearly a personal element,[199] Justice Wong summarized the *Stewart* approach in this matter:

> 17. The litmus test for whether there is an income source continues to be the two-step approach set out by the Supreme Court of Canada in *Stewart*, i.e.:
>
> (i) Is the activity in question undertaken in pursuit of profit, or is it a personal endeavour?
>
> In other words, does the taxpayer intend to carry on the activity for profit and is there objective evidence to support that subjective intention? The taxpayer must show that their predominant intention is to make a profit from the activity and that the activity has been conducted so as to be consistent with objective standards of business-like behaviour.
>
> (ii) If it is not a personal endeavour, is the source of the income a business or property? …
>
> 18. Where the activity: (a) appears to be clearly commercial, (b) contains no personal or hobby element, and (c) the evidence is consistent with the view that the activity is conducted for profit, then a source of income exists for the purposes of the Act. However, where the activity could be considered a personal pursuit,

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[198] *Tweneboah v. The King*, 2023 TCC 121, ¶15.

[199] *Preston v. The King*, 2023 TCC 136, ¶21.

> then one must ask if the activity is being carried on in a sufficiently commercial manner so as to be a source of income.[200] [*Footnotes omitted*.]

(h) **Summary**

[124] There are several passages in the Supreme Court's decision in *Stewart* that might possibly be read, in the context of a commercial activity with no personal element, as not requiring any inquiry into a taxpayer's intention to pursue a profit.[201] However, those passages seem to be at odds with other passages (such as those set out above in paragraphs 110 and 113) that indicate that there can be no source of income without an intention to pursue a profit, objectively established by evidence. Furthermore, there are two passages in *Stewart* that suggest that the intention to make a profit must be the taxpayer's predominant intention.[202] However, it appears that the requirement of a profit-pursuing predominant intention should be confined to situations where the particular activity has a personal element.

[125] Perhaps the requirement of an intention to profit is implicit in the *Stewart* passages that seem to suggest otherwise.[203] Or, as stated in *Stackhouse,* there is an assumption underlying the test in *Stewart* to the effect that a commercial activity is undertaken for profit.[204]

[126] Regardless, as a trial judge, it behooves me to apply the interpretation of the *Stewart* test set out by the FCA in *Paletta Estate* and *Brown*. Even if *Paletta Estate* and *Brown* do not precisely coincide on all points,[205] both of those decisions emphasize that, to be a source of income, there must be an intention to profit.

(i) **Proof of Intention**

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[200] *Ibid*, ¶17-18. The omitted footnotes refer to various passages in *Stewart* and *Paletta Estate* (FCA). Other recent relevant decisions by Justice Wong are *Zupet v. The King*, 2023 TCC 111, ¶40-57; and *Porisky v. The King*, 2024 TCC 84, ¶35-37.

[201] Brian J. Arnold, "Federal Court of Appeal Reverses *Paletta Estate*," *The Arnold Report* (Canadian Tax Foundation), posting 232, June 14, 2022, 8th-11th paragraphs.

[202] *Stewart*, *supra* note 180, ¶54 & 63.

[203] Arnold (Report 232), *supra* note 201, 11th paragraph.

[204] *Stackhouse*, *supra* note 109, ¶103 & 108.

[205] See *Stackhouse*, *supra* note 109, ¶100 & 106; and Friedlan, *supra* note 196, 10th 12th, 15th, 18th and 19th paragraphs.

[127] Turning to the manner of proving a taxpayer's intention, the Supreme Court of Canada has provided helpful guidance. In *Symes*, Justice Iacobucci stated:

> As in other areas of law where purpose or intention behind actions is to be ascertained, it must not be supposed that in responding to this question, courts will be guided only by a taxpayer's statements, *ex post facto* or otherwise, as to the subjective purpose of a particular expenditure. Courts will, instead, look for objective manifestations of purpose, and purpose is ultimately a question of fact to be decided with due regard for all of the circumstances.[206]

[128] Several years later, in *Ludco Enterprises*, Justice Iacobucci returned to this topic:

> In the interpretation of the Act, as in other areas of law, where purpose or intention behind actions is to be ascertained, courts should objectively determine the nature of the purpose, guided by both subjective and objective manifestations of purpose.[207]

[129] Thus, as was stated by Justice Côté (in dissent) in *MacDonald*:

> We are bound to follow *Symes*' and *Ludco*'s authoritative statements that intent is a question that requires an assessment both of the taxpayer's subjective intention and of the presence or absence of objective manifestations of that intention. Neither the objective nor the subjective element is determinative on its own.[208]

[130] However, as indicated by the majority in *MacDonald*, where the subjective statements of intention and the objective manifestations of intention do not coincide, greater weight should be given to the latter.[209]

2. **Application**

(a) **Subjective Statements of Intention**

[131] Beginning with the subjective statements of Mr. Chad's intention, during his cross-examination, he stated:

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[206] *Symes v. The Queen*, [1993] 4 SCR 695 (SCC) at 736.

[207] *Ludco Enterprises Ltd. v. The Queen*, [2001] 2 SCR 1082, 2001 SCC 62, ¶54.

[208] *MacDonald v. The Queen*, [2020] 1 SCR 319, 2020 SCC 6, ¶56.

[209] *Ibid*, ¶43. See also *van der Steen v. The Queen*, 2020 FCA 168, ¶29-31.

> … [O]ne of the reasons I entered into these transactions was the expectation or hope to make a profit ….[210]

[132] During his direct examination, Mr. Chad stated that his reasons for opening an account with Velocity were:

> (a) "to trade in Fx [*sic*], forward swaps", as he "had large Fx [*sic*] exposure," and "had experienced [FX] losses before", such that, with "the exchange rates … moving a great deal," he "wanted to understand it";[211]
>
> (b) "to create access to the market";[212]
>
> (c) "to learn about the market, figure it out, understand it";[213]
>
> (d) to "learn, understand, develop tools and strategies that [he] could possibly use";[214]
>
> (e) to "potentially profit from that trading specifically";[215]
>
> (f) "to pursue" "tax planning", specifically "a deferral plan";[216] and
>
> (g) to "incorporate [his FX learning] in other portions of [his] business".[217]

[133] Mr. Chad presented to the Court several proposal or transactional documents relating to proposed or actual deals, which either had an FX component or, according to him, benefitted from his learning and experience in FX trading. The objective of this evidence was to show how Mr. Chad had applied, to his

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[210] Transcript, vol. 7 (June 29, 2022), p. 907, lines 6-12. See also vol. 3 (June 22, 2022), p. 337, line 13, and p. 350, line 9 to p. 351, line 25; and vol. 7 (June 29, 2022), p. 908, line 25 to p. 909, line 11.

[211] Transcript, vol. 3 (June 22, 2022), p. 336, lines 12-21.

[212] *Ibid*, p. 336, line 28 to p. 337, line 1.

[213] *Ibid*, p. 337, lines 4-5.

[214] *Ibid*, p. 337, lines 8-9.

[215] *Ibid*, p. 337, line 13.

[216] *Ibid*, p. 337, lines 16-18.

[217] *Ibid*, p. 337, lines 24-27. In addition to the citations in this footnote and the preceding six footnotes, see also the citations in footnote 7 above.

corporations' businesses, in the years after 2011, what he had learned from his FX trading.[218] Those documents were the following:

> (a) a letter dated October 26, 2016, sent to Encana Corporation ("Encana"), by Signalta, on behalf of itself and two other entities, and containing a non-binding proposal to purchase Encana's interests in a gas and liquid formation in northwestern Alberta;[219]
>
> (b) a discussion document dated August 18, 2017, presented by National Bank Financial Markets to an unnamed entity (referred to in the document as "Acquire Co" or the "Company"), which was not identified by Mr. Chad in his testimony, but which was presumably Signalta or one of its subsidiaries or affiliates, setting out a proposal to arrange or underwrite bank financing for a contemplated acquisition;[220]
>
> (c) a Physical Gas Transaction Confirmation Amendment #3 to Contract Price, dated October 5, 2017, between Signalta and Suncor Energy Marketing Inc. ("Suncor"), for the sale of natural gas by the former to the latter, between November 1, 2018 and March 31, 2019;[221]
>
> (d) three Power Swap Confirmations, each dated January 11, 2021, between TransAlta Energy Marketing Corp. ("TransAlta") and 2014/15 Power Peaking LP ("Power Peaking"), for the sale of electric power by the latter to the former, during February, August and September 2021, and an Assignment and Novation Agreement, dated January 19, 2021, among Power Peaking, Signalta and TransAlta;[222]
>
> (e) four Net Natural Gas Purchase Statements, dated January 21, 2019, February 20, 2019, March 20, 2019 and April 18, 2019, issued by Suncor to

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[218] Transcript, vol. 5 (June 27, 2022), p. 661, lines 3-11; p. 661, line 27 to p. 662, line 15; p. 664, lines 3-24; p. 667, line 15 to p. 670, line 14; p. 674, lines 1-18; p. 680, line 24 to p. 681, line 3; p. 684, line 6 to p. 685, line 2; and p. 687, lines 11-19.

[219] Exhibit A-57. See also Transcript, vol. 5 (June 27, 2022), p. 659, line 10 to p. 662, line 22.

[220] Exhibit A-58.

[221] Exhibit A-59.

[222] Exhibit A-60.

> Signalta, for the months of December 2018 and January, February and March 2019;[223] and
>
> (f) an undated Memo to All Joint Venture Participants in the Signalta Joint Venture, commenting on Alberta power prices for 2014 to 2021 (which appears to be the year in which the Memo was written).[224]

[134] The documents constituting Exhibits A-57 to A-62 were not included in Mr. Chad's List of Documents.[225] Copies of those documents were provided to the Crown in mid-June 2022 (a week or two before the trial began). By way of background, on January 21, 2022 I had issued an Order, granting leave to the Crown to amend certain specified provisions of its Second Amended Reply, and fixing a timetable for any additional examinations for discovery that may have been necessitated by reason of such amendments. Copies of the said documents were provided by Mr. Chad to the Crown in response to some of the Crown's additional examination-for-discovery written questions.

[135] In view of the foregoing, it is unlikely that Mr. Chad and his counsel had Exhibits A-57 to A-62 in mind when they drafted Mr. Chad's pleadings and as they prosecuted this Appeal from 2017 to 2021. This may call into question the purported connection between the deals that are the subject of Exhibits A-57 to A-62 and Mr. Chad's intention when he made the Trades.

[136] As indicated in the above description of Exhibits A-57 to A-62, the deals referenced in those documents were proposed or implemented in the period 2016-2021. I am of the view that the chronological connection between those deals and the Trades, which were made in 2011 and 2012, was rather tenuous, at best.

[137] Furthermore, the deals that are described in Exhibits A-57 to A-62 were proposed or entered into by Signalta or a subsidiary or affiliate thereof, and related to oil, gas or electric power. The Trades were made by Mr. Chad personally, and related to FX forward trading.

[138] Given the chronological gap and the differences in parties and activities, I am not persuaded that Exhibits A-57 to A-62 support the proposition that Mr. Chad

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[223] Exhibit A-61.

[224] Exhibit A-62.

[225] In these Reasons, I will use the phrase "Exhibits A-57 to A-62" to refer to the originals of these documents, copies of which were eventually entered into evidence as such exhibits.

entered into the Trades in pursuit of profit. The fact that Mr. Chad's FX learning was put to good use in businesses carried on by Signalta or a subsidiary or affiliate thereof in 2016 to 2021, is not sufficient to prove that, in 2011, Mr. Chad undertook the Trades, in his own name, for the purpose of personally pursuing a profit.

[139] During his testimony, Mr. Chad stated on several occasions that, in making the Trades, he hoped to acquire learning that he could use in his businesses. While the acquisition of learning is a laudable and valuable objective, and while Mr. Chad undoubtedly hoped to make a profit from those businesses, the *ex post facto* statement of a pursuit of learning is not objective evidence that Mr. Chad entered into the Trades to pursue a profit.

(b) **Objective Manifestations of Intention**

[140] In addition to considering Mr. Chad's statements of his subjective intention, as directed by the Supreme Court, I must also review any objective manifestations of that intention, particularly as set out in a list of facts admitted by Mr. Chad and in various emails and other documents written in 2011 and 2012.

(i) Admitted Facts

[141] In response to a Request to Admit, Mr. Chad admitted (among other things) the following:

(a) Mr. Chad contacted Tim Hodgins prior to the commencement of the Trades.

(b) Prior to the Trades, Mr. Chad provided to Mr. Hodgins a target loss amount for 2011.

(c) The initially agreed-upon target loss was $20,000,000.

(d) The target loss was later changed to $22,000,000.

(e) One of the purposes for arranging and undertaking the Trades was to reduce, avoid or defer Mr. Chad's tax payable under the ITA.

(f) In his 2011 income tax return, Mr. Chad:

i. claimed a business loss of $22,184,109 in respect of the Trades; and

ii. deducted no less than $9,610,068 of that claimed business loss against income from other sources for the 2011 taxation year.[226]

(ii) Contemporaneous Correspondence

[142] Various emails exchanged between Mr. Chad and Mr. Hodgins (as well as other individuals) in late 2011 and early 2012 provide some insight into the circumstances, including Mr. Chad's thinking, at that time, bearing in mind that Mr. Chad and Mr. Hodgins had, for 2011, initially agreed on a target loss of $20,000,000, which was subsequently revised to be $22,000,000:

(a) On November 22, 2011, Mr. Hodgins sent an email to Mr. Chad, advising that the amount to be paid by Mr. Chad to Velocity as a fee in respect of the trading was $200,000 and the amount of the margin payment was $100,000, for a total payment of $300,000. Mr. Hodgins also outlined the trading process in these terms:

> The trading process will involve me looking for ideas for your approval. When the account is funded, I will send an email with an analysis of a specific trade in terms of risk and reward, that suits your margin and risk appetite. If you like the idea, please reply to the email, which I will take as an order.[227]

(b) Desiring to establish some standing instructions for Velocity, on November 24, 2011, Mr. Chad sent an email to Mr. Hodgins, proposing a set of standing instructions that had been recommended by Mr. Lemons.[228]

(c) On November 29, 2011, while Velocity was in the process of considering the proposed standing instructions, Mr. Hodgins sent an email to Mr. Pasco, stating:

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[226] Exhibit R-1, facts #11, #15, #18, #20, #29 & #30.

[227] Exhibit A-11, page 1. In his testimony, Mr. Chad referred to the $200,000 payment as a commission; see Transcript, vol. 4 (June 23, 2022), p. 599, lines 18-25. Elsewhere, Mr. Chad often referred to the $200,000 payment as a fee; see Transcript, vol. 3 (June 22, 2022), p. 255, line 10 to p. 356, line 26; p. 357, lines 11-21; p. 482, lines 3-11; p. 482, line 27 to p. 483, line 1; vol. 5 (June 27, 2022), p. 716, line 23 to p. 717, line 6; p. 750, lines 4 to 14; vol. 6 (June 28, 2022), p. 814, lines 7-10; p. 863, line 26 to p. 864, line 1; vol. 7 (June 29, 2022), p. 966, line 21 to p. 967, line 3; vol. 8 (June 30, 2022), p. 1170, line 8 to p. 1172, line 18; and vol. 9 (July 4, 2022), p. 1194, lines 14-19; and p. 1198, lines 1-8.

[228] Exhibit A-16.

> All he [i.e., Mr. Chad] wants is for me to watch for downside and alert him if we hit his level-ie this is a call level as opposed to a discretionary stop…. He is pushing for something that lets him sleep at night re million dollar losses. I have told him the likely outcomes of adverse moves are 1-5 thousand or so which he is happy with, however, he wants a bit more comfort against Armageddon.[229]

(d) Not having heard back from Mr. Pasco in respect of the above email, on November 30, 2011, Mr. Hodgins sent another email to Mr. Pasco, which read, "Can we chat this am about this? I need to call him-he is a worrier."[230]

(e) On November 30, 2011, by email, Mr. Pasco sent to Mr. Hodgins a proposal for a revision desired by Velocity in respect of one of Mr. Chad's proposed standing instructions.[231]

(f) On November 30, 2011, Mr. Hodgins emailed the revision desired by Velocity to Mr. Lemon and Mr. Chad.[232]

(g) The revision desired by Velocity was acceptable to Mr. Chad, who arranged for the preparation of a revised set of standing instructions, which he signed and emailed to Mr. Hodgins on November 30, 2011.[233]

(h) On behalf of Velocity, Simon Law (a founder and a director of Velocity) signed the revised standing instructions and emailed them to Mr. Hodgins on November 30, 2011.[234]

(i) On November 30, 2011, by email, Mr. Hodgins forwarded the fully signed revised standing instructions to Mr. Chad and Mr. Lemons. Mr. Hodgins also said that he would send a trade idea later that day to Mr. Chad.[235] The standing instructions attached to that email read as follows:

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[229] Exhibit R-16, second page.

[230] Exhibit R-16, first page.

[231] Exhibit R-16, first page.

[232] Exhibit A-20.

[233] Exhibit A-21.

[234] Exhibit A-22. See also Transcript, vol. 3 (June 22, 2022), p. 378, lines 13-22; and vol. 10 (July 5, 2022), p. 1391, line 22 to p. 1392, line 3.

[235] Exhibit A-22, p. 1.

1. Instructions from the client to investment representative may be given orally, but must be followed up by a written email in order to be effective.

2. The investment representative shall promptly act on the instructions of the client as soon as the instructions are received in writing.

3. Investment representative shall monitor the transactions, work, take profit and stop loss levels in accordance with instructions from the client. The client shall be informed when these levels are reached. These take profit and stop loss orders will be then executed upon client instructions.

4. There will be a standing stop loss directive if the net economic effect of a straddle results in a loss more than the margin.

5. There will not be any open positions.

6. There will be a timely notification of net economic losses as to a straddle.

7. These instructions will not vary, except by email notification.[236]

(j) Also on November 30, 2011, further to the above email, Mr. Hodgins proposed an initial trade, which he said "will profit if Canada hikes rates sooner than the US or [if] the US cuts rates while Canada stays unchanged." He discussed possible market circumstances, and then said, "This should create a profit for the trade I will suggest below, subject to the lower treasury yield translating to lower libor…." Mr. Hodgins discussed the risks to the trade, and then said, "I will monitor carefully for these negative outcomes and hedge accordingly, should you decide to go ahead."[237] Mr. Hodgins requested instructions, and later that day Mr. Chad instructed Mr. Hodgins to proceed with the trade.[238]

(k) On December 7, 2011, in an email sent by Mr. Hodgins to Mr. Chad, after a telephone conversation between them, the former said, "As discusses [*sic*] this am, in order to double the open position you could place the following trade", and he then set out the details of the suggested trade. Later the same

[236] Exhibit A-22, p. 2.

[237] Exhibit A-23, first page.

[238] Exhibit A-23, second page.

day, Mr. Chad replied, to express his concurrence and to instruct Mr. Hodgins to "proceed and place the trade as discussed."[239]

(l) On December 28, 2011, Mr. Hodgins sent to Mr. Chad an email, which stated, in part, "Things are moving a bit more now and we are getting closer with each move. A new trade that will get us there faster could be the following: [the particulars of the proposed Trade are then set out]…."[240] Later that day, Mr. Chad emailed Mr. Hodgins to instruct him to proceed.[241]

(m) On December 30, 2011, after receiving a daily customer statement report (a "Statement"),[242] Mr. Chad emailed Mr. Hodgins to inquire whether "all the current positions get closed off for now", or whether there would be "another set of adjustments to come".[243] In his reply, dated December 31, 2011, Mr. Hodgins stated that some Trades were open, and would close at Mr. Chad's instruction. Mr. Hodgins went on to state, "Closed trades equal 22.0174 mil loss."[244] Thus, before the end of 2011, a loss of $22,017,400 (i.e., slightly more than the revised target loss) had been crystallized.

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[239] Exhibit A-36. Mr. Hodgins' discussion of the details, market circumstances and risks of the trade proposed in the December 7 email was significantly briefer than the discussion of similar factors in the November 30 email.

[240] Exhibit A-37; and Exhibit R-8, fourth page.

[241] Exhibit A-38.

[242] At the end of each trading day in London (UK), Velocity emailed to each of its customers (or clients) a statement showing the results of that customer's trading, if any, on that day and the status of the customer's account. Initially, the cover emails referred to each statement as a "daily customer statement report". When the form of the statement and the form of the standard cover email were revised in January 2012 (see Exhibit A-48), the cover emails, as well as the statements themselves, simply used the term "Statement", which is the term that I have used in these Reasons. Mr. Chad and Mr. Hodgins typically used the term "statement", or occasionally, "report". Incidentally, it appears that there may have been another change, in July 2012, in the form of the Statements; see Exhibit A-56.

[243] Exhibit A-40; and Exhibit R-8, fifth page.

[244] Exhibit A-40; and Exhibit R-8, fifth page.

(n) On January 3, 2012, in an email to Mr. Hodgins, Mr. Chad stated, "As discussed today, please ensure that the 'perfect hedge' transactions are executed."[245]

(o) On January 4, 2012, Mr. Hodgins emailed Mr. Chad and Mr. Lemons to summarize the pattern of the differences between the value dates of various pairs of Trades. Mr. Hodgins then stated, "You can see the 6/1/6/1/6 pattern in the first group gives considerable symmetry and therefore strong hedging impact. The 4/3/6 day distances on the other group is [*sic*] not as symmetrical but gives a very strong hedge. We could replace the 27 sep with a 25 sep to create a 4/3/4 day pattern, however this would realize a [*sic*] open leg. The difference is tiny and I think you are exceptionally hedged as is. Let me know if you wish to close out the open leg."[246]

(p) When reviewing the Statement dated January 12, 2012, Mr. Chad noticed that the unrealized profit/loss amount[247] was $196,132.70,[248] which seemed high to him. Consequently, the same day, Mr. Chad sent an email to Mr. Hodgins, stating:

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[245] Exhibit A-41; and Exhibit R-8, fifth page.

[246] Exhibit A-42.

[247] The initial form of Statements used both "P/L" and "P&L", and the revised form of Statements used "Unrealised PnL", to refer to the profit/loss amount. Some of the emails and other documents used "p/l" for that purpose. In these Reasons, I have generally used the term "profit/loss amount". The profit/loss amounts, as expressed in the Statements, showed the difference, from time to time, between the aggregate value of the gain legs and the aggregate value of the loss legs of the various Trades. The $240,000 fee (or commission) paid by Mr. Chad to Velocity was not factored into the calculation of the profit/loss amounts. Thus, the profit/loss amounts shown in the Statements were not synonymous with "profit" or "loss", as those terms are used in the ITA.

[248] Exhibit A-32, p. 19. Exhibit A-32 contains Statements (i.e., daily customer statement reports) for some of the days in January 2012. However, that exhibit does not contain a Statement for every trading day that month. The profit/loss amounts shown in the available Statements for the first two weeks of January 2012 are –$6,144.79 on January 2, 2012, $2,296.12 on January 3, 2012, –$612.19 on January 4, 2012, –$4,509.13 on January 5, 2012, and $196,132.70 on January 12, 2012. Exhibit A-32 does not contain copies of the Statements for the trading days immediately before or after January 12, 2012. The profit/loss amounts were shown in the Statements in US currency; Transcript, vol. 3 (June 22, 2023), p. 441, line 15; and Exhibits A-43 and A-55.

> The attached statement shows a significant gain on the net position (converted to US) compared to the day before. I believe that you did not want me to concentrate on that representation but is there some sort of timing error as I thought the more recent hedges had reduced the volatility for now?[249]

(q) In an email sent later the same day, Mr. Hodgins replied:

> There was a bad price input overnight and this is an aberration which does not reflect the market….
>
> [A technical explanation of the pricing aberration is then given.]
>
> I have reported this and suggest we look again tomorrow-the p/l [i.e., profit/loss amount] is in the region of the previous days [*sic*] statement whish [*sic*] is more in line with the market.
>
> Apologies for the confusion and in the meantime, the hedge is working.[250]

(r) A week later, on January 19, 2012, in reviewing the Statement issued by Velocity to him on that day, Mr. Chad observed that the profit/loss amount was –$221,382.66, prompting him to request of Mr. Hodgins, "Please confirm that a similar pricing error as before (but instead to the negative) is occurring on this statement."[251]

(s) The next day, January 20, 2012, Mr. Hodgins replied:

> Rob apologies-this is embarrassing but it seems a fact of life. The reval [*sic*] on your statement again does not reflect the market and is causing some absurd numbers. These tend to be correct most of the time but this one again is an aberration.
>
> We have a very neutral hedge on now and the market agrees. I am tempted to suggest that you close out the trades to prove this revaluation is incorrect but you would have to ok this. Let me know if you would like to simply close out these positions to settle on the much lower number. I see –8,200 CAD if you closed it now.[252]

(t) That same day, after receiving Mr. Hodgins' email, Mr. Chad spoke with Mr. Lemons, and then advised Mr. Hodgins:

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[249] Exhibit A-43, p. 1.

[250] Exhibit A-44.

[251] Exhibit A-45.

[252] Exhibit A-46.

> I am fine with your explanation for now. Bruce [Lemons] wanted to wait a little longer before we consider closing these positions out. I will talk to him further.[253]

(u) In an email dated March 22, 2012, from Mr. Chad to Mr. Lemons, with a copy to Mr. Hodgins, Mr. Chad stated (among other things):

> In the last two days the value of the unrealized margin differential has swung from –$22,000 to +$29,500 (now in my favor). I suspect that there are some inaccuracies in the pricing shown on the report that may be causing some of the fluctuations but Tim did describe the values getting funky as the expiries were approached.
>
> If that is still his advice, it would be my preference to replace some of the positions expiring soon with positions expiring further out and therefore fundamentally maintaining the overall position we have currently constructed.[254]

(v) On the same day, Mr. Hodgins replied to Mr. Chad, with a copy to Mr. Lemons:

> I always agree with taking profits and your trading rationale makes sense. The swing from negative to positive does not happen every day and this is worth jumping on. We can then place more trades later.
>
> I will close out the existing cluster of trades to take profit and let's look at new trades when i [sic] am back in town in early April.
>
> Bruce, I assume this [is] in line with your planning?[255]

(w) On April 10, 2012, after closing out Mr. Chad's Trades, Mr. Hodgins sent a trading summary to Mr. Chad, together with an email, which stated, "Enclosed please find a summary of your fx trading with Velocity. I have shown the closed p/l for the year ending Dec 31 2011, and the closed p/l for 2012 to date. The profit on the entire trading was CAD 6,200, which is not as high as I had hoped, but a profit nevertheless…." The trading summary showed a loss in 2011 in the amount of –$22,017,400, and a gain in 2012 in

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[253] Exhibit A-47.

[254] Exhibit R-9, p. 1-2.

[255] Exhibit R-9, p. 1. If Mr. Lemons replied to Mr. Chad's email of March 22, 2012, or to Mr. Hodgins' email of the same date, that reply was not put into evidence.

the amount of $22,023,600. The summary also showed that the difference between those two amounts was $6,200.[256]

(x) After reviewing a Statement emailed to him on April 20, 2012, Mr. Chad sent an email to Mr. Hodgins, with a copy to Mr. Lemons, stating:

> It looks to me on the statement above (see the open position summary starting on page 2) that there are some open positions that are maturing shortly to be offset. Please confirm.
>
> From your summary (the second attachment) I assumed all positions were offset/closed. Please clarify for me if I am reading the statements incorrectly.[257]

(y) Two days later, on April 22, 2012, not having received a reply to his email of April 20, 2012, Mr. Chad sent an email to Mr. Lemons, with a copy to Mr. Hodgins, inquiring about Mr. Hodgins' email address. Mr. Chad also stated:

> Tim did a statement as you described earlier (one of the attachments to my recent email to you) but from my reading it is not consistent with the daily statements that I am currently getting. The daily statements most recently are showing continued valuation fluctuations and summarize open positions currently held. It was my understanding that we had closed out all positions for now, until the next set of trades. Some of those open positions summarized on the daily statements mature April 25th (this week).
>
> Please let me know if you hear back from Tim. I anticipate that I am mistaken in my reading of the statements as it is not consistent with our instructions to Tim and not consistent with the closing summary he did on April 10th as again attached above.[258]

(z) That same day (i.e., April 22, 2012) and presumably after receiving the above email from Mr. Chad, Mr. Lemons forwarded to Mr. Hodgins a copy of Mr. Chad's email of April 20, 2012. In the forwarding email, Mr. Lemons

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[256] Exhibit A-51, p. 1 & 4. In the Statement dated March 26, 2012, the amount of $6,200 was described as the "open position exposure", while the "Unrealised PnL" was shown as $8,669.25. Although the closed net amount of $6,200 was described by Mr. Hodgins as a profit, it was not actually a profit, as that term is used in the ITA, because it disregarded the $240,000 fee (or commission) paid by Mr. Chad to Velocity.

[257] Exhibit A-52, p. 1; and Exhibit A-53, p. 1.

[258] Exhibit A-54.

did not write anything.[259] However, also on April 22, 2012, Mr. Lemons sent an email to Mr. Hodgins, with a copy to Mr. Chad, reiterating the email address for Mr. Hodgins that Mr. Lemon had always used successfully, suggesting that perhaps Mr. Chad's email of April 20, 2012 had been sent to an older email address, and asking Mr. Hodgins to confirm his proper email address. Mr. Lemons also stressed the importance of Mr. Hodgins ensuring that the daily Statements provided by Velocity were "absolutely consistent" with the summary statement prepared by Mr. Hodgins.[260]

(aa) On April 23, 2022, Mr. Hodgins sent an email to Mr. Chad and Mr. Lemons, explaining that the open position summary document that he had previously sent to them indicated that all value dates had been closed. He also stated that "the p/l (in USD unfortunately) is shown" in the document. He further stated, "Some of the closed value dates are now passed and there are some to follow but they net to the CAD 6200." He went on to say, "A good place to look is the net exposure by Currency and look at the CAD columns. I have summarized this section on tab 2 of my spreadsheet. This shows that the value dates from April 11 to April 19 have fallen to cash and equal –CAD 47,923,400. There are a number of value dates from April 25 onwards that would fall to the cash in time which add to CAD 47,929.600 [*sic*], plus there is cash after commissions charged of CAD 60,000 to equal CAD 47,989,600 …. The net exposure number is cash plus p/l or 60,000 cash plus CAD 6,200 p/l[.]"[261] [*Underlining in the original.*]

3. **Comments**

[143] Given the nature of the FX Activities, they did not have a personal element. Therefore, Mr. Chad needs to produce objective evidence to show merely that, in participating in the FX Activities, he was pursuing a profit. He need not show that his predominant intention was to make a profit.

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[259] Exhibit A-53.

[260] Exhibit A-54.

[261] Exhibit A-55. It is my understanding that the references to "net exposure" in Mr. Hodgins' email refer to Velocity's exposure (or potential liability) to pay cash to Mr. Chad. The $60,000 mentioned in the email was the remaining balance of Mr. Chad's initial margin payment (i.e., $100,000), less the portion thereof (i.e., $40,000) that had been taken by Velocity to pay the additional fee (or commission) of $40,000 that had become payable when the amount of the agreed-upon target loss had been increased from $20,000,000 to $22,000,000.

[144] In *Paletta Estate*, the FCA confirmed the definitions of "profit" and "loss", as follows:

> Pursuant to section 9 of the Act, the income derived from a business or property source is the "profit" derived therefrom, *i.e.*: the revenues less the expenses incurred to earn them…. The "loss" from a business or property is the result of the reverse equation. Because they are the reverse side of the same coin, the existence of a "profit" or "loss" for tax purposes is subject to the same conditions.[262] [*Case reference omitted.*]

[145] A long line of cases has established that "profit" is a net concept. For instance, in *Symes*, Justice Iacobucci noted that, in *Royal Trust*, "Thorson P. recognized that the deduction of business expenses is a necessary part of the s. 9(1) 'profit' calculation"[263] Justice Iacobucci went on to state:

> In other words, the "profit" concept in s. 9(1) is inherently a net concept which presupposes business expense deductions.[264] [*Underlining in original.*]

[146] As noted above, the closed net amount at the conclusion of the FX Activities was $6,200.00 (in the Statement dated March 26, 2012, this was described as the "open position exposure"). Both Mr. Chad and Mr. Hodgins referred to that amount as a profit,[265] notwithstanding that the $240,000 fee had not been taken into consideration when calculating the $6,200. This indicates to me that they were using the word "profit" to mean either a positive profit/loss amount or a positive open position exposure, and not to mean "profit" as a net concept (i.e., revenue less expenses), which is the meaning of "profit" that is applicable for the purposes of section 9 of the ITA, as explained in *Symes*, *Royal Trust*, *Paletta Estate* and the other cases cited above. Therefore, rather than relying on Mr. Chad's subjective statement that, in undertaking the FX Activities, he was pursuing a profit (by which he may have meant a positive profit/loss amount or a positive open position

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[262] *Paletta Estate* (FCA), *supra* note 113, ¶31. The case reference omitted from the above quotation is *Russel v. Town and County Bank*, (1883) 13 App. Cas. 418 at 424, as cited in *MNR v. Anaconda American Brass Ltd.*, 55 DTC 1220; [1955] CTC 311 (JCPC).

[263] *Symes*, *supra* note 206, p. 721-722, referencing *Royal Trust Co. v. MNR*, 57 DTC 1055 (Ex. Ct.).

[264] *Symes*, *ibid*, p. 722. See also *De Geest v. The Queen*, 2022 FCA 22, ¶18; *Canadian Pacific Railway Company v. The Queen*, 2021 FC 1014, ¶ 479-481; *Rio Tinto Alcan Inc. v. The Queen*, 2016 TCC 172, ¶67; and *Canderel Limited v. The Queen*, [1995] 2 CTC 22, at 38-39, 95 DTC 5101, at 5110 (FCA).

[265] Transcript, vol. 4 (June 23, 2022), p. 602, lines 15 & 22; and Exhibit A-51.

exposure), I prefer to focus on the objective manifestations of his intention, some of which have been discussed above, and others of which are discussed below.

[147] In determining whether a taxpayer intended to earn a profit from a particular activity in respect of which expenses were incurred, one would expect the taxpayer to factor those expenses into the profit/loss calculation.

[148] As I reviewed the above correspondence between Mr. Chad and Mr. Hodgins (with Mr. Lemons sometimes included), I noticed that there was little, if any, mention of the $240,000 fee (or commission) paid by Mr. Chad to Velocity. As observed below, they gave no thought to achieving a profit, once the $240,000 fee was taken into consideration.

[149] The initial Trade suggested by Mr. Hodgins to Mr. Chad was described in the former's email of November 30, 2011.[266] The fact that Mr. Hodgins indicated that the Trade would profit if certain conditions were met might suggest that Mr. Chad's intention was to pursue a profit. However, my reading of the email is that Mr. Hodgins was referring to the profit potential of that particular Trade, and not to the profit potential of Mr. Chad's overall FX Activities.

[150] In his email of December 28, 2011, Mr. Hodgins suggested to Mr. Chad a "new trade that will get us there faster…"[267] Although he understood that Mr. Hodgins was "focusing on the … target" loss, Mr. Chad said, during his examination-in-chief, that he "also focused on the P&L."[268] The Statement dated December 28, 2011 showed that the profit/loss amount was $1,230.05,[269] which was substantially less than the $240,000 fee that Mr. Chad had paid to Velocity.[270]

[151] On December 31, 2011 (which was a Saturday), Mr. Hodgins advised Mr. Chad that the Trades that had been closed in late 2011 had resulted in a loss of $22,017,400 (slightly exceeding the target loss of $22,000,000).[271] The Statement

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[266] Exhibit A-23, first page. See subparagraph 142(j) above.

[267] Exhibit A-37 and Exhibit R-8, fourth page. See subparagraph 142(l) above.

[268] Transcript, vol. 4 (June 23, 2022), p. 524, lines 19-23.

[269] Exhibit A-31, p. 62. As indicated in footnote 247 above, the profit/loss amounts were calculated without reference to the $240,000 fee (or commission).

[270] I am aware that the profit/loss amount is expressed in US currency and the fee is expressed in Canadian currency. However, the relative magnitudes of these two amounts are so different that the observation made above is not undermined by the use of different currencies.

[271] Exhibit A-40; and Exhibit R-8, fifth page.

sent by Velocity to Mr. Chad on December 30, 2011 (which was the last trading day of 2011) showed a profit/loss amount of –$7,068.73.[272] The Statement sent by Velocity to Mr. Chad on January 2, 2012 (which was the first trading day of 2012) showed a profit/loss amount of –$6,144.79.[273] The Statement sent by Velocity to Mr. Chad on January 3, 2012 showed a profit/loss amount of $2,296.12.[274] While the profit/loss amount on January 3, 2012 was positive, it was only slightly greater than the negative amounts that had been posted on December 30, 2011 and January 2, 2012. Furthermore, the profit/loss amount of $2,296.12 was miniscule when compared to the $240,000 fee that Mr. Chad had paid to Velocity. It was in that environment that Mr. Chad instructed Mr. Hodgins, on January 3, 2012, to "ensure that the 'perfect hedge' transactions are executed."[275]

[152] By instructing that a hedge be implemented, Mr. Chad was, in essence, signalling that he was not concerned about achieving a profit/loss amount great enough to allow him to recoup the $240,000 fee that he had paid to Velocity. The instruction to hedge at that point in time (i.e., three days after Mr. Hodgins had advised Mr. Chad that the target loss had been realized, and on a day when the profit/loss amount was only $2,296.12, which was substantially less than the $240,000 fee) was not consistent with an intention to pursue a profit.

[153] The Statement sent by Velocity to Mr. Chad on January 4, 2012 showed a profit/loss amount of –$612.19.[276] In other words, the profit/loss amount had dipped into the negative again. On January 4, 2012, Mr. Hodgins replied to Mr. Chad's email of the previous day (in which Mr. Chad had instructed that the "perfect hedge" be implemented). In that reply, Mr. Hodgins explained that "the 6/1/6/1/6 pattern in the first group [of Trades] gives considerable symmetry and therefore strong hedging impact … [and that the pattern for] the other group is not as symmetrical but gives a very strong hedge." Mr. Hodgins then suggested a modification that could be made to the pattern for the second group, but, after

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[272] Exhibit A-31, p. 70.

[273] Exhibit A-32, p. 3.

[274] Exhibit A-32, p. 7.

[275] Exhibit A-41; and Exhibit R-8, fifth page. See subparagraph 142(n) above. "Perfect hedge" was a term sometimes used by Mr. Hodgins. Mr. Chad did not believe in perfect hedges. Nevertheless, Mr. Chad was concerned about the volatility and consequent risk, in the context of his open positions, and he wanted to tighten down the volatility and reduce the risk. See Transcript, vol. 4 (June 23, 2022), p. 528, line 26 to p. 532, line 20; and p. 537, line 3 to p. 538, line 18; and vol. 10 (July 5, 2022), p. 1452, line 22 to p. 1455, line 27.

[276] Exhibit A-32, p. 11.

noting that the difference would be "tiny", he reassured Mr. Chad that "you are exceptionally hedged as is."[277] Thus, on a day when the profit/loss amount was negative, Mr. Hodgins was focused on maintaining, or perhaps improving, the hedge, rather than taking steps to achieve a profit/loss amount large enough to offset the $240,000 fee that Mr. Chad had paid to Velocity.

[154] The Statement sent by Velocity to Mr. Chad on January 12, 2012 showed a profit/loss amount of $196,132.70,[278] prompting him to send an email to Mr. Hodgins to inquire about the "significant gain", compared to the previous day's profit/loss amount. While Mr. Chad suspected that there might be "some sort of timing error", rather than asking whether there might be a prospect of recouping the $240,000 fee, he seemed to express surprise that "the more recent hedges had [not] reduced the volatility…."[279] It seems to me that Mr. Chad was more concerned about ensuring that the hedges would preclude the profit/loss amount from deviating significantly above or below zero, than he was about exploring whether it would be possible to obtain a profit/loss amount large enough to achieve an actual profit, once the $240,000 fee was deducted.

[155] In Mr. Hodgins' reply, emailed on the evening of January 12, 2012, he confirmed that the profit/loss amount shown for that day was an aberration. He indicated that a profit/loss amount "more in line with the market" would be "in the region of the previous day[']s statement". He also recommended that they wait to review the Statement for the next day (seemingly implying that the profit/loss amount on January 13, 2012 would not be as high as on January 12, 2012). Mr. Hodgins concluded his email by reiterating that "in the meantime, the hedge is working."[280] Thus, once again, the focus was on maintaining the hedge, rather than achieving a profit/loss amount large enough to cover the $240,000 fee, which may have yielded an actual profit (depending on whether any other expenses were also incurred).

[156] The Statement sent by Velocity to Mr. Chad on January 19, 2012 showed a profit/loss amount of –$221,382.66,[281] as a result of which he sent an email to Mr. Hodgins asking him to confirm that a "similar pricing error as before (but instead

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[277] Exhibit A-42. See subparagraph 142(o) above.

[278] Exhibit A-32, p. 19.

[279] Exhibit A-43, p. 1. See subparagraph 142(p) above.

[280] Exhibit A-44. See subparagraph 142(q) above.

[281] Exhibit A-32, p. 27 (which is the twenty-third page from the front of the exhibit).

to the negative)" had occurred.[282] Mr. Hodgins' response on January 20, 2012 confirmed that the profit/loss amount on January 19, 2012 was an aberration, and that they had "a very neutral hedge" on at that time. Mr. Hodgins "was tempted to suggest" that Mr. Chad close out the Trades to prove that the profit/loss amount of –$221,382.66 was incorrect. Mr. Hodgins indicated that, according to his understanding of the market and his calculations, if Mr. Chad were to close his positions at that time, the closed net amount would be –$8,200.[283] This potential closed net amount, like the actual closed net amount of $6,200 on March 26, 2022 and the profit/loss amounts that we have seen above, was calculated before deducting the $240,000 fee and any other expenses.

[157] Mr. Hodgins' tentative suggestion on January 20, 2012 that Mr. Chad close out his Trades at a time when the resultant closed net amount (even when calculated without deducting the $240,000 fee) would be negative was not consistent with an intention, on the part of his client, to pursue a profit.

[158] On the advice of Mr. Lemons, on January 20, 2012, Mr. Chad instructed Mr. Hodgins "to wait a little longer before … closing [the open] positions out."[284] That waiting period lasted until March 22, 2012, when Mr. Chad observed, in an email to Mr. Lemons, that the "unrealized margin differential" (presumably a reference to "Unrealised PnL")[285] had "swung from –$22,000 to +$29,500 (now in [his] favor)".[286] He proposed replacing "some of the positions expiring soon with positions expiring further out and therefore fundamentally maintaining the overall position [they had] currently constructed."[287] Given that "the overall position [which they had] constructed" was strongly and "exceptionally hedged",[288] it does not appear that Mr. Chad was endeavoring to obtain a profit/loss amount greater than $240,000, which is what would have been required to have actually earned a profit.

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[282] Exhibit A-45. See subparagraph 142(r) above.

[283] Exhibit A-46. See subparagraph 142(s) above.

[284] Exhibit A-47. See subparagraph 142(t) above.

[285] See Exhibit A-34, p. 53, 57 & 61.

[286] Exhibit R-9, p. 1. On March 20, 2012, the Unrealised PnL was –$22,229.57; on March 21, 2012, the Unrealised PnL was –$6,096.78; and on March 22, 2012, the Unrealised PnL was $29,573.89. See Exhibit A-34, p. 53, 57 & 61.

[287] Exhibit R-9, p. 1-2. See subparagraph 142(u) above.

[288] Exhibit A-42. See subparagraph 142(o) above.

[159] The same day, Mr. Hodgins replied, saying that he agreed "with taking profits" and that the "swing from negative to positive … [was] worth jumping on."[289] However, although Mr. Hodgins used the word "profits", he was not actually contemplating or attempting to achieve a profit/loss amount greater than $240,000. In Mr. Hodgins' reporting email of April 10, 2012, after all of the Trades had been closed, he noted that the "profit on the entire trading was CAD 6,200".[290] However, that amount did not actually represent a profit, as it was calculated without deducting the $240,000 fee paid by Mr. Chad to Velocity.

[160] In the emails that were subsequently circulated by Mr. Chad, Mr. Lemons and Mr. Hodgins on April 20, 22 and 23, 2014,[291] the focus was on the continued fluctuation of the profit/loss amount and on whether all positions had been closed.[292] There was no discussion of whether an actual profit (i.e., revenue less expenses) had been earned.

[161] Although the above documentary evidence indicates that little, if any, attention was given by Mr. Chad and Mr. Hodgins to the $240,000 fee in late 2011 and 2012, particularly for the purpose of determining the profitability (or lack thereof) in respect of the Trades, that fee was not overlooked when preparing Mr. Chad's 2011 and 2012 income tax returns. Mr. Chad deducted $166,666.67 of that fee in computing his straddle-trading income for 2011,[293] and $73,333.33 of that fee in computing his straddle-trading income for 2012.[294]

4. **Finding**

[162] I did not find Mr. Chad to be a witness who lacked credibility. However, given the passage of time between 2011 (when Mr. Chad commenced the FX Activities) and 2022 (when Mr. Chad testified in the trial of this Appeal), it is

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[289] Exhibit R-9, p. 1. See subparagraph 142(v) above.

[290] Exhibit A-51, p. 1. See subparagraph 142(w) above.

[291] Exhibits A-52, A-53, A-54 and A-55.

[292] See subparagraphs 142(x), (y), (z) and (aa) above.

[293] Exhibit A-63, p. 24. In computing his straddle-trading income for 2011, Mr. Chad also deducted bank and wire charges in the amount of $42.00, resulting in total deducted expenses in the amount of $166,708.67. The total straddle-trading loss reported by Mr. Chad for 2011 was $22,184,108.67 (i.e., $22,017,400.00 + $166,708.67).

[294] Exhibit A-67, p. 17. In computing his straddle-trading income for 2012, Mr. Chad also deducted bank and wire charges in the amount of $30.00, resulting in total deducted expenses in the amount of $73,363.33.

possible that his memory of something conceptual, such as his intention or purpose, in 2011, in undertaking the Trades, may have diminished. Furthermore, it appears to me that Mr. Chad was not using the word "profit" in the manner in which that word is used in section 9 of the ITA.

[163] Consequently, as instructed by the Supreme Court in *Symes*, *Ludco Enterprises* and *MacDonald*, where Mr. Chad's *ex post facto* statements of his trading intention in 2011 varied from the objective manifestations of that intention (particularly as set out in the contemporaneous documents discussed above), I prefer the latter.

[164] The emails and other correspondence that were put into evidence and that pertained to Mr. Chad's introduction to Velocity, the onboarding process and the initial establishment of his relationship with Velocity, more or less during the period September 30, 2011 to November 30, 2011 (i.e., Exhibits A-1 to A-3 and A-8 to A-22) made no mention of a profit objective or of a trading strategy designed to recoup the initial fee (or commission) of $200,000. Granted, Mr. Hodgin's email at 2:12 p.m. on November 30, 2011 did propose a Trade that could profit, but I read this as a reference to that particular Trade, and not as a reference to the entirety of Mr. Chad's proposed FX Activities, during the initial round of trading (which was from November 30, 2011 to March 26, 2012).

[165] There was no *pro forma* income statement, financial forecast or other written projection in 2011 that set out a plan to achieve a profit/loss amount great enough to cover the $240,000 fee and yield an actual profit, nor was there any written trading strategy structured to realize a profit/loss amount of that magnitude.[295]

[166] As indicated above, on January 20, 2012, Mr. Hodgins suggested to Mr. Chad that he consider giving instructions to close the open positions, so as to prove that the profit/loss amount of negative $221,382.66, as shown on the Statement dated January 19, 2012, was incorrect. Mr. Hodgins projected that, if the open positions were to be closed at that time, the closed net amount would be negative $8,200. This suggestion by Mr. Hodgins is significant, because, if Mr. Chad had previously advised Mr. Hodgins of a pursuit-of-profit objective, it is unlikely that Mr. Hodgins would have suggested that all positions be closed at a time when the result would have been a negative closed net amount.

[295] See *Savage v. The Queen*, 2017 TCC 247, ¶24.

[167] The most telling of the various objective manifestations of Mr. Chad's intention was that, only three days after achieving the target loss of $22,000,000 (and then some), Mr. Chad instructed Mr. Hodgins to implement a hedge,[296] so as to reduce the volatility,[297] which, if left unhedged, and assisted with an appropriately modified trading strategy, might have possibly resulted in a profit/loss amount great enough to recoup the $240,000 fee and yield an actual profit, but which might have also led to a significant loss,[298] a risk, it seems, that Mr. Chad was not inclined to take.

[168] While the "assumption underlying the test in *Stewart* is that a commercial activity is undertaken for profit,"[299] in my view, the documentary evidence calls that assumption into question in the context of this Appeal. Although Mr. Chad, when testifying, asserted that, in participating in the Trades, he intended to pursue a profit, the contemporaneous documentary evidence indicates that he and Mr. Hodgins were focused on achieving the agreed-upon target loss (as revised), and that, once that loss had been realized, the risks of the Trades were strongly and effectively hedged, so as to keep the profit/loss amount in a relatively neutral position. In other words, despite the appearances of commerciality, the FX Activities were not, in fact, conducted with a view to profit.[300] Hence, I do not consider the FX Activities to have been "clearly commercial".[301]

[169] The documentary evidence from 2011 and 2012, as summarized and discussed above, does not give any indication that Mr. Chad or Mr. Hodgins intended, in conducting the FX Activities, to achieve a profit/loss amount great enough to offset the $240,000 fee, which was a significant expense in respect of those activities. Thus, my view is that the intention of Mr. Chad and Mr. Hodgins, in implementing the Trades, was not to earn a profit, but rather, to incur a loss for 2011 of approximately $22,000,000.

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[296] On New Year's Eve 2011 (a Saturday), Mr. Hodgins informed Mr. Chad that the target loss had been realized. On Tuesday, January 3, 2012 (the first business day of the new year), Mr. Chad spoke with Mr. Hodgins, and then followed up with an email, to give the instructions to hedge. See Exhibits A-40 and A-41.

[297] Exhibit A-43.

[298] See Exhibit R-16, p. 2.

[299] *Stackhouse*, *supra* note 109, ¶103.

[300] See *Paletta Estate* (FCA), *supra* note 113, ¶36.

[301] See *Stewart*, *supra* note 180, ¶60-61; and *Walls*, *supra* note 190, ¶19.

[170] Consequently, the evidence does not support the proposition that Mr. Chad intended to profit from the FX Activities in 2011. Therefore, for the purposes of the ITA and this Appeal, the FX Activities were not a source of income.

D. Date of Execution of the Trades

[171] It is the position of the Crown that the various Trades were executed on their respective value dates, and not on the trade dates shown in the Statements.[302]

[172] As discussed above, under the heading "Legal Effectiveness of the Trades", I have concluded that the FX Contracts were legally effective, in accordance with their terms. Having so concluded, it follows that each Trade was executed on the trade date shown, in the applicable Statement, for that Trade.

E. Accounting Method

[173] The Parties disagree as to the proper accounting method that should have been used to report the Trades for the purposes of the ITA. As I have found that the FX Activities were not a source of income, it is not necessary for me to decide this issue.

F. Deductibility of Fee

[174] The Parties also disagree as to the deductibility of the $240,000 fee paid by Mr. Chad to Velocity. As noted above, in computing his income for 2011, Mr. Chad deducted a significant portion of that fee, specifically $166,666.67. The Minister disallowed that deduction. Mr. Chad asserts that that portion of the fee was deductible in 2011.

[175] The deductibility of expenses flows from the *profit* concept in subsection 9(1) of the ITA, which is a net concept that presupposes the deduction of business expenses.[303] As noted above, I have found that the FX Activities were not conducted with a view to profit, and were not clearly commercial, such that they did not constitute a source of income in the form of a business. As the FX Activities were not a business for the purposes of the ITA, the *profit* concept in subsection 9(1) does not provide for a deduction of the $166,666.67 paid, as a fee for brokerage services, by Mr. Chad to Velocity in 2011.

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[302] Fresh Amended Reply, ¶15.aaa.

[303] *Symes*, *supra* note 206, p. 722.

G. General Anti-Avoidance Rule

[176] GAAR is a provision of last resort.[304] Given that I have determined that the FX Activities did not constitute a source of income, GAAR is not needed, nor is it applicable, here.

[177] Nevertheless, I will make a few brief comments about the standard three steps in a GAAR analysis: tax benefit, avoidance transaction and abusive tax avoidance.[305]

1. Tax Benefit

[178] Counsel for Mr. Chad have acknowledged that a tax benefit resulted from the FX Activities, but submit that the Crown incorrectly characterized the tax benefit.[306]

2. Avoidance Transaction

[179] Mr. Chad's counsel have also acknowledged that the Trades were avoidance transactions, but submit that the Crown improperly characterized the series of transactions, and incorrectly alleged that Mr. Chad had no *bona fide* purpose for the FX Activities other than to obtain a tax benefit.[307]

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[304] *The Queen v. Canada Trustco Mortgage Company*, [2005] 2 SCR 601, ¶21; *S.T.B. Holdings Ltd. v. The Queen*, 2002 FCA 386, ¶26; *The Queen v. Imperial Oil Limited*, 2004 FCA 36, ¶31; and *Quinco Financial Inc. v. The Queen*, 2018 FCA 137, ¶14.

[305] *Canada Trustco, ibid*, ¶17.

[306] Mr. Chad's Submissions, p. 194, ¶585.

[307] Mr. Chad's Submissions, p. 196, ¶593.

3. Abusive Tax Avoidance

[180] Straddle trading was a key feature of Mr. Chad's tax deferral strategy. By closing out all the loss legs of his Trades in 2011, and not closing out any of the gain legs of his Trades until 2012, Mr. Chad deferred a significant amount of tax from 2011 to 2012.

[181] The history of the tax treatment of straddle trading in Canada goes back at least some 30 years, to the *Friedberg* case,[308] which dealt with spread transactions in gold futures. In that case, Mr. Friedberg reported his losses when they were actually incurred, and his gains when they were actually realized. The Supreme Court stated that the Crown had not demonstrated that there was any error in Mr. Friedberg's having used the "lower of cost or market method" of accounting, rather than the "mark to market method", to report the losses and gains.

[182] With respect to the appropriateness of considering the loss leg and the gain leg of a spread transaction in isolation from one another, the Supreme Court, in *Friedberg*, substantially agreed with the reasons of the trial judge, as affirmed by the FCA.[309] The trial judge had noted that (at that time) there was no provision in the ITA requiring that a commodities trader use a particular accounting method. The trial judge also rejected the Crown's argument that Mr. Friedberg's accounting method had resulted in an artificial reduction of income, for the purposes of former subsection 245(1) of the ITA. The trial judge noted that the only difference between the two methods of accounting related to the timing of the reporting of income. The trial judge, in rejecting the Crown's suggestion that Mr. Friedberg's losses were fictitious, held that Mr. Friedberg had participated in real transactions in the financial marketplace, and that the consequences of those transactions, whether gains or losses, had been borne by him.[310]

[183] In *Paletta Estate*, the FCA said the following about the *Friedberg* decision:

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[308] *The Queen v. Friedberg*, [1993] 4 SCR 285, 160 NR 312 (SCC).

[309] *Ibid*, at SCR p. 286; which affirmed 92 DTC 6031 (FCA), p. 6035-6036; which affirmed 89 DTC 5115 (FCTD), p. 5120-5122, in respect of this issue.

[310] *Ibid* (FCTD), p. 5122.

> *Friedberg* confirms that the straddle trading strategy can legitimately be used to reduce one's tax when the trades are made in the course of a business, but it can find no application where, as here, there is no source of income to begin with.[311]

[184] If the FX Activities had constituted a source of income (which they did not), it is by no means clear whether Mr. Chad's straddle-trading strategy would, or would not, have resulted in abusive tax avoidance. As it is not necessary for me to make a finding in respect of this issue, I decline to do so.

VI. CONCLUSION

[185] Given that the FX Activities did not constitute a source of income, the Appeal is dismissed.

[186] Subject to the comments that follow in this paragraph and in the next paragraph, costs in respect of the Appeal are awarded to the Crown. For greater certainty, with respect to the motions heard in January 2021 and September 2021:

(a) the costs in respect of Mr. Chad's motion, which was heard on January 27-28, 2021, to strike out portions of the Crown's Second Amended Reply (which was then the Crown's most recent pleading) have already been considered;[312] and

(b) no costs are awarded to the Crown in respect of its motion, which was heard on September 2, 2021, to amend its Second Amended Reply.[313]

[187] Costs in respect of the Crown's recusal motion, which was heard on December 7, 2022, are awarded to Mr. Chad.

[188] The Parties shall have 30 days from the date of the Judgment in respect of this Appeal to reach an agreement on costs and to so advise the Court, failing which each Party shall have a further 30 days to file written submissions in respect of the costs awarded to that Party, and each Party shall have an additional 30 days thereafter (i.e., 90 days from the date of the Judgment) to file a written response to the other Party's initial submissions. Any submissions in support of a Party's claim for costs shall be limited to seven pages in length, and any Party's response to the

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[311] *Paletta Estate* (FCA), *supra* note 113, ¶59.

[312] *Chad*, *supra* note 109, ¶66-67; and *Chad v. The Queen*, 2023 TCC 76.

[313] *Chad v. The Queen*, 2022 TCC 18, ¶68.

other Party's claim for costs shall be limited to five pages in length. If, within the applicable time limits, the Parties do not advise the Court that they have reached an agreement and no submissions are received from the Parties, costs shall be awarded to the respective Parties in accordance with the Tariff.

Signed at Ottawa, Canada, this 25th day of October 2024.

"Don R. Sommerfeldt"

Sommerfeldt J.

Schedule "A"[314]

The Trades

New Trade ID	FX swap	FX swap forward legs	Contract	Trade Date	Value Date	Buy/Sell	Trade Amount USD	Trade Price	Trade Amount CAD
7355	FX swap 1	S1FA	CADUSD	30-Nov-11	12-Sep-12	Sell	-200,000,000	1.023996	204,799,200
6650		S1FB	CADUSD	30-Nov-11	19-Sep-12	Buy	200,000,000	1.024093	-204,818,600
6651	FX swap 2	S2FA	CADUSD	06-Dec-11	18-Sep-12	Buy	200,000,000	1.016862	-203,372,400
7356		S2FB	CADUSD	06-Dec-11	19-Sep-12	Sell	-200,000,000	1.016892	203,378,400
7336	FX swap 3	S3FA	CADUSD	07-Dec-11	12-Sep-12	Sell	-200,000,000	1.015122	203,024,400
6652		S3FB	CADUSD	07-Dec-11	18-Sep-12	Buy	200,000,000	1.015190	-203,038,000
6674	FX swap 4	S4FA	CADUSD	12-Dec-11	12-Sep-12	Buy	400,000,000	1.032422	-412,968,800
7337		S4FB	CADUSD	12-Dec-11	13-Sep-12	Sell	-400,000,000	1.032434	412,973,600
6649	FX swap 5	S5FA	CADUSD	19-Dec-11	13-Sep-12	Buy	400,000,000	1.042103	-416,841,200
7340		S5FB	CADUSD	19-Dec-11	14-Sep-12	Sell	-400,000,000	1.042112	416,844,800
6675	FX swap 6	S6FA	CADUSD	23-Dec-11	20-Sep-12	Buy	400,000,000	1.024192	-409,676,800
7338		S6FB	CADUSD	23-Dec-11	27-Sep-12	Sell	-400,000,000	1.024270	409,708,000
6671	FX swap 7	S7FA	CADUSD	28-Dec-11	11-Apr-12	Buy	800,000,000	1.027014	-821,611,200
7341		S7FB	CADUSD	28-Dec-11	18-Apr-12	Sell	-800,000,000	1.027148	821,718,400
7339	FX swap 8	S8FA	CADUSD	28-Dec-11	20-Sep-12	Sell	-400,000,000	1.017157	406,862,800
6676		S8FB	CADUSD	28-Dec-11	21-Sep-12	Buy	400,000,000	1.017169	-406,867,600
7344	FX swap 9	S9FA	CADUSD	29-Dec-11	19-Apr-12	Sell	-1,600,000,000	1.027477	1,643,963,200
6659		S9FB	CADUSD	29-Dec-11	26-Apr-12	Buy	1,600,000,000	1.027616	-1,644,185,600
6670	FX swap 10	S10FA	CADUSD	29-Dec-11	25-Apr-12	Buy	1,600,000,000	1.023617	-1,637,787,200
7345		S10FB	CADUSD	29-Dec-11	26-Apr-12	Sell	-1,600,000,000	1.023637	1,637,819,200
7342	FX swap 11	S11FA	CADUSD	29-Dec-11	11-Apr-12	Sell	-800,000,000	1.024034	819,227,200
6672		S11FB	CADUSD	29-Dec-11	12-Apr-12	Buy	800,000,000	1.024054	-819,243,200
6673	FX swap 12	S12FA	CADUSD	03-Jan-12	26-Apr-12	Buy	800,000,000	1.021371	-817,096,800
7343		S12FB	CADUSD	03-Jan-12	01-May-12	Sell	-800,000,000	1.021472	817,177,600
25679.N1	FX swap 13	S13FA	CADUSD	26-Mar-12	14-Sep-12	Buy	400,000,000	1.001166	-400,466,400
25679.F1		S13FB	CADUSD	26-Mar-12	18-Sep-12	Sell	-400,000,000	1.001283	400,513,200
25689.N1	FX swap 14	S14FA	CADUSD	26-Mar-12	21-Sep-12	Sell	-400,000,000	1.000743	400,297,200
25689.F1		S14FB	CADUSD	26-Mar-12	27-Sep-12	Buy	400,000,000	1.000882	-400,352,800
25702.N1	FX swap 15	S15FA	CADUSD	26-Mar-12	12-Apr-12	Sell	-800,000,000	1.024034	819,227,200
25702.F1		S15FB	CADUSD	26-Mar-12	18-Apr-12	Buy	800,000,000	1.024162	-819,329,600
25718.N1	FX swap 16	S16FA	CADUSD	26-Mar-12	19-Apr-12	Buy	1,600,000,000	0.997514	-1,596,022,400
25718.F1		S16FB	CADUSD	26-Mar-12	25-Apr-12	Sell	-1,600,000,000	0.997646	1,596,233,600
25721.N1	FX swap 17	S17FA	CADUSD	26-Mar-12	26-Apr-12	Sell	-800,000,000	0.996997	797,597,600
25721.F1		S17FB	CADUSD	26-Mar-12	01-May-12	Buy	800,000,000	0.997101	-797,680,800
Total									6,200

[314] This table is photocopied from Mr. Bird's report, Exhibit A-85, tab 1, Appendix 3, p. 98.

CITATION:	2024 TCC 142
COURT FILE NO.:	2017-1458(IT)G
STYLE OF CAUSE:	S. ROBERT CHAD and HIS MAJESTY THE KING
PLACES OF HEARING:	Vancouver, British Columbia; Ottawa, Ontario; Toronto, Ontario; Calgary, Alberta
DATES OF HEARING:	June 20-23, 2022, June 27-30, 2022, July 4-7, 2022, August 16-19, 2022, August 22-25, 2022, January 20, 2023, January 23-26, 2023, April 18-19, 2023, May 15-18, 2023, and August 21-24, 2023
REASONS FOR JUDGMENT BY:	The Honourable Justice Don R. Sommerfeldt
DATE OF JUDGMENT:	October 25, 2024

REPRESENTATIVES:

Counsel for the Appellant:	Justin Kutyan Dov Whitman Kelly Ng Shara Sullivan
Counsel for the Respondent:	Charles Camirand Shubir (Shane) Aikat Grant Nash Larissa Benham Gerard Westland

COUNSEL OF RECORD:

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