

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160426

Docket: A-532-14

Citation: 2016 FCA 130

**CORAM: TRUDEL J.A.
STRATAS J.A.
RYER J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

AGNICO-EAGLE MINES LIMITED

Respondent

Heard at Toronto, Ontario, on January 26, 2016.

Judgment delivered at Ottawa, Ontario, on April 26, 2016.

REASONS FOR JUDGMENT BY:

RYER J.A.

CONCURRED IN BY:

**TRUDEL J.A.
STRATAS J.A.**

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REASONS FOR JUDGMENT

RYER J.A.

[1] This is an appeal by Her Majesty the Queen (the “Crown”) from a decision of Justice Judith Woods (the “Judge”) of the Tax Court of Canada dated November 4, 2014 and cited as 2014 TCC 324.

[2] In her decision, the Judge allowed the appeal of Agnico-Eagle Mines Limited (the “Taxpayer”) from reassessments (the “Reassessments”) in which the Minister of National

Revenue (the “Minister”) determined that the Taxpayer had foreign exchange gains as a result of conversions (each, a “Conversion”) of certain of its United States dollar (“US\$”) denominated debentures (the “Convertible Debentures”) into its common shares (“Common Shares”) that occurred in each of the Taxpayer’s 2005 and 2006 taxation years.

[3] The Reassessments were issued pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the “Act”), which was in force in each of the taxation years of the Taxpayer that are in issue. Unless otherwise indicated, all references to legislative provisions shall be to the corresponding provisions of the Act.

[4] In allowing the appeals, the Judge concluded that no foreign exchange gains were realized by the Taxpayer on the Conversions that occurred in the Taxpayer’s 2005 and 2006 taxation years. This conclusion was premised upon the Judge’s interpretation of the terms and conditions stipulated in an indenture, dated February 15, 2002 (the “Indenture”), which applied to the Convertible Debentures.

[5] Under her interpretation of these terms and conditions, holders of Convertible Debentures who exercised their rights to acquire Common Shares on conversions were essentially completing subscriptions for Common Shares that they made when they subscribed for and acquired their Convertible Debentures. With respect, it is my view that, in making this interpretation, the Judge committed a reviewable error that warrants our intervention.

[6] Properly interpreted, the relevant terms and conditions of the Indenture contemplate that upon a Conversion, the indebtedness of the Taxpayer that is evidenced by the Convertible Debentures that were converted was repaid by the issuance of the stipulated number of Common Shares.

[7] As will be more fully explained below, this interpretation leads me to conclude that the gains assessed in the Reassessments were incorrectly determined. As a result, I conclude that the appeal should be allowed.

I. BACKGROUND

[8] The parties provided a Partially Agreed Statement of Facts to the Judge. For the purposes of this appeal, the relevant facts are set forth hereinafter. In these reasons, all dollar amounts are in Canadian currency (“C\$”), except where otherwise indicated.

[9] The Taxpayer is a public corporation, within the meaning of subsection 89(1), that is subject to the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the “OBCA”).

[10] Throughout the period from 2002 to 2006, the Common Shares were listed for trading on the New York Stock Exchange (the “NYSE”) and the Toronto Stock Exchange (the “TSX”).

[11] The Directors of the Taxpayer passed resolutions effective January 30, 2002 (the “Issuance Resolutions”) approving the public offering of Convertible Debentures, including

arrangements with the underwriters, the filing of a prospectus (the "Prospectus") and the listing of the Convertible Debentures for trading.

[12] The Issuance Resolutions authorized the Taxpayer to enter into the Indenture with a trust corporation as trustee for and on behalf of each person (a "Holder") who acquired a Convertible Debenture. The principal terms of the Indenture, insofar as this appeal is concerned, are as follows:

- a) each Convertible Debenture constituted a promise by the Taxpayer to pay to its Holder US\$1,000 (the "Principal Amount") on February 15, 2012 ("Maturity" or the "Maturity Date") and was evidenced by a form of security (the "Convertible Debenture Security Form") contained in an appendix to the Indenture;
- b) each Convertible Debenture bore interest at the rate of 4.5% per annum payable semi-annually on its Principal Amount;
- c) the indebtedness of the Taxpayer to the Holder of a Convertible Debenture was subordinate in right of repayment to the prior payment in full of certain obligations of the Taxpayer that were defined in the Indenture as "Senior Indebtedness";
- d) unless an event of default, as defined in clause 1.1 of the Indenture (an "Event of Default"), had occurred, on the Maturity Date, the Taxpayer had the right, exercisable upon written notice, to elect to pay the then outstanding Principal Amount of the Convertible Debentures, plus all accrued and unpaid interest thereon (the "Maturity Amount"), in Common Shares, rather than in cash;

- e) at any time on or after February 15, 2006, the Taxpayer had the right, exercisable upon written notice (a "Redemption Notice"), to redeem (a "Redemption") all or any portion of the outstanding Convertible Debentures at a price (the "Redemption Price") equal to the aggregate Principal Amount of the Convertible Debentures selected for redemption, plus any accrued and unpaid interest thereon. From and after the time of a Redemption Notice, the Redemption Price of the Convertible Debentures referred to therein became due and payable on the date specified in that notice (the "Redemption Date"). Provided that no Event of Default had occurred, the Taxpayer had the right to satisfy its obligation to pay all or a portion of the Redemption Price in Common Shares;
- f) the number of Common Shares that the Taxpayer was obliged to issue if it elected to pay the Maturity Amount or the Redemption Price in Common Shares was determined by a formula under which the aggregate Maturity Amount or Redemption Price was divided by 95% of the amount defined in clause 1.1 of the Indenture as the "Current Market Price" of a Common Share, which amount was basically the weighted average trading price of the Common Shares on the NYSE over a 20-day period stipulated in that definition;
- g) at any time on or before the Maturity Date or any Redemption Date, Holders had the right to make a Conversion of their Convertible Debentures into 71.429 Common Shares per Convertible Debenture (the "Conversion Rate"), subject to adjustments in certain circumstances that are not relevant to this appeal, by notice (a "Conversion Notice") given by or on behalf of each Holder. Conversions occurred on the date (the "Conversion Date") upon which all of the formalities stipulated in the Convertible Debenture Security Form were completed. As a consequence of a Conversion, a Holder ceased to be a Holder

of the indebtedness evidenced by each Convertible Debenture that was converted and received the stipulated number of Common Shares in full satisfaction of such indebtedness. Except in circumstances that are not relevant to this appeal, a Holder who gave a Conversion Notice was not entitled to any payment in respect of accrued and unpaid interest on a Convertible Debenture at the time of the Conversion. An important provision of the Indenture in this regard is the following portion of clause 12.3, which reads as follows:

No payment or adjustment will be made for dividends on or other distributions with respect to any Common Shares except as provided in this Article 12. The Common Shares issued on the conversion (together with the cash payment, if any, in lieu of fractional shares) shall be applied to fully satisfy the Company's obligation to repay the Principal Amount.

[Emphasis added]

- h) upon a Conversion, the number of Common Shares that were to be issued to the Holder that gave a Conversion Notice did not include a fraction of one Common Share. Instead, the Taxpayer was obliged to make a cash payment in lieu of issuing a fractional share.

This was stipulated in clause 12.4 of the Indenture, which reads as follows:

12.4 Fractional Shares

The Company will not issue a fractional Common Share upon conversion of a Security. Instead, the Company will deliver cash for the current market value of the fractional share, which shall be determined by multiplying the Sale Price (on the Trading Day in respect of which the Sale Price is determined) on (i) if the Conversion Date is a Trading Day, the Conversion Date or (ii) if the Conversion Date is not a Trading Day, the last Trading Day prior to the Conversion Date, of a full share by the fractional amount and rounding the product to the nearest whole cent, one-half cent being rounded upward.

[Emphasis added]

- i) the discharge of the liability of the Taxpayer in respect of the indebtedness evidenced by the Convertible Debentures was provided for in clause 10.1 of the Indenture, which reads as follows:

10.1 Discharge of Liability on Securities.

(a) When the Company shall have delivered to the Trustee all outstanding Securities (other than Securities replaced pursuant to Section 2.14) for cancellation or (ii) after the Securities have become due and payable, whether at Maturity, on any Redemption Date, on a Change of Control Purchase Date, upon an election by a Holder to convert his Securities or otherwise, and the Company shall have deposited with the Trustee, the Paying Agent or the Conversion Agent (as applicable in accordance with this Indenture) cash or Common Shares, or any combination thereof (as applicable in accordance with this Indenture) sufficient to pay the entire amount due and payable with respect to each outstanding Security (other than Securities replaced pursuant to Section 2.14), and if in either case the Company shall have paid all other sums payable hereunder by the Company, then this Indenture shall, subject to Sections 4.2 and 9.8, cease to be of further effect...

[Emphasis added]

[13] The Issuance Resolutions also dealt with the issuance of Common Shares upon a conversion, a redemption or the maturity of the Convertible Debentures. In particular, clause 11 of the relevant portion of these resolutions (the “Value of Consideration for Share Issuance Resolution”) reads as follows:

...it is hereby determined that the aggregate consideration for the issue from time to time of each common share of the Company issueable upon the conversion, redemption or maturity of the Debentures or other common shares that may be issued pursuant to the terms of the Indenture (the “Underlying Common Shares”) shall be described in and on the terms provided for under the Indenture (the “Consideration”) and that the fair value of the Consideration is not less than the amount of money that the Company would have received if the Underlying Common Shares had been issued for money.

[Emphasis added]

[14] On or about February 15, 2002 (the "Issuance Date"):

- a) the Taxpayer issued 143,750 Convertible Debentures for US\$143,750,000;
- b) the Convertible Debentures were listed for trading on the TSX;
- c) the foreign exchange ("F/X") rate was C\$1.588 to US\$1.00, with the result that the principal amount of each Convertible Debenture, determined in C\$, was \$1,588;
- d) the Common Share trading price on the NYSE was approximately US\$12.68; and
- e) using the Conversion Rate, each Common Share would have to increase in value to US\$14 per share before the conversion feature would commence to be "in the money", *i.e.*, before a Holder would recover an amount at least equal to the US\$1,000 Principal Amount of a Convertible Debenture upon a Conversion.

[15] On December 13, 2005, the Directors passed resolutions (the "Redemption Resolutions") in which they ratified and confirmed the Issuance Resolutions and approved the redemption of all of the outstanding Convertible Debentures. Pursuant to the Redemption Resolutions, on December 20, 2005, the Taxpayer issued Redemption Notices stipulating that:

- a) the Redemption Date would be February 15, 2006;
- b) the Redemption Price would be approximately US\$1,022.68 per Convertible Debenture, representing the principal and accrued interest on each Convertible Debenture, and would be paid by the issuance of 63.4767 Common Shares; and

- c) Holders maintained their conversion rights and, if they exercised those rights, they would receive 71.429 Common Shares per Convertible Debenture.

[16] In 2005 (largely on or after December 20th of that year), Holders of 10,855 Convertible Debentures gave Conversion Notices and received 775,359 Common Shares upon the surrender of those Convertible Debentures and the extinguishment of the indebtedness of the Taxpayer to them thereunder.

[17] In 2006, Holders of 131,784 Convertible Debentures gave Conversion Notices and received 9,413,189 Common Shares upon the surrender of those Convertible Debentures and the extinguishment of the indebtedness of the Taxpayer to them thereunder.

[18] The Conversions occurred on a number of different Conversion Dates in 2005 and 2006. On those dates, the F/X rate varied from C\$1.1443 to 1.1726 per US\$1.00. On an aggregate basis, expressed in C\$, these Conversions gave rise to the following results:

2005 Conversions

Principal Amount at Issuance	Principal Amount at Extinguishment	Fair Market Value ("FMV") of Shares Issued
\$17,237,740	\$12,648,138.90	17,010,809.77

2006 Conversions

Principal Amount at Issuance	Principal Amount at Extinguishment	FMV of Shares Issued
\$209,272,992	\$152,174,399.90	\$262,029,721.89

[19] On or about February 15, 2006, 1,111 Convertible Debentures were redeemed pursuant to the December 20, 2005 Redemption Notice and 70,520 Common Shares were issued upon the

surrender of those Convertible Debentures and the extinguishment of indebtedness of the Taxpayer thereunder. Expressed in C\$, these Redemptions gave rise to the following results:

2006 Redemptions		
Principal Amount at Issuance	Principal Amount at Extinguishment	FMV of Shares Issued
\$1,764,379	\$1,282,205.10	\$1,946,780

[20] In its 2005 income tax return, the Taxpayer did not report any capital gains in respect of the Conversions that occurred in its 2005 taxation year.

[21] By Reassessment dated February 11, 2011 (the “2005 Reassessment”), the Minister reassessed the Taxpayer for its 2005 taxation year on the basis that, pursuant to subsection 39(2), the Taxpayer was deemed to have realized capital gains in the aggregate amount of \$4,499,360 as a result of the 2005 Conversions. These gains represented the difference between the Principal Amounts of the Convertible Debentures that were converted in 2005, determined in C\$, on the date of their issuance and on the date of their Conversions.

[22] The Taxpayer objected to the 2005 Reassessment, the Minister confirmed it and the Taxpayer appealed it to the Tax Court of Canada.

[23] In its 2006 income tax return, the Taxpayer reported a capital gain as a result of the 2006 Conversions and the Redemptions, using a methodology that it now agrees was incorrect.

[24] By Reassessment dated December 29, 2010 (the “2006 Reassessment”), the Minister reassessed the Taxpayer for its 2006 taxation year on the basis that, pursuant to subsection 39(2),

the Taxpayer was deemed to have realized capital gains in the aggregate amount of \$57,676,430 as a result of the 2006 Conversions and the Redemptions. These gains were determined in essentially the same way that the 2005 capital gains were determined.

[25] The Taxpayer objected to the 2006 Reassessment, the Minister confirmed it and the Taxpayer appealed it to the Tax Court of Canada. The Judge heard the Taxpayer's appeals of the 2005 and 2006 Reassessments together.

II. THE JUDGE'S DECISION

[26] The Judge allowed the Taxpayer's appeal with respect to the deemed capital gains that were assessed in respect of the 2005 Conversions and the 2006 Conversions but upheld the assessment of deemed capital gains in respect of the Redemptions.

[27] The Judge determined that the Convertible Debentures were extinguished on the Conversions and Redemptions. She then found that the determination of whether the Taxpayer made a gain as a result of a foreign currency fluctuation, pursuant to subsection 39(2), required a comparison of the amount received by the Taxpayer upon the issuance of the Convertible Debentures and the amount paid by it upon their extinguishment, with both amounts expressed in Canadian currency.

[28] Citing *Teleglobe Canada Inc. v. R.*, 2002 FCA 408, 296 N.R. 268 [*Teleglobe*], the Judge found that the amount the Taxpayer had paid to extinguish the Convertible Debentures by the

issuance of the Common Shares was not necessarily reflected by the trading price of the Common Shares at the time of their issuance. Rather, the amount paid was the amount for which the shares were issued, which was to be determined by the parties' agreement.

[29] The Judge rejected the Taxpayer's assertion that the Common Shares were issued for an amount equal to the fair market value of the Convertible Debentures at the time of their Conversion because, in her view, that assertion did not accurately reflect the transaction documents or the Taxpayer's commitment to issue 71.429 Common Shares per Convertible Debenture upon the Conversion of each Convertible Debenture.

[30] The Judge found that the amount for which the Common Shares were issued was US\$14 per share because "[t]he Indenture and the Prospectus clearly contemplate that the Common Shares are to be issued for US\$14.00 per Common Share" (Judge's reasons at paragraph 52). This led the Judge to conclude that the amount paid by the Taxpayer for the extinguishment of each Convertible Debenture was US\$1,000 (*i.e.*, US\$14 per Common Share multiplied by 71.429 Common Shares).

[31] Having determined that the amount paid by the Taxpayer upon the extinguishment of each converted Convertible Debenture was US\$1,000, the Judge then considered whether and when that amount was required to be converted to Canadian currency in accordance with subsection 261(2), which requires an amount expressed in a foreign currency that is relevant in computing a taxpayer's Canadian tax results, within the meaning of subsection 261(1)

(“Canadian Tax Results”), to be converted into Canadian currency using the rate effective on the date that the amount arose.

[32] The Judge concluded that the US\$1,000 amount “arose” not at the time of the extinguishment of a Convertible Debenture but at the time of its issuance. This, she reasoned, was because that was when the “true consideration” for the issuance of the Common Shares was received by the Taxpayer.

[33] As a consequence of this determination, the Judge concluded that the same amount – \$1,588 – was received on the issuance of each Convertible Debenture and on its extinguishment, and therefore the Taxpayer realized no foreign exchange gain on any of the Conversions.

III. RELEVANT STATUTORY PROVISIONS

[34] In this appeal, the relevant statutory provisions are subsection 39(2), the definition of “amount” in subsection 248(1), the definition of Canadian Tax Results in subsection 261(1), and subsection 261(2). These provisions are reproduced later in these reasons when they are addressed.

IV. ISSUE

[35] The issue in this appeal is whether the Judge committed a reviewable error in concluding that the Minister erred in assessing capital gains against the Taxpayer under subsection 39(2) as a result of the 2005 and 2006 Conversions.

[36] In my view, this issue raises the following questions:

- a) whether the Judge committed a reviewable error in her interpretation of the Indenture;
- b) whether the Judge committed a reviewable error in her conclusion that the amount paid by the Taxpayer to extinguish the indebtedness evidenced by the Convertible Debentures “arose”, within the meaning of paragraph 261(2)(b), at the time when such indebtedness came into existence (*i.e.*, the Issuance Date) and not the time when such indebtedness was extinguished (*i.e.*, the Conversion Date); and
- c) whether the Judge committed a reviewable error in concluding that the amount paid by the Taxpayer to extinguish the indebtedness evidenced by each Convertible Debenture that was subject to a Conversion was US\$1,000.

V. STANDARD OF REVIEW

[37] In appellate review of a decision of the Tax Court of Canada, this Court applies the standard of correctness with respect to questions of law and the standard of palpable and overriding error with respect to questions of fact and mixed fact and law in respect of which

there are no readily extricable questions of law (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paragraphs 8, 10 and 37 [*Housen*]).

[38] During argument of this appeal, we received submissions concerning the effect of the Supreme Court's recent decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 [*Sattva*]. In that case, the Supreme Court discussed the standard of review of judges' interpretations of contracts. Insofar as the Judge's interpretation of the Indenture—a contractual document—in this case is concerned, does *Sattva* require us to apply a different standard of review from the usual appellate standard of review in *Housen*? For the reasons set out below, I would answer that question in the negative.

[39] In *Sattva*, the Supreme Court instructed us that many issues of contractual interpretation are questions of mixed fact and law. This is because the goal of interpretation—to ascertain the objective intentions of the parties—is inherently fact specific, informed as it is by the surrounding facts and circumstances (*Sattva* at paragraph 55). In situations where the question is suffused by facts, the deferential standard of palpable and overriding error will apply on appeal (*Sattva* at paragraphs 50-52).

[40] However, the Supreme Court also stated that where there is an extricable question of law, such as the application of a wrong legal standard or incorrect legal principle, failure to consider a required element of a legal test or failure to consider a legally relevant factor, correctness is the standard of review (*Sattva* at paragraph 53).

[41] This is entirely consistent with *Housen* at paragraphs 33 to 36. Therefore, *Sattva* does not require us to depart from the usual standard of review that we apply in appeals from the Tax Court of Canada.

VI. ANALYSIS

[42] In order to address the issue at the heart of this appeal, I will first consider the question of whether, bearing in mind the standard of review, the Judge's interpretation of the Indenture must be set aside, since, in my view, the answer to this question will have a direct impact upon the other two questions. Thereafter, I will address the statutory provisions and relevant case law with respect to the taxation of foreign currency gains under the Act and their application to the facts of this case.

A. The interpretation of the Indenture

[43] The Judge's determination of the income tax consequences that flowed from the 2005 and 2006 Conversions was premised upon her interpretation of the terms and conditions of the Indenture, in particular those dealing with conversions. Accordingly, the necessary first step in determining whether the Judge made any error that warrants our intervention is to undertake a review of her interpretation of the terms and conditions of the Indenture.

[44] In my view, the Judge appears to have simultaneously adopted two different, and mutually irreconcilable, characterizations of the Indenture and the legal rights and obligations

created thereunder. This inconsistency is a legal error of the sort that requires this Court's intervention.

[45] In paragraph 45 of her reasons, the Judge concluded that the Convertible Debentures were extinguished upon Conversion and that the Common Shares were issued as payment for that extinguishment. In reaching this conclusion, the Judge must be taken to have determined that upon receipt of funds from Holders on the Issuance Date, the Taxpayer became indebted to them in the amount of US\$1,000 per Convertible Debenture, agreed to pay interest on such indebtedness while outstanding and agreed to repay such indebtedness at the times and in the manners stipulated in the Indenture.

[46] As I will explain, it is my view that this is the correct characterization of the Convertible Debentures and the Indenture under which they were issued.

[47] However, paragraphs 52 to 67 of the Judge's reasons appear to be premised upon a different characterization. In paragraph 55 of her reasons, the Judge concluded that when Holders tendered US\$1,000 per Convertible Debenture as the subscription price for each Convertible Debenture that they agreed to purchase, they did so in payment of the subscription price (US\$14 per share) of the Common Shares that might, at some future time, be issued to them if they issued Conversion Notices to the Taxpayer. In other words, the Judge concluded that the subscription price tendered by Holders on the Issuance Date ought to be characterized not as a subscription for an indebtedness of the Taxpayer as evidenced by the Convertible Debentures but rather as the subscription price of Common Shares that might, at some future

time, be issued if and to the extent that such Holders decided to convert their Convertible Debentures pursuant to the conversion provisions of the Indenture.

[48] The Judge rejected the assertion that a Conversion constituted a repayment of the indebtedness evidenced by the Convertible Debentures by the issuance of Common Shares. In doing so, at paragraph 65 of her reasons, the Judge found that the portion of clause 12.3 of the Indenture (reproduced above), which, in my view, stipulates that the issuance of Common Shares on a Conversion constitutes repayment of the Principal Amount of the converted securities, was “buried in a lengthy section dealing with conversion procedures, and [had] a more limited purpose”.

[49] At paragraph 66 of her reasons, the Judge concluded:

[66] All that section 12.3 appears to accomplish is to ensure that the debt has been satisfied on a conversion. But the issuance of the Common Shares does more than satisfying the debt. It also satisfies Agnico’s commitment to issue Common Shares that is embedded in the conversion right.

[50] Although the consequences of the Redemptions are not in issue in this appeal, it is noteworthy that at paragraph 73 of her reasons, the Judge concluded that the Common Shares issued by the Taxpayer on the Redemptions were issued in satisfaction of the Redemption Price of the Convertible Debentures. While the Judge uses the phrase “in satisfaction of the Redemption Price,” it is my view that she meant nothing more than that there had been a repayment of the indebtedness evidenced by the Convertible Debentures plus accrued interest on the Redemptions.

[51] In my view, the Judge characterized the rights and obligations created by the Indenture as a subscription by Holders for 71.429 Common Shares at a subscription price of US\$1,000 where the Convertible Debentures held by such Holders were converted into Common Shares. On the other hand, the Judge characterized the rights and obligations in respect of Redemptions under the Indenture as repayments of the Principal Amount of the indebtedness evidenced by the Convertible Debentures plus accrued interest (*i.e.*, the Redemption Price) by the issuance of Common Shares.

[52] In other words, the Judge found that the Indenture constituted a subscription for shares in respect of those Holders who exercised their Conversion rights under the Indenture but that the Indenture did not constitute a share subscription for those Holders whose Convertible Debentures were redeemed.

[53] The characterization of the rights and obligations of Holders and the Taxpayer under the Indenture must be determined as of the time that the Indenture was entered into and became operative. At that time, it would not have been possible to know whether the Convertible Debentures would be redeemed, converted or repaid on the Maturity Date. With great respect, it appears to me that the Judge characterized the Indenture and the rights and obligations thereunder on an *ex post facto* basis and, in doing so, she made inconsistent interpretations. To repeat, according to the Judge's analysis, the Indenture constituted a subscription for shares for Holders whose Convertible Debentures were converted into Common Shares, while it constituted a subscription for a debt security in respect of which the indebtedness was repayable in shares for those whose Convertible Debentures were redeemed.

[54] In my view, this *ex post facto* characterization is the product of legal error and thus we must intervene.

[55] Moreover, it seems illogical to say that Holders who acquired Common Shares on Conversions that they initiated over three years after they acquired their Convertible Debentures would have agreed that the subscription price of each of those shares would be US\$14 when the very reason for the Conversions was that the fair market value of each Common Share at the time that the Conversion Notices were issued was an amount in excess of US\$14. In other words, the reason that the Holders were prepared to forgo receipt of US\$1,000 for each Convertible Debenture on Maturity or 63.4767 Common Shares on the Redemptions stipulated in the December 20, 2005 Redemption Notices (which had an aggregate fair market value of around US\$1,000) was precisely because the fair market value of the Common Shares which they would receive on the Conversion of each Convertible Debenture was greater than US\$1,000 on the Conversion Dates, *i.e.*, the Conversion feature was “in the money.”

[56] Finally, as mentioned above, in examining clause 12.3 of the Indenture, the Judge (at paragraph 65 of her reasons) effectively read out words from that clause on the basis that they were “buried” in it. In my view, it was a legal error for the Judge to read out these words on the basis that they are not particularly prominent in the Indenture. In the interpretation of any contract, a judge is legally obligated to consider all words used by the parties in ascertaining the objective meaning of the terms and conditions of the agreement.

[57] In my view, then, the Judge's interpretation of the conversion provisions was vitiated by legal error. This requires us to intervene under the standard of review prescribed in *Housen* and, incidentally, also in *Sattva*.

[58] It is now incumbent on me to provide my interpretation of the provisions of the Indenture that are relevant for the purposes of this appeal.

[59] In interpreting a contractual document, it is necessary to consider the entirety of that document. In undertaking this exercise, I start with the Convertible Debenture Security Form, which indicates an issuance date of February 15, 2002 and stipulates a promise to pay an amount in US currency on February 15, 2012. This form states that it is subject to the terms and conditions that are included on that form and also those contained in the Indenture. I conclude that, upon issuance, each Convertible Debenture represented an indebtedness of the Taxpayer to its Holder in an amount of US dollars that was repayable in US\$1,000 on the Maturity Date.

[60] The Indenture contains terms and conditions that contemplate repayments of the indebtedness evidenced by the Convertible Debentures on dates other than the Maturity Date and using a repayment medium other than US currency.

[61] Article 3 of the Indenture contemplates Redemptions at the option of the Taxpayer, at any time on or after February 15, 2006, upon payment of the Redemption Price on the Redemption Date. In this context, it is my view that a Redemption of a Convertible Debenture means nothing more than a repayment of the indebtedness of the Taxpayer that is evidenced by the Convertible

Debenture that is the subject of the applicable Redemption Notice on a date other than its Maturity.

[62] Clause 2.7 of the Indenture permits the Taxpayer to repay Convertible Debentures that have matured or have been called for Redemption pursuant to a Redemption Notice by the issuance and delivery of Common Shares, pursuant to the Share Payment Option.

[63] Article 12 of the Indenture permits the Holders to convert their Convertible Debentures into Common Shares at any time prior to the earlier of their Maturity Date or any applicable Redemption Date into a fixed number of Common Shares per Convertible Debenture. The Taxpayer asserted that the Judge correctly concluded that the Indenture provided that Conversions were share subscriptions and not repayments of the indebtedness evidenced by Convertible Debentures that were converted. However, nothing in the language of Article 12 of the Indenture indicates that a Holder who issues a Conversion Notice is thereby subscribing for Common Shares. The form of Conversion Notice stipulates only that the Convertible Debentures therein described are to be converted into Common Shares.

[64] Clause 12.3 of the Indenture stipulates that Common Shares issued on a Conversion of a Convertible Debenture are “applied to fully satisfy the Company’s obligation to repay the Principal Amount” (my emphasis) of that Convertible Debenture. In my view, this provision stipulates that the indebtedness of the Taxpayer to a Holder of a Convertible Debenture who issues a Conversion Notice is repaid on the Conversion Date. More particularly, each such Holder relinquishes such Holder’s right to receive US\$1,000 per Convertible Debenture, in cash,

on its Maturity Date, along with all of its other rights under the Indenture, as consideration for the issuance to such Holder of 71 Common Shares plus a payment of an amount of US\$ cash in lieu of the fractional share, as provided for in clause 12.4 of the Indenture. However, I would add that this provision of clause 12.3 of the Indenture says nothing about the amount or quantum of the repayment made by the issuance of Common Shares (and the payment of US\$ cash, if any, in lieu of fractional shares) upon a Conversion. Rather, it signifies an agreement, as between the Taxpayer and Holders who convert, that the Principal Amount of each Convertible Debenture will have been fully repaid upon the issuance of the Common Shares, and US\$ cash in lieu of any fractional share, in respect of each Conversion. Whether it may be said that such repayment was made for an amount greater or less than the Principal Amount of each Convertible Debenture is not specifically addressed by this provision. Moreover, whether or not the issuance of a Conversion Notice may be, in effect, a subscription for Common Shares by the issuing Holder, does not, in my view, change the legal effect of the Conversion, which is the repayment of the indebtedness of the Taxpayer that is evidenced by the Convertible Debentures referred to in the Conversion Notice by the issuance of Common Shares and cash in lieu of any fractional Common Share.

[65] This interpretation is consistent with the Maturity and Redemption provisions under which the indebtedness evidenced by the Convertible Debentures is repaid on the applicable date using the repayment medium that the Taxpayer is required or permitted to use.

[66] The appropriateness of this consistency in treatment is evident from clause 10.1 of the Indenture, which is reproduced earlier in these reasons. The effect of clause 10.1 is to provide

that the Indenture will cease to have effect (except for limited purposes that are not relevant to this appeal) when there has been sufficient payment of the amount due and payable under the Convertible Debentures – in cash or in Common Shares – as a consequence of the occurrence of the Maturity, the Redemption or the Conversion of such Convertible Debentures. This provision clearly contemplates the payment of the indebtedness evidenced by the Convertible Debentures upon their Conversion by the issuance of Common Shares. In this regard, it is to be recalled that, under clause 3.5 of the Indenture, the December 20, 2005 Redemption Notice had the effect of rendering the entire indebtedness of the Taxpayer under the Convertible Debentures immediately due and payable.

[67] In conclusion, it is my view that, by issuing Conversion Notices, Holders were enforcing their rights to repayment of the indebtedness of the Taxpayer to them that was evidenced by their Convertible Debentures by the issuance of 71.429 Common Shares per Convertible Debenture, subject only to the fractional share limitations in clause 12.4 of the Indenture. In doing so, such Holders chose (for obvious commercial reasons) to receive 71.429 Common Shares per Convertible Debenture rather than to receive the 63.4767 Common Shares per Convertible Debenture that they would otherwise have been paid if their Convertible Debentures had been redeemed pursuant to the December 20, 2005 Redemption Notice. It follows, in my view, that Holders who issued Conversion Notices had the indebtedness of the Taxpayer to them that was evidenced by their Convertible Debentures repaid by the issuance of Common Shares in accordance with the terms of Article 12 of the Indenture.

[68] Having determined the correct interpretation of the applicable provisions of the Indenture, I will now refer to the legislative and jurisprudential context in which that interpretation must be applied.

B. The legislative and jurisprudential context

[69] Prior to the enactment of section 261, taxpayers generally computed their income tax results under the Act in Canadian currency. Subsection 261(2) was apparently enacted to ensure that this practice would continue, notwithstanding some *obiter dicta* in *Imperial Oil Ltd. v. Canada*, 2006 SCC 46, [2006] 2 S.C.R. 447 suggesting that conversions of foreign currency amounts to Canadian currency were not always required. That provision reads as follows:

Canadian currency requirement

261.(2) In determining the Canadian tax results of a taxpayer for a particular taxation year,

(a) subject to this section, other than this subsection, Canadian currency is to be used; and

(b) subject to this section, other than this subsection, subsection 79(7) and paragraphs 80(2)(k) and 142.7(8)(b), if a particular amount that is relevant in computing those Canadian tax results is expressed in a currency other than Canadian currency, the particular amount is to be converted to an amount expressed in Canadian currency using the relevant spot rate for the day on which the particular amount arose.

Monnaie canadienne — exigences

261.(2) Les règles ci-après s'appliquent au calcul des résultats fiscaux canadiens d'un contribuable pour une année d'imposition :

a) sous réserve du présent article, à l'exception du présent paragraphe, la monnaie à utiliser est le dollar canadien;

b) sous réserve du présent article, à l'exception du présent paragraphe, du paragraphe 79(7) et des alinéas 80(2)(k) et 142.7(8)(b), toute somme prise en compte dans le calcul de ces résultats qui est exprimée dans une monnaie autre que le dollar canadien est convertie en son équivalence en dollars canadiens selon le taux de change au comptant affiché le jour où elle a pris naissance.

[70] Importantly, section 261 goes further than just confirming the requirement to compute Canadian income tax results in Canadian currency. It allows taxpayers, in limited circumstances, to make an election (a “Functional Currency Election”), pursuant to subsection 261(3), to determine their Canadian Tax Results in a currency other than Canadian currency. According to the Department of Finance Technical Notes, the Functional Currency Election was meant to facilitate compliance and to promote more representative financial reporting for taxpayers who maintain their books and records in a foreign currency.

[71] In approaching the issues in this appeal in the context of the statutory obligation upon taxpayers to compute their Canadian Tax Results in Canadian currency, pursuant to subsection 261(2), it seems logical to first consider the requirements of that provision.

[72] Where, as in this case, no Functional Currency Election is made, paragraph 261(2)(a) mandates that the Canadian Tax Results of a taxpayer for a particular taxation year are to be determined using Canadian currency. Canadian Tax Results is broadly defined as follows:

Definitions

261.(1) The following definitions apply in this section.

...

Canadian tax results of a taxpayer for a taxation year means

Définitions

261.(1) Les définitions qui suivent s’appliquent au présent article.

[...]

résultats fiscaux canadiens En ce qui concerne un contribuable pour une année d’imposition

- | | |
|--|--|
| (a) the amount of the income, taxable income or taxable income earned in Canada of the taxpayer for the taxation year; | a) son revenu, revenu imposable ou revenu imposable gagné au Canada pour l'année; |
| (b) the amount (other than an amount payable on behalf of another person under subsection 153(1) or section 215) of tax or other amount payable under this Act by the taxpayer in respect of the taxation year; | b) son impôt, ou toute autre somme, à payer pour l'année en vertu de la présente loi, à l'exception d'une somme à payer au nom d'une autre personne en application du paragraphe 153(1) ou de l'article 215; |
| (c) the amount (other than an amount refundable on behalf of another person in respect of amounts payable on behalf of that person under subsection 153(1) or section 215) of tax or other amount refundable under this Act to the taxpayer in respect of the taxation year; and | c) l'impôt, ou toute autre somme, qui lui est remboursable pour l'année en vertu de la présente loi, à l'exception d'une somme remboursable au nom d'une autre personne au titre de sommes à payer au nom de celle-ci en application du paragraphe 153(1) ou de l'article 215; |
| (d) any amount that is relevant in determining the amounts described in respect of the taxpayer under paragraphs (a) to (c). | d) toute somme qui est prise en compte dans le calcul des sommes visées aux alinéas a) à c). |

[73] This definition has been framed by reference to various “amounts”. Similarly, paragraph 261(2)(b) contemplates that an otherwise relevant “amount” may be expressed in a currency other than Canadian currency and then mandates the conversion of that “amount” into Canadian currency. Specifically, the foreign currency amount must be converted to Canadian currency using a stipulated rate of exchange on the date that the foreign currency amount first “arose”.

[74] The legislation provides no specific guidance as to the interpretation of the term arose. The parties disagree as to the determination of one of two foreign currency amounts that must be translated into Canadian currency pursuant to paragraph 261(2)(b). The first amount is agreed upon. It is the US\$1,000 paid by Holders to acquire Convertible Debentures on the Issuance Date. According to the Crown, the second amount is the amount paid by the Taxpayer to extinguish the indebtedness evidenced by the Convertible Debentures upon their Conversions. The Crown asserts that this extinguishment amount “arose” on each Conversion Date, when the indebtedness evidenced by Convertible Debentures was extinguished, and had to be translated into Canadian currency on each such date. In contrast, the Taxpayer asserts that the Judge correctly determined that the second amount was also US\$1,000 but that such amount constituted the subscription price that Holders of Convertible Debentures who undertook Conversions agreed to pay for the Common Shares that were the subject of their subscriptions. The Taxpayer thus asserts that this subscription amount “arose” on the Issuance Date and had to be translated into Canadian currency on that date.

[75] In this appeal, the ultimate issue is whether the Taxpayer realized a capital gain, pursuant to subsection 39(2), as a result of the 2005 and 2006 Conversions. Because the Taxpayer did not make a Functional Currency Election in the taxation years in issue, the application of subsection 261(2) must be considered. In particular, the existence of foreign currency amounts must be identified, their relevance to the Canadian Tax Results of the Taxpayer for its 2005 and 2006 taxation years must be determined and, if relevant, the time at which such amounts are required to be converted into Canadian currency must also be determined.

[76] The gains that were the subject of the Reassessments were assessed pursuant to subsection 39(2), which read as follows:

Capital gains and losses in respect of foreign currencies

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

(a) the amount, if any, by which

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

exceeds

(ii) the total of all such losses sustained by the taxpayer in the

Gains et pertes en capital relatifs aux monnaies étrangères

39.(2) Malgré le paragraphe (1), lorsque, par suite de toute fluctuation, postérieure à 1971, de la valeur de la monnaie ou des monnaies d'un ou de plusieurs pays étrangers par rapport à la monnaie canadienne, un contribuable a réalisé un gain ou subi une perte au cours d'une année d'imposition, les règles suivantes s'appliquent :

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

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

sur :

(ii) le total des pertes subies par le contribuable au cours de

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

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

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

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

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

(b) the amount, if any, by which

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

(i) the total determined under subparagraph 39(2)(a)(ii),

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

exceeds

sur :

(ii) the total determined under subparagraph 39(2)(a)(i), and

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

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

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

shall be deemed to be a capital loss of

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

[77] While subsection 39(2) refers to both gains and losses, the issue in this appeal is limited to a determination of whether, by virtue of any fluctuation in the C\$/US\$ F/X rate, the Taxpayer “made a gain” in its 2005 and 2006 taxation years as a result of the Conversions of Convertible Debentures that occurred in those years.

[78] In these circumstances, as discussed above, the Indenture mandates that the 2005 and 2006 Conversions must be viewed as repayments by the Taxpayer of the indebtedness evidenced by the Convertible Debentures that were extinguished on those Conversions. In other words, the Taxpayer repaid its indebtedness of US\$1,000, evidenced by each Convertible Debenture, by the issuance to the Holder of each such Convertible Debenture of 71.429 Common Shares, subject to the fractional share limitation described above. Thus, the question is whether, as a consequence of these debt repayments, the Taxpayer made a gain for the purposes of subsection 39(2). As will be more fully discussed below, in my view, this question is essentially whether, in C\$ terms, the Taxpayer paid less on the repayment of its indebtedness evidenced by the Convertible Debentures, on their Conversions in 2005 and 2006, than it received on the issuance of those Convertible Debentures in 2002.

[79] The interpretation and application of subsection 39(2) is relatively straightforward where an indebtedness denominated in a foreign currency is repaid in cash denominated in that same currency.

[80] If in this case, the repayment of the indebtedness evidenced by a Convertible Debenture was made by a tender of US\$1,000 in cash to the Holder of that Convertible Debenture, then the Crown's position – that the Taxpayer realized a gain as a result of the relative increase in the value of the C\$ against the US\$ between the time at which that Convertible Debenture was issued and the time of its repayment – would appear to be unassailable. The US\$ cash tendered on repayment would be converted into Canadian currency on the repayment date and a comparison of the amount so determined to be the amount for which the Convertible Debenture was issued (here, \$1,588) would determine the extent, if any, to which the Taxpayer had a gain.

[81] However, a different approach is required where the repayment consideration is other than US currency. More particularly, a determination is required with respect to the amount or value in Canadian currency of the consideration given by the Taxpayer to satisfy its repayment obligations in respect of the Convertible Debentures on the Conversions. Once determined, the amount of the repayment consideration must then be compared to the amount initially borrowed, also stipulated in C\$.

[82] In my view, this approach is consistent with that taken by this Court in *Minister of National Revenue v. MacMillan Bloedel Ltd.* (1999), 243 N.R. 388, [1999] 3 C.T.C. 652 (F.C.A.) [*MacMillan Bloedel*]. In that case, Justice Strayer determined that the question of whether a

Taxpayer realized a loss, for the purposes of subsection 39(2), on a redemption of preferred shares that were denominated in US currency was whether, in C\$ terms, the Taxpayer paid more to redeem the shares than it received on their issuance.

[83] In the circumstances of this appeal, where we must determine whether subsection 39(2) operates to require the Taxpayer to recognize a gain on the 2005 and 2006 Conversions, I interpret *MacMillan Bloedel* as requiring a comparison, in Canadian currency, of the amount of the consideration given up by the Taxpayer on the repayment of Convertible Debentures, on their Conversion, to the amount received by the Taxpayer upon their issuance.

[84] Having determined the correct interpretation of the Indenture and examined the relevant statutory and jurisprudential context, I will now turn to the issue in this appeal.

C. Did the Judge commit a reviewable error in concluding that the Taxpayer did not make a gain for the purposes of subsection 39(2) as a result of the 2005 and 2006 Conversions?

[85] In light of the determinations that I have made, it must be determined whether, by issuing Common Shares, plus US\$ cash equivalent to the value of any fractional Common Share, to repay its US\$ denominated indebtedness evidenced by the Convertible Debentures that were converted, the Taxpayer had a gain that was attributable to foreign currency fluctuations, within the meaning of subsection 39(2).

[86] As I have stated, the determination of whether the Taxpayer has made a foreign currency gain, for the purposes of subsection 39(2), requires a comparison of two amounts initially expressed in US currency: the amount of US\$ received by the Taxpayer upon the issuance of the indebtedness evidenced by the Convertible Debentures (the “Issuance Amount”) and the amount paid by the Taxpayer upon its repayment of such indebtedness (the “Repayment Amount”). By virtue of subsection 261(2), each of these two US\$ amounts must be converted into Canadian currency, using the applicable F/X rate, on the date upon which each such amount arose. If the Issuance Amount exceeds the Repayment Amount, then the Taxpayer will have a foreign currency gain, for the purposes of subsection 39(2).

[87] In this appeal, the parties agree that the Issuance Amount in respect of the indebtedness evidenced by the Convertible Debentures arose on the Issuance Date. However, as noted above, the parties disagree as to the nature of the second amount that is required to be translated into Canadian currency under paragraph 261(2)(b). Having determined that the Judge committed a reviewable error in interpreting the conversion provisions of the Indenture as including share subscriptions by Holders of Convertible Debentures who undertook Conversions and that the proper interpretation of those provisions is that Conversions constituted repayments of the indebtedness evidenced by the Convertible Debentures by the issuance of Common Shares and US\$ cash in respect of any fractional Common Share, it is my view that each Repayment Amount arose on the date of each such repayment, *i.e.*, on each Conversion Date. To this extent, I accept the Crown’s assertion that the foreign currency amount that relates to each such repayment “arose” on the date of each such repayment. However, the determination of when the Repayment Amount arose does not determine the quantum of the Repayment Amount.

[88] The parties agree that the Issuance Amount is approximately \$1,588 (being the C\$ equivalent of the US\$1,000 that the Taxpayer received upon the issuance of each Convertible Debenture). Similarly, both parties assert that the second foreign currency amount that was required to be translated into Canadian currency was also US\$1,000, but they disagree as to the nature of such amount and when it arose for the purposes of such translation.

[89] Having determined that the second foreign currency amount is the Repayment Amount, which is the amount paid or given up by the Taxpayer on the Conversions to repay the indebtedness evidenced by the Convertible Debentures, and that the Repayment Amount was paid by the issuance of Common Shares and US\$ cash to the extent of any fractional Common Share, I reject the parties' assertions that the Repayment Amount was US\$1,000 per Convertible Debenture. Holders of Convertible Debentures that were converted did not receive US\$1,000 per Convertible Debenture from the Taxpayer upon the Conversions.

[90] Given that the Repayment Amount is an "amount", for the purposes of paragraph 261(2)(b), in the absence of any indication in the Indenture as to how the quantum of the Repayment Amount must be determined, I would look to the definition of "amount" in subsection 248(1) for assistance. The relevant portion of that provision reads as follows:

Definitions

248.(1) In this Act,

...

amount means money, rights or things expressed in terms of the amount of money or the value in terms of money

Définitions

248.(1) Les définitions qui suivent s'appliquent à la présente loi.

[...]

montant Argent, droit ou chose exprimés sous forme d'un montant d'argent, ou valeur du droit ou de la

of the right or thing, except that, chose exprimée en argent. Toutefois :
... [...]

[91] If applicable, this definition may well have led me to conclude that the Repayment Amount was the “value” of the Common Shares issued upon the repayment of each Convertible Debenture. In this regard, it seems to me that the value of a Common Share on each Conversion Date may well have been an amount determinable by reference to the trading price of a Common Share on the NYSE or TSX on each such date because the Taxpayer could, in all likelihood, have received such an amount if it had undertaken a treasury offering of its Common Shares on each such date.

[92] In this context, the establishment of the value of a Common Share on each Conversion Date would likely require evidence as to the relationship between the trading price of the Common Shares and the price at which underwriters would agree to market such shares. In this regard, the practice might be to price the treasury shares at a discount to the trading price of such shares on the applicable market. An example of this may be seen in the Indenture, in which the value of Common Shares issued on Redemptions was stipulated to be 95% of the “Current Market Price” of the Common Shares, as defined in clause 1.1 of the Indenture.

[93] Fortunately, the terms and conditions of the Indenture provide an answer as to how the quantum of the Repayment Amount was intended to be determined. The resolution of this matter is assisted by clause 12.4 of the Indenture, which has been reproduced above.

[94] This provision of the Indenture stipulates that upon the Conversion of Convertible Debentures, no fractional shares will be issued. Instead, the Holder is entitled to cash equal to the “current market value of the fractional share”, which is stipulated as the amount of the fraction multiplied by the “Sale Price” of a Common Share on the Conversion Date (if a “Trading Day” as defined in clause 1.1 of the Indenture). For this purpose, “Sale Price” is defined in clause 1.1 of the Indenture by reference to the trading price of the Common Shares on the NYSE. Further, clause 1.1 of the Indenture stipulates that “cash” refers to US currency.

[95] The operation of clause 12.4 of the Indenture may be illustrated by way of an example. If a Holder owned a single Convertible Debenture, clause 12.4 of the Indenture would apply with the result that, upon the Conversion of that Convertible Debenture, such Holder would receive 71 Common Shares and a US\$ cash payment equal to the product of 0.429 times the “Sale Price” of a Common Share on the Conversion Date.

[96] Thus, the Indenture specifically provides a formula for the determination of the portion of the Repayment Amount that is represented by any fractional Common Share that would otherwise be issuable as partial repayment of the indebtedness evidenced by a Convertible Debenture upon its Conversion. In my view, it may be readily inferred that the parties intended that this formula would apply equally to the determination of the quantum of the balance of the Repayment Amount that was paid by the issuance of a whole number of Common Shares upon each Conversion.

[97] In my view, this approach is consistent with *Teleglobe* in that the question of what was given up by the Taxpayer, when it repaid its indebtedness evidenced by the Convertible Debentures by the issuance of Common Shares upon the Conversions, is determined by reference to the terms and conditions of the Indenture, which reflect the agreement of the Taxpayer and Holders of Convertible Debentures.

[98] My approach appears to bring about the same result as if the approach referred to above, in which the application of the definition of “amount” in subsection 248(1), had been used.

[99] More importantly, my approach is essentially the same approach taken by the Directors in the Value of Consideration for Share Issuance Resolution. When the Directors of the Taxpayer passed the Value of Consideration for Share Issuance Resolution, it appears that they were complying with subsection 23(4) of the OBCA, which reads as follows:

Value determined by directors

23.(4) The directors shall, in connection with the issue of any share not issued for money, determine,

(a) the amount of money the corporation would have received if the share had been issued for money; and

(b) either,

(i) the fair value of the property or past service in consideration of which the share is issued, or

(ii) that such property or past

Fixation de la valeur par les administrateurs

23.(4) Lors de l'émission d'une action contre un apport autre qu'en numéraire, les administrateurs établissent :

a) le montant que la société aurait reçu si l'action avait été émise contre un apport en numéraire;

b) et, selon le cas :

(i) la juste valeur des biens ou du service rendu qui sert d'apport,

(ii) le fait que la juste valeur de

service has a fair value that is not less than the amount of money referred to in clause (a).

ces biens ou de ce service rendu n'est pas inférieure à la somme d'argent visée à l'alinéa a).

[100] Having adopted the language of this provision of the OBCA in the Value of Consideration for Share Issuance Resolution, at least in part, it is apparent that the Directors were of the view that when the Taxpayer issued Common Shares on the Conversions, the consideration received by it for the issuance of those Common Shares was not money. Indeed, the Value of Consideration for Share Issuance Resolution provides that the consideration for the issuance of Common Shares on Conversions was the consideration that each Holder gave to the Taxpayer as stipulated in the Indenture.

[101] Under my interpretation of the conversion provisions of the Indenture, each Holder gave up such Holder's right to receive US\$1,000 per Convertible Debenture, in cash, at Maturity, along with all of such Holder's other rights under the Indenture, when the indebtedness of the Taxpayer to such Holder was repaid upon each Conversion. Thus, the relinquishment of such rights constituted the consideration given by each Holder to the Taxpayer for the issuance of 71 Common Shares per Convertible Debenture plus the US\$ cash payment in lieu of a fractional Common Share.

[102] The Value of Consideration for Share Issuance Resolution then goes on to address paragraph 23(4)(b) of the OBCA and contains the Directors' determination that the fair value of the consideration receivable by the Taxpayer for the issuance of 71 Common Shares per Convertible Debenture "is not less than the amount of money" that the Taxpayer would have received if it had issued such shares for money, rather than the rights relinquished by each

Holder on the Conversions. In my view, this amount of money is essentially the same as the “Sale Price” of a Common Share, as defined in clause 1.1 of the Indenture.

[103] Applying the approach to the determination of the Repayment Amount that is, in my view, provided for the Indenture, it follows that the Repayment Amount in respect of each Convertible Debenture was, in essence, the US\$ amount determined when the “Sale Price” of a Common Share, on each Conversion Date, as determined for the purposes of clause 12.4 of the Indenture, was multiplied by 71.429.

[104] The resulting US\$ amount would then be converted to C\$, in accordance with subsection 261(2) on each Conversion Date, and the determination of whether the Taxpayer made a gain, for the purposes of subsection 39(2), would be made by comparing the C\$ amount, so determined, with \$1,588, the C\$ amount received by the Taxpayer on the Issuance Date. This calculation would be required with respect to each Conversion, as the Repayment Amounts would not necessarily be identical in respect of all Conversions. If the Repayment Amount in respect of any particular Conversion is less than the related Issuance Amount, the Taxpayer would have a gain, for the purposes of subsection 39(2), in respect of that Conversion.

VII. DISPOSITION

[105] For the foregoing reasons, I would allow the appeal, set aside the judgment of the Tax Court of Canada and, rendering the decision that the Judge ought to have made, remit the matter back to the Minister for reassessment in accordance with these reasons.

[106] While the Crown is successful in that I would allow the appeal, the Reassessments will not stand, thus confirming the appropriateness of the Taxpayer's appeal to the Tax Court of Canada. Accordingly, on balance, I consider success to have been divided and, as such, I would order no costs here or below.

"C. Michael Ryer"

J.A.

"I agree
Johanne Trudel J.A."

"I agree
David Stratas. J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-532-14

(APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA FROM JUSTICE JUDITH WOODS, DATED NOVEMBER 4, 2014 (DOCKET NUMBER 2014 TCC 324)).

STYLE OF CAUSE: HER MAJESTY THE QUEEN v.
AGNICO-EAGLE MINES
LIMITED

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 26, 2016

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: TRUDEL J.A.
STRATAS J.A.

DATED: APRIL 26, 2016

APPEARANCES:

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