Federal Court of Appeal  Cour d'appel fédérale

Date: 20200218

Docket: A-335-18

Citation: 2020 FCA 47

CORAM: **NOËL C.J.**
RENNIE J.A.
RIVOALEN J.A.

BETWEEN:

BAREJO HOLDINGS ULC

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on November 13, 2019.

Judgment delivered at Ottawa, Ontario, on February 18, 2020.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: RENNIE J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal brought by Barejo Holdings ULC (the appellant) from an order of the Tax Court of Canada (2018 TCC 200) wherein Boyle J. (the Tax Court judge) answered a preliminary question pursuant to a motion made jointly by the appellant and the Crown under Rule 58 of the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a.

[2] At issue is whether two contracts—styled as "Notes"—were debt for purposes of paragraphs 94.1(1)(*a*) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the Act) during the appellant's 2010 taxation year, even though the amounts to be paid thereunder were unknown and would remain so until a later year when the Notes would come to term. The Tax Court judge answered this question in the affirmative holding that in order for a debt to exist under this provision, it suffices that the amounts be ascertainable when payment becomes due.

[3] The appellant contends that in so holding, the Tax Court judge failed to have regard to the well-established legal meaning of the word debt, according to which a debt does not arise unless and until the amount to be paid is known or ascertainable.

[4] The Crown maintains that the word debt is capable of a variety of meanings and takes the position that the Notes were debt even though the amounts to be paid would only be ascertainable in a later year when payment becomes due.

[5] For the reasons which follow, I agree with the Crown that the word debt is capable of a variety of meanings and that a textual, contextual and purposive analysis of paragraph 94.1(1)(*a*) supports the conclusion that the Notes were debt under this provision during the taxation year in issue even though the amounts to be paid remained to be ascertained at the time. I therefore propose that the appeal be dismissed.

[6] The provisions of the Act that are relevant to the analysis are reproduced at the end of the reasons.

FACTS

[7] The factual background against which the question was posed is set out in an Agreed Statement of Facts. Of significance for present purposes is the following information:

- At all relevant times, the appellant was a Canadian-controlled private corporation;
- The appellant held shares of Saint-Lawrence Trade (SLT), an open-ended investment company incorporated under the laws of the British Virgin Islands;
- SLT was a non-resident of Canada and was, at all relevant times, a controlled foreign affiliate (CFA) of the appellant;
- The predecessor of SLT was GAM Diversity Inc. (GD);
- Like SLT, GD was an open-ended investment company;
- The assets of GD were managed by Global Asset Management (GAM), a professional hedge fund manager.

[8] Because of anticipated legislative changes in Canada, GD was reorganized on November 30, 2001. For this purpose, the following steps were undertaken:

- Non-Canadian shareholders exchanged their shares in GD for shares in newly-incorporated GAM Global Diversity Inc. (Global);
- The GD assets notionally attributable to the common shares held by non-Canadian shareholders were transferred to Global;
- The name of GD was changed to SLT;
- SLT sold a one-half undivided co-ownership in the remaining assets to each of Scotiabank (Ireland) Limited (SIL), a non-resident affiliate of The Bank of Nova Scotia (BNS), and TD Global Finance (TDGF), a non-resident affiliate of Toronto Dominion Bank (TD);

- Using the proceeds of the sale, SLT acquired the Notes, one from each of Bank of Nova Scotia International Limited (BNSI), a non-resident subsidiary of BNS, and Toronto Dominion International Inc. (TDII), a non-resident subsidiary of TD.

[9] The BNSI Note and the TDII Note (together, the Notes) were each purchased by SLT on November 30, 2001 for a price of USD 498 million representing the Reference Assets Net Asset Value at the time (BNSI Note and the TDII Note, Appeal Book, Vol. 3, respectively pp. 511 and 553). Their salient features are the following:

- They are governed by the laws of the England;
- The Reference Assets comprise of interests in a group of professionally managed hedge fund investments employing a variety of investment techniques and strategies;
- The Reference Assets Net Asset Value is equal to the amount by which the actual value of the Reference Assets exceeds certain specified liabilities, which are chargeable against the Reference Assets;
- The Reference Assets, regardless of the actual owner thereof, are required to be managed by GAM pursuant to the terms of the Reference Assets Management Agreement (RAMA);
- The composition of the Reference Assets constantly fluctuates over time, reflecting dispositions and acquisitions of hedge fund investments by GAM. The Reference Assets Net Asset Value, in turn, constantly fluctuates over time, depending on both the composition and the performance of the individual hedge fund investments;
- GAM calculates the Reference Assets Net Asset Value on each Monday, with the exception of public holidays, on an aggregate and per investment basis;
- The “Maturity Date” of each Note is the “Stated Maturity Date” of November 30, 2016 or, if applicable, the “Early Termination Date”;
- The “Early Termination Date” is the date on which any cure period, notice period or extension period expires in connection with an “Early Termination Event” (namely, SLT may terminate the Notes if the credit rating of the Canadian parents of the issuing banks falls below certain thresholds, if material adverse changes in tax laws occur in any country impacting SLT or the majority of its shareholders, and if, for any reason whatsoever, it provides a prior notice of not less than 367 days to the issuing banks);

- The amounts payable in settlement of the Notes upon maturity or early termination is an amount reflecting the value of the Reference Assets at that time, or in certain cases, the sales proceed of their orderly disposition;
- The obligations of the issuer under the Notes are each guaranteed by BNS and TD, respectively;
- Upon request, SIL provides shareholders of SLT with a put facility equal to the purchase price of all or a portion of its shares.

[10] The key feature of the Notes to keep in mind is that after they were purchased, their value was derived from the value of the Reference Assets, which was in constant flux. As a result, the amounts to be paid under the Notes were unknown and would remain so until maturity or early termination.

JUDICIAL HISTORY

[11] This is the second question to reach this Court in this matter. In order to understand how it arose and the reasons given by the Tax Court judge in disposing of it, it is necessary to review the proceedings to date.

[12] A first question was answered by the Tax Court judge in 2015 (*Barejo Holdings ULC v. The Queen*, 2015 TCC 274, [2015] D.T.C. 1216 [*Barejo* 2015]) after the Minister of National Revenue (the Minister) reassessed the appellant for its 2004 through 2010 taxation years to include in the computation of its income distinct amounts, two of which are related to the appellant's interest in SLT.

[13] The reassessments were issued pursuant to the Foreign Accrual Property Income (FAPI) regime as well as the Offshore Investment Foreign Property (OIFP) rules. Under the FAPI regime, Canadian taxpayers are attributed their proportionate share of income earned by a controlled foreign affiliate (CFA). Because SLT was a CFA of the appellant, it had to pay tax on its FAPI, if any. The OIFP rules have a similar effect in that they impute income to Canadian taxpayers who hold property contemplated by those rules through a non-resident entity that is not a CFA. Initially, the Minister invoked both subsections 91(1) and 95(1). Specifically, it relied on element A of the formula provided in subsection 95(1) pertaining to interest income and element C which modifies subsection 94.1(1) to allow for its application where foreign investment property is held through a CFA rather than by the taxpayer directly. Insofar as the OIFP inclusions are concerned, the Minister invoked subsection 94.1(1) on its own.

[14] By the time the first question was argued before the Tax Court judge, only the 2010 taxation year remained in play and the Minister had abandoned its reliance on element A of subsection 95(1). As explained in greater detail in paragraphs 76 and 77 of these reasons, of sole relevance was whether an amount was to be included in the income of SLT pursuant to section 94.1, as modified by element C of the formula set out in subsection 95(1). That is, if SLT holds an interest in an OIFP and the other requirements found in paragraph 94.1(1) are met, the appellant will be attributed its proportionate share of SLT's income under the FAPI regime for the 2010 taxation year. In turn, this requirement can only be met if, pursuant to paragraph 94.1(1)(*a*), the two Notes held by SLT are "debt" ("créance" in the French text), for purposes of this provision.

[15] Even though this was the only question to be decided (*Barejo* 2015, para. 4), the parties persisted in asking the Tax Court judge to answer a broader question:

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

[16] The Tax Court judge had numerous concerns about the broad nature of this question. Before answering it, he made extensive comments regarding the scope of the answer that he was prepared to give (*Barejo* 2015, paras. 5-13).

> [5] The Court's answer will only address whether the Notes in question are debt for the purposes of the *Act*. There are certain limitations, constraints and qualifications which need to be clearly set out before continuing.
>
> [6] The key constraint, limitation or qualification on the Court's ability to answer the reference question as framed is that it asks if the Notes are debt for purposes of the *Act*.
>
> [7] Firstly, to answer such a broad question it would be necessary to presume or to be satisfied that the word debt, and similar words such as indebtedness, debtor, debt obligation, et cetera, has the same meaning in each of the many provisions of the *Act* in which it is used without being defined. That is not necessarily the case. It is certainly possible that there may be some differences to the meaning of the term, depending upon the surrounding text and overall context of a particular provision or régime in the *Act*. The Court does not herein propose to preclude that as a possibility.
>
> [8] Secondly, as a general principal, the provisions of the *Act* apply to transactions, Notes and relationships that are most often the subject of provincial legislative jurisdiction. The proper characterization of a commercial, contractual, business, work, or family relationship for purposes of the application of the federal Act will generally need to be determined in accordance with, or least after considering, the provincial law applicable to the relationship or transactions.
>
> [9] This limitation is compounded by the fact that Canada is a bijural common-law/civil law country and, in this case, the Appellant has some direct or indirect connections to the province of Quebec.

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

[17] Having expressed these limitations, the Tax Court judge went on to hold that (*Barejo* 2015, para. 129):

> […] the core essential characteristics of debt generally for purposes of the *Act* are:
>
> (i) an amount or credit is advanced by one party to another party;
>
> (ii) an amount is to be paid or repaid by that other party upon demand or at some point in the future set out in the agreement in satisfaction of the other party's obligation in respect of the advance;
>
> (iii) the amount described in (ii) is fixed or determinable or will be ascertainable when payment is due; and
>
> (iv) there is an implicit, stipulated, or calculable interest rate (which can include zero).
>
> [Citations omitted.]

According to the third characteristic, the amount to be paid need only be ascertainable when payment is due and, as the Notes were otherwise found to bear the other characteristics, the Tax Court judge held that they were debt for purposes of the Act (*Barejo* 2015, para. 133).

[18] In reaching this conclusion, he again made it clear that his reasons were not to be read as holding that the Notes were debt for the purpose of any specific provision of the Act (*Barejo* 2015):

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

[19] The appellant brought an appeal against the Tax Court judge's decision that the Notes were debt for purposes of the Act as a whole. In disposing of the appeal, this Court refused to assess the correctness of the answer given by the Tax Court judge because nothing turned on it in the underlying appeals. The only outstanding issue before the Tax Court was whether the Notes were debt for purposes of paragraph 94.1(1)(*a*), and the Tax Court judge made it clear that this was not the question that he answered. Moreover, there were no statutory parameters against which the correctness of the general answer that he gave could be assessed as no statutory consequence of any sort flowed from the finding that the Notes are debt for purposes of the Act as a whole. Given this, the Court held that dwelling on the Tax Court judge's extensive analysis would be a pointless exercise (*Barejo Holdings ULC v. Canada*, 2016 FCA 304, [2016] D.T.C. 5139, paras. 12-15).

[20] After the appellant's leave to appeal to the Supreme Court from this decision was denied (37425 [June 22, 2017]), the parties went back before the Tax Court judge and put to him the question that needed to be answered:

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

[21] The Tax Court judge agreed to answer this second question on terms that it was open to him to decide that the word "debt" for purposes of paragraph 94.1(1)(*a*) has the same meaning as that ascribed in *Barejo* 2015. He also indicated that his answer would be given on the basis that the common law and the civil law are equally applicable in ascertaining the meaning of the word debt (Order of the Tax Court dated June 21, 2018 authorizing the second question, Appeal Book, Vol. 1, p. 166). This brings a useful precision to the applicable Canadian law in light of the Tax Court judge's earlier findings in *Barejo* 2015, at paragraph 12, that although the Notes are governed by the laws of England, Canadian law is presumed to apply as no evidence was adduced as to the state of the English law.

DECISION UNDER APPEAL

[22] The Tax Court judge answered the second question by incorporating his reasons in *Barejo* 2015 into his second decision (*Barejo Holdings ULC v. The Queen,* 2018 TCC 200, [2018] D.T.C. 1144 [*Barejo* 2018]), and by confirming that the general answer that he gave in response to the first question was his "complete answer" to the second question (*Barejo* 2018, paras. 13-14, 25).

[23] Although he made a few comments specific to section 94.1 and its purpose (*Barejo* 2018, paras. 17-18), he discounted these after noting that the parties made no submissions on the text, context and purpose of section 94.1. He added, without conducting the prerequisite analysis, that any use that could be made of the text, context and purpose of section 94.1 was not obvious to him

(*Barejo* 2018, para. 20). He did not say why he came to this view except to explain earlier on that (*Barejo* 2018, para. 9):

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

[24] We are left with a decision that ostensibly settles the meaning of the word debt for purposes of paragraph 94.1(1)(*a*) without the benefit of a textual, contextual and purposive analysis of this provision.

COURT'S DIRECTION

[25] Before us, neither party saw fit to address this shortcoming and look into the text, context and purpose of paragraph 94.1(1)(*a*). As a result, the Court issued the following direction shortly before the hearing of the appeal:

> DIRECTION
>
> The question to be resolved in this case turns on the meaning to be given to the word "debt" as it appears in paragraph 94.1(1)(*a*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). As stated in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, at paragraph 47:
>
> > [i]n order to reveal or resolve any latent ambiguities in the meaning of provisions of the Income Tax Act, the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation.
>
> As this is an exercise that must be conducted, the parties are invited to make submissions on the text, context and purpose of paragraph 94.1(1)(*a*) […]

[26] The initial submissions made by the parties in their respective memorandum of fact and law, as well as the text, context and purpose submissions received further to this direction, are summarized below.

POSITION OF THE APPELLANT

[27] The appellant's primary argument focusses on the third core essential characteristic identified in *Barejo* 2015. It contends that the Tax Court judge erred in holding that the Notes are debt under paragraph 94.1(1)(*a*), even though the amounts to be paid are unknown and will only be ascertained in the later year when payment becomes due. In support of this contention, the appellant asserts in succession that in the absence of a statutory definition, the term debt must be given its legal meaning; that under commercial law, the definition of debt requires that the sum payable be certain or readily reducible to a certainty; and that, since it is impossible to ascertain the amounts to be paid under the Notes prior to maturity, they do not qualify as debt.

[28] In support of the first proposition, the appellant relies on the decisions of the Supreme Court in *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915, para. 31 [*Will-Kare*] and *Backman v. Canada*, 2001 SCC 10, [2001] 1 S.C.R. 367, para. 17 [*Backman*]. Both stand for the proposition that in order to determine the meaning of an undefined legal term under the Act, reference must be made to its meaning pursuant to commercial law (Memorandum of the Appellant, para. 32).

[29] Adopting this approach, the appellant, citing *Diewold v. Diewold*, [1941] S.C.R. 35, 1 D.L.R. 561, at p. 39 [*Diewold*] and Professor Dunlop in *Creditor-Debtor Law in Canada*,

2nd ed. (Toronto: Carswell, 1994) (Dunlop), at page 16, contends that the only accepted meaning of the word debt pursuant to commercial law is "an obligation to pay a sum certain or a sum readily reducible to a certainty" (Memorandum of the Appellant, paras. 2, 33-38). The appellant further maintains, relying on language used in a line of jurisprudence cumulating with the decision of the Manitoba Court of Appeal in *Ste. Rose & District Cattle Feeders Co-op v. Geisel*, 2010 MBCA 52, 319 D.L.R. (4th) 694 [*Ste. Rose*], that a distinction must be made between "debt" and "liability", the former having a narrower meaning that requires that the amount to be paid be ascertainable prior to maturity. According to the appellant, the Notes gave rise to a liability in 2010, but not a debt (Memorandum of the Appellant, paras. 47-50).

[30] Given the Tax Court judge's finding that the amount due under the Notes was not known or ascertainable during the taxation year in issue, the appellant argues that he was bound to hold that the Notes did not qualify as debt in the hands of SLT.

[31] Finally, the appellant submits that the general conclusion reached by the Tax Court judge provides a full answer to the second question as there is no reason to define debt differently for purposes of paragraph 94.1(1)(*a*). In this respect, it "gratefully adopts" the Tax Court judge's conclusion that looking into the text, context and purpose of paragraph 94.1(1)(*a*) would not alter the outcome one way or the other (Memorandum of the Appellant, para. 39 citing *Barejo* 2018, para. 20).

[32] Before concluding its submissions, the appellant repeats at paragraph 62 of its memorandum the argument that was at the forefront of its case before the Tax Court judge. It

reiterates that the Notes are effectively a gamble because "[t]he essence or substance of this arrangement is not a creditor-debtor relationship, but rather a speculation with no ceiling for the potential rewards and no floor for the potential losses". The appellant contends that this gamble was such that not only was it impossible to determine the amount that would be payable, there was also a possibility that the Note holder might have nothing to claim at maturity if the Reference Assets lost all their value.

- *Text, Context and Purpose Submissions*

[33] The appellant reiterates that the word debt, being undefined, must receive its ordinary legal meaning. In contrast, the term "non resident-entity" is defined under paragraph 94.1(1)(*a*) "to capture all manner of entities" (Appellant's Text, Context and Purpose Submissions, para. 8). Had Parliament wished to expand the meaning of the word debt in the way proposed by the Tax Court judge, it would have proceeded in the same way.

[34] As to the context of section 94.1, the appellant points to the fact that Parliament uses the expression "other obligation" to pay an amount in a number of provisions in juxtaposition with the term debt (or indebtedness) which suggests that not every obligation to pay an amount is a "debt". One category of portfolio investments listed in paragraph 94.1(1)(*b*)—"indebtedness or annuities"—would also lead to a certain degree of redundancy, since the total amount paid pursuant to a life annuity would fall under the Tax Court judge's definition of "debt". Finally, the appellant relies on a statement made in *obiter* in *Gerbro Holdings Company v. Canada*, 2016 TCC 173, [2016] D.T.C. 1165 [*Gerbro*], aff'd 2018 FCA 197, at paragraph 124, to the effect that "cash-settled derivatives" would not "fit snugly" into the categories of portfolio investments

listed in paragraph 94.1(1)(*b*). The appellant seizes on this to argue that the Notes, because of their nature, are not debt for purposes of paragraph 94.1(1)(*a*).

[35] Lastly, the appellant argues that as the purpose of section 94.1 is to achieve capital export neutrality, a determination that the Notes are debt within the meaning of paragraph 94.1(1)(*a*) would defeat this objective because had the Notes been issued by a Canadian chartered bank and held directly by a Canadian taxpayer, no inclusion would result.

POSITION OF THE CROWN

[36] The Crown relies on a different line of jurisprudence which also deals with the legal meaning of debt, and submits that the definition proposed by the appellant is overly narrow. It adopts as its own the Tax Court judge's conclusion that the word debt has a meaning which extends to a right to claim an amount that becomes known when payment is due, and submits that this was the intended meaning when paragraph 94.1(1)(*a*) was enacted (Memorandum of the Crown, paras. 30-42).

[37] The Crown adds that the position advanced by the appellant in dealing with the second question is based on "shifting sands". In addressing the first question, the appellant maintained that the Notes were derivative instruments akin to a gamble with no predictable outcome. The appellant now relies on the distinction between the "debt" and "liability" and argues that during the year in issue, the Notes were a liability which had yet to mature into a debt. According to the Crown, the distinction now drawn between "debt" and "liability" is more closely connected to

contingency claims in the context of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and has no application here (Memorandum of the Crown, paras. 47-48).

- *Text, Context and Purpose Submissions*

[38] The Crown argues that in enacting section 94.1, without defining the word debt, Parliament intended to capture any manner of debt. Had it wished to restrict the meaning, it would have used a more specific expression such as "exigible debt or liquidated debt". This is consistent with a series of judicial pronouncements rejecting the notion that "financial instruments cannot be qualified as debt prior to maturity" (Crown's Text, Context and Purpose Submissions, para. 6). For example, in *Heffer v. Kokatt*, 1918 CanLII 154 (SK CA), 42 D.L.R. 322 [*Heffer*], it was held that an action to recover a payment reflecting the market price for hay at the due date is an action for debt even though the amount payable was incapable of being ascertained before then as the terms of the agreement furnished the means to determine this amount (Crown's Text, Context and Purpose Submissions, para. 9 citing *Heffer*, para. 21).

[39] Insofar as context is concerned, the Crown contends that the other types of property listed in paragraph 94.1(1)(*a*) are targeted even though their value fluctuates over time. The fluctuating nature of the portfolio investments listed in paragraph 94.1(1)(*b*) supports the conclusion that Parliament contemplated that the value of the types of property mentioned in paragraph 94.1(1)(*a*) would vary until maturity. Lastly, while the definition of debt is broad, Parliament limited the application of section 94.1 by including other thresholds such as the requirement that the OIFP derives its value from the listed portfolio investments and that its acquisition be tax motivated.

[40] As for the purpose of section 94.1, the Crown insists on its anti-avoidance nature. In *Walton v. The Queen* (1998), [1999] 1 C.T.C. 2105, 98 D.T.C. 1780, the Tax Court held that the purpose was to prevent the use of offshore investment funds to achieve an indefinite deferral of tax on passive income. In *Gerbro*, the Tax Court insisted on the global objective which was to ensure capital export neutrality. These goals cannot be achieved if the word debt is given the narrow meaning advocated by the appellant.

[41] The Crown adds that there is no factual basis for the appellant's novel position that the Notes are "cash-settled derivatives" of the type referred to in *Gerbro*. It points to the Agreed Statement of Facts, which does not allude to this.

[42] Finally, the Crown challenges the appellant's contention that the tax deferrals achieved by the shareholders of SLT would also have resulted if instead a Canadian taxpayer and a Canadian chartered bank had been direct parties to the Notes. It points out that in contrast with the foreign asset manager, the transactions made by the Canadian bank in managing the assets in Canada would have attracted tax.

ANALYSIS

[43] The narrow issue which arises on appeal is whether it was open to the Tax Court judge to hold that the Notes can be labelled as debt for the purposes of paragraph 94.1(1)(*a*) during the appellant's 2010 taxation year even though the amounts to be paid thereunder were unknown at that time and could not be known until a later year when payment becomes due.

[44] The answer to this question turns on the meaning to be given to the word debt under paragraph 94.1(1)(*a*), and whether the Notes come within this meaning. The Tax Court judge's finding that the Notes bear the essential core characteristics of a debt for purposes of this provision involves a two step process that gives rise to a question of mixed fact and law reviewable only if a palpable and overriding error is shown to have been made. However, whether he properly identified these essential characteristics gives rise to an extricable question of law reviewable on a standard of correctness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para. 37; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, paras. 33-35).

[45] The particular feature of the Notes that underlies the debate is easily understood. During the taxation year in issue, the amounts ultimately payable under the Notes were unknown and not reducible to certainty due to the fluctuation of the value of the Reference Assets. That said, the value of the Reference Assets was calculated weekly so that the value of the Notes was known at all times.

[46] Counsel for the appellant insisted during the hearing that what was unknown before the due date was not only the amount to be paid under the Notes, but whether the issuing banks would have any obligation to pay. The argument as I understand it is that a market downturn could realistically have wiped out the total value of the Reference Assets thereby doing away with the obligation of the issuing banks to pay anything under the Notes at maturity or upon early termination.

[47] The fact that the Notes were a gamble which could result in there being no obligation to pay anything at the due date was at the forefront of the appellant's case before the Tax Court judge in *Barejo* 2015 (Appellant's Concise Statement of Facts and Law, Appeal Book, Vol. 1, p. 189, paras. 45-46; Appellant's Notes of Argument before the Tax Court, Appeal Book, Vol. 2, p. 225, paras. 21, 31 and 38). He nevertheless found that "[u]pon maturity, there is a payment obligation" under the Notes and that the second essential characteristic of a debt—an amount is to be paid or repaid at some point in the future—was accordingly present (*Barejo* 2015, para. 133(ii)). This finding, which required the Tax Court judge to apply the legal test to the facts (*Barejo* 2015, para. 44), was made one year before the maturity date and no evidence of any sort was adduced suggesting that the value of the Reference Assets had collapsed or were about to lose the totality of their value. It is obvious that no such scenario was established in the eyes of the Tax Court judge.

[48] Indeed none could be. We are dealing here with multi-million dollar funds each initiated by a USD 498 million infusion, managed by professionals equipped with the methods and means to anticipate and safeguard against declining markets. In this regard, I need only take judicial notice of the 2007-2008 global downturn and the fact that despite this downturn, the Reference Assets actually grew in value from $1,546,000,000 at December 31, 2005 to $1,655,000,000 and $1,718,000,000 at December 31, 2008 and 2009 respectively (Financial Statements of SLT for the years ended December 2005 and 2009, Appeal Book, respectively Vol. 4, p. 790 and Vol. 5, p. 809).

[49] During the hearing, counsel for the appellant alluded to the Lehman Brothers bankruptcy in 2008 and argued that the issuing banks could have suffered the same fate. Recognizing that nothing is impossible, this is insufficient to put into question the financial capacity of the issuing banks to discharge their obligations under the Notes. Some evidence of financial frailty would be required, particularly as the Notes were guaranteed by the Canadian parents of the issuing banks. Even if this did not suffice, SLT was protected from a major collapse by reason of the early termination clause which allowed it to terminate the Notes if the credit rating of the Canadian parents fell below specified risk rating.

[50] Neither the existence of an obligation to pay nor the financial capacity of the issuing banks to discharge this obligation were ever in doubt on the facts of this case.

[51] This leaves us with the undisputed fact that the exact amounts to be paid under the Notes were unknown in 2010 and would remain unknown until the due date, by reason of the fluctuating nature of the Reference Assets. In discussing whether this precludes the existence of a debt, the parties have, from the beginning, focused on the absence of a statutory definition of the word debt. Both agreed that because the term is undefined, its legal meaning pursuant to commercial law prevailed. However, each relied on different decisions and disagreed on the appropriate legal meaning.

[52] The parties also proceeded on the assumption that the meaning of debt is the same throughout the Act regardless of the provision in which this word is used (Memorandum of the Appellant, para. 39; Memorandum of the Crown, para. 31). The presumption of consistent

expression supports this approach (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. [Markham: LexisNexis Canada, 2014] at pp. 363-367 [Sullivan] commenting on *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378, 61 D.L.R. (4th) 725, at p. 1387).

[53] However, this presumption is not absolute. As explained in *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385, 89 D.L.R. (4th) 218, at page 400, "[u]nless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an act". That the same word can have a different meaning depending on the context in which it is used is particularly so when dealing with the Act, a statute known for its specificity and technical complexity (*Will-Kare*, para. 33). This case illustrates the importance of examining the particular provision in issue when dealing with the Act.

[54] The parties' generalist approach also appears to have been driven by a misinterpretation of the Supreme Court's jurisprudence. In *Backman*, and its concurrent case *Spire Freezers Ltd. v. Canada*, 2001 SCC 11, [2001] 1 S.C.R. 391 [*Spire Freezers*], the Court had to determine whether a foreign partnership could deduct losses pursuant to section 96 of the Act. While the Court stated the issue as "whether a valid partnership [had] been established for income tax purposes" (para. 1), in *Spire Freezers*, it specified at paragraph 17 (see also *Backman*, para. 17):

> [As] held in *Backman*, where a Canadian taxpayer seeks to deduct partnership losses through s. 96 of the Act, he or she must satisfy the essential elements of a partnership that exist under Canadian law. In other words, for the purposes of s. 96 of the Act, the essential elements of a partnership must be present, even in respect of foreign partnerships.
>
> [Citations omitted.]

Here, the Supreme Court makes it clear that the construction that it gave to the term "partnership" was for purposes of section 96; nowhere does it suggest that a word can be given a general meaning unrelated to the text, context and purpose of the provision in which it is used. Indeed, this is a mandatory exercise (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 [*Canada Trustco*]).

[55] In contrast with the word "partnership" which has a well-defined legislative meaning under provincial law (as does for instance the word "share" in paragraph 94.1(1)(*a*)), there is no single meaning of the word debt; it is capable of various definitions and the one which best reflects Parliament's intent can only be made apparent by a textual, contextual and purposive analysis of paragraph 94.1(1)(*a*) (*Canada Trustco*, para. 10; *Canada v. Cheema*, 2018 FCA 45, [2018] 4 F.C.R. 328, paras. 73-84). The appellant is rightfully grateful that the Tax Court judge saw no need to conduct this analysis because this furthers its efforts throughout to keep this provision out of the debate. However, when we move away from general discussions about the Act as a whole and focus on paragraph 94.1(1)(*a*)—as we must—the appellant's position becomes unsustainable. This is the issue to which I now turn.

- *Text*

[56] A word must be read in its immediate context, also referred to as its co-text (Sullivan, pp. 30-33). In subsection 94.1(1), the term debt appears in the following set of words: "an 'offshore investment fund property' […] is […] a share of […] an interest, or a debt of […] a non-resident entity […] that may reasonably be considered to derive its value, directly or indirectly, primarily from portfolio investments […] in shares […] indebtedness […] interests in […] funds or entities

[…] commodities […] real estate […] resource properties […] [foreign] currency […] options to acquire or dispose of any of the foregoing, […] or any combination of the foregoing".

[57] As can be seen, a simple reading shows that a debt of a non-resident entity, may derive its value from portfolio investments that fluctuate over time. It follows that excluding an instrument from the ambit of the word debt simply because the amount which can ultimately be claimed will only be known when the term expires would effectively mean that Parliament has spoken in vain in providing for a "debt […] that may reasonably be considered to derive its value […] from portfolio investments". In this respect, the appellant did not point to any situation where the word debt in paragraph 94.1(1)(*a*) could find application if, as it maintains, the right to claim an amount whose value fluctuates and will only become known at maturity cannot be a debt.

[58] It is also useful to consider the words with which the word debt is associated, i.e. "shares of" or "an interest in" a non-resident entity both of which refer to property that must also derive its value from the same portfolio investments. Based on the rule of interpretation applicable to associated words, two or more terms that have an analogous grammatical and logical function invites the reader to look at the common feature among the terms (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. [Markham: LexisNexis Canada, 2008], at p. 227, as cited by the Supreme Court in *Opitz v. Wrzesnewskyj*, 2012 SCC 55, [2012] 3 S.C.R. 76, para. 41). That common feature is the fluctuating value of the debt, share or interest as they must all derive their value primarily from portfolio investments that fluctuate.

[59] As will be seen when we come to the context and purpose analysis, subsection 94.1(1) was intended to prevent the deferral of income through the use of foreign investments in low tax jurisdictions, the accumulation of the proceeds and their reinvestment offshore. Targeting offshore investment property that derive its value from fluctuating assets as a basis for accruing income in the hands of the Canadian taxpayer during the holding period is the method used to achieve this goal. Construing the word debt so as to exclude an instrument because it derives its value from assets that fluctuate in circumstances where shares and interests qualify precisely because they derive their value from the same fluctuating assets defeats that objective and provides for an absurd result.

[60] The position adopted by the appellant in addressing the 2015 question was essentially that the Notes were derivative instruments that are a gamble on the fluctuating value of the Reference Assets (*Barejo* 2018, para. 19, footnote 2). According to the appellant, the essence of the relationship is not one of creditor/debtor, but rather speculation with no certainty as to the outcome until maturity or early termination (Appellant's Concise Statement of Facts and Law, Appeal Book, Vol. 1, p. 189, paras. 45-46; Appellant's Notes of Argument before the Tax Court, Appeal Book, Vol. 2, p. 225, paras. 31-34, and 38; see also Transcript of Submissions during the 2015 Hearing before the Tax Court, Appeal Book, Vol. 2, pp. 258-260).

[61] When confronted with the text of subsection 94.1(1), the appellant's argument loses its traction altogether since this provision contemplates in express terms that an instrument that derives its value from fluctuating portfolio investments can be a debt. It follows that the speculative nature of the Notes, and the resulting uncertainty as to the amount ultimately payable, cannot be

an obstacle. This may explain why before us the appellant shifted its position and now focuses on the distinction between debt and liability. Specifically, it argues that the Notes are a "liability" that will become "debt" at maturity or upon early termination (Memorandum of the Appellant, paras. 46-50). Based on this reasoning, the Notes would be debt, but only at maturity or upon early termination when the amounts due become known.

[62] The Tax Court judge did not address this debt/liability distinction as it was only mentioned parenthetically by the appellant to assert that "not all liabilities are debts". This assertion was made in response to the contention that the Notes are debt because they were shown as "liabilities" in the financial statements of the issuing banks (Appellant's Notes of Argument before the Tax Court, Appeal Book, Vol. 2, p. 225, para. 25). The Tax Court judge's reasons are therefore not helpful on this point. However, he did explain, more generally, that "[t]here is not a single, all purpose, all encompassing, and all limiting or circumscribing legal definition of debt in Canada" (*Barejo* 2015, para. 65). I endorse this conclusion and if anything, the new line of jurisprudence advanced by the appellant in support of its debt/liability distinction confirms this view.

[63] This line of jurisprudence begins with *J.D. McArthur Co. Ltd. v. Alberta and Great Waterways Railway Co.*, [1924] 2 D.L.R. 118 (Alta. App. Div.), a case about the relief of indebtedness in a commercial context, where Clarke J.A. of the Alberta Court of Appeal, concurring in the result, said at page 140:

> This term "liability" has a broader meaning than the term "debt", and has been interpreted as "the condition of being actually or potentially subject to an obligation, or, in a more special sense, as denoting inchoate, future, unascertained, or imperfect obligations as opposed to debts, — the essence of which is that they are generally ascertained and certain.

[64] This last passage was recently cited with approval by the Manitoba Court of Appeal in the context of bankruptcy proceedings in *Ste. Rose*, at paragraph 77. In addition, the appellant referred to *SemCanada Crude Oil Company (Celtic Exploration Ld. #2) (Re)*, 2012 ABQB 489, another bankruptcy case, where the Alberta Court of Queen's Bench held that "liability" is a broad term and "debt" a narrower one, which means a specific kind of obligation for a liquidated or certain sum (para. 33). Relying on the distinction drawn by these decisions, the appellant submits that the Notes do not qualify as debt until maturity.

[65] The meaning ascribed by these decisions is informed by their particular context and reflects one of a variety of meanings which have been given to the word debt over the years. This can be best illustrated by the exhaustive review conducted by the Quebec Court of Appeal in *Senza inc. c. Québec (Sous-ministre du Revenu)*, 2007 QCCA 1335, at paragraphs 83 to 94 [*Senza*]. At issue in that case was whether amounts to be paid to a financial institution pursuant to sale and lease back arrangements were debt for purposes of section 1136(1)(*e*) of the *Quebec Taxation Act*, C.Q.L.R., c. I-3., even though the payments were not exigible at the time. Adopting a broad meaning, inspired by the statutory context and purpose, the Quebec Court of Appeal confirmed that the amounts were debt under this provision despite their non-exigibility.

[66] Notably, the distinction between debt and liability is not made in the *Code Civil of Québec* (CCQ) under which an obligation with a suspensive term can exist prior to maturity,

without being exigible (article 1508 CCQ), and where the prestation that the debtor is bound to render to the creditor may relate to any property, even future property, provided that it is determinate as to kind, and determinable as to quantity (articles 1371, 1373 and 1374 CCQ). As to the meaning of the word "determinable", doctrinal authors explain that [TRANSLATION] "at first glance, the Code only requires the means of determining the quantity, by applying a sufficiently precise, objective rule that is provided for in the contract" (Didier Lluelles and Benoît Moore, *Droit des obligations*, 3rd ed. (Montréal: Éditions Thémis, 2018), § 1049.13).

[67] It follows that under civil law, a debt ("créance") may exist even if the future value of the prestation is uncertain prior to maturity, provided that it is precisely and objectively determinable based on the terms of the Contract. What matters is that the parties have eliminated any equivocation as to the amount to be paid on the due date. Such is the case here, and the relevance of the CCQ in addressing the issue at hand is particularly important as almost all the shareholders of SLT are Quebec residents (Application for Exemptive Relief, Appeal Book, Vol. 5 p. 956).

[68] At common law, the term "debt" is loosely used (Dunlop, pp. 11-16). The line of cases relied upon by the appellant can be contrasted with another trend illustrated by the decision of the Saskatchewan Court of Appeal in *Heffer*, at paragraph 21, where it was held that an action for debt can result from a contract "that by its terms, furnishes the means of ascertaining the amount due". This illustrates the wide range of possible meanings at common law. *Black's Law Dictionary* accounts for most of these meanings (Bryan A. Garner, *Black's Law Dictionary*, 8th ed. (Saint-Paul: Thomson West, 2004), pp. 432-433).

[69] In commercial law and insolvency law, a contingent debt is not presently fixed but may become fixed in the future with the occurrence of some event; an exigible debt is liquidated; a liquidated debt is an amount determined by agreement of the parties or by operation of law; a liquid debt is due immediately and unconditionally; and an unliquidated debt is one that has not been reduced to a specific amount, about which there may be a dispute. Understandably, all are debts, but each is characterised by different legal attributes depending on the legal context in which the term is used and the interests at play. To illustrate the point, the phrase "exigible debt" or "liquidated debt" would each be pleonasm when regard is had to the *Diewold* definition of debt advocated by the appellant, since this definition entails that a debt is both exigible and liquidated. As pointed out by the Court of Appeal of Quebec, this is a narrow definition drawn from the interpretation of the *Farmers' Creditors Arrangement Act, 1934*, S.C. 1934, c. 53, which is not necessarily appropriate when interpreting a tax statute (*Senza,* para. 115).

[70] One can see from this review that the Tax Court judge was on solid ground when he rejected the appellant's argument that there is a single, black letter law definition of the word debt in Canada. Courts have adopted different terminologies and given different meanings to the word debt and its analogs depending on the area of law and the particular context in which it is used. There is overwhelming jurisprudential support for the Tax Court judge's conclusion that there is no all-encompassing definition of that term.

[71] The issue therefore is which of the two competing meanings—a liability is distinct from a debt and does not become a debt unless and until the amount to be paid becomes known or is

reducible to certainty; or, it suffices that the amount to be paid be ascertainable when payment is due—best reflects Parliament's intention when regard is had to the text of paragraph 94.1(1)(*a*).

[72] As a matter of first impression, the definition proposed by the appellant would not make the words of subsection 94.1(1) totally redundant as it allows for the recognition of the Notes at maturity, when the amount to be paid becomes known. But even then, subsection 94.1(1) would have no application if SLT's fiscal year ends on November 30, a date which coincides with the initial reorganization which took place on November 30, 2001. This is because no income can be accrued under this provision unless a debt is held "at the end of a month in the year" and no such debt could be held as of the end of November 2016, if the Notes were settled by payment made on November 30 of that year, in conformity with section 5.1 of the Notes (BNSI Note and the TDII Note, Appeal Book, Vol. 3, respectively pp. 533 and 575). As a result, no debt would be held by SLT at any time during the year of maturity any more than during the prior years.

[73] If on the other hand, SLT's fiscal year coincides with its financial year end (December 31), SLT would have held a debt at the close of the month ending November 30, 2016, that is in one of the 180 months during which the Notes were in place.

[74] Either way, the result is that Parliament would have effectively spoken in vain in providing for a debt that derives its value from portfolio investments that fluctuate. When regard is had to the rule against redundancy (*Winters v. Legal Services Society*, [1999] 3 S.C.R. 160, 177 D.L.R. (4th) 94, para. 48) and section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, the meaning proposed by the appellant would have to be rejected on that account alone.

- *Context*

[75] The FAPI regime and the OIFP rules are part of subdivision I "Shareholders of Corporations Not Resident in Canada". Save for certain aspects that are not at play in this case (*Gerbro*, paras. 113-117), the regime and the rules are complementary. The present case provides a good illustration of the way in which they interact.

[76] For the taxation year in issue, two distinct amounts related to the appellant's interest in SLT were added into its income. As provided for under subsection 91(1), the first amount is equal to the appellant's pro rata share of SLT's FAPI, as defined in subsection 95(1). One component of FAPI, element C of the formula, corresponds to the amount that would be included if SLT were a Canadian resident to which 94.1(1) applied. The question therefore is whether SLT holds an interest in an OIFP in the form of a debt of a non-resident-entity—the Notes.

[77] The second amount included in the appellant's income for the year in issue resulted from the direct application of subsection 94.1(1) for the portion of its 2010 taxation year following January 31, when SLT ceased to be a CFA of the appellant. This inclusion is not tied to the Notes, but is rather based on the appellant's holding of an OIFP in the form of the shares of SLT. Although the direct application of subsection 94.1(1) is not impacted by the question we are called upon to answer, it serves to illustrate how the OIFP rules and the FAPI regime interact. Indeed, all other requirements being present, the imputed income under subsection 94.1(1) in the case of a taxpayer holding the OIFP directly, and 95(1) in the case of a taxpayer holding the same property through a CFA, is computed the same way given the direct application of subsection 94.1(1) in the first

case and the directed application of this provision under element C of subsection 95(1) in the other. In order to achieve this result, subsection 95(1) modifies the text of subsection 94.1(1) so as to bring within its scope an interest in an OIFP held by a CFA of a taxpayer. In this respect, section 94.1 operates as an anti-avoidance measure as it targets investments made through a non-resident entity that is not a CFA and that would, for that reason, escape the application of the FAPI regime. The OIFP rules consistent with the FAPI regime make it clear that income is intended to be accrued throughout the holding period.

[78] The precise circumstances that led to the creation of the OIFP rules are best encapsulated by Jinyan Li, Arthur Cockfield and J. Scott Wilkie in *International Taxation in Canada* (4th ed. [Markham : LexisNexis Canada, 2018], at p. 365):

> [T]hese rules establish a regime to determine whether a foreign vehicle should be treated as an investment and, if so, how a taxpayer's income from that investment should be measured for Canadian tax purposes <u>when, otherwise, it and the taxpayer's interest in it would exist outside the tax system unless and until actual distributions of foreign income were made to the investor or the investor sold the investment property.</u> [Emphasis added.]

[79] The appellant, in addressing the context of section 94.1, points to the fact that in a number of other provisions, Parliament uses expressions such as "other obligations" to pay an amount in juxtaposition with the word "debt" or "indebtedness" (subsection 15(2.16), 18(5), 80.01(4), 80.01(5.1), 80.1(5), 89(4) to (6), 89(8) to (10), 107.4(4), 128.1(2), etc.). This, according to the appellant, is the drafting technique used by Parliament to capture obligations broader than debt.

[80] However, Parliament expresses its intent in various ways, the most common and effective being the use of plain and explicit language. In this case, Parliament could not have been any clearer in bringing within the meaning of debt in paragraph 94.1(1)(*a*) a right to claim an amount that derives its value from portfolio investments that fluctuate. Indeed, Parliament was so clear that the words used would have to be ignored if effect was to be given to the appellant's contention.

[81] The appellant seizes on the statement made by the Tax Court in *Gerbro* according to which cash-settled derivatives such as swaps and contracts for differences "might not fit snugly" into the portfolio investments listed in subparagraphs 94.1(1)(*b*)(i) to (ix) (*Gerbro*, para. 124). It argues that likewise the Notes are "cash-settled derivatives" and that if they do not fit within paragraph 94.1(1)(*b*), it is hard to see how they are debt for purposes of paragraph 94.1(1)(*a*) (Appellant's Text, Context and Purpose Submissions, para. 12).

[82] Although, the Notes are, in a literal sense, cash-settled derivatives in that they derive their value from the underlying assets and are ultimately to be settled by cash payments, they are not the type of "cash-settled derivatives" referred to by the Tax Court in *Gerbro*. What the Tax Court referred to in *Gerbro* are forward contracts involving two parties who take converse positions as to the market price of the underlying asset at the close date. Under such a contract, not only is the amount to be paid unknown until the close date but equally unknown up to that time is which of the two parties will end up being debtor and creditor.

[83] The suggestion that the Notes are "cash-settled derivatives" of the type envisaged in *Gerbro* finds no support in the evidence and indeed is contrary to the Agreed Statement of Facts

which identifies the two issuing banks as the sole parties liable to make the respective payment under the Notes.

[84] In commenting on the context of paragraph 94.1(1)(*a*), the appellant lastly referred to the fact that the portfolio investments listed in paragraph 94.1(1)(*b)* include "annuities". According to the appellant, this reference would be redundant if the word debt in paragraph 94.1(1)(*b*) includes an instrument that allows the holder to claim an amount that only becomes known at the due date.

[85] In advancing this argument, the appellant fails to consider the defined meaning of the word "annuity" (subsection 248(1)) which includes periodic payments whether under a contract, will or trust. When regard is had to the first two characteristics of a debt identified by the Tax Court judge, which require that an amount be credited or advanced by the creditor to the debtor in the expectation of a payment or repayment, an annuity constituted by a gift made by way of a will or a trust would not be captured by the meaning ascribed to the word debt. Hence the need for a specific reference to annuities in subparagraph 94.1(1)(*b*)(ii).

- *Purpose*

[86] The fundamental objective behind both the FAPI regime and the OIFP rules is capital export neutrality, i.e., taxing capital appreciation in a similar way whether it results from Canadian or foreign investments (*Gerbro*, para. 111). Absent these, investments made through the use of foreign entities by Canadian taxpayers would only be taxable when income is distributed, as these foreign entities are non-residents earning income outside of Canada. As a result, tax would be deferred for Canadians investing abroad while the contrary holds true for investments made

through Canadian resident entities. The annual imputation of income while the foreign investments are in place has the effect of leveling the playing field. The appellant's proposed definition of debt would effectively keep the deferral in place.

[87] A more precise objective underlying section 94.1 is the prevention of deferral through the use of roll-up funds. Here again, the objective is to prevent the avoidance of the FAPI regime by interposing non-resident entities that are not CFAs.

[88] The appellant argued that the definition of debt advocated by the Crown would defeat the capital export neutrality objective behind the FAPI regime and the OIFP rules since no income inclusion would have taken place until maturity if the Notes had been issued by a Canadian chartered bank and had been held directly by a taxpayer in Canada (Appellant's Text, Context and Purpose Submissions, para. 15).

[89] There is no basis for this argument. Although counsel for the appellant questioned this point, there is no doubt that the transactions reflecting the ongoing disposition and acquisition of investments by the hedge fund manager, if conducted by a Canadian chartered bank, would have given rise to tax consequences pursuant to the Act, thereby affecting the return of the Reference Assets and the amount payable under the Notes (Agreed Statement of Facts, para. 28, Appeal Book, Vol. 2, p. 316). Based on the record, the application of subsection 94.1(1) advances capital export neutrality on the facts of this case.

- *Conclusion*

[90] In the end, the appellant's contention that a debt for purposes of paragraph 94.1(1)(*a*) does not exist unless and until the amount to be paid becomes known must be rejected as it would make the word debt redundant, require that the context be overlooked and defeat the purpose for which this provision was enacted. In contrast, the Crown's position gives effect to the text, acknowledges the context and advances the purpose for which subsection 94.1(1) was enacted.

[91] When regard is had to the text, context and purpose of paragraph 94.1(1)(*a*), a debt arises for purposes of this provision when an amount or credit is advanced by one party to another party; an amount is to be paid or repaid by that other party at some point in the future in satisfaction of the advance and this amount is fixed or determinable or will be ascertainable when payment is due. As these three conditions are present here—i.e. there was a USD 498 million advance made to each of the issuing banks, a resulting obligation on the part of the issuing banks to repay an amount equal to the value of the Reference Assets at maturity or upon early termination, and this amount was ascertainable with precision at the due date—this suffices to dispose of the appeal subject to two observations.

[92] The Tax Court judge found that a fourth characteristic must also be present in order for a debt to exist; i.e. there must be an implicit, stipulated, or calculable interest rate (which can include zero) (*Barejo* 2015, para 129(iv)). I agree with the Tax Court judge that the reference to interest in the Notes, even if zero is the amount to be considered for this purpose, can be indicative of a debt as loans are often described as "no interest" or "interest-free" (*Barejo* 2015, paras. 131 and 133(v)).

However, there is no requirement under the civil law or the common law, that there be an interest component in the amount to be paid or repaid in order for a debt to exist and nothing in subsection 94.1(1) suggest that interest must be present in order for a debt to exist under that provision. It follows that the fourth characteristic identified by the Tax Court judge is not essential.

[93] The Tax Court judge was also equivocal as to whether each of the characteristics that he identified had to be present in order for a debt to exist. He explained that "[a]ll of these core essentials may not need to be perfectly met in particular circumstances" (*Barejo* 2015, para. 130). This comment was likely prompted by the general nature of the question that he initially considered. However, when dealing with the word debt in paragraph 94.1(1)(*a*), only the first three characteristics identified by the Tax Court judge are relevant and all three must be present in order for a debt to exist under that provision.

DISPOSITION

[94] For the above reasons, I would answer the second question in the affirmative and dismiss the appeal with costs.

"Marc Noël"
Chief Justice

"I agree.
Donald J. Rennie J.A."

"I agree.
Marianne Rivoalen J.A."

ANNEX

***Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)**	***Loi de l'impôt sur le revenu*, L.R.C. 1985, c. 1 (5e supp.)**
PART I	**PARTIE I**
Income Tax	**Impôt sur le revenu**
DIVISION B	**SECTION B**
Computation of Income	**Calcul du revenu**
SUBDIVISION I	**SOUS-SECTION I**
Shareholders of Corporations Not Resident in Canada	**Actionnaires de sociétés ne résidant pas au Canada**
Amounts to be included in respect of share of foreign affiliate	**Sommes à inclure au titre d'une action dans une société étrangère affiliée**
91 (1) In computing the income for a taxation year of a taxpayer resident in Canada, there shall be included, in respect of each share owned by the taxpayer of the capital stock of a controlled foreign affiliate of the taxpayer, as income from the share, the percentage of the foreign accrual property income of any controlled foreign affiliate of the taxpayer, for each taxation year of the affiliate ending in the taxation year of the taxpayer, equal to that share's participating percentage in respect of the affiliate, determined at the end of each such taxation year of the affiliate.	**91 (1)** Dans le calcul du revenu pour une année d'imposition d'un contribuable résidant au Canada, il doit être inclus, relativement à chaque action qui lui appartient dans le capital-actions d'une société étrangère affiliée contrôlée du contribuable, à titre de revenu tiré de l'action, le pourcentage du revenu étranger accumulé, tiré de biens, de toute société étrangère affiliée contrôlée du contribuable, pour chaque année d'imposition de la société affiliée qui se termine au cours de l'année d'imposition du contribuable, égal au pourcentage de participation de cette action, afférent à la société affiliée et déterminé à la fin de chaque telle année d'imposition de cette dernière.
Offshore investment fund property	**Bien d'un fonds de placement non-résident**
94.1 (1) Where in a taxation year a taxpayer, other than a non-resident-	**94.1 (1)** Lorsque, au cours d'une année d'imposition, un contribuable,

owned investment corporation, holds or has an interest in property (in this section referred to as an "offshore investment fund property")

autre qu'une société de placement appartenant à des non-résidents, détient un bien ou a un droit sur un bien (appelé « bien d'un fonds de placement non-résident » au présent article) qui répond aux conditions suivantes :

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

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

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

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

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

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

(ii) indebtedness or annuities,

(ii) en créances ou en rentes,

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

(iii) en participations dans un ou plusieurs fonds ou organismes ou dans une ou plusieurs sociétés, fiducies, sociétés de personnes ou entités,

(iv) commodities,

(iv) en marchandises,

(v) real estate,

(v) en biens immeubles,

(vi) Canadian or foreign resource properties,

(vi) en avoirs miniers canadiens ou étrangers,

(vii) currency of a country other than Canada,

(vii) en monnaie autre que la monnaie canadienne,

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

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

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

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

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

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

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

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

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

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

that one of the main reasons for the taxpayer acquiring, holding or having the interest in such property was to derive a benefit from portfolio investments in assets described in any of subparagraphs 94.1(1)(b)(i) to 94.1(1)(b)(ix) in such a manner that the taxes, if any, on the income, profits and gains from such assets for any particular year are significantly less than the tax that would have been applicable under this Part if the income, profits and gains had been earned directly by the taxpayer, there shall be included in computing the

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

taxpayer's income for the year the amount, if any, by which

l'année l'excédent éventuel du total visé à l'alinéa f) sur le montant visé à l'alinéa g) :

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

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

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

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

is multiplied by

(ii) the quotient obtained when the prescribed rate of interest for the period including that month is divided by 12

(ii) le quotient de la division par 12 du taux d'intérêt prescrit pour la période comprenant ce mois;

exceeds

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

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

[…]

[…]

Definitions for this Subdivision

Définitions applicables à la présente sous-section

95 (1) In this Subdivision, […]

95 (1) Les définitions qui suivent s'appliquent à la présente sous-section. […]

foreign accrual property income of a foreign affiliate of a taxpayer, for any taxation year of the affiliate, means the amount determined by the formula

revenu étranger accumulé, tiré de biens S'agissant du revenu étranger accumulé, tiré de biens, d'une société étrangère affiliée d'un contribuable, pour une année d'imposition de la société affiliée, le montant calculé selon la formule suivante :

(A + A.1 + A.2 + B + C) – (D + E + F + F.1 + G + H)

(A + A.1 + A.2 + B + C) – (D + E + F + F.1 + G + H)

Where […]

où : […]

C is, where the affiliate is a controlled foreign affiliate of the taxpayer, the amount that would be required to be included in computing its income for the year if

(a) subsection 94.1(1) were applicable in computing that income,

(b) the words "earned directly by the taxpayer" in that subsection were replaced by the words "earned by the person resident in Canada in respect of whom the taxpayer is a foreign affiliate",

(c) the words "other than a controlled foreign affiliate of the taxpayer or a prescribed non-resident entity" in paragraph 94.1(1)(a) were replaced by the words "other than a prescribed non-resident entity or a controlled foreign affiliate of a person resident in Canada of whom the taxpayer is a controlled foreign affiliate", and

(d) the words "other than a capital gain" in paragraph 94.1(1)(g) were replaced by the words "other than any income that would not be included in the taxpayer's foreign accrual property income for the year if the value of C in the definition **foreign accrual property income** in subsection 95(1) were nil and other than a capital gain", […]

C lorsque la société affiliée est une société étrangère affiliée contrôlée du contribuable, le montant qui serait inclus dans le calcul du revenu de la société affiliée pour l'année si :

a) le paragraphe 94.1(1) s'appliquait au calcul d'un tel revenu;

b) les passages « gagnés directement par le contribuable » au paragraphe 94.1(1) étaient remplacés par « gagnés par la personne résidant au Canada pour qui le contribuable est une société étrangère affiliée »;

c) le passage « (autre qu'une société étrangère affiliée contrôlée du contribuable ou une entité non-résidente visée par règlement) » à l'alinéa 94.1(1)a) était remplacé par « (autre qu'une entité non-résidente visée par règlement ou une société étrangère affiliée contrôlée d'une personne résidant au Canada et dont le contribuable est une société étrangère affiliée contrôlée) »;

d) le passage « (autre qu'un gain en capital) » à l'alinéa 94.1(1)g) était remplacé par « (autre qu'un revenu qui ne serait pas inclus dans le revenu étranger accumulé, tiré de biens du contribuable pour l'année si la valeur de l'élément C de la formule figurant à la définition de **revenu étranger accumulé, tiré de biens** au paragraphe 95(1) était nulle et autre qu'un gain en capital) »; […]

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