Docket: 2013-4032(IT)G

BETWEEN:

JAMES S.A. MACDONALD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 13, 14, 15 and 16, 2017, at Toronto, Ontario

Before: The Honourable Justice Dominique Lafleur

Appearances:

Counsel for the Appellant:	James Bunting Elie Roth Stephen S. Ruby
Counsel for the Respondent:	Suzanie Chua

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2004, 2005, 2006 and 2007 taxation years is allowed, with costs to the Appellant, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Montreal , Quebec, this 8th day of August 2017.

"Dominique Lafleur"

Lafleur J.

Citation: 2017 TCC 157
Date: 20170808
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BETWEEN:

JAMES S.A. MACDONALD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lafleur J.

A. OVERVIEW.

[1] This appeal concerns the determination of the proper income tax treatment of various Cash Settlement Payments (as defined below) made by the Appellant, Mr. James S.A. MacDonald, in partial and final settlement of a Forward Contract (as defined below) under the *Income Tax Act*, RSC, 1985, c. 1 (5th supp.), as amended (the "Act"), during the 2004, 2005 and 2006 taxation years. Mr. MacDonald treated the Cash Settlement Payments made pursuant to the Forward Contract totaling $9,956,837 as being on income account under subsection 9(1) of the Act and claimed business losses in the aggregate amount of $9,936,149. The Minister of National Revenue (the "Minister") reassessed Mr. MacDonald on the basis that these payments were made on account of capital, and, therefore, resulted in capital losses. Also, as a result of the reassessment for the 2005 taxation year, the Minister reassessed Mr. MacDonald for the 2007 taxation year to delete a minimum tax carryforward credit on the basis that such carryforward was no longer available.

[2] The Appellant contended that the Forward Contract was an adventure or concern in the nature of trade, being a pure speculation. The Forward Contract was a bet against the price of the Bank of Nova Scotia (the "BNS") common shares (the "BNS shares"). Furthermore, the Forward Contract could only be

cash settled and did not involve the transfer of shares. Accordingly, any payment made under the Forward Contract was on income account and the resulting losses were business losses. It is only if the Forward Contract was considered a hedge of a capital asset that the Cash Settlement Payments and the resulting losses could be converted into a capital payment and capital losses for Mr. MacDonald. However, it is clear that Mr. MacDonald's intention in entering into the Forward Contract was to profit in the short-term in the decline of the price of the BNS shares and was not to hedge his BNS shares. Furthermore, there are no links as to both timing and quantum between the Forward Contract and the BNS shares or any other capital assets owned by Mr. MacDonald. Accordingly, the Cash Settlement Payments were on income account and the resulting losses were business losses to Mr. MacDonald.

[3] The Respondent submitted that Mr. MacDonald entered into the Forward Contract to hedge the BNS shares held by him since the Forward Contract was sufficiently linked to the BNS shares, the Forward Contract being a partial same asset hedge. As the BNS shares are capital assets to Mr. MacDonald, the Cash Settlement Payments will also be considered as being made on account of capital, resulting in capital losses to Mr. MacDonald, within the meaning of sections 38, 39 and 40 of the Act. Furthermore, the Respondent submitted that the Cash Settlement Payments were not deductible on income account because they were capital expenditures within the meaning of paragraph 18(1)(*b*) of the Act.

B. THE FACTS.

[4] By the time this appeal reached trial, the parties had come to an agreement on many of the relevant facts in a Partial Statement of Agreed Facts, attached as Appendix A to these Reasons for Judgment.

[5] Mr. MacDonald testified. He was a very honest and straightforward witness. I found him to be a credible witness and I do not doubt the truth of the facts he testified about.

[6] Each party also called an expert witness: for the Appellant, Mr. John Kurgan, a futures and commodities specialist at RBC Dominion Securities and for the Respondent, Mr. Peter Klein, Professor of Finance at the Beedie School of Business at Simon Fraser University. Both witnesses were qualified as experts in the areas of financial services, forward contracts,

derivatives and hedging and their reports and rebuttal reports were filed with the Court as expert reports.

[7] Mr. MacDonald has over 40 years of capital markets and corporate finance experience, starting at the brokerage firm McLeod Young Weir ("MYW") in 1969, and when MYW was purchased by the BNS in 1988, he continued his career at Scotia McLeod Inc. As a result of BNS acquisition of MYW in 1988, Mr. MacDonald acquired 183,333 common shares of BNS in exchange for shares that he held in MYW.

[8] In 1994, Mr. MacDonald invested in VFC Inc. ("VFC"), an automobile finance company that engaged in non-prime automotive credit financing. He was VFC's Chairman and owner of 963,004 shares of VFC. In 2003, VFC shares were publicly offered. In 2006, the Toronto-Dominion Bank ("TD Bank") acquired all the shares of VFC and Mr. MacDonald received approximately $13 million worth of common shares of TD Bank in exchange for his shares of VFC.

[9] In March 1997, Mr. MacDonald left Scotia McLeod Inc. and created Enterprise Capital Management Inc. ("ECM"), which managed funds for Canadian institutional investors and high net worth individuals and which raised and invested funds in a variety of companies.

[10] In the late 1990s, Mr. MacDonald anticipated, on the basis of his view of certain world financial events that the BNS shares he held could decline in value in the short term, despite his optimism about their long-term potential value. Such events included the 1997 Asian Debt Crisis, the collapse of the Thai Bhat, the October 1997 mini-crash of the New York Stock exchange, the Russian Debt Crisis in 1998 and the 1998 collapse of the Long Term Capital Management hedge fund. Mr. MacDonald's negative short-term outlook stemmed from concerns he had about these adverse developments in international markets; in addition, in his view, BNS was the most internationally exposed to such events of all of the Canadian banks.

[11] Mr. MacDonald approached TD Securities Inc. ("TDSI") to discuss a forward contract to speculate against the trading price of the BNS shares. Mr. MacDonald entered into a forward contract (the "Forward Contract") with TDSI on the trade date of June 26, 1997, the terms of which were set out in a confirmation letter dated July 2, 1997, (the "Confirmation"), with a forward date

of June 26, 2002, (the "Forward Date"). The Forward Contract could only be cash settled. There was no entitlement to elect physical settlement (i.e. delivery of BNS shares) of the Forward Contract. The cash settlement provision was very important to Mr. MacDonald as he had no intention of selling the BNS shares. The Confirmation contained optional early termination provisions pursuant to which Mr. MacDonald could elect to terminate the Forward Contract prior to the Forward Date. The Confirmation required a securities pledge agreement between Mr. MacDonald and TDSI as credit support for purposes of the Forward Contract. However, no copy of that agreement was produced at trial. Mr. MacDonald had testified that he did not have a copy of said document.

[12] Mr. MacDonald made cash settlement payments under the Forward Contract as follows: $2,204,065 in his 2004 taxation year, $5,855,329 in his 2005 taxation year and $1,897,442 in his 2006 taxation year (the "Cash Settlement Payments"). The Cash Settlement Payments were paid from Mr. MacDonald's chequing account with TD Bank.

[13] Pursuant to the Confirmation:

(a) Mr. MacDonald agreed to pay TDSI the amount by which the "Reference Price" (the official closing price of the BNS shares on the Toronto Stock Exchange ("TSX") on the Forward Date) exceeded the "Forward Price" (as defined in the Forward Contract as being $68.46), multiplied by the number of "Reference Shares", being the number of BNS shares subject to the Forward Contract (165,000 BNS shares); and

(b) TDSI agreed to pay Mr. MacDonald the amount by which the Forward Price exceeded the Reference Price, multiplied by the number of Reference Shares.

[14] The Forward Contract was subsequently amended and extended several times to either adjust the Forward Price (to reflect changes to the quarterly dividend on the BNS shares) and the number of Reference Shares (to reflect a split of the shares and a stock dividend), or to extend the Forward Date and to substitute TDSI for TD Global Finance (In these reasons for judgment, I will refer to TDSI and/or TD Global Finance as TDSI). The Forward Contract was terminated on March 29, 2006.

[15] On June 6, 1997, TD Bank offered a credit facility to Mr. MacDonald which was accepted by the latter on July 7, 1997, (the "Loan"). Mr. MacDonald also entered into a securities pledge agreement with TD Bank (the "Securities Pledge Agreement"), pursuant to which he pledged 165,000 BNS shares and the Confirmation as collateral security for the Loan. Also, as collateral security for the Loan, Mr. MacDonald pledged to TD Bank all amounts which may become payable to him by TDSI pursuant to the Confirmation. The Loan made available up to $10,477,480, subject to a maximum of 95% of the spot price of the BNS shares multiplied by the number of BNS shares under the Securities Pledge Agreement. The Securities Pledge Agreement also refers to an Inter-Creditor Agreement between TD Bank and TDSI, as the pledged securities (the BNS shares, the Confirmation and amounts payable by TDSI under the Confirmation) would be pledged to both of TD Bank and TDSI.

[16] Mr. MacDonald borrowed $4,899,000 under the Loan in 1997, which proceeds were used for the purpose of investing in Enterprise Capital Limited Partnership (part of the group of ECM) and other various securities. The funds were borrowed before the taxation years under reassessment in this appeal, and substantially all of the borrowed funds had been repaid before the commencement of the relevant taxation years. On January 1, 2004, the balance outstanding under the Loan was $554,485. Mr. MacDonald testified that he considered the Loan terminated when it was fully repaid by him on November 5, 2004.

[17] Mr. MacDonald testified that he considered the Loan to be ancillary to the Forward Contract — he viewed the Loan as a "by-product" of the Forward Contract. He claimed that he entered into the Loan because it was offered to him on very favorable terms.

[18] Mr. MacDonald also testified that he felt that he was able to take advantage of a downturn in the market as well as of a downturn in the price of the BNS shares and that his intention was to achieve a profit on an anticipated decline in the value of the BNS shares based on "storm clouds" he saw on the investment horizon. He stated that his intention was not to hedge and he was very clear on that point.

[19] Mr. MacDonald explained during his testimony that not realizing a gain on the Forward Contract in or around 1998 when the market was down was, in hindsight, a major error and that he compounded the error by continuing to wait to settle under the Forward Contract.

[20] Mr. MacDonald explained that, during the relevant period, he had the financial latitude to absorb the losses arising under the Forward Contract. Mr. MacDonald testified that the aggregate income reported on his T1 personal tax returns from 2002 through 2006 was approximately $28.5 million, even after deducting any losses sustained under the Forward Contract.

[21] Mr. MacDonald testified that he did not sell his BNS shares to offset the losses arising under the Forward Contract and the BNS shares that he did sell during the relevant taxation years, were sold by him for the purpose of rebalancing his investment portfolio. After the acquisition of VFC by TD Bank, Mr. MacDonald acquired a significant shareholding in TD Bank. In order to reduce his position in Canadian financial institutions, Mr. MacDonald sold some of his BNS shares over time.

[22] Notwithstanding the sale of some BNS shares over the years, Mr. MacDonald testified that he maintained a positive long-term outlook with respect to BNS. He explained at trial that, presently, the BNS shares are his largest share investment, the "cornerstone" of his investment portfolio, amounting to approximately 15 percent of his total share portfolio. He has no intention of selling the BNS shares and intended to keep them indefinitely.

C. THE ISSUE.

[23] The issue in this appeal is whether the Cash Settlement Payments made by Mr. MacDonald under the Forward Contract during the 2004, 2005 and 2006 taxation years were on income account and resulted in business losses for Mr. MacDonald or whether said payments were on capital account and resulted in capital losses for Mr. MacDonald under the Act.

D. THE POSITION OF THE PARTIES.

1. The Appellant's Position.

[24] The Appellant submitted that I should first determine whether the Forward Contract was, in and of itself, an adventure or concern in the nature of trade as a speculative instrument. If I conclude that the Forward Contract was an adventure or concern in the nature of trade, then I have to determine whether the Forward Contract was sufficiently linked (both in terms of timing and quantum) with an underlying capital asset so as to convert the payments on income account made

by Mr. MacDonald under the Forward Contract as payments on capital account, resulting in capital losses to Mr. MacDonald. If I conclude that the Forward Contract was not an adventure in the nature of trade, then, according to the Appellant, I should dismiss the appeal.

[25] According to the Appellant, the Forward Contract was an adventure or concern in the nature of trade and the Cash Settlement Payments were therefore fully deductible on income account for the purposes of the Act, under subsection 9(1). The Forward Contract, by itself, cannot be viewed as an income producing capital asset as it did not generate a current yield. The Forward Contract did not involve an exchange, sale or delivery of any BNS shares. Furthermore, the Forward Contract was a speculative instrument and gave rise to profit or loss solely by virtue of fluctuations in the value of the contract itself and more particularly, it could only give rise to gain or loss by virtue of the fluctuations in the price of the Reference Shares (that is the BNS shares) on its cash settlement. It is clear that the Forward Contract was itself the sole source of income. At the time Mr. MacDonald entered into the Forward Contract, it was uncertain whether the stock price of the Reference Shares would exceed or be exceeded by the Forward Price on the Forward Date. Mr. MacDonald's sole purpose and intention in entering into the Forward Contract was to speculate on, and profit from, an anticipated decline in the trading price of the BNS shares.

[26] In order to succeed in this appeal, the Respondent must establish that the Forward Contract was a hedge against a capital asset, such that the Forward Contract is treated as a capital asset, with the result that any gains or losses resulting from its settlement will be on capital account. In this appeal, the requirements pertaining to a hedge are not made out as Mr. MacDonald had no intention to hedge when entering into the Forward Contract and there was no linkage between the Forward Contract and any capital assets owned by Mr. MacDonald, including the BNS shares, in terms of both quantum and timing. According to the Appellant, the Forward Contract did not hedge any capital asset and, therefore, the losses on income account were not converted into losses on capital account.

2. The Respondent's Position.

[27] The Respondent took issue with the approach taken by the Appellant. According to the Respondent, as the Minister is taking the view and had reassessed on the basis that the Cash Settlement Payments were payments made

on capital account since the Forward Contract was a hedge of the BNS Shares (which are capital assets to Mr. MacDonald), then my analysis should start with a discussion as to whether the Forward Contract was a hedge. If I answer in the affirmative, then I will have to determine the nature of the assets being hedged so as to qualify the Cash Settlement Payments, whether as payments made on income or on capital account. If I conclude in the negative, I will have to determine whether Mr. MacDonald was engaged in a business, which, by definition, under subsection 248(1) of the Act, includes an adventure or concern in the nature of trade. If I do conclude that Mr. MacDonald was engaged in a business, the Cash Settlement Payments will then be considered as payments made on income account resulting in business losses for Mr. MacDonald.

[28] According to the Respondent, the Forward Contract was not an adventure or concern in the nature of trade; the Forward Contract was "property" and "capital property" as defined under the Act.

[29] According to the Respondent, Mr. MacDonald's primary intention in entering into the structured arrangement, including the Forward Contract, was "to lock-in an economic gain on the underlying BNS shares pledged and the Forward Contract, and to protect the value of the BNS shares". By entering into the Forward Contract, Mr. MacDonald had locked-in a gain as if the BNS shares had been sold by fixing the price (the Forward Price) and by virtue of the Loan, he had gained access to funds similar to the amount that would have been obtained if the BNS shares had been sold in the spot market instead.

[30] Mr. MacDonald was exposed to no risk of loss from the structured arrangement and was not a speculator on the Forward Contract. According to the Respondent, Mr. MacDonald would have made a "multimillion-dollar profit" from his position under the Forward Contract from August 1997 to May 2000 as the world financial crisis grew and the BNS shares price fell; however, he did not act on it.

[31] Furthermore, Mr. MacDonald's secondary intention was to benefit from the disparity flowing from the reporting of the losses on the Forward Contract on account of income and the reporting of the gains on the disposition of the BNS shares on account of capital.

[32] The Respondent took the position that Mr. MacDonald had hedged the BNS shares. The Forward Contract was a partial same asset hedge for

Mr. MacDonald's long-term investment in the BNS shares, i.e. a forward contract under which the underlying assets (or delivery assets) and the Reference Shares were the BNS shares. Consequently, the linkage between the BNS shares and the Forward Contract was clear. Since Mr. MacDonald reduced his overall exposure to price fluctuations in the BNS shares and the number of BNS shares comprising the delivery assets never exceeded the number of BNS shares owned by Mr. MacDonald, Mr. MacDonald had hedged the BNS shares.

[33] Furthermore, as the Forward Contract is a partial same asset hedge, there was no need for the original purchase of the BNS shares to be contemporaneous with the entering into of the Forward Contract. The Respondent also pointed to linkages between the Forward Contract, the Loan and the Securities Pledge Agreement, which I will review later in these reasons for judgment.

E. DISCUSSION.

1. The Legal Framework.

[34] Until 2013, the Act did not address directly the taxation of financial derivative instruments. Therefore, basic tax principles should apply as to the issue of whether payments made under a financial derivative instrument are on income or capital account and the case law will provide guidance as to how to apply the Act to that type of instrument.

[35] As mentioned above, the parties took differing approaches with respect to the appropriate legal framework that I should use for my analysis in this appeal. For the reasons below, I am of the view that the Appellant's approach should be used as it is in accordance with the structure of the Act. Therefore, I should first determine whether the Forward Contract was, in and of itself, an adventure or concern in the nature of trade for Mr. MacDonald, so as to be a source of income that is a "business" under paragraph 3(*a*) of the Act. If I conclude that the Forward Contract was, in and of itself, an adventure or concern in the nature of trade for Mr. MacDonald, then the Cash Settlement Payments will be considered payments from a source, namely the Forward Contract, which was a business and will be on income account provided the Forward Contract was not a hedge of a capital asset, which later issue should be examined as a second step to my analysis. In my view, this approach is in accordance with the principles for ascertaining profit under subsection 9(1) of the Act developed by the Supreme Court of Canada in *Canderel Ltd v Canada*, [1998] 1 SCR 147, [1998] SCJ No 13 (QL) [*Canderel*],

that "[i]n seeking to ascertain profit, the goal is to obtain an accurate picture of the taxpayer's profit for the given year" (para. 53).

[36] The basic rules for determining the income of a taxpayer are found in section 3 of the Act, the relevant part of it reads as follows:

3 Income for taxation year — The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:

(*a*) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,

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

(i) the total of

(A) all of the taxpayer's taxable capital gains for the year from dispositions of property other than listed personal property, and

. . .

(ii) the amount, if any, by which the taxpayer's allowable capital losses for the year from dispositions of property other than listed personal property exceed the taxpayer's allowable business investment losses for the year,

. . .

3 Revenu pour l'année d'imposition — Pour déterminer le revenu d'un contribuable pour une année d'imposition, pour l'application de la présente partie, les calculs suivants sont à effectuer :

a) le calcul du total des sommes qui constituent chacune le revenu du contribuable pour l'année (autre qu'un gain en capital imposable résultant de la disposition d'un bien) dont la source se situe au Canada ou à l'étranger, y compris, sans que soit limitée la portée générale de ce qui précède, le revenu tiré de chaque charge, emploi, entreprise et bien;

b) le calcul de l'excédent éventuel du montant visé au sous-alinéa (i) sur le montant visé au sous-alinéa (ii) :

(i) le total des montants suivants :

(A) ses gains en capital imposables pour l'année tirés de la disposition de biens, autres que des biens meubles déterminés,

[…]

(ii) l'excédent éventuel de ses pertes en capital déductibles pour l'année, résultant de la disposition de biens autres que des biens meubles déterminés sur les pertes déductibles au titre d'un placement d'entreprise pour l'année, subies par le contribuable;

[…]

[37] The Supreme Court of Canada explained in *Friesen v Canada*, [1995] 3 SCR 103 at 111, [1995] 2 CTC 369, 1995 CanLII 62 [*Friesen*] that section 3 of the Act:

> . . . recognizes two basic categories of income: "ordinary income" from office, employment, business and property, all of which are included in s. 3(*a*), and income from a capital source, or capital gains which are covered by s. 3(*b*). The whole structure of the *Income Tax Act* reflects the basic distinction recognized in the Canadian tax system between income and capital gain.

[38] In accordance with paragraph 3(*a*) of the Act, income derived from a source that is a business, including an adventure or concern in the nature of trade, will be included in the income of a taxpayer under the Act. Therefore, gains and losses from the settlement of a forward contract will be considered on income account provided they are income from a source that is a business, including an adventure or concern in the nature of trade. On the other hand, gains and losses from the settlement of a forward contract will be considered on capital account provided they are income from a source that is a capital or capital property.

2. The Forward Contract: an adventure or concern in the nature of trade or capital property?

2.1 The Appellant's position:

[39] According to the Appellant, the Forward Contract is the "quintessential adventure or concern in the nature of trade" as it is highly speculative in nature, involves great risks, was isolated and non-recurring and was not used by Mr. MacDonald to "lock-in" any gain on his BNS shares. The Forward Contract could only be profitable if the trading price of the BNS shares upon settlement was less than the Forward Price. When Mr. MacDonald entered into the Forward Contract, it was uncertain whether he would be required to make payments to TDSI or whether he would receive an amount from TDSI.

[40] Furthermore, the Forward Contract cannot be viewed as an income-producing asset in the traditional sense, since it does not, by itself, generate a current yield; it will give rise to gain or loss by reference to the trading price of the BNS shares on the settlement date. The Forward Contract cannot be considered "property" or "capital property" because "it is a tree that bears no fruit". On maturity of the Forward Contract, there is no exchange, sale

or delivery of the BNS shares and there is no capital asset separate from it that is being bought or sold. The Forward Contract is the sole source of income for Mr. MacDonald. The BNS shares, being the Reference Shares under the Forward Contract, are not the source of income.

[41] Given the nature of the cash-settled Forward Contract and Mr. MacDonald's stated intention at the time he entered into the Forward Contract that he expected to profit from an anticipated fall in the trading price of the BNS shares, the Forward Contract was "a pure speculation" or an adventure or concern in the nature of trade.

2.2 The Respondent's position:

[42] According to the Respondent, a forward contract is "property" within the meaning of subsection 248(1) of the Act, a word so broadly defined that it includes a "right of any kind whatever", and is "capital property" within the meaning of subsection 248(1) and section 54 of the Act. The Respondent cited *Friesen*, *supra*, a case decided by the Supreme Court of Canada (at para 42), for the proposition that there are only two classes of property under the Act, inventory and capital property, and argued that a derivative instrument can be either a capital property or inventory. According to the Respondent, the Forward Contract at issue in this appeal is capital property.

[43] The Forward Contract is not an adventure or concern in the nature of trade. The Respondent submitted that in order for there to be an adventure in the nature of trade, there must be a scheme for profit-making which does not include anticipated tax advantages, which was what Mr. MacDonald was trying to obtain (*Canada v Loewen* (*CA*), [1994] 3 FC 83 at 93, [1994] 2 CTC 75 [*Loewen*]).

[44] According to the Respondent, a series of facts do not establish that Mr. MacDonald had a scheme for profit-making; I will review these facts below.

[45] Furthermore, the Respondent pointed to the following factors that are relevant to determine whether a transaction is on income or capital account: i) the nature of the property sold; ii) the length of the period of ownership; iii) the frequency or number of similar transactions; iv) the work done to put the property into marketable condition during the ownership period; v) the circumstances responsible for the sale; vi) the motive at the time of acquisition

and, if there was a secondary intention at the time of purchase, to resell (*Belcourt Properties Inc v The Queen*, 2014 TCC 208 at paras 30-31, 2014 DTC 1182).

2.3 Discussion.

[46] For the following reasons, I am of the view that the Forward Contract was, in and of itself, entered into by Mr. MacDonald as an adventure or concern in the nature of trade as a speculative instrument.

[47] A forward contract is a type of financial derivative instrument. The Supreme Court of Canada in *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 SCR 715, at para 30 [*Placer Dome*], generally describes a forward contract as "a contract that obligates one party to buy, and another party to sell, a specified amount of a particular asset at a specified price, on a given date in the future". The Supreme Court states that the obligation under a forward contract is two-sided, that is both parties have an obligation to perform. The Supreme Court also notes that, as commonly understood under generally accepted accounting principles ("GAAP"), financial derivatives are contracts whose value is based on the value of an underlying asset, reference rate, or index (para 29).

[48] Similarly, Dr. Klein generally described a forward contract as an agreement between a seller and a buyer to exchange a certain number of units of a "Delivery Asset" at a future "Delivery Date" for a pre-agreed "Delivery Price". He also explained that, in this case, it is evident that Mr. MacDonald was the "seller" under the Forward Contract notwithstanding the fact it is not certain until the date of settlement which party will be required to transfer economic value. In other words, until the spot price of the Reference Shares (i.e. the current market price) on the date of settlement was known, it was unclear whether Mr. MacDonald would pay TDSI or whether he would receive a payment from TDSI.

[49] As mentioned above, the definition of the word "business" in subsection 248(1) of the Act includes an "adventure or concern in the nature of trade". However, that phrase is not defined in the Act and we must turn to the common law to ascertain its meaning.

[50] A "scheme for profit-making" is the first requirement for an adventure or concern in the nature of trade and must be present in the intention of the

taxpayer. The courts have focused on the intention of the taxpayer at the time of entering into the transaction.

[51] In determining whether a transaction is an adventure or concern in the nature of trade, the Exchequer Court of Canada in *MNR v James A Taylor*, [1956] CTC 189, 56 DTC 1125 [*Taylor*], stated that all of the circumstances of the transaction must be considered and that no single criterion can be formulated in reaching this determination (*Taylor*, *supra* at 1139). In that case, the Exchequer Court of Canada noted that the nature and quantity of the subject matter was a relevant consideration as to whether a transaction is an adventure in the nature of trade; in addition, the fact that a transaction is isolated or unique is not a test as to whether it is an adventure in the nature of trade: indeed, it may be, on the contrary, "a very important factor" (*Taylor*, *supra* at 1137). The Exchequer Court cited with approval a statement of Lord Carmont in *Reinhold* (*Commissioners of Inland Revenue v Reinhold*, (1953) 34 TC 389) "that there are cases "where the commodity itself stamps the transaction as a trading venture" (*Taylor*, *supra* at 1139).

[52] In *Canada Safeway Limited v Canada*, 2008 FCA 24, 2008 DTC 6074 [*Canada Safeway*], the Federal Court of Appeal opined that although the courts have used various factors to determine whether a transaction is an adventure in the nature of trade or a capital transaction, the most determinative factor is the intention of the taxpayer at the time of acquiring the property and if that intention reveals a scheme for profit-making, then the transaction will be an adventure or concern in the nature of trade (para 43). In assessing whether a scheme for profit-making exists, the courts have to determine whether the taxpayer had "a legitimate intention of gaining a profit from the transaction" (*Friesen*, *supra* at para 16). However, if the taxpayer intended to hold the property for the purpose of producing income or to be used in the production of income, it will be considered a capital property (*Canada Safeway*, *supra* at para 78).

[53] The courts have consistently emphasized that adventures in the nature of trade are speculative trading ventures and they involve great risk (*Continental Bank of Canada v Canada*, [1998] 2 SCR 358, 98 DTC 6501; *Aviva Canada Inc formerly CGU Group Canada Ltd v The Queen*, 2006 TCC 57, [2006] GSTC 8).

[54] In *Ethicon Sutures Ltd v The Queen*, 85 DTC 5290 (FCTD), [1985] FCJ No 436 (QL) (FCTD), the Federal Court stated that "where the

transaction is a speculation made in the hope of profit, it will be treated as an adventure in the nature of trade . . .” (page 5293).

[55] The Appellant referred this Court to the Canada Revenue Agency (the “CRA”) Interpretation Bulletin IT-459 (September 8, 1980) (now archived) as support for the proposition that all of the circumstances of a transaction must be considered when determining whether it is an adventure or concern in the nature of trade. In this document, the CRA reiterated the principal tests for determining whether a transaction is an adventure or concern in the nature of trade, which are derived from the case law:

> i) whether the taxpayer dealt with the property acquired by him in the same way as a dealer in such property ordinarily would deal with it;
>
> ii) whether the nature and the quantity of the property excludes the possibility that its sale was the realization of an investment or was otherwise of a capital nature, or that it could have been disposed of other than in a transaction of a trading nature; and
>
> iii) whether the taxpayer’s intention as established or deduced, is consistent with other evidence pointing to a trading motivation.

[56] Applying the doctrine propounded in *Canada Safeway*, *supra*, to this case, the most important factor to consider answering the question as to whether the Forward Contract was, in and of itself, an adventure or concern in the nature of trade is the intention of Mr. MacDonald at the time of entering into the Forward Contract.

[57] Clearly, a forward contract can be used to hedge or to speculate (*Placer Dome*, *supra* at para 29). Thus, the type of derivative instrument used has no bearing on Mr. MacDonald’s intention. Further, it cannot be inferred from the terms and conditions of the Forward Contract, the Loan and the Securities Pledge Agreement that there was a speculative intention, or not. In other words, these agreements do not state that the purpose was to hedge or to speculate.

[58] The Respondent argued that Mr. MacDonald’s primary intention by entering into that structured arrangement, including the Forward Contract, was to lock-in an economic gain on the BNS shares pledged and the Forward Contract, and to protect the value of the BNS shares. He therefore was exposed to no risk of loss from the structured arrangement. Furthermore, according to the

Respondent, Mr. MacDonald did not show a scheme for profit-making and did not act as a dealer or trader would act. I do not agree with the Respondent.

[59] I am of the view that Mr. MacDonald's sole purpose and intention in entering into the Forward Contract was to speculate on and profit from, an anticipated decline in the trading price of the BNS shares; his testimony was credible and reliable, and he was himself a very credible witness. In addition, I am not satisfied that there was a change of intention over the years, even where Mr. MacDonald stated that he continued holding the Forward Contract because he wanted to cut his losses, since a change of intention must be clear and unequivocal (*Edmund Peachey Ltd v The Queen*, 79 DTC 5064 at 5067 (FCA), [1979] FCJ No 2 (QL) (FCA)).

[60] In order for there to be an adventure in the nature of trade, there must be a scheme for profit-making and I am of the view that a scheme for profit-making was present in this case. The facts showed that Mr. MacDonald had a legitimate intention of gaining a profit from the Forward Contract. When he entered into the Forward Contract, it was uncertain as to whether he would be required to make a payment to TDSI or whether he would receive an amount from TDSI. The Forward Contract afforded Mr. MacDonald an opportunity to speculate on the outcome that the price of the BNS Shares would drop in the short term and that he could profit from that anticipated drop. His testimony was uncontradicted and the surrounding facts supported his testimony.

[61] I agree with the following arguments raised by the Appellant. Mr. MacDonald entered into a Forward Contract that could only be cash settled. Hence, the Forward Contract did not involve an exchange, sale or delivery of any BNS shares. The Forward Contract was pure speculation since Mr. MacDonald had to deal with the Forward Contract to get income from it, *i.e.* he had to terminate it or partially terminate it to get any income; the Forward Contract did not, by itself, yield income. The Forward contract could only be profitable if the trading price of the BNS shares at the maturity date was lower than the Forward Price and only if Mr. MacDonald dealt with the Forward Contract, *i.e.* if he terminated it or partially terminated it. Furthermore, the Forward Contract itself stamps the transaction as a trading venture as it was highly speculative in nature, it involved great potential for risk and reward, it was isolated and non-recurring, and was not used to lock-in any gain in the BNS Shares. As to whether Mr. MacDonald would receive or be required to make

payments under the Forward Contract was entirely dependent upon the future movement in the market price of the BNS Shares on the TSX.

[62] Although there were cross-references between the various agreements (the Forward Contract, the Loan, the Security Pledge Agreement), the evidence showed that Mr. MacDonald did not consider the Loan as being part of the Forward Contract. He considered the Loan to be a by-product of the Forward Contract, and testified that since the terms and conditions were so advantageous, he accepted the credit offered by TD Bank. The evidence showed that Mr. MacDonald treated the Loan and the Forward Contract as two separate instruments. Only a small percentage of the loan credit offered was borrowed by Mr. MacDonald. In addition, in November 2004, the Loan was repaid in totality; but the Forward Contract remained in place. The fact that Mr. MacDonald invested the amount borrowed in ECM and other publicly listed securities is not relevant with respect to that determination.

[63] What I have to examine is the intention of Mr. MacDonald at the time of entering into the Forward Contract as confirmed by the execution of the Confirmation. The Confirmation was executed on July 2, 1997; the Forward Contract has a trade date of June 26, 1997. I am of the view that, on balance, the evidence showed that Mr. MacDonald's intention at the time of entering into the Forward Contract was to gain a profit by speculating that the market price of the BNS shares would drop in value because of the storm clouds he foresaw coming in the financial markets and which he referred to in his testimony: the 1997 Asian Debt Crisis, the collapse of the Thai Bhat, the October 1997 mini-crash of the New York Stock Exchange, the Russian Debt Crisis in 1998 and the 1998 collapse of the Long Term Capital Management hedge fund. In his own words, Mr. MacDonald's intention "was to achieve a profit on an anticipated decline in the value of Bank of Nova Scotia shares based on the storm clouds that [he] saw in the investment horizon". It is clear from Mr. MacDonald's testimony that his intention was to speculate — he wanted to profit from a potential decline in the value of the BNS shares in the light of the state of the financial market around the time he entered into the Forward Contract.

[64] An important factor supporting my conclusion as to the intention of Mr. MacDonald is that when Mr. MacDonald entered into the Forward Contract, he did not know whether he would be making a payment to TDSI or whether he would receive a payment from TDSI. According to Mr. MacDonald's testimony, which I found credible and reliable, his unfavourable short term outlook stemmed

from concerns he had about these adverse developments in the international markets and because, in his view, BNS, of all of the Canadian banks was the most internationally exposed to such events. His belief was based on the vast experience he had gained during the numerous years he had worked in the financial market and the critical information he had of BNS specifically. Mr. MacDonald's testimony was clear as to what his intention was in entering into the Forward Contract. As a very well-informed person in the world of finance, he saw storm clouds on the horizon. Also, because he worked at a very high level position at the BNS for many years, he was able to reasonably conclude that the BNS was the most exposed of the Canadian banks to the foreign market turbulence.

[65] The Respondent argued that Mr. MacDonald's self-serving statements alone cannot be determinative of his intention. However, I am not guided solely by Mr. MacDonald's statements (i.e. by his subjective intention) and I must look for objective manifestations of purpose, which is a question of fact to be decided from all of the circumstances (*Symes v Canada*, [1993] 4 SCR 695 (at 736), [1994] 1 CTC 40; *Swirsky v Canada*, 2014 FCA 36, 2014 DTC 5037 at para 8). As mentioned in the previous paragraph, the facts and surrounding circumstances showed that the testimony of Mr. MacDonald was credible and reliable.

[66] Another very important fact to take into account in this particular case is that Mr. MacDonald did not intend to ever sell his BNS shares and he wanted to hold on to them for the very long term. The facts also supported his testimony in that respect as Mr. MacDonald only sold only a small number of BNS shares throughout the years to rebalance his portfolio. In 2003 and 2004, he did not sell any BNS shares (he donated 400 BNS shares in 2004). In 2005, as VFC was becoming quite successful, Mr. MacDonald sold 273,000 BNS shares, representing 37% of his shareholding. The reason given by Mr. MacDonald for selling the BNS shares was credible: as he was one of the founders of VFC, it would not look good if he were to sell VFC shares. Also, in 2006, Mr. MacDonald acquired TD Bank shares in exchange for his shares of VFC and decided to sell some BNS shares and TD Bank shares to rebalance his portfolio. In 2006, Mr. MacDonald sold 10,000 BNS shares, representing only 2.2% of his shareholding. Mr. MacDonald's testimony was very clear: the BNS shares are the cornerstone of his investment portfolio, representing approximately 15% of the value of his portfolio at the date of the hearing. Accordingly, it is clear that Mr. MacDonald took an important financial risk by entering into the Forward Contract. If the market price of the BNS shares went up, he would have had to

make a payment to TDSI. As he did not want to sell the BNS shares and he did not, in fact, sell any BNS shares when he made payments under the Forward Contract, it is evident that making payments under the Forward Contract without selling any corresponding BNS shares put Mr. MacDonald in a disadvantageous financial position. Therefore, one cannot conclude that he had locked-in a gain by entering into the Forward Contract. Furthermore, keeping in mind the important fact that Mr. MacDonald testified that he wanted to keep the BNS shares for the very long term, I do not see why Mr. MacDonald would have entered into the Forward Contract with the intent of making a payment to TDSI, which would be to lose money.

[67] The Respondent emphasized in her submissions that, at all times, the number of BNS shares owned by Mr. MacDonald was in excess of the number of shares subject to the Forward Contract. According to Dr. Klein's testimony, in order to speculate, that is to increase one's exposure to risk, the number of shares under the contract must be greater than the number of shares owned. Further, Dr. Klein concluded that there would still be a hedge in respect of the number of shares owned. The Respondent invoked Lamarre ACJ's comments in *George Weston Limited v The Queen*, 2015 TCC 42, [2015] 4 CTC 2010 [*George Weston*]: in order for a transaction to be speculative, a derivative transaction must have a notional value in excess of actual risk exposure (para 68). Also, in *Placer Dome*, *supra*, the Supreme Court of Canada stated that for a transaction to be speculative, the taxpayer must be exposed to something over and above its actual exposure (para 29).

[68] I do not agree with the Respondent's proposition. If the Respondent's position is correct, then it will be impossible to ever speculate using a derivative instrument while maintaining a long position in an asset. As I have concluded above, Mr. MacDonald was exposed to no risk by holding the BNS shares since he did not want to sell them for the very long term. Accordingly, by entering into the Forward Contract, I am of the view that he increased his risk, as he did not know if he would have to make a payment to TDSI or whether he would receive a payment from TDSI.

[69] My conclusion is reinforced by the cash settlement feature of the Forward Contract which, as expressed by Mr. Kurgan, is more likely to be used by a speculator. As mentioned above, Mr. MacDonald cannot settle the Forward Contract by transferring any BNS shares; the only method of settlement is by way of cash transfer. The sole source of income for Mr. MacDonald is the

Forward Contract. However, Dr. Klein was of the opinion that the cash settlement feature of the Forward Contract was not determinative of a hedge or speculation as they are economically equivalent. At the hearing, Dr. Klein testified as to the economic equivalence between cash settled and a physically settled forward contract. I agree with him that he had made that demonstration. However, in tax cases, form matters and my goal is not to determine the economic equivalence between two different transactions but the tax consequences arising from a specific transaction and, to that end, I must try to obtain an accurate picture of the income of a taxpayer. I am of the view that the present case corresponds to the first caveat referred to by the Supreme Court of Canada in *Shell Canada Ltd v Canada*, [1999] 3 SCR 622, [1999] SCJ No 30 at paras 39 and 45 [*Shell*]:

> 39 This Court has repeatedly held that courts must be sensitive to the economic realities of a particular transaction, rather than being bound to what first appears to be its legal form: *Bronfman Trust*, *supra*, at pp. 52-53, *per* Dickson C.J.; *Tennant*, *supra*, at para. 26, *per* Iacobucci J. But there are at least two *caveats* to this rule. First, this Court has never held that the economic realities of a situation can be used to recharacterize a taxpayer's *bona fide* legal relationships. To the contrary, we have held that, absent a specific provision of the Act to the contrary or a finding that they are a sham, the taxpayer's legal relationships must be respected in tax cases. Recharacterization is only permissible if the label attached by the taxpayer to the particular transaction does not properly reflect its actual legal effect: *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298, at para. 21, *per* Bastarache J.
>
> . . .
>
> 45 . . . Unless the Act provides otherwise, a taxpayer is entitled to be taxed based on what it actually did, not based on what it could have done, and certainly not based on what a less sophisticated taxpayer might have done.
>
> [Emphasis added.]

[70] Nevertheless, I am also cognizant of the comments of the Supreme Court of Canada in *Placer Dome*, *supra*, "that, at least for the purposes of GAAP, the way in which a derivative contract functions as a "hedge" is unaffected by the method by which the contract is settled" (para 31). However, as also stated by the Supreme Court in *Canderel*, *supra*, GAAP is not determinative of tax treatment (para 36 and following).

[71] The Respondent also argued that as the Forward Contract was subject to an early termination provision that allowed Mr. MacDonald to partially or wholly terminate the Forward Contract prior to the Forward Date, Mr. MacDonald should have acted on it when the price of the BNS shares fell in 1998 and throughout the mid-2000 and he would have made profits in the multi-million figures. The Respondent argued that Mr. MacDonald did not act like a dealer or speculator. Indeed, Mr. MacDonald admitted in testimony that in 1998, he could have entirely terminated the Forward Contract and could have made a substantial profit given the market price of the BNS shares at that time. It does raise the question as to why Mr. MacDonald, when faced with an opportunity to profit, did not even partially terminated the Forward Contract during this period if his intention was to speculate using the Forward Contract. But Mr. MacDonald gave a reasonable explanation: he admitted that he made a mistake in not taking the profit.

[72] It is not evident from the evidence if there were other circumstances where Mr. MacDonald could have profited under the Forward Contract. Aside from Mr. MacDonald's admission regarding 1998, according to the evidence available, there is only one period of time (between July 2, 1997, and November 28, 1997, on the assumption the Forward Price under the Forward Contract was not amended to be less than $67.854 in this period) where the Reference Price was less than the Forward Price (in which case, TDSI would be required to make a payment to Mr. MacDonald upon settlement). No amended Confirmations are found in the evidence from between November 28, 1997, and March 22, 2002; thus, I do not have information about the Forward Price during this period. After March 22, 2002, it appears that the Reference Prices were higher than the Forward Prices as set out in the amended Confirmations (in which case, Mr. MacDonald would be required to make a payment to TDSI upon settlement). While it appears that Mr. MacDonald may have been "passive" compared to a dealer or trader, I am of the view that this is not sufficient to conclude that Mr. MacDonald was not acting as a dealer or trader in respect of the Forward Contract. Furthermore, to ascertain in hindsight the intention of Mr. MacDonald at a specific time is, in my view, to be done with extreme caution. In hindsight, it is easy to say that, as the price of the BNS shares went down in 1998 up to the mid-2000, Mr. MacDonald should have settled the Forward Contract and would have made multi-million dollars from the arrangement. As mentioned above, storm clouds existed back in 1997. Furthermore, as Mr. Kurgan testified, a bear market had started in the mid-2000 and growing anxiety existed on the financial

markets; the attack on the twin towers in New York City on September 11, 2001, also generated a lot of anxiety in the financial market.

[73] The Respondent further stated that Mr. MacDonald had no ability to make any profit or speculate under the Forward Contract as he had pledged all payments to be made by TDSI under the Forward Contract as collateral under the Loan and had assigned all of his rights under the Forward Contract to TD Bank. Furthermore, Mr. MacDonald had also pledged the BNS shares. I do not see the relevancy of these arguments. The fact that collaterals are taken by banks is not relevant for determining whether a person is engaged in an adventure or concern in the nature of trade. A creditor will often require collaterals as a guarantee under a contract; this has no bearing on the question of whether the debtor is engaged in an adventure or concern in the nature of trade. More particularly, the fact that Mr. MacDonald had pledged all payments to be made by TDSI under the Forward Contract and the BNS shares as collateral under the Loan and had assigned all of his rights under the Forward Contract to TD Bank is not relevant for determining whether Mr. MacDonald was engaged in an adventure or concern in the nature of trade. The determinant for whether Mr. MacDonald would receive a payment under the Forward Contract was whether the Forward Price exceeded the Reference Price. It was not necessary for Mr. MacDonald to sell or deal in his BNS shares in order to profit using the Forward Contract. Further, while the amounts payable to Mr. MacDonald by TDSI, if any, were pledged to TD Bank under the Securities Pledge Agreement, Mr. MacDonald would still be entitled to such amounts (provided he did not default under the agreements). I would also add that the fact that the BNS shares were pledged was irrelevant for Mr. MacDonald as he had the intention to keep the BNS shares for the long term and the evidence showed that he effectively did.

[74] The Respondent added that Mr. MacDonald had no ability to deal with the Forward Contract while TD Bank's commitment to lend existed since the Loan required that he maintains the Forward Contract. However, Mr. MacDonald testified that he considered the Loan to be a by-product of the Forward Contract; a commitment to lend was offered to him by TD Bank on very favorable terms and that is why Mr. MacDonald executed the Loan. Furthermore, the evidence showed that he did not borrow the whole amount offered to him under the Loan; he borrowed $4,899,000 out of $10,477,480, so approximately 47% of the credit offered by TD Bank. He used part of these loaned funds to invest in ECM and also purchased more publicly listed securities. Since Mr. MacDonald is financially affluent, I am of the view that if he had wanted to deal with the

Forward Contract, he would have had the means to repay the amount owed under the Loan and terminate the Forward Contract at his convenience.

[75] The Respondent noted that the first repayment on the Loan (February 2003) was closely followed by the first Cash Settlement Payment (June 2003) and part of the BNS shares that were pledged were released back to Mr. MacDonald, thereby demonstrating that Mr. MacDonald could not have traded. In my view, the Respondent errs in examining the BNS shares and not the Forward Contract. Mr. MacDonald had stated that he did not wish to sell the BNS shares; the question is whether he acted as a dealer or trader in respect of the Forward Contract and not in respect of the BNS shares. The question is not whether he had speculated with the BNS shares but whether he had speculated when he entered into the Forward Contract. The same could be said about the Respondent's argument that if Mr. MacDonald was a dealer or trader, he would have reported all transactions in securities on income account. The question here is whether the Forward Contract was an adventure or concern in the nature of trade; hence, I have to determine if Mr. MacDonald was acting as a dealer or trader in respect of the Forward Contract. I do not see the relevancy of how he dealt with publicly listed securities to the question of whether Mr. MacDonald was engaged in an adventure or concern in the nature of trade in respect of the Forward Contract.

[76] Furthermore, according to the Respondent, there is no evidence of an overall profit-making scheme or an opportunity for profit by immediate realization as Mr. MacDonald entered into a single Forward Contract, for 9 years, which was amended several times. In contrast, a dealer or trader would have had multiple contracts. I am of the view that this argument cannot be sustained as the Exchequer Court in *Taylor*, *supra*, had concluded that the fact that a transaction is isolated or unique is not a test as to whether it is an adventure or concern in the nature of trade (*Taylor*, *supra* at para 48).

[77] The Respondent assumed that Mr. MacDonald had a secondary intention to obtain a tax benefit which cannot be considered as a scheme for profit-making and referred to *Loewen*, *supra*, in support of this argument, where the Federal Court of Appeal stated: "I do not think it can properly be said that a transaction whose sole purpose is to reduce the tax otherwise payable by a taxpayer is, for that reason alone, an adventure in the nature of trade" (page 95).

[78] In *Loewen*, *supra*, the Federal Court of Appeal clearly stated that the reduction of taxes cannot be the sole factor to consider in the determination of whether an operation is an adventure or concern in the nature of trade, and other factors must be present. In Mr. MacDonald's case, I am of the view that reducing the taxes otherwise payable was not one of the purposes of his entering into the Forward Contract. Mr. MacDonald's testimony was clear: he did not want to ever sell the BNS shares and wanted to hold to them for the very long term. The facts showed that that was, and continued to be, his intention. Therefore, there could be no mismatch reporting — namely business losses on the Forward Contract and capital gains on the sale of the BNS shares as argued by the Respondent.

[79] Finally, with respect to past practices, Mr. MacDonald testified that, prior to 1997, he had not entered into a forward contract in respect of a publicly traded security. He testified that he was in the practice of writing call options against securities that he owned and these were reported as income because he regarded them as speculative and he "thought it was best to have a consistent approach to both the options and the forward contract". The Respondent pointed out that Mr. MacDonald treated some of the options as being on capital account. She submitted that from 2003, Mr. MacDonald altered his reporting status for BNS options trades and treated the options as being on account of income. Mr. MacDonald testified that a "very minor number" were "inadvertently" treated as capital. Therefore, despite Mr. MacDonald's practice of reporting other derivatives on account of income, there does appear to be some inconsistency in respect of his treatment of the call options. However, in this appeal, my concern is with the Forward Contract and not the call options. Consequently, his inconsistency in the treatment of the call options has no bearing as to whether or not the Forward Contract was an adventure or concern in the nature of trade.

3. Hedging.

[80] The second step of my analysis consists in determining whether Mr. MacDonald had hedged a capital asset when he entered into the Forward Contract, and, in the affirmative, what is the capital asset being hedged, so as to convert the Cash Settlement Payments from a payment made on income account to a payment made on capital account. It is clear from the evidence adduced at trial and the submissions of the parties that the BNS shares held by Mr. MacDonald are the capital assets to be considered in making that determination.

For the following reasons, I am of the view that Mr. MacDonald did not hedge the BNS shares: Mr. MacDonald did not have a clear intention to hedge when he entered into the Forward Contract and the facts of this case did not show a link both in terms of quantum and timing between the Forward Contract and the ownership of the BNS shares or any transaction in respect of the BNS shares. Furthermore, no other links had been found.

3.1 Definition of a hedge.

[81] There is no definition of a hedge in the Act. In the Canadian Dictionary of Finance and Investment Terms, the word hedge is defined as a strategy used to offset investment risk, where a "perfect hedge is one eliminating the possibility of future gain or loss" (Jerry White et al, Canadian Dictionary of Finance and Investment Terms, 2nd ed (Hauppauge, NY: Barron's, 2000) (Canadian Dictionary of Finance). The Black's Law Dictionary (10th edition, 2014) defines a hedge as follows:

> To use two compensating or offsetting transactions to ensure a position of breaking even; esp., to make advance arrangements to safeguard oneself from loss on an investment, speculation, or bet, as when a buyer of commodities insures against unfavorable price changes by buying in advance at a fixed rate for later delivery.

[Emphasis added.]

[82] In his expert report, Mr. Kurgan described a hedge as "simultaneously using one investment to offset the risk of any adverse price movement in another investment". Mr. Klein, in his report, explained that a hedger seeks "to reduce or eliminate their exposure to a source of risk to which they are already exposed" and was in disagreement with the use of the term "adverse" used by Mr. Kurgan, since a hedge offsets all price changes in the asset being hedged.

[83] According to Mr. Kurgan, linkage both in quantum and time, is essential for a hedge. More particularly, an asset will not be hedged unless there is a hedging instrument at the relevant time and the amount of the hedge is directly linked to the amount of the underlying asset.

[84] However, Dr. Klein did not agree that hedging can properly be restricted in that way as there is no requirement for a hedge to be in place for the entire amount of the asset being hedged as partial hedges are common in the industry.

Furthermore, according to Dr. Klein, there is no need for the hedge to be terminated at the same time as the asset being hedged is sold. The linkage both in quantum and time is not needed provided that there is a sufficient linkage in other ways between the hedge and the asset being hedged.

[85] From the commercial definition of that word as well as the experts' testimony, I am of the view that an essential component of a hedge is that the strategy used to hedge must result in an offset of investment risk.

[86] Furthermore, the case law referred to below holds that the central indicia of a hedge are: (i) an intention to eliminate risk (i.e. to hedge), and (ii) a hedging instrument that is directly linked (or symmetrical) to the underlying asset that is the subject of the hedge in terms of both quantum and timing (the "linkage principle") (*Reference re: Grain Futures Taxation Act (Manitoba)*, [1925] JCJ No 4 (QL), [1925] 2 WWR 60). Also, I am of the view that a hedge requires both a clear intention to hedge as well as a close linkage between the purported hedging instrument and the underlying asset or transaction. The link in quantum and timing is very important because it locks in either a gain or a price.

[87] The Appellant cited *Echo Bay Mines Ltd v Canada* (*TD*), [1992] 3 FC 707, 92 DTC 6437 [*Echo Bay*], *Placer Dome*, *supra*, and *Salada Foods Ltd v The Queen*, [1974] CTC 201 (FCTD), 74 DTC 6171 (FCTD) [*Salada Foods*], as authorities that confirmed the requirement of an extremely close link between the purported hedge and the underlying asset or transaction in order to support a finding of a hedge for income tax purposes.

[88] More specifically, in *Echo Bay*, *supra*, the Federal Court of Appeal concluded that there was a sufficient inter-connection and integration with the taxpayer's business, i.e. the production of silver, such that the gain from the closing out of the forward sales contract was considered income from that business. In reaching its conclusion, the court noted that finding a hedge "depends upon assessment at the time forward sales contracts are concluded of capacity and intention to produce product committed under those contracts . . ." [1992] 3 FC 707 at 716).

[89] In *Placer Dome*, *supra*, although the Court was concerned with the definition of "hedging" in the Ontario *Mining Tax Act* and further, the case did not bear on income versus capital gain, the Supreme Court of Canada gave some helpful comments about hedging, as commonly understood, as referring to

transactions that offset financial risk. In addition, the Supreme Court reviewed the meaning of hedging as it is commonly understood under GAAP:

> 29 . . . As Professors Grottenthaler and Henderson explain, there are essentially two reasons for entering into such a contract — to speculate on the movement of the underlying asset, reference rate or index, or to hedge exposure to a particular financial risk such as the risk posed by volatility in the prices of commodities: see M.E. Grottenthaler and P.J. Henderson, *The Law of Financial Derivatives in Canada* (loose-leaf), at p. 1-8. This distinction between speculation and hedging is an important one. A transaction is a hedge where the party to it genuinely has assets or liabilities exposed to market fluctuations, while speculation is "the degree to which a hedger engages in derivatives transactions with a notional value in excess of its actual risk exposure": see B.W. Kraus, "The Use and Regulation of Derivative Financial Products in Canada" (1999), 9 *W.R.L.S.I.* 31, at p. 38. . . .
>
> [Emphasis added.]

The Supreme Court also concluded that the general principles articulated in the *Echo Bay*, *supra*, had some relevance in the situation under review and adopted a strict approach to the linkage principle:

> 35 Although I am mindful that *Echo Bay Mines* concerned a different statute, one in which "hedging" is not a defined term, I conclude that the general principles articulated in that case have some relevance here. The central issue in *Echo Bay Mines* was whether gains and losses from hedging were sufficiently linked to the underlying transaction, namely the production and sale of silver, to constitute "resource profits" within the meaning of the Regulations under the *Income Tax Act*. . . .
>
> [Emphasis added.]

[90] In *Salada Foods*, *supra*, the Federal Court upheld the Minister's assessment that the profit from the transaction was income from an adventure in the nature of trade. In that case, the taxpayer, which owned a number of subsidiaries in the United Kingdom, had anticipated a decline in the value of the pound sterling against the Canadian dollar. The taxpayer sold forward a certain amount of pound sterling for delivery the next year. The pound sterling did decline in value and the taxpayer closed out its short position in the pound sterling realizing a substantial profit. The taxpayer argued the profit was a capital gain on the basis that the transaction was a hedge to protect its investments in the UK subsidiaries but the profit was assessed as income from an adventure in the nature of trade.

The Federal Court upheld the Minister's assessment by noting that the amount of pound sterling sold forward bore no relationship and there was no link to the value of the UK subsidiaries. The Federal Court concluded that the transaction was an adventure in the nature of trade as it was carried out as a purely speculative transaction with the intention and hope of profit:

> In arranging the forward sale contract the Plaintiff acted in exactly the same fashion as a dealer or speculator in currencies would act. There was never any intention on the part of Salada that the transaction be in any way an investment in its normal sense and, in fact, it was acknowledged by the Plaintiff to be wholly speculative. The whole success of the enterprise depended on purchasing the £500,000 at a lower price than that at which it had contracted to deliver them six months before and the necessity for so doing in turn arose, not because the Plaintiff knew the pound was to be devaluated, but because it speculated that it would. It was not investing idle capital funds nor was it disposing of a capital asset. What was done was done because Salada was confronted with an abnormal situation from which it hoped to gain an advantage, not matter what the motivating factor was for desiring such an advantage. (pp.206-207)

[91] Furthermore, the Appellant stated that, to his knowledge, there are no Canadian tax cases whereby a hedge was imposed where the taxpayer did not expressly have the stated intention to implement a hedge. The Appellant referred to *Saskferco Products ULC v Canada*, 2008 FCA 297, [2009] 1 CTC 302 [*Saskferco*], as authority for the proposition that, in the absence of a direct linkage, a mere intention to hedge on the part of the taxpayer is insufficient to find a hedge for income tax purposes. In *Saskferco*, *supra*, the taxpayer argued that the borrowing operation in US dollars was a natural hedge of its dollar-based revenues. The Federal Court of Appeal, upholding this Court's decision, held that the primary purpose of the borrowing operation was to finance the construction of a capital asset, notwithstanding the fact that it may have been intended to hedge the foreign currency, and concluded that there was no correlation between the loan and the asset said to be hedged, namely the US dollar sales revenue, and therefore, there was no hedge for income tax purposes.

[92] Both parties also referred to *George Weston*, *supra*, in support of their respective positions.

[93] In *George Weston*, *supra*, George Weston Ltd. ("GWL") treated payments received in respect of the termination of cross-currency basis swap contracts on account of capital, and reported a capital gain. The Minister reassessed GWL on the grounds that the receipts were on account of income. GWL was a Canadian

publicly traded corporation that held direct and indirect subsidiaries in Canada and the United States. In 2001, GWL acquired a predominantly U.S.-based bakery business, Bestfoods Baking. The acquisition increased the corporate group's net investments in USD operations and was financed entirely by debt. GWL argued that it entered into the swap to preserve its consolidated balance sheet equity and to protect against foreign exchange fluctuations. The respondent's theory was that the receipts on closing out the derivative could be treated as being on account of capital for income tax purposes only if it could be established that the derivative transaction was linked to an underlying transaction — such as the purchase or sale of a capital asset, the repayment of a debt denominated in a foreign currency, or the investment of idle capital funds. The respondent was of the view that it is not sufficient to hedge the net investment through a hedge if the taxpayer has no intention to sell the investment since there would be no offsetting position against which the gains or losses arising from the contract could be matched.

[94] Associate Chief Justice Lamarre noted that the Supreme Court in *Shell*, *supra*, did not say that the gain or loss on a derivative must necessarily be linked to a gain or loss on another transaction and she opined that there is no legal basis to deny capital treatment to proceeds earned from a hedging contract if there is no sale or proposed sale of the underlying item being hedged. In finding that the swaps were entered into as a hedge of the investment in the USD operations, Lamarre ACJ considered GWL's intention, the amounts of the swaps and the amounts of the USD operations which were approximately equal as well as the timing of the acquisition of the swaps which was fairly close to the acquisition of the USD operations.

[95] In my view, *George Weston*, *supra*, confirmed the requirement to assess both the taxpayer's intention and conduct in determining whether a transaction is a hedge as well as the requirement to apply the linkage principle. In that case, the amounts of the swaps matched the value of the underlying U.S. assets that the taxpayer intended to hedge and there was some contemporaneity as the timing of the swaps was sufficiently close to the time the U.S. assets (the asset that was being hedged) were acquired. It was clear that the taxpayer would not have entered into the derivatives in the absence of the BestFoods acquisition and Lamarre ACJ accepted that the intention was to hedge the investment. I agree with the Appellant that, notwithstanding some comments suggesting that *George Weston*, *supra*, broadens the circumstances whereby a hedge may be found, the

law still requires a close linkage between the purported hedging instrument and the underlying asset.

3.2 Discussion.

Intention

[96] Before examining the linkage principle, I have to determine whether Mr. MacDonald had a clear intention to hedge against his BNS shares. I am of the view that he did not have such an intention, as I have found that he had speculated by entering into the Forward Contract. As I have examined in detail the intention of Mr. MacDonald at the time he entered into the Forward Contract in the previous section of these reasons for judgment, I will not address that issue here.

Linkage principle

[97] Citing *George Weston*, *supra*, the Respondent argued that the existing risk was Mr. MacDonald's ownership of the BNS shares and the potential for price fluctuations. She stated that the Forward Contract reduced Mr. MacDonald's exposure to price volatility. The Respondent pointed out that her position is that the Forward Contract is sufficiently linked to the ownership of the BNS shares so as to constitute a hedge. It is not her position that the Forward Contract is linked to a transaction that is the sale of the BNS shares or the reimbursement of the Loan.

[98] The Respondent relied also on Dr. Klein expert's opinion. Dr. Klein was of the view that the Forward Contract was a partial same asset hedge for Mr. MacDonald's long term investment in the BNS shares, namely a hedge where the Delivery Asset and the asset being hedged is the same asset, namely the BNS shares, and therefore the link is very clear. Accordingly, in this case, no other links are required to conclude that a hedge exists. Dr. Klein expressed the opinion that the use of the words "Reference Assets" or "Delivery Assets" were used interchangeably in forward contracts. As the number of Reference Stock under the Forward Contract did not exceed the number of BNS shares owned by Mr. MacDonald, that means that Mr. MacDonald hedged the BNS shares. Furthermore, as the Forward Contract provided for a financial and economic equivalence of an immediate sale, Mr. MacDonald had effectively eliminated all risks related to price fluctuation and, therefore, there was a hedge.

[99] I do not agree with Dr. Klein. In my view, the Forward Contract cannot be described for income tax purposes as a partial same asset hedge of the BNS shares. The BNS shares are the Reference Shares in the Forward Contract and are not the Delivery Assets. Mr. Kurgan also testified that the Forward Contract is not a same asset hedge of the BNS shares as the BNS shares are not the Delivery Assets but are the Reference Shares under the Forward Contract. Mr. MacDonald cannot settle the Forward Contract by transferring BNS shares to TDSI. The settlement under the Forward Contract has to be satisfied by the exchange of cash.

[100] My conclusion is also based on the testimony of both experts to the effect that a forward contract is a negotiated contract between the parties as opposed to a future contract that is a standardized document. If the parties had wanted the BNS shares to be the Delivery Assets, it would have been provided for in the Forward Contract, but it was not.

[101] Furthermore, Dr. Klein's opinion is based on a purely economic and financial perspective. To follow the economic and financial model presented by Dr. Klein at the hearing would lead this Court to speculate on what could happen as opposed to concluding as to what did happen. This is not what this Court should do when determining the tax consequences resulting from a specific fact pattern (*Shell*, *supra* at para 45).

[102] Both experts also agreed that the fact that the Forward Contract had the effect of an immediate sale has no bearing as to whether Mr. MacDonald had hedged or not.

[103] Furthermore, I am of the view that the Respondent erred when she said that the risk for Mr. MacDonald rested with his ownership of BNS shares and the potential for price fluctuations, citing *George Weston*, *supra*. The facts in *George Weston*, *supra*, are clear: the swaps were entered into to protect GWL against a devaluation of the USD compared to the Canadian dollar which would have had a negative impact on GWL's financial statements and on GWL's debt to equity ratio. The risk in GWL was clear and, in the absence of the swaps, GWL would have had suffered from the devaluation of the USD as it would have had a direct impact on GWL's financial statements and a direct impact on its shareholders. When the risk was no longer present, GWL terminated the swaps.

[104] However, I am of the view that the situation I am faced with is entirely different as to the existence of a risk. In arguing as she did, the Respondent did not take into account the actual facts of this case. Mr. MacDonald testified that he wanted to keep the BNS shares for the very long term. He sold only a small number of BNS shares over the years to rebalance his portfolio. He owned the BNS shares for the past 30 years. He entered into the Forward Contract, which was cash settled, confirming his intention not to sell the BNS shares. I do not see how Mr. MacDonald could have been exposed to a risk associated with the ownership of the BNS shares since he did not want to ever sell the BNS shares and, in fact, he only sold a small number of shares. As long as he did not sell the BNS shares, he suffered no risk in holding the BNS shares and I do not see how price fluctuations could have affected him.

[105] Accordingly, I am of the view that other links, both in terms of quantum and timing, have to be present in order to find that the Forward Contract had hedged the BNS shares and that the existence of an offsetting transaction is a prerequisite to find a hedge in this particular case.

[106] According to the Respondent, Mr. MacDonald created an opportunity to terminate the Forward Contract permanently by fully repaying the Loan, since "otherwise he would have been required to 'maintain the Forward Transaction'". As the Loan required the Forward Contract but the Forward Contract did not require the Loan, it would make sense that when you repay the Loan, you terminate the Forward Contract at the same time. Both experts agreed that the Loan was irrelevant as to whether Mr. MacDonald had hedged or not. I agree with them. The Loan was fully repaid in November 2004. Mr. MacDonald did not borrow any amount under the Loan in 2004, 2005 and 2006. Furthermore, Mr. MacDonald testified that the Loan was ancillary to the Forward Contract. I cannot find any connection between the amount borrowed under the Loan and the entering into, and the settlement of, the Forward Contract.

[107] In the present case, there is no particular transaction that occurred around the time Mr. MacDonald entered into the Forward Contract, which could be considered as a triggering event. In *George Weston*, *supra*, there was a related transaction — the Bestfoods acquisition — that triggered the decision to enter into the swaps and to which the swaps could be linked in timing. In this appeal, Mr. MacDonald owned the BNS shares for approximately 30 years prior to entering into the Forward Contract. There was a significant disparity between the entering into, and the settlements of, the Forward Contract and Mr. MacDonald's

acquisition and disposition of the BNS shares. Mr. MacDonald continued to own approximately 447,000 BNS shares after the final settlement under the Forward Contract. I find that there was no close linkage between the settlements of the Forward Contract and the BNS shares. Specifically, the settlements were not based on any anticipated sale of the BNS shares and the sale of BNS shares by Mr. MacDonald did not occur in close proximity to the settlements.

[108] Indeed, the quantum of BNS shares under the Forward Contract is less than the number of shares owned by Mr. MacDonald. This suggests that there is no close matching in terms of the value under the Forward Contract and the value of Mr. MacDonald's ownership of BNS shares. Nevertheless, both experts confirmed that one may enter into a partial hedge.

[109] The Respondent pointed out that, as Mr. MacDonald settled under the Forward Contract, a corresponding number of BNS shares were released back to him, such that there was perfect correlation as to quantum and timing. I am not convinced by this argument. This simply seems like a logical result flowing from the settlement of a forward contract.

[110] Furthermore, I am not convinced by Dr. Klein's opinion to the effect that the cash flows are a link between the Forward Contract and the BNS shares. The schedule of expected dividends is arguably a standard component of a forward contract. Furthermore, in his testimony, Dr. Klein specifically said that schedule A would appear in a forward contract both for a hedger and a speculator.

[111] The Respondent argued that since the terms of the Forward Contract are certain, then there is a lock-in because Mr. MacDonald is certain to get the Forward Price on the Forward Date of that delivery or reference stock or underlying asset. However, in his testimony, Dr. Klein agreed that, in the hypothetical situation where a person settles a forward contract with cash and does not dispose of the underlying shares on the market at the same time as he settles the forward contract, he will not have locked-in a gain on the shares and will still be subject to a change of price on the shares the very next day. I am of the view that the fact that Mr. MacDonald had sold forward the BNS shares is irrelevant for determining whether he had hedged the BNS shares or not. Both experts testified to that effect. Legally, Mr. MacDonald remains the beneficial owner of the BNS shares; the shares were pledged. Furthermore, I agree with Mr. Kurgan that the spot forward equivalence under the Forward Contract is

nothing more than a pricing mechanism and is not indicative of a hedge. Until the Reference Price of the BNS shares was determined, it was unclear which of the parties to the Forward Contract would be required to make a payment.

[112] As the Forward Contract was to be cash-settled only, the only possible manner for Mr. MacDonald to be protected from a loss under the Forward Contract was to sell a certain number of BNS shares to cover the corresponding loss on the settlement of the Forward Contract. But Mr. MacDonald never sold any BNS shares at the same time, or in close proximity with, the settlement of the Forward Contract. Accordingly, Mr. MacDonald only had an unrealized gain on the BNS shares but an actual loss on the settlement of the Forward Contract. I am of the view that without Mr. MacDonald having sold BNS shares in very close proximity with the settlement of the Forward Contract, one cannot conclude that Mr. MacDonald had mitigated or reduced a risk. The evidence adduced at the hearing showed very clearly that Mr. MacDonald did not sell any BNS shares in very close proximity to the settlement of the Forward Contract.

[113] More specifically, the first partial settlement of the Forward Contract occurred on June 16, 2003, and there were subsequent periodic terminations occurring until March 29, 2006. Mr. MacDonald donated a minimal number of BNS shares during this period; however, the first sale of BNS shares occurred on January 19, 2005. Thus, the payment on the settlement of the Forward Contract arose at different times from the realized gains on the sales of BNS shares.

[114] The Respondent pointed out that Mr. MacDonald started VFC in 1994, and, at incorporation, Mr. MacDonald owned 963,004 shares in VFC with an adjusted cost base of about $1 each or a total cost of about $1 million, and raised approximately $5 million. The Respondent added that, on March 19, 1997, the Appellant incorporated and co-founded ECM and needed cash for this new business venture and this reveals a link between the Forward Contract and the BNS shares since the Loan was available. I fail to see that link.

[115] The Respondent submitted that other links are present in this case: the amount of the Loan outstanding would have been reduced if the original Forward Price was reduced; if the number of Reference Shares under the Forward Contract were reduced, the credit facility available to Mr. MacDonald under the Loan would also be reduced; the terms of the Loan also required Mr. MacDonald to “maintain the Forward Transaction”; Mr. MacDonald also pledged as collateral the payments from TDSI that he would be entitled to receive under the

Forward Contract as well as 165,000 BNS shares. I am of the view that the above-mentioned links are not sufficient to call for a finding of a hedge in this appeal.

[116] In *Shell*, *supra*, the Supreme Court of Canada rejected the Crown's argument that foreign currency contracts were so closely related to money borrowed under debentures issued by the taxpayer that the two instruments should be treated as one (para. 65). I acknowledge that in *Shell*, *supra*, the various agreements were entered into between arm's length parties. Here, the parties with whom Mr. MacDonald contracted with are banks or corporations within the same group. However, I am of the view that, given the credible testimony of Mr. MacDonald and the absence of links between the amounts of the Loan used by Mr. MacDonald and the value of the BNS shares as Reference Shares in the Forward Contract, the same principle applies in this appeal.

[117] Therefore, the only link between the Forward Contract and the BNS shares was the fact that Mr. MacDonald entered into the Securities Pledge Agreement, the Forward Contract and the Loan at approximately the same time. This link is insufficient to call for a finding of a hedge in the present appeal.

F. CONCLUSION.

[118] On the basis of the foregoing, I am of the view that the Cash Settlement Payments are payments made on income account resulting in business losses for Mr. MacDonald and therefore, the appeal from the reassessments made under the Act for the 2004, 2005, 2006 and 2007 taxation years is allowed, with costs to the Appellant, and the matter is referred back to the Minister for reconsideration and reassessment in accordance with these Reasons for judgment.

Signed at Montreal, Quebec, this 8th day of August 2017.

"Dominique Lafleur"

Lafleur J.

APPENDIX A

2013-4032(IT)G

TAX COURT OF CANADA

BETWEEN:

JAMES S.A. MACDONALD

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

PARTIAL STATEMENT OF AGREED FACTS

The parties, through their respective counsel, agree, for the purpose of this appeal only, and any appeal therefrom, that the following facts are true and that the documents contained in the joint book of documents are accurate copies of authentic documents. The parties are free to make submissions with respect to, and are not to be taken as agreeing to, the degree of relevance or weight to be attributed to these facts and documents. The parties are free to seek to introduce additional facts in evidence at trial, however, such facts may not be inconsistent with the facts herein, unless the parties agree. This agreement shall not bind the parties in any other action.

The Appellant – James MacDonald

1. The Appellant, James S.A. MacDonald, is an individual who at all material times was a resident of Canada for the purposes of the *Income Tax Act* (the "*Act*").

2. Commencing in or about 1969, Mr. MacDonald joined McLeod Young Weir where he was employed in various capacities culminating in his becoming the head of mergers and acquisitions of that firm in or about 1986.

3. McLeod Young Weir was a Canadian brokerage firm that was engaged in various aspects of corporate finance, investment banking, underwriting and retail bond and stock trading.

4. In or about March 1988, the Bank of Nova Scotia acquired McLeod Young Weir which became ScotiaMcLeod Inc.

5. As a result of the acquisition of McLeod Young Weir by the Bank of Nova Scotia, Mr. MacDonald acquired 183,333 common shares of the Bank of Nova Scotia ("BNS shares") in exchange for his shares of McLeod Young Weir which he had acquired during the period 1969 to 1988. Mr. MacDonald did not own BNS shares in excess of the number obtained from the McLeod Young Weir acquisition. As noted below, in 1998 and 2004, there was a stock split and stock dividend respectively.

6. Mr. MacDonald was the Deputy Chairman of ScotiaMcLeod, Inc. until 1997 when he left ScotiaMcLeod, Inc. and formed Enterprise Capital Management Inc. ("Enterprise Capital") on March 19, 1997.

7. Enterprise Capital managed funds for Canadian institutions and high net worth individuals, raised funds from third party investors and invested those funds in a variety of companies on behalf of its investors through several holding entities, including a limited partnership known as Enterprise Capital Limited Partnership.

8. In or about 1994, Mr. MacDonald invested in an automobile finance company, VFC Inc. ("VFC") that engaged in non-prime automotive purchase financing, automotive repair financing and consumer instalment loans. The appellant was VFC's Chairman and owner of 963,004 shares in VFC.

9. On September 26, 2003, VFC shares were publicly offered on the Toronto Stock Exchange. The appellant sold 86,967 VFC shares on the public offering, reducing the number of shares he owned to 876,047.

10. Mr. MacDonald owned VFC common shares having a value of approximately $5.7 million according to the prospectus for the public offering in September 2003.

11. In 2006, VFC was acquired by the Toronto Dominion Bank ("TD Bank") and Mr. MacDonald received 153,000 common shares of TD Bank having a value of approximately $13 million in exchange for his common shares of VFC.

The Forward Transaction

12. On June 26, 1997, TD Securities Inc. ("TDSI") and Mr. MacDonald entered into a cash settled forward transaction ("Forward Transaction") with a forward date of June 26, 2002 ("Forward Date") and having terms and conditions as set out in a confirmation letter agreement dated July 2, 1997 (the "Confirmation")[1] between TDSI and Mr. MacDonald.

13. Pursuant to the Confirmation[2]:

    (a) Mr. MacDonald agreed to pay to TDSI, the product of the positive amount, if any, by which the "Reference Price" exceeded the "Forward Price" of $68.46[3] multiplied by the number of Reference Shares subject to the Forward Transaction; and

    (b) TDSI agreed to pay to Mr. MacDonald the product of the positive amount, if any, by which the Forward Price of $68.46 exceeded the Reference Price on the Forward Date multiplied by the number of Reference Shares subject to the Forward Transaction.

14. Under the Confirmation, "Reference Shares" was defined to be BNS common shares (BNS–TSE) ("BNS shares") and the Confirmation stipulated that the number of such shares of Reference Shares was 165,000, and "Reference Price" was defined as the official closing price of shares of the Reference Shares on The Toronto Stock Exchange on the "Forward Date", which was specified to be June 26, 2002. On or about June 26,

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[1] Joint book, tab 1.

[2] Joint book tab 1.

[3] The Forward Price of $68.46 was amended by agreement between the parties to $67.854, see Joint book, tab 2.

1997, the closing price of a BNS share on the Toronto Stock Exchange was $61.50 and on or about July 2, 1997, the closing price of a BNS share on the Toronto Stock Exchange was $62.50.

15. The fair market value of the appellant's 183,333 BNS shares as at June 26, 1997 and July 2, 1997 was $11,273,146 and $11,458,312 respectively.

16. Settlement of the Forward Transaction was to be made on the "Cash Payment Date" which was defined to be three business days after the Forward Date, subject to the occurrence of a "Market Disruption Event" as defined in the Confirmation.

17. The Forward Transaction as stated in the Confirmation and subsequent amendments thereto[4]:

    (a) could only be cash settled because there was no provision in the agreement that permitted it to be physically settled (by delivery of shares) in lieu of cash; and

    (b) contained optional early termination provisions whereby Mr. MacDonald could elect to terminate the Forward Transaction prior to the Forward Date on three business days' notice to TDSI, in which case, the Forward Transaction would be cash settled on the basis of the value of the Forward Transaction as at the early termination date, subject to adjustments to compensate TDSI for costs incurred by it as a consequence of such early termination, ("Cash Settlement Payment").

18. The BNS shares were subsequently split on February 12, 1998 on a 2 for 1 basis. On April 2, 2004, the BNS shares effectively split again on a 2 for 1 basis by means of the issuance by the Bank of Nova Scotia of a stock dividend of one BNS share for each issued and outstanding BNS share.

19. The Confirmation was subsequently amended and extended several times with new confirmations being executed by the parties until March 29, 2006 when the Forward Transaction terminated. These amendments, *inter alia*, adjusted the Forward Prices to reflect changes in the quarterly dividend payable on the Reference Shares and doubled the

[4] Joint book tabs 1 to 17.

number of Reference Shares to reflect the two separate two-for-one stock splits in the BNS shares mentioned above. In a confirmation dated March 22, 2002 and subsequent amendments thereto, the Forward Transaction was amended to substitute TDGF in lieu of TDSI. Subsequent amendments to the Confirmation made on several occasions also extended the Forward Date in addition to amending the Forward Price and the number of Reference Shares[5].

20. On July 7, 1997, Mr. MacDonald accepted the terms of a credit facility set out in a letter dated June 6, 1997, (the "Loan Agreement")[6] from the Toronto Dominion Bank ("TD Bank").

21. The Loan Agreement provided for the type of credit and amount as a term loan of up to $10,477,480, at interest, subject to a maximum of originally 90% but later amended to 95%, of the spot price of the BNS shares on the trade date multiplied by the number of BNS shares under the securities pledge agreement.

22. In 1997, Mr. MacDonald borrowed the principal amount of $4,250,000 from the TD Bank pursuant to the Loan Agreement and used the proceeds to invest in Enterprise Capital Limited Partnership. Mr. MacDonald subsequently borrowed an additional principal amount of $649,000 in 1997 from the TD Bank pursuant to the Loan Agreement, which funds were invested by Mr. MacDonald in various securities.

23. The total amount borrowed under the Loan Agreement was $4,899,000 in 1997 and repayments made by Mr. MacDonald to TD Bank until the loan was fully repaid were as follows:

Date	**Amount**
Total loan drawn down in 1997	$4,899,000
February 3, 2003 repayment	$2,999,430
	$1,899,569
September 16, 2003 repayment	$1,345,084

[5] Joint book, tabs 2 to 17.

[6] Joint book, tab 30

	$554,484
January 15, 2004 repayment	$100,000
	$454,484
November 5, 2004 repayment	$454,484

24. As at January 1, 2004, the outstanding principal amount of the Loan was $554,484.85 and the loan was fully repaid by November 5, 2004.

The Securities Pledge Agreement

25. On or about July 2, 1997, Mr. MacDonald entered into a securities pledge agreement with TD Bank[7] and TDSI but the securities pledge agreement with TDSI was, as stated, later transferred to TDGF. Pursuant to the securities pledge agreement Mr. MacDonald pledged 165,000 BNS shares to TD Bank as collateral security for the Loan[8].

Early Partial Terminations of Forward Transaction/Sales of BNS Shares/Donations of BNS Shares

26. Mr. MacDonald made the Cash Settlement Payments when he elected to apply the early termination provision in the Confirmation and subsequent amendments thereto.

27. All Cash Settlement Payments made by Mr. MacDonald were pursuant to the Forward Transaction between himself and TDGF with trade date June 26, 1997 described in the confirmation letter issued by TDSI dated July 2, 1997 and amended from time to time, from Mr. MacDonald's chequing account with TD Bank in accordance with his instructions.

28. The Cash Settlement Payments made by Mr. MacDonald prior to January 1, 2004 are as set out in Schedule A hereto.

2004 taxation year (January 1 – December 31)

29. As a result of early partial terminations of the Forward Transaction in 2003, as at January 1, 2004, there were 182,600 BNS shares that were Reference Shares pursuant to the

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[7] Joint book, tab 29.

[8] Joint book, tab 29.

Forward Transaction with TDGF as stated in the confirmations dated December 15, 2003[9] and January 14, 2004[10].

30. As at January 1, 2004, Mr. MacDonald owned 366,111 BNS shares of which 182,600 were pledged to the TD Bank pursuant to the Securities Pledge Agreement.

31. On April 2, 2004, the number of Reference Shares subject to the Forward Transaction of 182,600 BNS shares became 365,200 BNS shares as a result of the 2 for 1 split of BNS shares as of that date. On that date, Mr. MacDonald owned 730,732 BNS shares.

32. As of June 10, 2004, Mr. MacDonald partially terminated the Forward Transaction in respect of 50,000 Reference Shares by paying to TDGF a cash settlement payment of $989,520, pursuant to a Forward Transaction Partial Termination Agreement dated June 9, 2004 between Mr. MacDonald and TDGF[11]. The cash settlement payment made by Mr. MacDonald to TDGF as of June 10, 2004 was computed as the product of (i) 50,000 Reference Shares and (ii) the amount by which, as at June 10, 2004, the Reference Price exceeded the Forward Price as adjusted for early termination, determined pursuant to the Confirmation. The Reference Price of a BNS share was $35.43 and the Forward Price of a Reference Share was $14.41 and as adjusted for early partial termination of the Forward Transaction, was $15.64. Accordingly, as of June 10, 2004, the Reference Price exceeded the adjusted Forward Price by $19.79 (i.e., $35.43 minus $15.64). The product of $19.79 and 50,000 Reference Shares is approximately $989,520, which was the cash settlement payment of June 10, 2004.

33. This early partial termination resulted in the number of Reference Shares subject to the Forward Transaction being reduced from 365,200 BNS shares to 315,200 such shares as stated in the confirmation dated June 16, 2004[12].

34. As of November 2, 2004, Mr. MacDonald partially terminated the Forward Transaction in respect of 50,000 Reference Shares by paying to TDGF a cash settlement payment of

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[9] Joint book, tab 8.

[10] Joint book, tab 9.

[11] Joint book, tab 22.

[12] Joint book, tab 10.

$1,214,544.87, pursuant to a Forward Transaction Partial Termination Agreement dated November 2, 2004 between Mr. MacDonald and TDGF[13], determined by applying the same methodology as illustrated in paragraph 32 above.

35. This early partial termination resulted in the number of Reference Shares subject to the Forward Transaction being reduced from 315,200 BNS shares to 265,200 such shares as stated in the confirmations dated November 2, 2004[14] and December 14, 2004[15].

36. The two early partial terminations completed in 2004 resulted in Mr. MacDonald paying TDGF approximately $2,204,065 as cash settlement payments and in 2004 the number of Reference Shares subject to the Forward Transaction was reduced from 365,200 BNS shares to 265,200 BNS shares.

37. On February 6, 2004 and November 17, 2004, Mr. MacDonald donated 745 and 400 BNS shares, respectively, to registered Canadian charities thereby reducing the number of BNS shares owned by him to 730,332 such shares.

38. In computing his income for his 2004 taxation year, Mr. MacDonald deducted the Cash Settlement Payments made by him in that year.

2005 taxation year (January 1 – June 9)

39. On January 1, 2005, Mr. MacDonald continued to own 730,332 BNS shares of which 265,200 such shares were pledged to the TD Bank. As at January 1, 2005, the number of Reference Shares that were the subject of the Forward Transaction was also 265,200.

40. During the period January 1, 2005 to March 29, 2005, Mr. MacDonald sold 63,000 BNS shares thereby reducing the number of BNS shares owned by him from 730,332 to 667,332 BNS shares. The 63,000 BNS shares were sold by Mr. MacDonald in six tranches as follows:

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[13] Joint book, tab 23.

[14] Joint book, tab 11.

[15] Joint book, tab 12.

Date	Number of BNS Shares Sold
January 19, 2005	10,000
January 20, 2005	10,000
January 27, 2005	10,000
January 28, 2005	10,000
February 23, 2005	13,000
March 29, 2005	10,000
	63,000

41. During the period April 1, 2005 to June 9, 2005, Mr. MacDonald sold 150,000 BNS shares reducing the number of such shares owned by him on May 4, 2005 from 667,332 to 517,732. The sales of the BNS shares by Mr. MacDonald during this period were as follows:

Date	Number of BNS Shares Sold
April 1, 2005	10,000
April 11, 2005	20,000
April 13, 2005	20,000
April 15, 2005	20,000
April 21, 2005	20,000
April 29, 2005	50,000
May 4, 2005	10,000
	150,000

42. Mr. MacDonald realized capital gains as a result of his sales of BNS shares in the period April 1, 2005 to June 9, 2005 and included the taxable capital gains therefrom in computing his income for his 2005 taxation year.

43. Mr. MacDonald did not terminate the Forward Transaction in respect of any Reference Shares during the period from January 1, 2005 to June 9, 2005.

2005 taxation year (June 10 – September 18)

44. As of June 10, 2005, Mr. MacDonald partially terminated the Forward Transaction in respect of 50,000 Reference Shares by paying to TDGF a cash settlement payment of $1,272,247.91, pursuant to a Forward Transaction Partial Termination Agreement dated June 10, 2005 between Mr. MacDonald and TDGF[16], determined by applying the same methodology as illustrated in paragraph 32 above. This early partial termination resulted in the number of Reference Shares subject to the Forward Transaction being reduced from 265,200 BNS shares to 215,200 such shares as stated in the confirmations dated June 15, 2005[17] and June 29, 2005[18].

45. As of August 2, 2005, Mr. MacDonald again partially terminated the Forward Transaction in respect of 31,200 Reference Shares by paying to TDGF a cash settlement payment of $862,771.12, pursuant to a Forward Transaction Partial Termination Agreement dated August 2, 2005 between Mr. MacDonald and TDGF[19], determined by applying the same methodology as illustrated in paragraph 32 above. This early partial termination resulted in the number of Reference Shares subject to the Forward Transaction being reduced from 215,200 BNS shares to 184,000 such shares[20].

46. As of August 8, 2005, Mr. MacDonald again partially terminated the Forward Transaction in respect of 50,000 Reference Shares by paying to TDGF a cash settlement payment of $1,373,499.53, pursuant to a Forward Transaction Partial Termination Agreement dated August 8, 2005 between Mr. MacDonald and TDGF[21], determined by applying the same methodology as illustrated in paragraph 32 above. This early partial termination resulted in the number of Reference Shares subject to the Forward Transaction being reduced from 184,000 BNS Shares to 134,000 such shares[22].

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[16] Joint book, tab 24.

[17] Joint book, tab 13.

[18] Joint book, tab 14.

[19] Joint book, tab 25.

[20] No copy of confirmation of 184,000 Reference shares under Forward Transaction.

[21] Joint book, tab 26.

[22] No copy of confirmation for 134,000 Reference Shares under the Forward Transaction.

47. The three early partial terminations completed between June 10, 2005 and September 18, 2005 resulted in Mr. MacDonald paying TDGF cash settlement payments aggregating $3,508,518.56[23] and the number of Reference Shares subject to the Forward Transaction was reduced from 265,200 BNS shares to 134,000 BNS shares. Mr. MacDonald deducted the $3,508,518.56 in computing his income for his 2005 taxation year.

48. During the period June 10, 2005 to September 18, 2005, Mr. MacDonald did not sell any BNS shares.

2005 taxation year (September 19 – September 30)

49. During the period September 19, 2005 to September 30, 2005, Mr. MacDonald sold 60,000 BNS shares reducing the number of such shares owned by him on September 30, 2005 from 517,332 to 457,332. The sales of the BNS shares by Mr. MacDonald during this period occurred as follows:

Date	Number of BNS Shares Sold
September 19, 2005	15,000
September 27, 2005	10,000
September 28, 2005	10,000
September 29, 2005	15,000
September 30, 2005	10,000
	60,000

50. Mr. MacDonald realized capital gains as a result of his sales of the BNS shares in the period September 19, 2005 to September 30, 2005 and included the taxable capital gains therefrom in his income for his 2005 taxation year.

51. As of September 28, 2005, Mr. MacDonald partially terminated the Forward Transaction in respect of 3,000 Reference Shares by paying to TDGF a cash settlement payment of $87,476.70, pursuant to a Forward Transaction Partial Termination Agreement dated September 28, 2005 between Mr. MacDonald and TDGF[24], determined by applying the

[23] Joint book, tabs 24, 25, 26.

[24] Joint book, tab 27.

same methodology as illustrated in paragraph 32 above. This early partial termination resulted in the number of Reference Shares subject to the Forward Transaction being reduced from 134,000 BNS shares to 131,000 such shares as stated in the confirmation dated September 29, 2005[25].

52. In computing his income for his 2005 taxation year, Mr. MacDonald deducted the cash settlement payment of $87,476.70.

2005 taxation year (October 1 – December 31)

53. As of November 15, 2005, Mr. MacDonald partially terminated the Forward Transaction in respect of 75,000 Reference Shares by paying to TDGF, a cash settlement payment of $2,259,334.34, pursuant to a Forward Transaction Partial Termination Agreement dated November 15, 2005 between Mr. MacDonald and TDGF[26], determined by applying the same methodology as illustrated in paragraph 32 above. This early partial termination resulted in the number of Reference Shares subject to the Forward Transaction being reduced from 131,000 BNS shares to 56,000 such shares as stated in the confirmations dated November 15, 2005[27] and December 29, 2005[28] with Maturity Date of March 29, 2006

54. In computing his income for his 2005 taxation year, Mr. MacDonald deducted the cash settlement payment of $2,259,334.34.

55. On November 17, 2005, Mr. MacDonald donated 350 of his BNS shares to a registered Canadian charity thereby reducing the number of BNS shares held by him as at December 31, 2005 from 457,332 BNS shares to 456,982 such shares.

56. In summary, in 2005 Mr. MacDonald disposed of 273,350 BNS shares reducing his ownership of BNS shares from 730,332 as at January 1, 2016 to 456,982 BNS shares by year end. The early partial terminations completed in 2005 resulted in Mr. MacDonald paying TDGF cash settlement payments aggregating $5,855,329.60 and the number of

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[25] Joint book, tab 15.

[26] Joint book, tab 28.

[27] Joint book, tab 17.

[28] Joint book, tab 18.

Reference Shares subject to the Forward Transaction was reduced from 265,200 BNS shares to 56,000 such shares.

2006 taxation year (January 1 – January 25)

57. On January 25, 2006, Mr. MacDonald disposed of 10,000 BNS shares reducing the number of BNS shares owned by him as at January 25, 2006 from 456,982 BNS shares to 446,982 such shares.

58. On the disposition by Mr. MacDonald of 10,000 BNS shares as at January 25, 2006, Mr. MacDonald realized a capital gain and included the taxable capital gain resulting therefrom in computing his income for his 2006 taxation year.

2006 taxation year (January 26 – April 3)

59. As of March 29, 2006, which was the Maturity Date of the Forward Transaction, Mr. MacDonald terminated the Forward Transaction in respect of 56,000 Reference Shares by paying to TDGF a cash settlement payment of $1,897,442.40 on April 3, 2006, determined by applying the same methodology as illustrated in paragraph 32 above. This early partial termination resulted in the number of Reference Shares subject to the Forward Transaction being reduced to nil and terminated the Forward Transaction.

60. In computing his income for his 2006 taxation year, Mr. MacDonald deducted the cash settlement payment of $1,897,442.40.

2006 taxation year (April 4 – December 31)

61. On October 18, 2006, Mr. MacDonald donated 500 BNS shares to a registered Canadian charity thereby reducing the number of BNS shares owned by him from 446,982 BNS shares to 446,482 such shares.

2007 taxation year

62. On April 3, 2007, Mr. MacDonald donated 475 BNS shares to a registered Canadian charity thereby reducing the number of BNS shares owned by him from 446,482 BNS shares to 446,007 such shares.

63. During the period October 4, 2007 to December 5, 2007, Mr. MacDonald sold 95,000 BNS shares reducing the number of such shares held by him on December 5, 2007 from 446,007

BNS shares to 351,007 such shares. The sales of the BNS shares by Mr. MacDonald during the period were as follows:

Date	Number of BNS Shares Sold
October 4, 2007	20,000
October 5, 2007	10,000
October 9, 2007	5,000
November 29, 2007	50,000
December 5, 2007	10,000
	95,000

64. Mr. MacDonald realized capital gains as a result of his sale of BNS shares in the period October 4, 2007 to December 5, 2007 and included the taxable capital gains therefrom in computing his income for his 2007 taxation year.

Reassessments and Appeals

65. The Minister of National Revenue (the "Minister") issued the following Notices of Reassessment in respect of Mr. MacDonald's 2004, 2005 and 2006 taxation years:

    (a) for Mr. MacDonald's 2004 taxation year, a Notice of Reassessment dated July 10, 2009 (the "2004 Reassessment");

    (b) for Mr. MacDonald's 2005 taxation year, a Notice of Reassessment dated July 10, 2009 (the "2005 Reassessment");

    (c) for Mr. MacDonald's 2006 taxation year, a Notice of Reassessment dated July 10, 2009 (the "First 2006 Reassessment");

    (d) for Mr. MacDonald's 2007 taxation year, a Notice of Reassessment dated July 10, 2009 (the "2007 Reassessment") (collectively, the "Original Reassessments").

66. By Notices of Objection dated August 5, 2009, each filed with the Minister on August 17, 2009, Mr. MacDonald objected to each of the Original Reassessments.

67. The Minister did not notify Mr. MacDonald within 90 days from the filings by Mr. MacDonald of his Notices of Objection that any of the Original Reassessments were vacated, confirmed or that there had been any further reassessments.

68. By a Notice of Appeal filed October 28, 2013, Mr. MacDonald appealed each of the Original Reassessments.

69. By a further Notice of Reassessment in respect of Mr. MacDonald's 2006 taxation year dated April 10, 2014 (the "Second 2006 Reassessment" and together with the 2004 Reassessment, the 2005 Reassessment and the 2007 Reassessment, collectively, the "Reassessments"), the Minister reassessed Mr. MacDonald's 2006 taxation year.

70. Pursuant to the Reassessments, the Minister reassessed Mr. MacDonald as follows:

    (a) in respect of Mr. MacDonald's 2004 taxation year, to disallow Mr. MacDonald's deduction in respect of the two cash settlement payments in the aggregate amount of $2,204,065 made by Mr. MacDonald in that year and to instead treat the cash settlement payments as capital losses;

    (b) in respect of Mr. MacDonald's 2005 taxation year to, *inter alia,* disallow Mr. MacDonald's deduction in respect of the five cash settlement payments made by Mr. MacDonald in that year in the aggregate amount of $5,855,279.60 and to instead treat the cash settlement payments as on account of capital resulting in a capital loss;

    (c) in respect of Mr. MacDonald's 2006 taxation year to, *inter alia*, disallow Mr. MacDonald's deduction in respect of the cash settlement payment made by Mr. MacDonald in that year in the aggregate amount of $1,897,442.40 and to instead treat the cash settlement payment as on account of capital resulting in a capital loss. Pursuant to the Second 2006 Reassessment, the Minister also increased the taxable capital gains realized by Mr. MacDonald in his 2006 taxation year by the amount of $45,079; and

    (d) in respect of Mr. MacDonald's 2007 taxation year to, *inter alia*, delete a minimum tax carryforward credit purportedly claimed by Mr. MacDonald in computing his

tax in respect of his 2007 taxation year, on the basis that such carryfoward was no longer available as a result of the changes made by the 2005 Reassessment.

Schedule A

Summary up to December 31, 2003

Activity	Reference shares[29]	Cash Settlement Payment	BNS shares owned and (disposed)	Loan repaid
Total Borrowing in 1997				$4,899,000
As at June 26, 1997, Number of Reference Shares under the Forward Transaction	165,000		183,333	
Increase as result of stock split February 12, 1998 (see above)	165,000		183,333	
As at June 26, 2002, Number of Reference Shares under the Forward Transaction	330,000		366,666	
Donations in 2001, 2002 and 2003			(555)	
	330,000		366,111	
Repay Loan – February 3, 2003				($2,999,430)
Partial Settlements in 2003[30]:				
Partial settlement on June 16, 2003	(27,400)	$788,585[31]		
Partial settlement on June 20, 2003	(10,000)	$279.889[32]		
Partial settlement on Aug 1, 2003	(20,000)	$562,765[33]		
Partial settlement on Sept 2, 2003	(20,000)	$577,621[34]		
Partial settlement on Sept 11, 2003	(50,000)	$1,463,799[35]		
Repay Loan - September 13, 2003				($1,345,084)
Partial settlement on Dec 10, 2003	(20,000)	$622,260[36]		

[29] Joint book tabs 2 to 17; see also, On September 2, 2003, 20,000 shares were cash settled as Mr. MacDonald opted for early partial termination of the Forward Transaction and paid $577,621, and 252,600 shares were rolled forward under the Forward Transaction but there is no copy of the confirmation for the Forward Transaction of 252,600 shares. On September 11, 2003, 50,000 shares were cash were cash settled as Mr. MacDonald opted for early partial termination of the Forward Transaction and paid $1,463,799 (Joint book tab 37, p. 22), and 202,600 shares were rolled forward under the Forward Transaction but there is no copy of the confirmation for the Forward Transaction of 202,600 shares; on August 2, 2005, 31,200 shares were cash settled as Mr. MacDonald opted for early partial termination of the Forward Transaction and paid $862,771 and 184,000 shares were rolled forward under the Forward Transaction but there is no copy of the confirmation for the Forward Transaction of 184,000 shares. On August 8, 2005, 50,000 shares were cash settled as Mr. MacDonald opted for early partial termination of the Forward Transaction and paid $1,373,499 and 134,000 shares were rolled forward under the Forward Transaction (see joint book, tab 37, p. 18.) but there is no copy of confirmation for the Forward Transaction of 134,000 shares.

[30] Total number of shares settled by the partial termination of the Forward Transaction in 2003 was 147,400, not 294,800 (see amended notice of appeal, para 9(a)) as they occurred pre-2004 stock dividend.

[31] Joint book, tab 19.

[32] Joint book, tab 18.

[33] Joint book, tab 20.

[34] Appellant's answers to undertakings dated March 26, 2015, pp. 22, 28.

[35] Appellant's answers to undertakings dated March 26, 2015, p. 22.

[36] Joint book, tab 21.

As at January 1, 2004	182,600[37]		366,111	$554,484

Summary January 1, 2004 to December 31, 2007
(Reassessed Years)

2004

Activity	Reference shares	Cash Settlement Payment	BNS shares owned and (disposed)	Loan repaid
As at January 1, 2004	182,600		366,111	$554,484
Repay Loan – Jan 15, 2004				($100,000)
Donation – Feb 6, 2004			(745)	
			365,366	
Stock dividend April 2, 2004	182,600		365,366	
Sub-total	365,200		730,732	$454,484
Partial settlement on June 10, 2004	(50,000)	$989,520[38]		
Partial settlement on Nov 2, 2004	(50,000)	$1,214,544[39]		
Repay Loan – Nov 15, 2004				($454,484)
Donation – Nov 17, 2004			(400)	
As at January 1, 2005	265,200		730,332	$0

[37] Joint book, tabs 8, 9, Appellant's answers to undertakings dated March 26, 2015, p. 24.

[38] Joint book, tab 22.

[39] Joint book, tab 23.

2005

Activity	Reference shares	Cash Settlement Payment	BNS shares owned and (disposed)	Loan repaid
As at January 1, 2005	265,200		730,332	$0
Sales Jan 19, 2005 to May 4, 2005			(213,000)	
			517,332	
Partial settlement on June 15, 2005	(50,000)	$1,272,247[40]		
Partial settlement on Aug 2, 2005	(31,200)	$862,771[41]		
Partial settlement on Aug 8, 2005	(50,000)	$1,373,499[42]		
Sales September 2005			(60,000)	
	134,000		457,332	$0
Partial settlement on Sept 28, 2005	(3,000)	$87,476[43]		
Partial settlement on Nov 15, 2005	(75,000)	$2,259,334[44]		
Donation – Nov 17, 2005	56,000		(350)	
As at January 1, 2006	56,000		456,982	

[40] Joint book, tab 24.

[41] Joint book, tab 25.

[42] Joint book, tab 26.

[43] Joint book, tab 27, Appellant's answers to undertakings dated March 26, 2015, p. 18.

[44] Joint book, tab 28.

2006/07

Activity	Reference shares	Cash Settlement Payment	BNS shares owned and (disposed)	Loan repaid
As at January 1, 2006	56,000		456,982	
Sales January 25, 2006			(10,000)	
Termination of Forward Transaction at maturity on March 29, 2006[45]	(56,000)	$1,897,442[46]	446,982[47]	
	0		446,982	$0
Donation – Oct 18, 2006			(500)	
As at January 1, 2007			446,482	
Donation – Apr 3, 2007			(475)	
Sale – Oct 4, 2007			(20,000)	
Sale – Oct 5, 2007			(10,000)	
Sale – Oct 9, 2007			(5,000)	
Sale – Nov 27, 2007			(50,000)	
Sales – Dec 5, 2007			(10,000)	
As at December 31, 2007	0	$0	351,007	$0

[45] Appellant's answers to undertakings dated March 26, 2015, pp. 18, 22,;Joint book tabs 17, 18

[46] Appellant's answers to undertakings dated March 26, 2015, p. 22.

[47] Appellant's answers to undertakings dated March 26, 2015, p. 33.

Respectfully submitted by the parties,

DATED at the City of Toronto, Ontario, on February 3rd, 2017.

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