Docket: 2017-1252(IT)G

BETWEEN:

HUSKY ENERGY INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on common evidence with the appeals of Hutchison Whampoa Luxembourg Holdings S.À.R.L. (2017-3776(IT)G) and L.F. Management and Investment S.A.R.L. (2018-388(IT)G) on January 9 to 12, 2023, January 16 to 19, 2023, and January 23 and 26, 2023, at Toronto, Ontario
And further submissions received on July 7, 2023 from the Appellants and on July 31, 2023 from the Respondent

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Nicolas X. Cloutier Dominic Bédard-Lapointe Robert Celac
Counsel for the Respondent:	Pascal Tétrault Montano Cabezas David McLeod

---

JUDGMENT

UPON hearing the evidence and submissions of counsel for the Appellants and counsel for the Respondent;

IN ACCORDANCE with the attached Reasons for Judgment, the appeal from the assessment of Husky Energy Inc. ("Husky") by notice dated January 15, 2015 is dismissed with costs to the Respondent.

The parties have 60 days to agree on costs. If no agreement is reached by Husky and the Respondent, the Respondent has a further 30 days to provide written submissions on costs not to exceed 10 pages and Husky has a further 30 days to provide written submissions in response to the submissions of the Respondent not to exceed 10 pages.

Signed at Ottawa, Canada, this 13th day of December 2023.

"J.R. Owen"

Owen J.

Docket: 2017-3776(IT)G

BETWEEN:

HUTCHISON WHAMPOA LUXEMBOURG HOLDINGS S.À.R.L.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on common evidence with the appeals of Husky Energy Inc. (2017-1252(IT)G) and L.F. Management and Investment S.A.R.L. (2018-388(IT)G) on January 9 to 12, 2023, January 16 to 19, 2023, and January 23 and 26, 2023, at Toronto, Ontario And further submissions received on July 7, 2023 from the Appellants and on July 31, 2023 from the Respondent

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Margaret Nixon Pierre-Louis Le Saunier Zev Smith
Counsel for the Respondent:	Pascal Tétrault Montano Cabezas David McLeod

---

JUDGMENT

UPON hearing the evidence and submissions of counsel for the Appellants and counsel for the Respondent;

IN ACCORDANCE with the attached Reasons for Judgment, the appeal from the assessment of Hutchison Whampoa Luxembourg Holdings S.à.r.l. (“HWLH”) by notice dated August 1, 2016 is allowed with costs to HWLH, and the assessment is vacated.

The parties have 60 days to agree on costs. If no agreement is reached by HWLH and the Respondent, HWLH has a further 30 days to provide written submissions on costs not to exceed 10 pages and the Respondent has a further 30 days to provide written submissions in response to the submissions of HWLH not to exceed 10 pages.

Signed at Ottawa, Canada, this 13th day of December 2023.

"J.R. Owen"

Owen J.

Docket: 2018-388(IT)G

BETWEEN:

L.F. MANAGEMENT AND INVESTMENT S.A.R.L.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on common evidence with the appeals of Husky Energy Inc. (2017-1252(IT)G) and Hutchison Whampoa Luxembourg Holdings S.À.R.L. (2017-3776(IT)G) on January 9 to 12, 2023, January 16 to 19, 2023, and January 23 and 26, 2023, at Toronto, Ontario And further submissions received on July 7, 2023 from the Appellants and on July 31, 2023 from the Respondent

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	Louise R. Summerhill Josh Kumar Monica Carinci
Counsel for the Respondent:	Pascal Tétrault Montano Cabezas David McLeod

---

JUDGMENT

UPON hearing the evidence and submissions of counsel for the Appellants and counsel for the Respondent;

IN ACCORDANCE with the attached Reasons for Judgment, the appeal from the assessment of L.F. Management and Investment S.a.r.l. ("LFMI") by notice dated August 1, 2016 is allowed with costs to LFMI and the assessment is vacated.

The parties have 60 days to agree on costs. If no agreement is reached by LFMI and the Respondent, LFMI has a further 30 days to provide written submissions on costs not to exceed 10 pages and the Respondent has a further 30 days to provide written submissions in response to the submissions of LFMI not to exceed 10 pages.

Signed at Ottawa, Canada, this 13th day of December 2023.

"J.R. Owen"

Owen J.

Citation: 2023 TCC 167
Date: 20231213
Docket: 2017-1252(IT)G

BETWEEN:

HUSKY ENERGY INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent;

Docket: 2017-3776(IT)G

AND BETWEEN:

HUTCHISON WHAMPOA
LUXEMBOURG HOLDINGS S.À.R.L.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent;

Docket: 2018-388(IT)G

AND BETWEEN:

L.F. MANAGEMENT
AND INVESTMENT S.A.R.L.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Owen J.

I. Overview

[1] Husky Energy Inc. ("Husky"), Hutchison Whampoa Luxembourg Holdings S.à.r.l. ("HWLH") and L.F. Management and Investment S.a.r.l. ("LFMI") (individually, an "Appellant" and, collectively, the "Appellants") each appeals an assessment by the Minister of National Revenue (the "Minister") that fixes the tax consequences to the Appellant in respect of dividends paid by Husky to two non-resident persons on October 1, 2003. I will refer to the assessments of Husky, HWLH and LFMI as the "Husky Assessment", the "HWLH Assessment" and the "LFMI Assessment", respectively.[1]

[2] On October 1, 2003, Husky paid a quarterly dividend of $0.10 (the "Second Quarter Dividend") and a special dividend of $1.00 (the "Special Dividend") on each of its common shares outstanding at that time. I will refer to the Second Quarter Dividend and the Special Dividend collectively as the "Husky Dividends".

[3] Husky paid $328,986,960 of the Husky Dividends (the "Dividends") to two non-resident corporations that, on August 29, 2003, were listed in the register of common shareholders of Husky maintained by Computershare.

[4] One of the two payee corporations, Hutchison Whampoa Europe Investments S.à.r.l. ("HWEI"), had borrowed 146,548,737 common shares in Husky under the terms of a securities lending agreement with a predecessor of HWLH called

---

[1] The Husky Assessment was issued by notice dated January 15, 2015 while the HWLH Assessment and the LFMI Assessment were issued by notices dated August 1, 2016.

U.F. Investments (Barbados) Limited ("UF Barbados"). HWEI was paid $161,203,610 of the Dividends (the "HWEI Dividends") less $8,060,180.50 withheld by Husky and therefore received $153,143,429.50.

[5] The second of the two payee corporations, L.F. Luxembourg S.à.r.l. ("LF Luxembourg"), had borrowed a total of 152,530,319 common shares in Husky under the terms of securities lending agreements with two predecessors of LFMI called L.F. Investments (Barbados) Limited ("LF Barbados") and H.F. Investments (Barbados) Ltd. ("HF Barbados"). LF Luxembourg borrowed 137,576,366 common shares of Husky from LF Barbados and 14,953,953 common shares of Husky from HF Barbados. LF Luxembourg was paid $167,783,350 of the Dividends (the "LF Luxembourg Dividends") less $8,389,167.50 withheld by Husky and therefore received $159,394,182.50.[2]

[6] On September 25, 2003, LF Barbados and HF Barbados amalgamated with a third corporation, LFCB Holdings Ltd., to form L.F. Investments (Barbados) Limited ("New LF Barbados"). Consequently, at the time that the Dividends were paid by Husky, New LF Barbados was the lender under the securities lending agreement with LF Luxembourg.

[7] The parties agree that in 2003, UF Barbados, LF Barbados, HF Barbados and New LF Barbados were resident in Barbados for the purposes of the *Canada–Barbados Income Tax Convention* (the "Barbados Treaty"). The parties also agree that in 2003, HWEI and LF Luxembourg (collectively, the "Luxcos") were resident in Luxembourg for the purposes of the *Canada–Luxembourg Income Tax Convention* (the "Luxembourg Treaty"). There is no evidence that contradicts these concessions.[3]

[8] The Minister's position is that tax under Part XIII of the *Income Tax Act,* R.S.C. 1985, c.1 (5th Supp.)(the "ITA") was exigible on the Dividends at the rate of 15%, which is the rate under Article X(2) of the Barbados Treaty ("Article X(2)").[4] Husky withheld and remitted tax under Part XIII at the rate of 5%, which is the lower of the two rates provided under Article 10(2) of the Luxembourg Treaty ("Article 10(2)"). I will refer to the difference in the amount

---

[2] The amounts received by HWEI and LF Luxembourg are stated here in Canadian dollars, which is the currency in which Husky declared the Husky Dividends. The actual payments to HWEI and LF Luxembourg were in United States dollars.

[3] See, generally, *Hammill v. Canada*, 2005 FCA 252 ("*Hammill*") at paragraph 31.

[4] The rate dictated by an applicable tax treaty overrides the 25% rate in Part XIII of the ITA by virtue of subsection 10(6) of the *Income Tax Application Rules*.

of Part XIII tax levied on the Dividends at the rates of 15% and 5% as the "shortfall".

[9] In support of the Husky Assessment, the Minister submits that:

1. UF Barbados and New LF Barbados, not HWEI and LF Luxembourg, were the beneficial owners of the Dividends. Therefore, the tax rate applicable to the Dividends was the 15% rate under Article X(2) and Husky was required to withhold and remit tax at that rate.

2. If HWEI and LF Luxembourg were the beneficial owners of the Dividends, neither controlled directly or indirectly at least 10% of the voting power in Husky. Therefore, the applicable rate under Article 10(2) was 15% rather than 5% and Husky was required to withhold and remit tax under Part XIII of the ITA at the 15% rate.

3. In the alternative, under the general-anti avoidance rule in section 245 of the ITA (the "GAAR"), the Minister is entitled to assess Husky for the shortfall.

[10] In support of the HWLH Assessment and the LFMI Assessment, the Minister submits that:

1. UF Barbados and New LF Barbados, not HWEI and LF Luxembourg, were the beneficial owners of the Dividends. Therefore, the tax rate applicable to the Dividends was the 15% rate under Article X(2) and HWLH and LFMI, as the successors of UF Barbados and New LF Barbados, respectively, is each liable for its respective share of the shortfall.

2. In the alternative, under the GAAR, the Minister is entitled to assess each of HWLH and LFMI, as the successors of UF Barbados and New LF Barbados, respectively, for its share of the shortfall.

II. <u>The Partial Agreed Statement of Facts and the Joint Book of Documents</u>

[11] The parties submitted a partial agreed statement of facts (the "PASF"), the contents of which are appended to these reasons as Appendix "A", and two volumes of the documents referenced in the PASF. The basis on which the

documents referenced in the PASF are entered into evidence is described in the "Preliminary Matters" section of the PASF.

[12] In addition, the parties submitted a joint book of documents in two volumes (the "Joint Book"). The basis on which the documents included in the Joint Book are entered into evidence is described in a documents agreement included at the beginning of the Joint Book.[5]

III. The Evidence

A. General

[13] The appeals were heard on common evidence.

B. The Witnesses

[14] The Appellants called six witnesses:

1. Martin John Gardiner Glynn. In 2003, Mr. Glynn was a member of the board of directors of Husky and was chairman of the audit committee of Husky.

2. Neil Douglas McGee. In 2003, Mr. McGee was a vice-president and the chief financial officer of Husky.

3. Donald Jeffrey Roberts. In 2003, Mr. Roberts was the group deputy chief financial officer of Hutchison Whampoa Limited ("HWL") in Hong Kong.

4. Wai Ying Fung. In 2003, Mr. Fung was group chief accountant of HWL in Hong Kong.

5. Kenneth Albert Cameron. Mr. Cameron was an auditor with the Canada Revenue Agency (the "CRA") who participated in the audit of the Appellants. Mr. Cameron was subpoenaed to testify by the Appellants.

[5] I entered the Joint Book into evidence as exhibit AR-1, but for clarity, I will refer to the two volumes in exhibit AR-1 as the Joint Book.

6. Laurie Marie Wills. Ms. Wills was an auditor with the CRA who participated in the audit of the Appellants. Ms. Wills was subpoenaed to testify by the Appellants.

[15] The Respondent called two witnesses, one of whom was qualified as an expert witness:

1. Bing Zhang. Mr. Zhang is an exchange of information officer with the Competent Authority Exchange of Information division of the CRA.

2. Werner Haslehner. Professor Haslehner testified as an expert in Luxembourg tax law.

C. The Credibility and Reliability of the Witnesses

[16] The credibility of a witness refers to the honesty of the witness, or the readiness of the witness to tell the truth. A finding that a witness is not credible is a finding that the evidence of the witness cannot be trusted because the witness is deliberately not telling the truth.

[17] The reliability of a witness refers to the ability of the witness to recount facts accurately. If a witness is credible, reliability addresses the kinds of things that can cause even an honest witness to be mistaken. A finding that the evidence of a witness is not reliable goes to the weight to be accorded to that evidence.

[18] Reliability may be affected by any number of factors, including the passage of time. In *R. v. Norman*, [1993] O.J. No. 2802 (QL), 68 O.A.C. 22, the Court of Appeal for Ontario explained the importance of reliability at paragraph 47:

> . . . The issue is not merely whether the complainant sincerely believes her evidence to be true; it is also whether this evidence is reliable. Accordingly, her demeanour and credibility are not the only issues. The reliability of the evidence is what is paramount. . . .

[19] With respect to each fact witness, I have considered all relevant factors[6] and I have concluded that each fact witness is credible.

---

[6] See *Nichols v. R.*, 2009 TCC 334 at paragraphs 23 and 24.

[20] With respect to reliability, as much of the oral evidence of the Appellants addressed the purpose of the transactions in issue, I note the following observation of Bowman, C.J. in *Makuz et al. v. R.*, 2006 TCC 263 at paragraph 32:

> I will outline briefly the evidence of the appellants but I should preface the outline with the caveat that statements of subjective intention about the reasons for entering into a transaction are considerably less persuasive than the objective facts and circumstances surrounding the transaction. Without suggesting that there was any conscious dishonesty in a person's statements of subjective intention, they tend to be unreliable because they are influenced by many extraneous factors. What actually happens is often a more reliable indication of a taxpayer's purpose.

D. Hearsay Issues

[21] The documentary evidence includes several public disclosure documents issued by Husky and other corporations. To the extent that the information in these documents is submitted for its truth, the evidence is hearsay.

[22] However, for the Husky documents such as its 2003 Annual Report at tab 1 of the Joint Book and its press releases, I find that the information in such documents is admissible under the principled exception as being both necessary and reliable.[7]

[23] With respect to the meaning of "necessary", in *R. v. F. (W.J.)*, [1999] 3 S.C.R. 569 at page 585, paragraph 31, the Court stated:

> Hearsay evidence may be necessary to enable all relevant and reliable information to be placed before the court, so justice may be done.

[24] In *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764 at page 787, paragraph 35, Lamer, C.J. stated:

> Necessity is met here in the same way it was met in *B. (K.G.)*: the prior statement is necessary **because evidence of the same quality cannot be obtained at trial**.

[Emphasis added.]

[7] In reaching this conclusion, I have applied the approach taken by Cromwell, J.A., as he then was, in *R. v. Wilcox et al.*, 2001 NSCA 45, who applies the dictates of the Supreme Court of Canada regarding the principled exception to the rule against hearsay to records created in a commercial context.

[25] I find that the evidence is necessary because the numerous detailed facts in Husky's publicly disclosed documents for 2003 are unlikely to be available to the Court in another form as a result of the effluxion of time and the frailties of human memory. Therefore, the evidence would not otherwise be available if not admitted under the principled exception.

[26] The standard for "reliability" is threshold reliability, not absolute reliability. To meet this standard, circumstantial guarantees of trustworthiness must be established.[8]

[27] Husky disclosed the information in documents such as its 2003 Annual Report and its press releases in accordance with applicable Canadian securities laws, which require disclosure of material facts and impose sanctions for failure to do so accurately and completely. In my view, the circumstances in which the information in these documents is collected and presented by Husky provide circumstantial guarantees of its trustworthiness. In addition, there is no evidence that contradicts the detailed information in these materials or otherwise calls into question the veracity of this information.[9]

[28] I will identify information obtained from such documents as "excepted hearsay evidence". Generally, I have included the information in my reasons solely to provide a more detailed account of events described in general terms by the witnesses. I note that the admission of such evidence for its truth is not an indication of the weight, if any, accorded to the evidence.

E. Summary of the Evidence

Introduction

[29] The PASF provides many detailed facts that I do not propose to repeat in these reasons. However, I will reference these facts as needed.

[30] In general, the oral evidence of the Appellants' witnesses focused on the reasons for which UF Barbados, LF Barbados and HF Barbados (collectively, the "Barbcos"[10]) entered into the securities lending arrangements described in the

---

[8] *R. v. Parrott*, 2001 SCC 3 at paragraph 68.

[9] See, generally, *R. v. Khelawon*, 2006 SCC 57.

[10] After the amalgamation of LF Barbados and HF Barbados on September 25, 2003, the Barbcos are UF Barbados and New LF Barbados.

PASF (the "securities lending arrangements"); the effect of the securities lending arrangements; the ownership structure above the Barbcos and Luxcos; Husky's reasons for paying the Special Dividend in 2003; and Husky's role in the securities lending arrangements.

Husky's Evidence

[31] Mr. McGee and Mr. Glynn testified on behalf of Husky.

[32] Mr. McGee testified that he joined Husky in 1997 as CFO when it was a private corporation known as Husky Oil Limited ("HOL"). At that time, the common shares of HOL were owned 49% by UF Barbados, 46% by LF Barbados and 5% by an indirect wholly owned subsidiary of the Canadian Imperial Bank of Commerce ("CIBC"). The capital of HOL also included Class A special voting shares owned by corporations not relevant to these appeals.

[33] Mr. McGee testified that in 2000, HOL merged with a listed corporation called Renaissance Energy Ltd. ("Renaissance") and thereby became a publicly traded corporation listed under the name Husky Energy Inc. Following the merger, Husky had only common shares outstanding with one vote per share and no unanimous shareholder agreement.[11]

[34] Mr. Glynn testified that Husky chose to declare the Special Dividend because at the time that the dividend was declared at a meeting of the board of directors of Husky on July 23, 2003 (the "July 23 Meeting"), Husky was in a very strong financial position and wished to address the discount that the market placed on its common shares by generating revenue for its minority shareholders. Mr. Glynn stated that because share buybacks were not common at the time, the Special Dividend was the only way to accomplish Husky's objective.[12]

---

[11] Lines 9 to 15 of page 8, lines 14 to 28 of page 9 and lines 1 to 2 of page 10 of the Transcript of Proceedings for January 10, 2023. The details of the merger are found in exhibit AH-1 at tab 12 of the Husky Book of Documents; this exhibit is titled "Information Circular with respect to a Proposed Arrangement involving Renaissance Energy Ltd. and Husky Oil Limited" (excepted hearsay evidence).

[12] Mr. Glynn succinctly summarizes Husky's circumstances and the rationale for the Special Dividend at lines 20 to 28 of page 39 and lines 1 to 25 of page 40 of the Transcript of Proceedings for January 9, 2023.

[35] Mr. McGee testified that in 2003, Husky's cash flow was particularly strong because commodity prices were higher than predicted in Husky's budget for 2003.[13]

[36] On July 24, 2003, Husky issued a press release describing its second quarter financial results as well as the Second Quarter Dividend and the Special Dividend.[14]

[37] Mr. McGee had no specific recollection of when he first heard about the Special Dividend but stated that he would have been involved in the preparation of the materials given to the board of directors of Husky for the July 23 Meeting, which meant that he would have been made aware of the Special Dividend about one week before that meeting.[15]

[38] Mr. McGee testified that Husky had to comply with the covenants accompanying its debt and that he would have checked with the treasury group at Husky to confirm that the Special Dividend was not offside those covenants.[16] Mr. McGee also stated that it was fundamental to Husky's business that it maintain its credit ratings and that paying down Husky's bond debt was not economic because of make-whole requirements.[17]

[39] Mr. McGee testified that the excess cash at the end of the second quarter of 2003 was $460 or $470 million.[18] With respect to using the excess cash for investment opportunities, Mr. McGee stated:

> There was the issue, I guess of alternate use of the funds. I guess you could say, you could take the money and invest it in additional businesses, additional assets; but we're always looking for new investments, but they didn't always arrive when you wanted them. So we looked at the cash flow, the budget was fully funded, the plan itself provided that there would be no debt at the end of the five years. So even though we paid special dividend, there was still being sufficient financial flexibility to take advantage of an acquisition. And indeed in the following months we did make an acquisition, Marathon.[19]

---

[13] Lines 6 to 21 of page 10 of the Transcript of Proceedings for January 10, 2023.
[14] Tab 48 of the PASF (excepted hearsay evidence).
[15] Lines 1 to 14 of page 11 of the Transcript of Proceedings for January 10, 2023.
[16] Ibid., lines 10 to 12 and 19 to 27 of page 12.
[17] Ibid., lines 4 to 24 of page 13.
[18] Ibid., lines 18 to 25 of page 14.
[19] Ibid., lines 25 to 28 of page 13 and lines 1 to 8 of page 14.

[40] In cross-examination, Mr. McGee stated that he did not know how the figure of $400 million was chosen but that the amount could be met out of Husky's cash resources.[20]

[41] Mr. Glynn testified that a week to 10 days prior to the July 23 Meeting, he received a call from Mr. Frank Sixt alerting him that the Special Dividend would be an item on the agenda. Mr. Glynn stated:

> A. . . . And it was of particular relevance to me, because as chairman . . . of the audit committee, there would have been some discussion about that at the audit committee and its capacity, Husky's capacity to pay dividends.[21]

[42] Subsequently, Mr. Glynn had the following exchange with counsel for Husky:

> Q. . . . Based on your knowledge, tell us how the principal shareholders influenced the decision to pay the special dividend.
>
> A. How they influenced the decision? They simply obviously talked to management and formed the view and consulted board members individually in advance. And then there was an agenda item at the board for discussion, there was a vote, I'm sure it was unanimous, that it be approved.[22]

[43] In cross-examination, Mr. Glynn had the following exchange with counsel for the Respondent:

> Q. And so he [Mr. Sixt] calls you to brief you on -- I will use your word -- this proposal, and I imagine he wanted you to vote in favour of the proposal?
>
> A. I didn't say that instantly, I wanted to read the material that he prepared to support the recommendation.
>
> Q. I don't doubt that, sir, you wanted to read the materials, but Mr. Sixt, he wanted you to vote in favour of the proposal? Is that fair?
>
> A. No, he just simply said that this was coming up for consideration and explained a rationale for it.
>
> Q. And your response was that you wanted to see the papers and consider the matter before the July 23rd meeting?

---

[20] Ibid., lines 8 to 13 of page 62.
[21] Lines 22 to 26 of page 38 of the Transcript of Proceedings for January 9, 2023.
[22] Ibid., lines 1 to 9 of page 50.

A. I recognized it was on the agenda and I would come prepared to have a view.[23]

[44] Following the declaration of the Husky Dividends at the July 23 Meeting, Husky was presented with the opportunity to purchase Marathon Oil Corp. ("Marathon"), which it did on October 1, 2003 for $831 million. Husky sold certain of Marathon's assets for $431 million for a net purchase cost of $400 million.[24]

[45] Mr. Glynn testified that there was no discussion regarding Marathon at the July 23 Meeting. He described the $400 million net cost of Marathon as "not a large amount in the scheme of things" because at the time, Husky had a market capitalization of $15 to $20 billion.[25]

[46] In cross-examination, Mr. Glynn confirmed that the Marathon transaction was not discussed at the July 23 Meeting and stated that he had no knowledge of whether the possible acquisition of Marathon was identified by, or being contemplated by, Husky's management at that time.[26]

[47] Because the purchase of Marathon closed on the same day as the payment of the Husky Dividends, Husky drew down on its line of credit but repaid these amounts by the end of 2003.[27] Husky's 2003 Annual Report states that despite the Special Dividend and the acquisition of Marathon, Husky's net debt fell to $1.8 billion at the end of 2003 compared to $2.1 billion at the end of 2002.[28] Referencing page 58 of Husky's 2003 Annual Report, Mr. McGee testified that Husky's long-term debt at the end of 2003 was $1.698 million compared to $2.385 million at the end of 2002.[29] The same page of the Husky's 2003 Annual Report states that at the end of 2003, Husky had no balance on its syndicated line of credit.

[48] Mr. McGee testified that he had no specific recollection of when he was told of the proposed securities lending arrangements. However, on the basis of the e-mail trail, he believed that it was one week before the July 23 Meeting,[30] which

---

[23] Lines 3 to 19 of page 66 of the Transcript of Proceedings for January 9, 2023.
[24] Husky's 2003 Annual Report ("Husky's 2003 Annual Report"), tab 1 of the Joint Book, at page 7 (excepted hearsay evidence).
[25] Lines 18 to 28 of page 49 of the Transcript of Proceedings for January 9, 2023.
[26] Ibid., lines 23 to 28 of page 77 and lines 1 to 15 of page 78.
[27] Ibid., lines 17 to 28 of page 45 and lines 1 to 9 of page 46.
[28] Husky's 2003 Annual Report, tab 1 of the Joint Book, at page 6 (excepted hearsay evidence).
[29] Lines 19 to 27 of page 16 of the Transcript of Proceedings for January 10, 2023.
[30] Ibid., lines 13 to 20 of page 17.

would have been around July 16, 2003. Mr. McGee stated that to the best of his knowledge, Husky was not involved in the decision to implement the securities lending arrangements, nor was it involved in the drafting of the associated documents; he also stated that he had no recollection of internal discussions regarding the securities lending arrangements.[31]

[49] In cross-examination, Mr. McGee repeated that he did not recall when he became aware of the securities lending arrangements but that it was likely one week before the July 23 Meeting.[32]

[50] Mr. McGee testified that his role with respect to the securities lending arrangements related to the fact that Husky common shares were being transferred and the resulting change in registered shareholders, which in turn raised withholding tax considerations.[33]

[51] Mr. McGee stated that there were no instructions from the Barbcos to obtain the 5% withholding tax rate. Mr. McGee also stated that the withholding tax rate did not affect Husky's financial position since it paid the gross amount of the Dividends.[34]

[52] Mr. McGee testified that Computershare maintained the share register for Husky, paid the dividends declared on Husky common shares and issued tax forms to the shareholders that received dividends.[35] Mr. McGee helped HWL with Computershare[36] and Computershare did register the transfer of the Husky common shares to the Luxcos that occurred because of the securities lending arrangements.[37]

[53] In cross-examination, Mr. McGee acknowledged that an e-mail to him from Don Roberts dated July 23, 2003[38] asked for his help with Computershare and included an e-mail from Computershare that referenced the Barbcos. In the e-mail, Mr. Roberts states: "This is exactly why we needed your involvement so the registrar is well aware that Husky knows the shareholder and all of this bureaucracy can be smoothly handled." Mr. McGee identified his handwritten note on the

[31] Ibid., lines 7 to 25 of page 18.
[32] Ibid., lines 13 to 18 of page 67 and lines 1 to 2 of page 75.
[33] Ibid., lines 23 to 28 of page 25 and lines 1 to 7 of page 26.
[34] Ibid., lines 27 to 28 of page 26 and lines 1 to 12 of page 27.
[35] Ibid., lines 18 to 28 of page 31, page 32, and line 1 of page 33.
[36] Ibid., lines 8 to 20 of page 34, lines 22 to 28 of page 38 and lines 1 to 6 of page 39.
[37] Ibid., lines 10 to 12 of page 28.
[38] Exhibit RH-3, tab 6 of the Husky Book of Documents.

e-mail which states: "Spoke to Jim Girgulis. He advised that the issues raised by HWL had been resolved."[39]

[54] In cross-examination, Mr. McGee was asked about a series of e-mails that ends with an e-mail from him to Dino Farronato, head of global taxation for HWL, dated July 31, 2003.[40] Mr. McGee states: "Our tax group have advised that, based on the documentation received, the withholding tax on HEI dividends paid to Hutchison Whampoa Europe Investments S.A.R.L. and L.F. Luxembourg S.A.R.L. would be at the rate of 5%."

[55] In response to questions from counsel for the Respondent regarding the earlier e-mails in the chain between him and David Weekes of Stikeman Elliott, Mr. McGee acknowledged that he must have requested a legal opinion from Stikeman Elliott regarding the rate of Part XIII tax on the Dividends as the opinion was addressed to him.[41] Mr. McGee did not however recall whether he had requested the documents identified by David Weekes in an e-mail from David Weekes to Dino Farronato and others dated July 18, 2003.

[56] Mr. McGee testified that HOL paid dividends on its shares in United States dollars and that, after its merger with Renaissance, Husky continued to pay dividends to the Barbcos in United States dollars. Mr. McGee described the process as follows:

> . . . So what happened when Husky Oil became Husky Energy, that practice continued so that on a dividend payment date Computer Share [*sic*] would do their run of all the dividend warrants. They would -- I think this is the way it was -- it would cancel the two warrants for the two shareholders because Husky would pay those two shareholders directly. It would take the exchange rate on the dividend payment date of Canadian dollar and U.S. dollar and then remit the U.S. dollar funds to the shareholder.[42]

[57] In cross-examination, Mr. McGee again stated that Husky had been paying dividends to the principal shareholders directly since 2000 when HOL merged with Renaissance.[43] Mr. McGee acknowledged that this arrangement was not reflected

---

[39] Lines 13 to 28 of page 53, page 54, and lines 1 to 16 of page 55 of the Transcript of Proceedings for January 10, 2023.
[40] Exhibit RH-5, tab 11 of the Husky Book of Documents.
[41] Exhibit AH-6, tab 10 of the Husky Book of Documents. This exhibit was entered as evidence that an opinion was obtained, not as an opinion of the rate of Part XIII tax.
[42] Lines 13 to 21 of page 33 of the Transcript of Proceedings for January 10, 2023.
[43] Ibid., lines 24 to 28 of page 83 and line 1 of page 84.

in Husky's Transfer Agent, Registrar and Dividend Disbursing Agent Agreement with Montreal Trust Company of Canada dated July 14, 2000. Mr. McGee suggested that "it was probably an arrangement that wasn't documented" and that so far as he was aware, Computershare had never refused to pay dividends to Husky's principal shareholders notwithstanding ambiguous (double hearsay) comments in an e-mail from Ian McNair to John Evans dated September 12, 2003.[44]

[58] In re-examination, Mr. McGee stated that as far as he was aware, Computershare had never paid dividends to the principal shareholders of Husky and that Husky had paid the dividends because the principal shareholders wanted their dividends paid in United States dollars.[45]

[59] Mr. Glynn testified that the securities lending arrangements were never "flagged" at any board of directors meeting or audit committee meeting of Husky and that "[o]ther than being asked . . . today, I don't recall ever knowing about it."[46] As well, Mr. Glynn stated that Husky's tax department would provide regular updates to the audit committee, but that tax risk associated with the Special Dividend was never raised either with the audit committee or with the board of directors of Husky.[47]

[60] In cross-examination, in response to questions as to whether a change of control was brought to his attention or brought up at a Husky board of directors meeting held in 2003, Mr. Glynn stated "no".[48] Mr. Glynn also stated that a change in the voting rights of Husky common shares was never discussed.[49]

[61] In re-examination, Mr. Glynn had the following exchange with counsel for Husky:

---

[44] Ibid., lines 19 to 28 of page 80, lines 1 to 9 and 26 to 28 of page 81 and lines 1 to 3 of page 82. The e-mail is exhibit RH-7, tab 3 of the Respondent's Book of Documents. The agreement with Montreal Trust is exhibit RH-6, tab 2 of the Respondent's Book of Documents. I take judicial notice of the fact that Computershare acquired the stock transfer business of Montreal Trust in 2000.
[45] Ibid., lines 10 to 24 of page 87.
[46] Lines 13 to 23 of page 51 of the Transcript of Proceedings for January 9, 2023.
[47] Ibid., lines 24 to 28 of page 51 and lines 1 to 12 of page 52.
[48] Ibid., lines 6 to 28 of page 79 and lines 1 to 3 of page 80.
[49] Ibid., lines 4 to 6 of page 80.

> Q. . . . To your knowledge, in your 20 years with Husky, were the decisions of any of the independent board members dictated or directed by the principal shareholders?
>
> 12 A. In my experience, no. I don't know I can't think of a case where an independent director was directed by one of the personal [*sic*, principal] shareholders. There was a great level of cordiality, respect, and seniority on the board that would have presented [*sic*, prevented] that from happening.[50]

[62] In chief, Mr. Glynn was asked about the directors of Husky. Mr. Glynn testified that nine of the 14 directors were considered "independent". He identified as not being "independent" Mr. Victor Li, Mr. Canning Fok, Ms. Poh Chan Koh, Mr. John Lau, and Mr. Frank Sixt.

[63] With respect to what he meant by "independent", Mr. Glynn stated:

> A. . . . You're either independent or you're not. And I just described who I believe to be independent.
>
> After I left the audit committee, I subsequently became chair of the governance committee. So on a regular basis we would go to outside counsel and make sure that there was no doubt as to the independence, because we had to state that in our circulars.
>
> . . .
>
> So in reading this list I believe nine out of 14 are independent.[51]

[64] Mr. Glynn also stated that the members of the audit and governance committees of Husky were all independent directors.[52]

[65] In cross-examination, counsel for the Respondent observed, and Mr. Glynn agreed, that the list of directors on pages 117 and 118 of Husky's 2003 Annual Report showed that two of the directors identified by Mr. Glynn as independent, Mr. Shurniak and Mr. Kwok, were also on the boards of HWL and Cheung Kong (Holdings) Limited ("CKHL"), respectively.

---

[50] Ibid., lines 9 to 16 of page 83.
[51] Ibid., lines 2 to 8 and 25 to 26 of page 56.
[52] Ibid., lines 9 and 10 of page 56.

[66] In chief, Mr. Glynn was asked about the nomination process for members of Husky's board of directors. Mr. Glynn stated:

> A. The governance committee had a role to play. They had a skills matrix. They had the desire for competence, diversity, and this was built up around the springtime where in advance of the AGM were the circulars and the slate of the directors were proposed. So the co-chairs differently [*sic*, definitely] had a big role to play in in [*sic*] giving advice and listening to advice from governance committee. And so a slate was proposed and voted on by the AGM, and my recollection is we had pretty favourable results including from minority shareholders to the slate of directors total.[53]

[67] In cross-examination, Mr. Glynn stated that Mr. Victor Li—Mr. Li Ka-Shing's son—indirectly asked him to be a director of Husky through the Chairman of HSBC. At the time, Mr. Glynn was the CEO of HSBC. Mr. Glynn described the request as somewhat unusual given his duties as CEO and stated that "we needed to check with people to see whether that was okay" given the time commitment.[54] In response to being asked whether Mr. Fok was involved in the request for him to become a director of Husky, Mr. Glynn answered, "I don't remember him being involved, no."[55]

[68] Also in cross-examination, Mr. Glynn testified that when he became a director of Husky in 2000, he knew two members of Husky's board of directors, one by reputation and another because he was a customer of HSBC. As well, he may have known Mr. Frank Sixt, who was previously a lawyer in Vancouver.[56]

<u>HWLH's Evidence</u>

[69] Mr. Roberts testified on behalf of HWLH. Mr. Roberts acquired his chartered accountant designation in Canada in 1975. Mr. Roberts joined HWL in 1988 as group chief accountant and became the group deputy chief financial officer in 2000. UF Barbados was one of the companies under his purview.[57] Mr. Wai Ying Fung

---

[53] Ibid., lines 23 to 28 of page 57 and lines 1 to 4 of page 58.
[54] Ibid., lines 2 to 27 of page 60.
[55] Ibid., lines 4 to 7 of page 61.
[56] Ibid., lines 2 to 14 of page 63.
[57] Lines 13 to 28 of page 5, page 6, and lines 1 to 9 of page 7 of the Transcript of the Proceedings for January 11, 2023.

reported to him on the affairs of UF Barbados.[58] Mr. Roberts frequently referred to Mr. Fung as WY Fung.

[70] Mr. Roberts described his role as group deputy chief financial officer as follows:

> My roles and responsibilities were the accounting policies for the listed entity and the group worldwide, the accounting for the headquarters, and the holding companies that were -- the accounts were maintained in head office. I was in charge of tax planning and tax compliance. I was also in charge of financial reporting and preparing the annual report in accordance with the stock exchange requirements in Hong Kong.[59]

[71] In cross-examination, Mr. Roberts agreed that the operations of the HWL group of companies were mainly in HWL's wholly owned subsidiary, Hutchison International Limited ("HIL"), and that he was employed by HIL. Mr. Roberts confirmed that he reported to Mr. Frank Sixt, who was the group chief financial officer of and an executive director of HWL, as well as a director of CKHL, and to Ms. Susan Chow, who was the deputy managing director of HWL.[60]

[72] Mr. Roberts testified that at the relevant time, UF Barbados was an indirect wholly owned subsidiary of HWL.[61] HWL was listed in Hong Kong and had its headquarters in Hong Kong. HWL was involved in five major business sectors and had operations in 30 countries. The HWL group of companies consisted of about 2,500 companies.[62]

[73] UF Barbados was registered in Barbados as a regular business company and was the holding company for investments in Canada such as Husky.[63] HWL included UF Barbados' financial results in its consolidated financial statements.[64]

[74] Mr. Roberts testified that 49.97% of the shares of HWL were owned by CKHL and that CKHL did not consolidate its financial results with those of HWL.[65]

---

[58] Ibid., lines 3 to 12 of page 69.
[59] Ibid., lines 16 to 23 of page 7.
[60] Lines 11 to 28 of page 99 and lines 1 to 15 of page 100 of the Transcript of the Proceedings for January 12, 2023.
[61] Lines 6 to 18 of page 9 of the Transcript of the Proceedings for January 11, 2023. Mr. Roberts testified that exhibit HWA-1, tab 1 of the HWLH Book of Documents shows the companies between HWL and UF Barbados.
[62] Ibid., lines 5 to 9 of page 7, lines 6 to 26 of page 8 and lines 1 to 8 of page 10.
[63] Ibid., lines 23 to 28 of page 10 and lines 1 to 8 of page 11.
[64] Ibid., lines 1 to 8 of page 12.
[65] Ibid., lines 16 to 23 of page 12.

[75] Later in his testimony, Mr. Roberts stated that HWL and CKHL were associated under the accounting rules, but that CKHL did not own 50% or more of HWL. He explained that if CKHL had a 50% or greater shareholding in HWL, it would have been required to consolidate CKHL's and HWL's financial results under the applicable accounting rules. Mr. Roberts testified that the financial results of CKHL and HWL were not consolidated and that CKHL accounts for HWL as an associated company.[66]

[76] I recognize that such statements include an element of opinion. However, Mr. Roberts is a chartered accountant who in 2003 was the group deputy chief financial officer of HWL. Mr. Roberts testified that he played a material role in the preparation of HWL's 2003 financial statements and 2003 annual report. In my view, Mr. Roberts's evidence regarding the accounting rules followed by HWL and CKHL falls under the exception for participant experts.[67]

[77] UF Barbados started to receive quarterly dividends from Husky in the second quarter of 2001. During 2001 and 2002, on a gross basis, UF Barbados was entitled to approximately Can$150 million of dividends. These dividends net of 15% Part XIII tax were settled in United States dollars.[68]

[78] For Barbados tax purposes, UF Barbados reported the net amount of the dividends that it received from Husky as dividend income. A copy of the 2003 Barbados tax return of UF Barbados is included at tab 86 of the PASF. Mr. Roberts understood that the rate of Barbados tax for 2001 and 2002 was the 36% rate stated on the 2003 tax return.[69]

[79] UF Barbados offset its dividend income from Husky with interest expense so that no tax was payable in Barbados. The interest was paid by UF Barbados to U.F. Holdings Limited ("UF Holdings"), the immediate parent of UF Barbados; to Union Faith Energy (UK) Limited, the immediate parent of UF Holdings; and to a sister corporation called Holodeck Limited.[70]

---

[66] Lines 6 to 28 of page 96 and lines 1 to 23 of page 97 of the Transcript of the Proceedings for January 12, 2023.
[67] *Kaul v. R.*, 2017 TCC 55 and *Roher v. R.*, 2019 FCA 313.
[68] Lines 27 to 28 of page 13, lines 1 to 5 and 13 to 28 of page 14 and lines 1 to 26 of page 15 of the Transcript of the Proceedings for January 11, 2023. The dividends received by UF Barbados in 2001 and 2002 are recorded as "Turnover" in the financial statements of UF Barbados entered as exhibits HWA-2 and HWA-3, tabs 2 and 3 of the HWLH Book of Documents: ibid., lines 21 to 28 of page 22, lines 1 to 5 of page 23 and lines 3 to 21 of page 38.
[69] Ibid., lines 1 to 22 of page 18.
[70] Ibid., lines 18 to 28 of page 20, page 21, lines 1 to 7 of page 22, and lines 18 to 21 of page 38. See, also, exhibit HWA-1.

[80] Mr. Roberts testified that UF Barbados owned approximately 35% of the common shares of Husky and that to the best of his knowledge, there was no contractual arrangement between UF Barbados and another shareholder of Husky to establish joint control over the economic activities of Husky.[71]

[81] Dino Farronato advised Mr. Roberts of the special dividend on July 2 or 3, 2003. Mr. Farronato was the head of group taxation for HWL, reported directly to Mr. Roberts and had an office next door to Mr. Roberts. Mr. Roberts discussed with Mr. Farronato if it was possible to reduce the tax of UF Barbados as much as possible.[72]

[82] In cross-examination, Mr. Roberts agreed that he would ask their Canadian tax advisors to consider the Canadian tax consequences of whatever it was they were planning to do and that tab 18 of the Joint Book addresses the potential tax savings from the securities lending arrangements.[73] More generally, Mr. Roberts had the following exchange with counsel for the Respondent:

> Q. Right. So but my question, it was to reduce as much as possible the taxation with respect to that dividend of Husky, and that included two components, one being the 36 per cent Barbados tax, the second one was the 15 per cent withholding tax. Is that a fair statement?
>
> A. It's a fair statement on the basis that we were always trying to reduce taxes. So if this is one of them, we will try to reduce it, yes.[74]

[83] Mr. Roberts testified that he worked with Mr. Farronato and discussed the Barbados tax consequences to UF Barbados with Ernst & Young's ("E&Y") office in Barbados on July 3 or 4, 2003.[75] Mr. Farronato described the tax consequences of the special dividend to UF Barbados and UF Holdings and Husky's obligation to withhold Part XIII tax in an e-mail to Mr. Roberts and other senior officers of HWL sent July 5, 2003.[76]

[84] Mr. Roberts testified as to his understanding of the tax consequences of the special dividend to UF Barbados based on his daily conversations with

---

[71] Ibid., lines 25 to 28 of page 23, lines 1 to 3 of page 24, lines 7 to 11 of page 34 and lines 18 to 21 of page 38.
[72] Ibid., lines 4 to 18 of page 40, lines 4 to 13 of page 41 and lines 7 to 10 of page 42.
[73] Lines 25 to 28 of page 103 and lines 1 to 16 of page 104 of the Transcript of the Proceedings for January 12, 2023.
[74] Ibid., lines 6 to 13 of page 101.
[75] Lines 20 to 27 of page 43 and lines 12 to 24 of page 54 of the Transcript of the Proceedings for January 11, 2023.
[76] Tab 24 of the Joint Book and ibid., lines 11 to 28 of page 44, pages 45 to 48, and lines 1 to 12 of page 49. I note that the e-mail is evidence of Mr. Farronato's understanding of the Barbados tax consequences, not evidence of the actual tax consequences under Barbados law. I also note that significant portions of the e-mail are redacted.

Mr. Farronato. Mr. Roberts understood that UF Barbados would pay tax under Part XIII of the ITA equal to 15% of the special dividend and would receive a tax credit in Barbados for that tax. As a result, the effective tax rate in Barbados was 21%.[77]

[85] Mr. Roberts testified that initially, two options were considered: migrating UF Barbados to another jurisdiction and increasing the interest rate on the debt owed by UF Barbados. The first option was rejected because it would take too long and was too difficult. For the second option, E&Y advised that the interest expense had to be reasonable. Interest calculations showed a required rate of 13.8%, which Mr. Roberts described as very high.[78]

[86] On July 10, 2003, Mr. Farronato wrote an e-mail to Mr. Wim Piot at PricewaterhouseCoopers' ("PwC") office in Luxembourg, which states, in part:

> We are therefore considering implementing the stock lending idea. [Redaction.] We will give you more details and will need to get a sign off on the Luxembourg tax and commercial law issues. We are aiming to get the stock lending in place before 24 July, 2003.
>
> The Husky shares owned by HWL's Barbados subsidiary will be lent to HWEI. However we would prefer not to lend to HWEI the shares held by the Barbados companies owned by the Li Family companies.
>
> We therefore need to urgently set up a new Luxembourg company to be owned by a Cayman Islands Trust.[79]

[87] HWEI was a company incorporated in Luxembourg that invested in various operations in Europe, mainly, telecommunications and container ports.[80] Mr. Roberts described the stock lending idea as follows:

> A. The idea was to have the shares registered in the name of Hutchison Whampoa, HWEI, and not registered in the UF Barbados. On that basis the dividend income would be received by HWEI in Luxembourg, and would not be subject to tax in Barbados.[81]

---

[77] Ibid., lines 15 to 28 of page 57 and lines 1 to 14 of page 58.
[78] Ibid., lines 19 to 28 of page 60, lines 1 to 26 of page 61 and lines 24 to 27 of page 63.
[79] Exhibit HWA-4, tab 4 of the HWLH Book of Documents.
[80] Lines 1 to 7 of page 66 and lines 3 to 6 of page 67 of the Transcript of Proceedings for January 11, 2023.
[81] Ibid., lines 19 to 23 of page 64. See, also, lines 14 to 20 of page 78.

[88] With respect to the reference by Mr. Farronato to the Li family companies, Mr. Roberts had the following exchange with counsel for HWLH:

> Q. Who are the Li family companies?
>
> A. Li family companies are LF Barbados and HF Barbados.
>
> Q. What was your involvement with respect to the Li family companies?
>
> A. I was not involved in the Li family companies. WY Fung was responsible for those companies. He had been for a number of years.
>
> Q. Was your recommendation with respect to stock lending idea, stock lending, contingent on what the Li family companies would do?
>
> A. No, it wasn't contingent.
>
> Q. Were the Li family companies part of what you have been describing as the Hutchison group of companies?
>
> A. No, they were not part of the listed HWL group of companies and not consolidated.[82]

[89] Mr. Roberts testified that the Li family companies—LF Barbados and HF Barbados—were mentioned in Mr. Farronato's e-mail because they had engaged the same advisors and that "it seemed only natural that with WY Fung being responsible for them that we would look at consequences together for the tax."[83]

[90] Mr. Roberts stated that Mr. Fung was an employee of HWL who wore two hats. He was responsible for the accounting of the "head office companies" that was done by HWL and was also responsible for LF Barbados and HF Barbados. Mr. Fung reported to Mr. Roberts with respect to the former role but not the latter role. Mr. Roberts was not involved in setting up LF Luxembourg.[84]

[91] On July 7, 2003, Mr. Roberts participated in a conference call that included Mr. Farronato and representatives from PwC and E&Y. Mr. Roberts could not

---

[82] Ibid., lines 20 to 28 of page 67 and lines 1 to 8 of page 68.
[83] Ibid., lines 9 to 17 of page 68.
[84] Ibid., lines 18 to 28 of page 68 and lines 1 to 27 of page 69.

recall if anyone else participated but stated that no Canadian advisors were on the call as Canadian tax was not discussed.[85]

[92] Mr. Roberts testified that he made recommendations to Ms. Susan Chow, the deputy managing director of HWL and a director of HWEI, and to Mr. Frank Sixt, the group CFO of HWL and a director of HWEI. The recommendations did not contemplate what LF Barbados and HF Barbados were to do and were not contingent on or related to what LF Barbados and HF Barbados were doing. The ultimate decision to proceed was made by the boards of UF Barbados and HWEI.[86]

[93] The documents for the share lending arrangements were drafted and settled for UF Barbados and HWEI and then were passed on to Mr. Fung to be settled for LF Barbados, HF Barbados and LF Luxembourg.[87]

[94] Mr. Roberts identified his undated handwritten notes listing items that he wanted to review in respect of UF Barbados and HWEI, including the securities lending agreements, the borrowing request, the subscription agreement and the agenda and draft minutes for the board of directors' meetings to be held on July 22, 2003. He stated that he wanted to review the agenda for the board meetings to ensure that the agreements were placed before the board of directors for approval and authorization for someone to sign them.[88]

[95] Mr. Roberts testified that the statement in his notes that the "key is Barbados tax opinion" reflected his opinion at the time that the key to the plan was the Barbados tax opinion. Mr. Roberts stated:

> The tax opinion, we were looking for an opinion that discussed how the SLA would be treated, if it was to be treated as a disposal of shares, and if there was a capital gain, how it would be treated. In addition, the SLA called for a repayment in the dividends paid during the landing period, to be under the subscription agreement to be repaid, or paid as compensation. This was going to be done under the subscription agreement as a capital contribution. So we were looking for Barbados to give us assurance that that amount would not be taxable in Barbados.[89]

[85] Ibid., lines 21 to 28 of page 70 and lines 1 to 16 of page 71.
[86] Ibid., lines 14 to 25 of page 76, lines 27 to 28 of page 77 and lines 1 to 7 of page 78.
[87] Ibid., lines 15 to 26 of page 77.
[88] Ibid., lines 24 to 28 of page 78 and lines 1 to 27 of page 79.
[89] Ibid., lines 16 to 26 of page 80.

[96] Mr. Roberts testified regarding a draft of E&Y's Barbados tax opinion.[90] Mr. Roberts stated that he crossed out the paragraph on page 7 of the draft that stated that "it can also be argued that" the main purpose of the capital contribution to UF Barbados was to reduce Canadian tax, because a main purpose had already been identified earlier in the draft and because the argument erroneously assumed that Husky had underlying foreign taxes.[91]

[97] In cross-examination, counsel for the Respondent took Mr. Roberts to the consolidated financial statements in Husky's 2003 Annual Report.[92] Page 73 of the Annual Report shows current income taxes of $147 million and total dividends paid for 2003 of $580 million. Mr. Roberts testified that the amount of tax was small in comparison to the dividends paid and that to obtain a tax credit in Barbados, the tax paid in Canada had to be related to the profit from which the dividends were paid.[93] Mr. Roberts then had the following exchange with counsel:

> Q. How are you getting -- where do you get this information?
>
> A. Because we never claimed it in Barbados.
>
> Q. But do you have a document? Is that reflected this this "[*sic*]"?
>
> A. No, I can't say it is.
>
> Q. Do we have it somewhere in the production?
>
> A. In the productions here, no. We filed the tax returns every year. We questioned, is there any underlying taxes, no, there's not.[94]

[98] Mr. Roberts testified that the overseas securities lending agreement between UF Barbados and HWEI (the "UF OSLA") was prepared by in-house counsel at HWL. Mr. Roberts stated that he reviewed one or two drafts, that there was minimal negotiation of the terms of the UF OSLA because the two parties were sister corporations, and that some of the terms of the UF OSLA were modified by the borrowing request issued by HWEI to UF Barbados.[95]

---

[90] Exhibit HWA-6, tab 6 of the HWLH Book of Documents.
[91] Lines 19 to 28 of page 94 and lines 1 to 19 of page 95 of the Transcript of the Proceeding for January 11, 2023.
[92] Tab 1 of the Joint Book, starting at page 70.
[93] Lines 4 to 21 of page 123 of the Transcript of the Proceedings for January 12, 2023.
[94] Ibid., lines 22 to 28 of page 123 and lines 1 to 4 of page 124.
[95] Lines 18 to 28 of page 99, page 100, and lines 1 to 6 of page 101 of the Transcript of the Proceeding for January 11, 2023. The borrowing request is at tab 10 of the PASF.

[99] In cross-examination, Mr. Roberts stated that the UF OSLA was motivated by tax planning to move UF Barbados' common shares in Husky from UF Barbados to HWEI so that HWEI would receive the dividends paid on October 1, 2003. Mr. Roberts stated that HWEI would realize the interest on the term deposit and an interest savings from temporarily reducing the loan from Hutchison OMF Limited ("HOMF").[96]

[100] Mr. Roberts identified two e-mails sent by him. The first e-mail was sent to an individual at Computershare in response to a request for additional documentation for the transfer of Husky common shares from UF Barbados to HWEI and from LF Barbados and HF Barbados to LF Luxembourg.[97] With respect to the reference in the e-mail to LF Barbados and HF Barbados, Mr. Roberts stated that all three Barbados companies used the same advisors and that an individual with E&Y in Barbados was the corporate secretary for all three companies.[98] The second e-mail was sent to Mr. McGee asking him to call Computershare to facilitate transferring the Husky common shares as soon as possible.[99]

[101] Counsel for HWLH asked Mr. Roberts about tabs 17 and 18 of the Joint Book. Tab 17 is an e-mail from Mr. Farronato to Mr. Roberts dated July 26, 2003 and tab 18 is an attachment to the e-mail titled "Tax saving from Husky share swap" showing the tax savings to each of UF Barbados, LF Barbados and HF Barbados. The attachment shows Canadian tax savings from the reduction in the rate of Part XIII tax from 15% to 5% and Barbados tax savings from the reduction of the income tax rate from 21% to nil. Mr. Roberts explained the inclusion of all three Barbados companies in the attachment:

> A. All three companies had investments in Husky. They were using the same advisors. Dino was assisting WY to implement it. Our head office company -- our head office legal team was also assisting. It just made sense to put it all together on one piece of paper. Efficiently to say all three companies were affected this way.[100]

[102] Mr. Roberts testified that the request for a Luxembourg tax ruling was submitted by letter dated July 30, 2003 and that that tax ruling was issued (by

---

[96] Lines 7 to 28 of page 115 and lines 1 to 7 of page 116 of the Transcript of Proceedings for January 12, 2023.
[97] Exhibit HWA-7, tab 7 of the HWLH Book of Documents.
[98] Lines 18 to 25 of page 117 of the Transcript of Proceedings for January 11, 2023.
[99] Exhibit HWA-8, tab 8 of the HWLH Book of Documents.
[100] Lines 15 to 21 of page 121 of the Transcript of Proceedings for January 11, 2023.

stamping the ruling request) on August 4, 2003.[101] The first paragraph on page 3 of the ruling request states:

> As explained above, HWEI will be the legal owner of the Husky shares loaned and will be legally entitled to receive any dividend declared by Husky. Likewise HWEI will recognize the Husky shares in its accounts and will book any dividend declared by Husky. At the end of the SLA period, HWEI will have to redeliver the Husky shares to UFI and pay the additional contribution to UFL. HWEI will not bear any material risk in connection with the Husky shares. The profits and the risks on the Husky shares will be ultimately borne by UFI and the HWL companies.

[103] Mr. Roberts understood the risk referred to in this paragraph to be the market risk related to the Husky shares, that is, the risk of the value of the Husky common shares increasing or decreasing during the term of the lending arrangement.[102]

[104] Mr. Roberts testified that as of August 2003, E&Y had not issued a final Barbados tax opinion and the Barbados tax authorities had not issued a tax ruling. In order to mitigate Barbados tax risk, the interest rate on the intercompany debt of UF Barbados was increased to 13.8% retroactive to January 2, 2003, which Mr. Roberts described as "belt and braces" to the plan. The interest rate was reduced to 6.63% effective at the beginning of 2004.[103]

[105] In cross-examination, counsel for the Respondent asked Mr. Roberts about the interest rate calculations at tab 26 of the Joint Book. Mr. Roberts agreed with counsel that the 13.756754% interest rate shown for UF Barbados—ultimately rounded up to 13.8%—was sufficient to shelter the compensation payment of Can$161,203,611 and the expected quarterly dividends for 2003 of Can$41,069,344, and that the same interest rate exercise was done for UF Holdings because of its increased interest income.[104] Mr. Roberts recalled that the tax rate in Barbados for UF Holdings as an international business corporation was 1% to 2.5%.[105]

---

[101] Tab 84 of the PASF.
[102] Lines 27 to 28 of page 125 and lines 1 to 13 of page 126 of the Transcript of Proceedings for January 11, 2023.
[103] Ibid., lines 21 to 28 of page 130, lines 1 to 25 of page 131 and lines 6 to 12 of page 133.
[104] Lines 16 to 28 of page 106, pages 107 to 109, and lines 1 to 10 of page 110 of the Transcript of the Proceedings for January 12, 2023.
[105] Ibid., lines 1 to 11 of page 126.

[106] Mr. Roberts agreed with counsel for the Respondent that the 2003 Barbados tax return of UF Barbados[106] showed at line 432 a deduction for interest expense of Barbados $294,878,074, which Mr. Roberts agreed was reflected as Can$191,479,269 in the 2003 financial statements of UF Barbados. The interest deduction resulted in a net loss for the year of Barbados $231,608,074, which Mr. Roberts agreed was sufficient to shelter UF Barbados' share of the Dividends.[107] Counsel and Mr. Roberts then had the following exchange:

> Q. So, then, the only reason to enter into the shareholding agreement is to get around the 15 per cent withholding tax. Is that a fair statement?
>
> 4 A. That's not a fair statement. The SLA was entered into to ensure the dividend was received by HWEI. The interest was calculated after that, as a belt and braces, as I explained earlier, if the tax treatment was not going to be the capital treatment, the full 161 million would have been then taxable. So it's an if, and if so, we needed this belt and braces to shelter that dividend income. Either on assessment or -- I guess under GAAR as well it could have been (inaudible).
>
> Q. But sir, if this had been paid directly, you wouldn't have needed to bump up the interest rate to 13 per cent, because you would have had the ability to use the foreign tax credit. So then the rate would have been around eight. Is that a fair statement?
>
> A. There still would have been tax payable. I don't know whether eight per cent is right, but there was not enough interest income without changing the rate and that was done as a belt and braces. We were reducing the assessable income in Barbados to zero by the SLA.
>
> Q. But again, my point is you didn't -- having it paid directly, you wouldn't have had to increase the rate as you did, correct?
>
> A. We needed -- if we didn't increase it then there would have been Barbados tax to pay.
>
> Q. But the point is you could have increased it less to somewhere around eight per cent, and the dividend could have been paid directly by Husky and there would be no tax in Barbados. That's the point that I'm making.
>
> A. The calculation of the interest we did not do. I don't remember doing that calculation. It would have been less than the 13.8, but it would have been significantly more than the year before. And the interest rates you showed me at

[106] Tab 86 of the PASF.

[107] Lines 17 to 28 of page 110 and pages 111 and 112 of the Transcript of the Proceedings for January 12, 2023. The 2003 financial statements are at tab 73 of the PASF.

> zero and 3.15. And there would have been tax paid. Unless the interest rate was also retroactively changed to a smaller number, but still, a substantial increase in interest rates.[108]

[107] In 2003, HWEI had its offices in Luxembourg and employed seven or eight individuals.[109] HWEI's financial statements for 2003 show employee remuneration of 769,902 euros and approximately 9.5 billion euros owed to group companies, including HOMF. The expenses of HWEI in 2003 consisted mainly of interest and administration costs.[110]

[108] On July 24, 2003, UF Barbados transferred 146,548,737 common shares in Husky to HWEI pursuant to a borrowing request dated July 22, 2003.[111] On October 1, 2003, Husky paid HWEI the HWEI Dividends. The gross amount of the HWEI Dividends was Can $161,203,610, of which Husky withheld Can $8,060,180.54 on account of tax under Part XIII of the ITA. The net payment in United States dollars was $110,564,962.28.[112]

[109] Counsel for HWLH asked Mr. Roberts to explain the use of the dividends and how the dividends and related amounts were reported by HWEI in its financial statements. HWEI placed US$110,564,000 in a term deposit from October 1 to 6, 2003 and on October 6, 2003 transferred US$110,564,962.28 to HOMF to pay down its debt to HOMF. The interest that had been earned on the term deposit was not transferred to HOMF. On November 20, 2003, HWEI drew down US$123,535,333.87 on its credit facility with HOMF and remitted the funds to UF Barbados in payment of the subscription price for 10,000 Class B redeemable preference shares and the compensation payment required under the UF OSLA. The various amounts were reported in HWEI's financial statements in euros.[113]

[110] On November 17, 2003, UF Barbados gave notice to HWEI to return 146,548,737 common shares of Husky. On November 20, 2003, HWEI presented

---

[108] Ibid., page 113 and lines 1 to 12 of page 114.
[109] Lines 20 to 28 of page 142 and lines 1 to 13 of page 143 of the Transcript of the Proceedings for January 11, 2023.
[110] Ibid., lines 22 to 28 of page 143, pages 144 to 146, and lines 17 to 22 of page 152, and tabs 61 and 65 of the PASF.
[111] Paragraph 24 and tab 10 of the PASF.
[112] Paragraphs 40 to 42 of the PASF.
[113] Lines 3 to 28 of page 28, pages 8 to 27, and lines 1 to 2 of page 28 of the Transcript of Proceedings for January 12, 2023. Mr. Roberts refers to various documents in the PASF, including tabs 17, 18, 50, 52, 56, 58, 59, 63 and 65.

the share certificate for, and executed an irrevocable power of attorney for the transfer to UF Barbados of, 146,548,737 common shares of Husky.[114]

[111] As a result of the appreciation of the Canadian dollar and the euro against the US dollar over the period from October 1, 2003 to November 20, 2003, HWEI had to borrow an additional 9.4 million euros from HOMF to fund the foreign exchange loss that it realized when making the compensation payment to UF Barbados. As well, because the compensation payment was equal to the gross amount of the HWEI Dividends (Can$161,203,610), HWEI had to borrow a further 4.7 million euros from HOMF to fund the compensation payment. The foreign exchange loan was forgiven in 2003 under the terms of a hedging agreement between HWEI and HOMF dated December 11, 2000.[115]

[112] Because of an error, the withholding tax loan was not forgiven until 2009. The 2003 Luxembourg tax return was corrected to add back the amount of the loan, and a revised Luxembourg tax ruling was obtained reflecting the failure to waive the loan in 2003. The 2009 Luxembourg tax return of HWEI reflected the forgiveness of the loan in 2009.[116]

[113] Counsel for HWLH asked Mr. Roberts to explain the financial statements of UF Barbados for 2003. The dividends reported on the financial statements were the quarterly dividends paid by Husky to UF Barbados for the first, third and fourth quarters of 2003 plus a small amount paid for the second quarter on shares of Husky acquired by UF Barbados after July 22, 2003. The statements also included the 15% Part XIII tax paid to Canada on the dividends and interest expense of Can$191,479,269. The interest expense reported was considerably higher than the interest expense for 2002 because of the increase of the interest rate to 13.8%.[117]

[114] Mr. Roberts testified that tax opinions addressing the securities lending arrangements were obtained from E&Y in Barbados and from PwC in Luxembourg and that tax rulings were requested and obtained from the Barbados and Luxembourg tax authorities. The Barbados tax ruling was requested and issued on

---

[114] Ibid., lines 22 to 28 of page 28, page 29, and lines 1 to 11 of page 30. Mr. Roberts refers to tabs 15 and 16 of the PASF.

[115] Ibid., lines 13 to 28 of page 30, lines 1 to 18 of page 31, lines 11 to 28 of page 32, pages 33 to 35, lines 1 to 25 of page 36, lines 5 to 28 of page 38, pages 39 and 40, and lines 1 to 20 of page 41, and tabs 53 and 65 of the PASF. Exhibit HWA-9 at tab 9 of the HWLH Book of Documents is a copy of the hedging agreement between HWEI and HOMF.

[116] Ibid., lines 8 to 28 of page 67 and lines 1 to 13 of page 68.

[117] Ibid., lines 7 to 28 of page 42, pages 43 and 44, and lines 1 to 17 of page 45, and tab 73 of the PASF.

a no-names basis first on October 21, 2003 and again in a slightly amended form on April 7, 2004.[118]

[115] Mr. Roberts testified that HWEI was originally named Symphonium S.à.r.l. and that in 2000, the then sole shareholder of Symphonium, which was a 100% indirect subsidiary of HWL, transferred all of its shares to three companies called Auditorium Investments 1 S.à.r.l., Auditorium Investments 2 S.à.r.l. and Auditorium Investments 3 S.à.r.l., all of which were 100% indirect subsidiaries of HWL. The name of Symphonium was changed to HWEI in 2001 but the ownership remained the same through 2003. Mr. Roberts stated that HWEI and UF Barbados were both 100% indirect subsidiaries of HWL, that UF Barbados had no direct or indirect interest in HWEI, and that there was no agreement to vote the shares of HWEI or unanimous shareholders agreement as HWEI and its shareholders were all 100% indirect subsidiaries of HWL.[119]

[116] Counsel for HWLH asked Mr. Roberts about a section in HWL's 2003 Annual Report[120] titled "Directors' Interests and Short Positions in Shares, Underlying Shares and Debentures" commencing on page 506. The introductory paragraph describes the content of the section. Mr. Roberts was involved in the drafting of the annual report and understood that the disclosure was required under the securities laws of Hong Kong.[121]

[117] Mr. Roberts stated his understanding that the number of shares added up to more than 100% of the shares of HWL because the interests shown are deemed interests in shares rather than the number of shares actually owned by the director.[122]

[118] Mr. Roberts testified that the numbers for Cheng Kong Holdings group were obtained from Eirene Yeung, who was the corporate secretary of CKHL, and that the numbers for the Li family trusts were obtained from the trustees or their legal representatives.

---

[118] Ibid., lines 5 to 21 of page 47, lines 20 to 28 of page 48, lines 1 to 7 of page 49, lines 2 to 18 of page 58 and lines 16 to 27 of page 63.
[119] Ibid., lines 7 to 28 of page 74, page 75, lines 1 to 22 of page 76, lines 7 to 28 of page 77 and lines 1 to 10 of page 78, and tabs 11 and 36 of the Joint Book.
[120] Tab 43 of the Joint Book.
[121] Lines 17 to 27 of page 88, lines 21 to 28 of page 89 and lines 1 to 6 of page 90 of the Transcript of Proceedings for January 12, 2023.
[122] Ibid., lines 22 to 28 of page 94 and lines 1 to 3 of page 95.

LFMI's Evidence

a) Evidence of Mr. Wai Ying Fung

[119] Mr. Wai Ying Fung testified on behalf of LFMI. Mr. Fung holds a chartered professional accountant designation in Canada and is a fellow member of the Chartered Institute of Management Accountants and the Hong Kong Institute of Certified Public Accountants. Mr. Fung joined HWL in November 1999 as group chief accountant and held that position in 2003. Before moving to HWL, Mr. Fung worked for a company called Concord Pacific in Vancouver, which was owned and controlled by the Li family, and prior to that worked for CKHL from 1973 to 1987.

[120] In cross-examination, Mr. Fung stated that he was employed by HIL and that his only remuneration was the salary paid to him by HIL.[123] Mr. Fung stated that he reviewed the financial statements of approximately 200 companies that were managed in the head office of HWL prior to sending them to the directors of the companies for approval. Mr. Fung reviewed the financial statements of HWEI prepared by employees of HWEI prior to sending them to the directors of HWEI for approval. Mr. Fung also prepared the financial statements for the annual report of HWL.[124]

[121] Mr. Fung testified that LF Barbados was an investment company established to hold shares in Husky and two or three other corporations. HF Barbados was established prior to 2003 to acquire shares in Husky owned by CIBC. In 2003, LF Barbados was owned indirectly by Mr. Li Ka-shing and a trust for the Li family, and HF Barbados was owned indirectly by Mr. Li Ka-shing. LF Barbados and HF Barbados were amalgamated to consolidate the assets in those companies into a single corporation (New LF Barbados). Mr. Fung was one of several directors of LF Barbados, HF Barbados and New LF Barbados. Mr. Fung stated that he did not report to anyone in his role as a director.[125]

[122] Mr. Fung testified that UF Barbados was owned indirectly by HWL and that Mr. Li Ka-shing did not have any control over UF Barbados.[126]

[123] Lines 6 to 20 of page 8 of the Transcript of Proceedings for January 17, 2023.
[124] Ibid., lines 3 to 25 of page 6, lines 15 to 28 of page 7 and lines 1 to 5 of page 8.
[125] Page 40 and lines 1 to 24 of page 41 of the Transcript of Proceedings for January 16, 2023.
[126] Ibid., lines 25 to 28 of page 41 and lines 1 to 10 of page 42.

[123] Counsel for LFMI asked Mr. Fung about an insider report that was dated November 20, 2003 and that had been sent to Stikeman Elliott by Ms. Eirene Yeung, the Corporate Business Council & Company Secretary for CKHL. Mr. Fung identified the signature on the report as that of Mr. Li Ka-shing. The report identified an ownership interest of New LF Barbados in Husky. Mr. Fung stated that the report did not address the shares held in Husky by UF Barbados because Mr. Li Ka-shing was not considered an insider in respect of those shares.[127]

[124] Mr. Fung testified that he was advised of the potential of Husky declaring the special dividend by Mr. Farronato, the head of group taxation for HWL.[128] Mr. Fung identified an e-mail dated July 4, 2003 in which Mr. Farronato requests an opportunity to discuss with Winston Gibbs of E&Y Barbados "the tax position of our Barbados companies." Mr. Fung stated that the concern was that the companies may not have sufficient expenses and that tax would be payable in Barbados. Mr. Farronato was seeking options to address this concern.[129]

[125] Mr. Fung testified that he was not involved in developing the plan for the securities lending arrangements. Mr. Fung understood that the plan was developed internally by Mr. Farronato and Mr. Roberts. Mr. Farronato asked Mr. Fung for financial information about, and the tax position in Barbados of, UF Barbados, LF Barbados and HF Barbados. All three companies retained the same tax advisors.[130]

[126] Mr. Fung testified that the purpose of the securities lending arrangements was mainly to shift the special dividends out of Barbados to avoid paying tax there. The boards of directors of LF Barbados and HF Barbados approved the securities lending arrangements, and Luxembourg was chosen because HWL had had companies in Luxembourg for eight years and was aware of the domestic tax rules in Luxembourg. LF Luxembourg was created because the Li family did not have any companies in Luxembourg. Mr. Fung identified HWL's Luxembourg company as HWEI and stated that HWEI was not owned by Mr. Li Ka-shing.[131]

[127] Mr. Fung testified that he asked Ms. Eliza Yee, the assistant company secretary for HWL, to set up LF Luxembourg, which he stated was owned by the

[127] Ibid., lines 14 to 28 of page 43 and lines 1 to 14 of page 44.
[128] Ibid., lines 2 to 10 of page 45.
[129] Ibid., lines 17 to 28 of page 45, page 46, and lines 1 to 19 of page 47, and exhibit LFA-1, tab 1 of the LFMI Book of Documents.
[130] Ibid., lines 19 to 28 of page 48 and lines 1 to 23 of page 49.
[131] Ibid., lines 24 to 28 of page 49, page 50, lines 1 to 3 of page 51 and lines 3 to 17 of page 53.

Li family trust. The e-mail that Mr. Fung sent to Ms. Yee stated that she could contact Ms. Shirley Yeung of CKHL.[132] Mr. Fung described his involvement in the arrangements as follows:

> A. In the planning stage, I was not involved in the planning stage. My involvement is only to provide the financial support, financial information to Dino Farronato for him to discuss with the consultants, the advisors. My role in that was to approve the deal, the agreements in the board meetings and then -- and also -- let's see.
>
> For the transfer of shares, I was involved in the implementation of the transfer of shares to the borrower to the LF Luxembourg from LF Barbados and HF Barbados, and I carried those share certificates to Atchison & Denman Vancouver for to sign off the revocable power of attorneys there, as witnessed by CIBC.[133]

[128] In cross-examination, counsel for the Respondent asked Mr. Fung if it was common to contact the secretary of HWL for this type of transaction and observed that the secretary of CKHL and the secretary of HWL were both involved in the creation of LF Luxembourg.[134] Mr. Fung responded:

> A. It should be the duty of the company secretary of Chung [*sic*, Cheung] Kong Holdings to look after the affair of Li Ka-shing. Li Ka-shing, the family trust of Li Ka-shing, this is a case, because they didn't have any connection over there in Luxembourg. That's why we asked Eliza Yee's help to help to arrange the incorporation of the two. Plus, Eliza Yee help to incorporate another company in Luxembourg for the Li family, and that is why we have the CC. We have copied all the correspondence with all the Luxembourg consulting advisor, so that the company secretary department of Chung [*sic*, Cheung] Kong would follow up.
>
> Q. So you're saying that the responsibilities in dealing with the LF -- or Li Ka-shing's investments, sides with Chung [*sic* Cheung] Kong Holdings?
>
> A. Yes.
>
> Q. Is that a fair statement?
>
> A. Yes.[135]

---

[132] Ibid., lines 4 to 28 of page 51 and lines 1 to 12 of page 52, and exhibit LFA-2, tab 2 of the LFMI Book of Documents.
[133] Ibid., lines 18 to 28 of page 52 and lines 1 and 2 of page 53.
[134] Lines 7 to 28 of page 50 and lines 1 to 12 of page 51 of the Transcript of Proceedings for January 17, 2023.
[135] Ibid., lines 13 and 28 of page 51 and line 1 of page 52.

[129] Mr. Fung testified that he attended in person in Barbados the meetings of the boards of directors of LF Barbados, HF Barbados and UF Barbados held on July 22, 2003. Mr. Fung stated that the minutes were accurate and that the securities lending arrangements were approved at these meetings.[136] Mr. Frank Sixt, who was one of the directors, presented the securities lending proposal at the board meetings of LF Barbados and HF Barbados.[137] LF Barbados and HF Barbados implemented the same transactions as UF Barbados except for the additional step of creating LF Luxembourg.[138]

[130] In cross-examination, counsel for the Respondent took Mr. Fung to an e-mail from Mr. Farronato sent July 16, 2003 in which Mr. Farronato states that "[a] transaction has arisen that requires physical Board of directors meetings for the three Barbados companies in Barbados". Mr. Fung stated that Mr. Farronato was not responsible for setting up the board meetings as E&Y in Barbados had been engaged as the secretary of the three companies.

[131] Mr. Fung speculated that Mr. Sixt might have asked Mr. Farronato to arrange the board meetings. Mr. Fung observed that the board meetings were being arranged around Mr. Sixt's expected presence in Barbados on from July 21 to 22, 2003, and stated that board meetings would normally take place when Mr. Sixt was in Barbados. Mr. Fung agreed with counsel for the Respondent that Mr. Sixt was on almost all the boards of directors of the companies involved in the securities lending arrangements.[139]

[132] Mr. Fung agreed with counsel for the Respondent that Mr. Sixt told him to attend the board meeting of July 22, 2003. Mr. Fung stated that he had to get approvals before he could attend board meetings for the Barbados companies.[140] Mr. Fung then had the following exchange with counsel:

> Q. So he told you to go, and then you said can I go? Is that how it works?

---

[136] Lines 6 to 28 of page 54, page 55, lines 1 to 17 of page 56, lines 13 to 28 of page 62 and lines 1 to 16 of page 63 of the Transcript of Proceedings for January 16, 2023, and tabs 5, 7, 10, 22, 23, 25 and 29 of the PASF.
[137] Ibid., lines 22 to 28 of page 57 and lines 1 and 2 of page 58.
[138] Ibid., lines 3 to 9 of page 58.
[139] Lines 21 to 28 of page 8, page 9, and lines 1 to 23 of page 10 of the Transcript of Proceedings for January 17, 2023, and tab 39 of the Joint Book.
[140] Ibid., lines 24 to 28 of page 10, lines 1 to 21 of page 11.

A. Normally we have the -- we will go to -- we will have to office or attend meetings, whenever it is necessary to do so. So I will advise the supervisor, Mr. Don Roberts, that I will be going, because it is required by the duties.

Q. But you didn't take time off from Hutchison Whampoa Limited?

A. I don't take a formal time off.

Q. Okay.

A. So go work -- to go overseas to attend meetings. It is part of my duties.

Q. Part of your duties as chief accountant of Hutchison Whampoa Limited; correct?

A. Yes. But in this case, just like – I was also a director of UF, UF Barbados, and that is why I have the duty to attend. I was representing the company or the group.[141]

[133] Counsel for the Respondent asked Mr. Fung about several of the directors, all of whom are identified in Appendix "A" of the PASF. Mr. Fung stated that Mr. Sng and Ms. Yao had no role with HWL, that Ms. Mahabir was a lawyer in Barbados and that Mr. Weed was in the internal audit group at HWL and was based in the United States.[142] Mr. Fung did not remember whether he was present while the meeting of the managers of LF Luxembourg took place.[143]

[134] Counsel for the Respondent suggested that on the basis of the times stated in the board minutes, there was insufficient time to consider the proposed securities lending arrangements before approving them. Mr. Fung stated that draft minutes were circulated prior to the meetings and that the directors went through the draft minutes point by point before approving the proposed transactions.

[135] Mr. Fung repeatedly denied that the board-level decisions had been made prior to the meetings and stated that although he thought it would be appropriate for the Barbados companies to proceed with the transactions, he was not in a position to know what the other directors would do at the meetings.[144] Mr. Fung

[141] Ibid., lines 22 to 28 of page 11, lines 1 to 12 of page 12.
[142] Ibid., lines 1 to 24 of page 13 and lines 7 to 23 of page 14.
[143] Ibid., lines 17 to 28 of page 16 and lines 1 to 19 of page 17.
[144] Ibid., lines 20 to 28 of page 17, pages 18 and 19, and lines 1 to 5 of page 20.

did not recall when the draft minutes were circulated and was not able to point to such documents in the productions.[145]

[136] Mr. Fung testified that the base currency of the securities lending arrangements was Canadian dollars because Husky declared dividends in Canadian dollars. However, Husky paid the Dividends to LF Luxembourg in United States dollars. The compensation payment was also in United States dollars and was equal to the gross amount of the relevant dividends.[146]

[137] Mr. Fung testified that the parties to the securities lending arrangements followed the terms and procedures in the securities lending arrangements as stated in the offshore securities lending agreements.[147] Mr. Fung stated that there were no restrictions on the voting rights transferred under these agreements.[148]

[138] Mr. Fung signed an irrevocable power of attorney dated July 24, 2003 for each of LF Barbados and HF Barbados to transfer their respective common shares in Husky to LF Luxembourg and for UF Barbados to transfer its common shares in Husky to HWEI. The powers of attorney were guaranteed by CIBC.[149]

[139] Mr. Fung also signed two Directions to Computershare Trust Company, Inc., dated July 25, 2003. The first Direction was to issue and register in the name of LF Luxembourg two share certificates—one for 137,576,366 common shares of Husky and the other for 14,953,953 common shares of Husky—representing the common shares of Husky transferred by LF Barbados and HF Barbados, respectively, to LF Luxembourg under the securities lending arrangements. The second Direction was to issue and register a share certificate for 146,548,737 common shares of Husky in the name of HWEI representing the common shares of Husky transferred by UF Barbados to HWEI.[150]

[140] Mr. Fung testified that LF Barbados and HF Barbados renegotiated the interest rate on intercompany loans described in the PASF so that the interest expense of those companies would be sufficient to offset the compensation

---

[145] Ibid., lines 16 to 28 of page 20 and lines 1 to 4 of page 21.
[146] Lines 18 to 28 of page 56 and lines 1 to 21 of page 57 of the Transcript of Proceedings for January 16, 2023.
[147] Ibid., lines 18 to 25 of page 58.
[148] Ibid., lines 12 to 18 of page 61 and lines 7 to 12 of page 62.
[149] Ibid., lines 3 to 28 of page 67 and lines 1 to 19 of page 68, and tabs 14, 36 and 37 of the PASF.
[150] Ibid., lines 20 to 28 of page 68, lines 1 to 11 and 24 to 28 of page 69 and lines 1 to 16 of page 70, and exhibits LFA-3 and LFA-4, tabs 3 and 4 of the LFMI Book of Documents.

payments to be made by LF Luxembourg under the securities lending arrangements.[151]

[141] Mr. Fung testified that he prepared a spreadsheet titled “Calculation of Daily Loan Balances” that calculated the daily loan balances of UF Barbados, LF Barbados and HF Barbados as support for the calculation of the revised interest rates required to generate sufficient interest expense to set off the amount of the compensation payments to those companies.[152]

[142] Mr. Fung also prepared the document found at tab 74 of the PASF for the same purpose. The minor variation in the interest rates stated in the documents is attributable to rounding. Mr. Fung presented the document at tab 74 of the PASF to the boards of directors of UF Barbados, LF Barbados and HF Barbados. The interest rates were reduced in 2004 because the Barbados tax authority did not challenge the treatment of the compensation payments as capital contributions and the Barbados companies had more than enough interest expense to shelter the quarterly dividends after 2003.[153]

[143] In cross-examination, counsel for the Respondent took Mr. Fung to a statement under the heading “Refinancing” in the minutes of the meeting of the board of directors of UF Barbados on July 22, 2003; this statement suggested that the major creditors may demand repayment of all outstanding loans if satisfactory changes to the financing terms were not made. Mr. Fung agreed with counsel that the statement was included in the minutes to justify to the Barbados tax authorities the increase in the interest rate on the intercompany debt.[154]

[144] Counsel for the Respondent took Mr. Fung through a lengthy review of the Barbados tax returns and put to Mr. Fung that the increased interest expense in the Barbados companies would have been sufficient to shelter the Dividends if received by the Barbados companies. Mr. Fung stated that this was the case only if the interest rate was not challenged, that there was a concern that the Barbados tax authorities would challenge the increased interest rate and that no calculations were done to determine the interest rate needed in such a scenario.[155] Mr. Fung

---

[151] Ibid., lines 16 to 28 of page 72 and lines 1 to 24 of page 73.
[152] Ibid., lines 6 to 28 of page 74 and lines 1 to 21 of page 75, and tabs 46 and 26 of the Joint Book.
[153] Ibid., lines 12 to 28 of page 76 and pages 77 and 78.
[154] Tab 5 of the PASF.
[155] Lines 7 to 28 of page 32, pages 33 and 34, lines 1 to 11 of page 35 and lines 6 to 13 of page 37 of the Transcript of Proceedings for January 17, 2023.

repeatedly denied that he did not do the calculation because the plan was to reduce Canadian withholding tax.[156]

[145] Mr. Fung testified that UF Barbados, LF Barbados and HF Barbados received some second quarter dividends from Husky as a result of acquiring additional common shares of Husky after July 24, 2003. These shares were not part of the securities lending arrangements.[157]

[146] Mr. Fung testified that one of his roles was to review the financial records of LF Luxembourg. In that capacity, he reviewed the financial statements of LF Luxembourg and some of the documents for the securities lending arrangements. He also received copies of documents such as bank statements and letters in respect of the bank account of LF Luxembourg.[158]

[147] Mr. Fung testified that there were no restrictions on HWEI's or LF Luxembourg's use of the funds received from Husky as a result of the payment of the Dividends, and that UF Barbados, LF Barbados and HF Barbados had no access to these funds or to the bank accounts of HWEI and LF Luxembourg.[159] I note that while questions were asked about HF Barbados' access to the dividends paid by Husky to LF Luxembourg, according to the PASF, HF Barbados ceased to exist as a separate legal entity on September 25, 2003, which is prior to the payment of the Dividends on October 1, 2003.

[148] Mr. Fung testified that no restrictions were placed on LF Luxembourg's and HWEI's use of the common shares of Husky borrowed under the securities lending arrangements.[160]

[149] Mr. Fung testified that LF Luxembourg deposited the dividends received from Husky first with a branch of ING for the period from October 1 to 8, 2003 and then with a branch of CIBC. The details are found in paragraphs 49 to 51 of the PASF and the accompanying documents.[161]

---

[156] Ibid., lines 14 to 28 of page 37, page 38, and lines 1 to 2 of page 39.
[157] Lines 2 to 20 of page 81 of the Transcript of Proceedings for January 16, 2023, and tab 7 of the Joint Book.
[158] Ibid., lines 15 to 19 of page 83, lines 14 to 17 and 26 to 28 of page 85, and lines 1 to 8 of page 86.
[159] Ibid., lines 15 to 28 of page 86, lines 1 to 17 of page 87 and lines 10 to 15 of page 89.
[160] Ibid., lines 18 to 26 of page 87.
[161] There appears to be a typo in paragraph 51. I assume the reference to October 6, 2003 is intended to be a reference to October 8, 2003, consistent with paragraph 50 and the ING statement at tab 67.

[150] LF Luxembourg reported the interest on the term deposits in its Luxembourg tax return for 2003 and used the principal and interest together with a loan from Castle DT Finance to fund the compensation payment to New LF Barbados.[162] The loan from Castle DT Finance was needed to reimburse New LF Barbados for the Part XIII tax withheld by Husky and to cover the appreciation in the Canadian dollar relative to the United States dollar during the term of the securities lending arrangements. Mr. Fung stated that the intent was to waive the loan from Castle DT Finance in 2003, but it was actually waived in 2009.[163]

[151] Mr. Fung provided an explanation of the LF Luxembourg financial statements for the period from July 16, 2003 to December 31, 2004 and an explanation of the report and financial statements of New LF Barbados for the period ending December 31, 2003.[164]

[152] Mr. Fung testified that LF Luxembourg prepared its 2003 Luxembourg tax return on the basis of the Luxembourg tax ruling and that the Luxembourg tax authority accepted the return as filed.[165] The 2003 Barbados tax return of New LF Barbados was also accepted as filed.[166]

[153] In cross-examination, Mr. Fung agreed with counsel for the Respondent that from the start, it was understood that LF Luxembourg would not be able to generate sufficient income to make up for the fact that the compensation payment to New LF Barbados included an amount equal to the Part XIII tax withheld by Husky. Mr. Fung also agreed that the share lending agreement was entirely tax motivated.[167]

[154] In cross-examination, Mr. Fung stated that there were no securities lending arrangements after 2003 because the loss from the interest expense in the Barbados corporations in 2003 was sufficient to shelter the dividend income in 2004, 2005 and 2006 and the companies had foreign tax credits. Mr. Fung denied that the absence of securities lending arrangements after 2003 was because of a change in

[162] Ibid., lines 12 to 19 of page 90, lines 9 to 28 of page 92, page 93, lines 1 to 15 of page 94.
[163] Ibid., lines 15 to 28 of page 95 and lines 1 to 8 of page 96.
[164] Ibid., lines 20 to 28 of page 96, page 97, lines 1 to 23 of page 98, lines 7 to 28 of page 99, lines 1 to 5 of page 100, lines 12 to 28 of page 101 and lines 1 to 9 of page 102.
[165] Ibid., lines 6 to 26 of page 100.
[166] Ibid., lines 18 to 26 of page 102.
[167] Lines 3 to 13 of page 45 of the Transcript of Proceedings for January 17, 2023.

Canadian tax law and stated that it was clear from the accounts that the Barbados companies had sufficient interest expense.[168]

[155] Mr. Fung testified that New LF Barbados and UF Barbados received special dividends from Husky in 2004, 2005 and 2007 and that there were no securities lending arrangements in those years because New LF Barbados and UF Barbados had sufficient interest expense to shelter the dividend income.[169]

[156] Mr. Fung testified that because the Li family had no employees in Luxembourg, the treasury department of CKHL dealt with the various financial transactions undertaken by LF Luxembourg. The records of these transactions were provided to Mr. Fung, who would have his assistant prepare the accounting records and the financial statements. The financial statements were then sent to the Luxembourg tax advisor who prepared financial statements conforming to Luxembourg accounting standards and the Luxembourg tax return and returned these statements and tax returns to Mr. Fung and his assistant for review. Mr. Fung would then arrange the sign-off by the directors of LF Luxembourg. Mr. Fung stated that a similar process was followed for the Barbados companies.[170]

[157] In cross-examination, Mr. Fung stated that the treasury functions of the treasury departments of CKHL and HWL were similar but that the treasury department of CKHL would look after the cash received and cash payments for Mr. Li Ka-shing and his trusts and that the treasury department of HWL would look after the same for UF Barbados and HWEI.[171]

b) Evidence of Mr. Kenneth Albert Cameron and Ms. Laurie Marie Wills[172]

[158] Mr. Cameron testified that he was one of two CRA auditors involved with the assessments under appeal and that the second CRA auditor was

---

[168] Ibid., lines 8 to 27 of page 47.

[169] Lines 15 to 22 of page 103 and lines 15 to 27 of page 105 of the Transcript of Proceedings for January 16, 2023.

[170] Ibid., lines 21 to 28 of page 106, page 107, and lines 1 to 4 of page 108.

[171] Lines 18 to 28 of page 48 and lines 1 to 10 of page 49 of the Transcript of Proceedings for January 17, 2023.

[172] Because these two witnesses were employees of the CRA subpoenaed to testify by LFMI, subsection 146(3) of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a permitted counsel for LFMI to cross-examine these witnesses.

Ms. Laurie Wills.[173] Mr. Cameron stated that in consultation with Ms. Wills, he made the assumptions of fact stated in the Reply for the appeal of LFMI.[174]

[159] Mr. Cameron testified that he did not prepare the chart attached as Appendix “A” to the Reply but that he had reviewed the chart and it represented a simplified version of the organization chart.[175]

[160] Counsel for LFMI presented Mr. Cameron with an e-mail to him from Patrick Bilodeau dated June 3, 2014.[176] The e-mail had attached a copy of a presentation to be made to the GAAR Committee. Counsel then had the following exchange with Mr. Cameron:

> Q. If you turn the page, there’s a presentation, the PowerPoint presentation called “Husky treaty shopping.” Do you recognize this PowerPoint presentation?
>
> A. I don’t -- well, I don’t recognize this particular presentation, but I haven’t said that -- I would say that I very likely received this.
>
> Q. And just to be fair, it was attached to this e-mail.
>
> A. Right.
>
> Q. And so, Mr. Cameron, if you turn to the page -- the second page, or slide two on the next page. There are two slides here, so the first slide says initial understanding of the facts, and so -- and Mr. Cameron, in there, it appears that the Canada Revenue Agency initially understood the facts, the org chart to look like it did on slide 2, which is that Mr. Li Ka-shing – there’s a direct line to HF, LF, and UF. Do you see that?
>
> A. Yes, I do.
>
> Q. And Mr. Cameron, on the next slide, it says actual share ownership. And so in there, the chart is revised, and it has Mr. Li Ka-shing owning -- holding 37 per cent into Chung Kong, which holds 49.9 per cent into Hutchison Whampoa, down the chain, and you see only the 100 per cent to HF and LF Barb.
>
> Mr. Cameron, this looks very similar, just by rounding, to the appendix A that is in the reply.

---

173 Lines 18 to 25 of page 4 of the Transcript of Proceedings for January 18, 2023.
174 Ibid., lines 2 to 9 of page 5.
175 Ibid., lines 13 to 24 of page 5.
176 Exhibit LFA-6 at tab 6 of LFMI’s Book of Documents.

> With respect to these two charts, does this reflect your understanding of how the understanding of the Canada Revenue Agency progressed with respect to ownership?
>
> A. I would say it generally does.
>
> Q. And so Mr. Cameron, the actual share ownership, because that substantially matches appendix A, that would reflect your understanding at the time of the raising the assessments?
>
> A. You're talking about appendix -- or the slide three, I'm assuming?
>
> Q. That's correct.
>
> A. Yes, that would be correct.[177]

[161] Mr. Cameron testified that paragraph 2 on page 18 of exhibit LFA-6 reflects the CRA's understanding at the time the assessments in issue in these appeals were raised and that the assumption of fact in paragraph 16k) of the Reply in the LFMI appeal reflected the view that there was *de facto* control.[178]

[162] Counsel for LFMI presented Mr. Cameron with a position paper dated January 15, 2015.[179] Mr. Cameron testified that he prepared the position paper and that the paper reflected the assumptions of fact that were made at the time of raising the assessments.[180] Mr. Cameron confirmed that the facts stated under the heading "Facts" commencing on page 4 represented the facts that he relied upon.[181]

[163] Counsel for the Respondent asked Mr. Cameron if his considerations differ in any of the three assessments under appeal and whether he incorporated the analysis of the Aggressive Tax Planning Division of the GAAR & Technical Support Section of the CRA in exhibit LFR-2[182] into his assessing position. Mr. Cameron responded "[n]ot materially" to the first question and "yes we did" to the second question.[183]

---

[177] Lines 13 to 28 of page 7 and lines 1 to 23 of page 8 of the transcript of Proceedings for January 18, 2023.
[178] Ibid., lines 27 and 28 of page 9, lines 1 to 9 of page 10 and lines 5 to 11 of page 12.
[179] Exhibit LFA-7 at tab 7 of LFMI's Book of Documents.
[180] Lines 3 to 13 of page 16 of the Transcript of Proceedings for January 18, 2023.
[181] Ibid., lines 16 to 19 of page 16.
[182] Tab 5 of the Respondent's Book of Documents.
[183] Lines 1 to 4 of page 32 and lines 8 to 10 of page 33 of the Transcript of Proceedings for January 18, 2023.

[164] With respect to the directors of the various companies, counsel for the Respondent and Mr. Cameron had the following exchange:

> Q. And I had asked you about the commonality of directors and you had brought me to this document [exhibit B of the Reply]. How does this document reflect your conclusions about commonality of directors, if any?
>
> A. I particularly point to Frank Sixt, who was on the board of directors of all the entities.
>
> Q. What conclusion did you draw from that?
>
> A. Essentially that -- my conclusions were that obviously there was relationship between various entities.[184]

[165] Counsel for LFMI presented Ms. Wills with a memorandum dated February 3, 2009.[185] Ms. Wills confirmed that she was the author of the memorandum and that the memorandum had been passed on to the Competent Authority Services Division of the CRA to be part of an information request issued to the government of Luxembourg.[186]

The Respondent's Evidence

[166] Mr. Zhang identified a request for information dated October 20, 2022 issued by the Canadian Competent Authority for Exchange of Information to the government of Luxembourg and the response received to that request dated November 16, 2022.[187]

[167] In cross-examination, Mr. Zhang was asked if other exchange of information requests were made to the government of Luxembourg between June and November 2022. Mr. Zhang stated that other exchanges of information took place with the government of Luxembourg but that he did not know the exact dates.[188]

---

[184] Ibid., lines 1 to 10 of page 31.
[185] Exhibit LFA-9 at tab 9 of LFMI's Book of Documents.
[186] Lines 18 to 28 of page 36 of the Transcript of Proceedings for January 18, 2023.
[187] Exhibit LFR-3 at tab 6 of the Respondent's Book of Documents and exhibit LFR-4 at tab 7 of the Respondent's Book of Documents, respectively.
[188] Lines 9 to 14 of page 37 of the Transcript of Proceedings for January 19, 2023.

The Respondent's Expert Evidence

[168] I held a *voir dire* on the admissibility of Professor Haslehner's expert report. Following the *voir dire*, I admitted sections 5.1 through 5.4 of the report. I also admitted sections 1 to 4 of the report except to the extent that they contain opinions regarding matters addressed in subsection 5.5 or section 6 of the report.[189]

[169] As a result of my ruling, Professor Haslehner's testimony was limited to section 11 of the *Steueranpassungsgesetz* (the "StAnpG"). Because there is no official translation of section 11 into English or French, Professor Haslehner provides the following English translation on page 6 of his report:

> For the attribution for taxation purposes the following rules apply, unless otherwise stated:
>
> 1. Assets transferred as a security are to be attributed to the transferor.
>
> 2. Assets transferred in trust (whether for remuneration or for free) are to be attributed to the transferor.
>
> 3. Assets acquired by a fiduciary in trust for the beneficiary are to be attributed to the beneficiary.
>
> 4. Assets held in proprietary possession are to be attributed to the possessor. A person that possesses an asset as his own is considered as the possessor of the property.
>
> 5. Assets that jointly belong to several persons are attributed to the persons as if they held a percentage interest. The percentage is to be determined as based on the share to which the persons are entitled in the jointly owned net assets, or in proportion to the return they would receive upon the dissolution of the joint ownership.

[Footnotes omitted.]

[170] Professor Haslehner states the following in footnote 5 of his report in reference to the use of the word "trust" in section 11 of the StAnpG:

> The authors of this translation specifically note that the use of the term 'trust' must not be understood in the way of a common law trust, since such an institution

---

[189] My oral reasons are found at lines 21 to 28 of page 3, pages 4 to 10, and lines 1 to 5 of page 11 of the Transcript of Proceedings for January 26, 2023.

> does not exist in Luxembourg law. Rather, the reference is intended to relate to contracts where an asset is transferred by the owner to another person who holds and manages them on their behalf (‘*fiducie*’, ‘Treuhand’).

[171] Professor Haslehner summarizes his opinions regarding section 11 of the StAnpG on page 4 of his report:

> §11 StAnpG is a fundamental provision in Luxembourg tax law that sets out the attribution of assets to a taxpayer. It is applicable to all taxes unless more specific provisions apply.
>
> In the context of income tax, it provides for the attribution of income (and expenses) deriving from an asset to its ‘economic owner’ rather than the ‘legal owner’ in five specific cases. As such, §11 StAnpG stipulates an exception to the general principle that income derived from an asset will be attributed to the legal owner of that asset.
>
> Beyond its explicit content, the provision is widely accepted to be a hallmark of the principle of ‘economic substance’ for the application of Luxembourg income tax law, although it does not directly set out such a principle.
>
> As a provision with general application, §11 StAnpG is not an anti-avoidance rule. It is clear that it can be invoked both by the tax administration and the taxpayer. Consequently, under Luxembourg procedural rules, whichever side in the dispute invokes the provision must prove the fulfilment of its conditions for application. In the absence of proof to the contrary (i.e. a division of legal and economic ownership), the default assumption is that attribution of taxable amounts is made to the legal owner of an asset.
>
> The determination of ‘economic ownership’ as separate from ‘legal ownership’ has to be made on the basis of a case-by-case assessment at any point when a taxable event occurs, taking into account all facts and circumstances of a specific case. In most general terms, the ‘economic owner’ can be said to be the person who exercises effective power over an asset in such a way as to permanently exclude the legal owner from the asset’s economic value.

IV. The Submissions of the Parties

A. Husky’s Submissions

[172] Husky’s declaration of the Husky Dividends was driven by financial considerations. The declaration of the Husky Dividends was not directed or dictated by Husky’s shareholders. In future years, Husky further increased its quarterly dividend and declared special dividends.

[173] Husky had general knowledge of the potential lending of the common shares in Husky owned by the Barbcos (the "Shares"), and some members of Husky's board of directors were aware that the transfer of the Shares was contemplated. However, the transfer of the Shares was not brought before the board of directors of Husky, and Husky was not involved in the decision to transfer the Shares and did not draft or review any of the related documents.

[174] The board of directors of Husky considered various options for the use of Husky's cash on hand and ultimately decided to declare the Husky Dividends. Subsequently, Husky agreed to acquire Marathon, which required Husky to borrow $192 million to finance the Husky Dividends. This borrowing was repaid by the end of 2003.

[175] Husky paid the Husky Dividends to its shareholders on October 1, 2003. Prior to the payment of the Dividends, Husky obtained copies of Luxembourg residence certificates and constating documents for HWEI and LF Luxembourg. Husky also obtained an opinion from Luxembourg counsel that the Luxcos were not partnerships and an opinion from Canadian counsel that the rate of tax payable by the Luxcos under Part XIII of the ITA was 5%.

[176] Husky withheld 5% of the Dividends and remitted that amount to the Receiver General for Canada. The rate of Part XIII tax payable by the Luxcos had no impact on Husky's financial position.

[177] Under the principles adopted in *Prévost Car Inc. v. R.*, 2008 TCC 231, affirmed 2009 FCA 57 ("*Prévost Car*"), the Luxcos were the beneficial owners of the Dividends. Prior to the payment of the Dividends, the Shares were transferred to the Luxcos, Computershare registered the Luxcos as the owners of the Shares, and the transfers of the Shares to the Luxcos were publicly disclosed. The Dividends paid to the Luxcos were paid to Luxembourg bank accounts. Husky had no reason to believe, and no evidence was presented to establish, that the Luxcos were acting as agents or nominees of the Barbcos.

[178] The guidance in *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795 ("*Duha*") applies to the determination of voting power. Prior to the payment of the Dividends, title to the Shares had been transferred by the Barbcos to the Luxcos as a result of the securities lending arrangements. Therefore, at the time that the Dividends were paid, each of the Luxcos had more than 10% of the voting power in Husky.

[179] There were no agreements of the nature described in *Duha* governing the voting of the Shares. In particular, the overseas securities lending agreements ("OSLAs") are not in the nature of the agreements described in *Duha* and therefore are not relevant to determining voting power. Even if the OSLAs were relevant to determining voting power, clause 4.2.6 of the OSLAs does not take away the voting rights of the Luxcos but rather states that the voting rights are exercisable by the person in whose name the Shares are registered. As the registered owners of the Shares, only the Luxcos could have exercised the voting rights conferred by the Shares. The Respondent's voting power argument has no foundation in fact.

[180] The GAAR does not apply to Husky. Husky accepts that withholding at 5% instead of 15% is a tax benefit. However, Husky did not reduce its own tax and was not directly or indirectly enriched by the reduced rate of withholding; therefore, Husky's tax benefit is only theoretical. As well, Husky's tax benefit is a duplication of the actual reduction of tax payable by the Barbcos.

[181] Husky's participation in the series of transactions identified by the Respondent is limited to the approval of the Husky Dividends by Husky's board of directors and paying the Husky Dividends. The evidence establishes that the Husky Dividends were declared and paid exclusively for *bona fide* non-tax business purposes of increasing the value of Husky. Husky did not enter into avoidance transactions.

[182] Husky had only limited knowledge of the transactions completed by the Barbcos and the Luxcos. Husky did not decide to declare and pay the Husky Dividends "because of" or "in relation to" those transactions. Husky did not take those transactions into account in deciding to declare and pay the Husky Dividends. Consequently, Husky's series of transactions includes only the two transactions of declaring and paying the Husky Dividends, which were completed for *bona fide* non-tax purposes.

[183] Treaty shopping is not inherently abusive: *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 ("*Alta Energy*") at paragraph 185. The rationale of the relevant provisions of the Luxembourg Treaty does not extend beyond the text of those provisions: *Alta Energy* at paragraphs 2 and 89 and *R. v. MIL (Investments) S.A.*, 2007 FCA 236 ("*MIL*") at paragraphs 5 and 6.

[184] Each tax benefit must be analyzed separately: *Lipson v. Canada*, 2009 SCC 1 ("*Lipson*") at paragraph 40. The manner in which Husky established

the rate of withholding was not abusive. Husky obtained evidence and a Canadian legal opinion that supported the 5% rate and acted in accordance with the guidance provided by the CRA in Information Circular 76-12R4 at paragraph 4.

[185] If the GAAR does apply, the tax consequences attributed to Husky must be reasonable. It would be unreasonable for Husky to be liable for a tax benefit conferred to its principal shareholders when the evidence established that (i) it did not benefit from the avoidance transactions, (ii) it did not author or implement the avoidance transactions, and (iii) it did comply with available CRA guidance, at a time where concerns about treaty shopping were not prevalent and the GAAR had not yet been amended to include a reference to the misuse or abuse of tax treaties.

B. HWLH and LFMI Submissions[190]

[186] Article 10(2) provides that dividends paid by a company resident of Canada to a resident of Luxembourg may be taxed in Canada according to the laws of Canada, but that if the beneficial owner of the dividends is a resident of Luxembourg, the rate of tax so charged shall not exceed 5% of the gross amount of the dividends if the beneficial owner of the dividends is a company (other than a partnership) which controls directly or indirectly at least 10% of the voting power in the company paying the dividends.

[187] In accordance with Article 3(2) of the Luxembourg Treaty, *Prévost Car* and *Velcro Canada Inc. v. R.*, 2012 TCC 57 ("*Velcro*") collectively describe the legal test for determining whether each of the Luxcos was a "beneficial owner" of its respective share of the Dividends for purposes of the Luxembourg Treaty. Under these decisions, the threshold for beneficial ownership is low, and the reduced rates of tax in Article 10(2) are denied only if the recipient of the dividends is an agent, nominee or conduit company.

[188] As a result of the securities lending arrangements, the Luxcos each acquired legal title to and beneficial ownership of their respective portions of the Shares. Because the Luxcos were the legal and beneficial owners of the Shares on which the Dividends were paid, it follows that the Luxcos were also the beneficial owners of their respective shares of the Dividends. This is confirmed by the meaning of "beneficial owner" established by *Prévost Car* and *Velcro*.

[190] I have summarized the submissions of HWLH and LFMI together solely to limit duplication as much as possible.

[189] According to *Prévost Car*, a beneficial owner of dividends is a person who enjoys and assumes all the attributes of ownership of the dividends. Such a person receives the dividends for that person's own use and enjoyment, assumes the risk and control of the dividends, and is not accountable to anyone for how that person deals with the dividends.

[190] The terms "possession", "use", "risk" and "control" adopted in *Prévost Car* are given their ordinary meanings. On the basis of the ordinary meanings adopted in *Velcro*, the facts establish that HWEI and LF Luxembourg had possession, use, risk and control of the HWEI Dividends and the LF Luxembourg Dividends, respectively.

[191] Specifically, the HWEI Dividends were deposited in bank accounts of HWEI and the LF Luxembourg Dividends were deposited in bank accounts of LF Luxembourg. The Barbcos had no access to these bank accounts, or to the Dividends. No restrictions were placed on the use of the Dividends by HWEI and LF Luxembourg.

[192] HWEI used the HWEI Dividends to acquire a term deposit on which it earned interest. When the term deposit matured, HWEI used the principal (but not the interest) to pay down a loan from HOMF, saving interest on that loan. HWEI borrowed from HOMF to make the compensation payment to UF Barbados required under the terms of the securities lending arrangements. The HWEI Dividends were paid to HWEI in US dollars but the compensation payment made by HWEI was in Canadian dollars. Consequently, HWEI realized a foreign exchange loss because the US dollar weakened during the term of the securities lending arrangements.

[193] LF Luxembourg used the LF Luxembourg Dividends to acquire a series of term deposits on which it earned interest. LF Luxembourg used the LF Luxembourg Dividends to partially fund the compensation payment to New LF Barbados required under the terms of the securities lending arrangements. However, LF Luxembourg was not required to use the LF Luxembourg Dividends to pay the compensation payment and had to borrow an additional US$13,352,816 from a related corporation (Castle) to make up the shortfall resulting from the withholding of Part XIII tax and a foreign exchange loss caused by the weakening of the US dollar during the term of the securities lending arrangements.

[194] The Luxcos reported the interest income that each earned on the Dividends in their respective financial statements and Luxembourg tax returns.

[195] The GAAR does not apply to alter the Canadian tax consequences of the Dividends.

[196] HWLH identifies the relevant series of transactions as follows:

- the approval by the board of directors of Husky of the Husky Dividends;
- the Borrowing Request;
- the OSLA;
- the Subscription Agreement;
- the transfer of the Husky Shares from the Appellant to HWEI;
- Husky paying the Husky Dividends;
- the Redelivery Notice;
- the Class B Share Subscription;
- the Compensation Payment; and
- the transfer of the Husky Shares from HWEI to the Appellant.[191]

[197] HWEI submits that the incorporation of LF Luxembourg identified by the Respondent is not part of the series of transactions relevant to HWEI as HWEI did not enter into the securities lending arrangements in contemplation of or in relation to the creation of LF Luxembourg.

[198] Husky declared and paid the Husky Dividends for non-tax reasons and the Barbcos entered into the securities lending arrangements to reduce the Barbados income tax that would otherwise have been imposed on the Dividends.

[199] Husky did not declare and pay the Husky Dividends to obtain a tax benefit and no tax benefit resulted from Husky declaring and paying the Husky Dividends.

[200] The Barbcos did not enter the securities lending arrangements to reduce Canadian tax under Part XIII of the ITA. The foreign tax savings sought by the

[191] LFMI does not identify a series of transactions in its submissions.

Barbcos is not a “tax benefit” under the definition in subsection 245(1) of the ITA, and foreign tax avoidance by the Barbcos is a non-tax purpose for the purpose of determining whether there is an “avoidance transaction” under subsection 245(3) of the ITA.

[201] The series of transactions as a whole and each step in the series of transactions were undertaken for *bona fide* non-tax purposes—saving Barbados income tax. The fact that an alternative series of transactions may have resulted in higher Canadian tax does not in and of itself support the existence of an avoidance transaction but is merely a factor to be considered in the avoidance transaction analysis.

[202] The fact that Canadian tax consequences may have been considered in choosing particular transactions over other possible transactions does not mean that the transactions are avoidance transactions even if those tax considerations played a primary or important role in the choice of the transactions. If transactions are undertaken primarily for *bona fide* non-tax purposes, as determined in light of the purpose of the series as a whole, the fact that the transactions give rise to one or more tax benefits does not change the primary purpose of the transactions.

[203] The choice of a company resident in Luxembourg to receive the Dividends is not an avoidance transaction because it was a choice between alternative transactions aimed primarily at reducing Barbados income tax.

[204] The transactions did not abuse the ITA, the Luxembourg Treaty or the Barbados Treaty. The transactions did not frustrate or defeat the underlying rationale of the relevant provisions of the ITA, the Luxembourg Treaty and the Barbados Treaty, nor did the transactions result in an outcome that these provisions sought to prevent.

[205] Even though the possibility for abuse was known and optional language was suggested by the Organisation for Economic Co-operation and Development (“OECD”), Canada and Luxembourg chose not to modify the beneficial ownership requirement in the version of the OECD Model Tax Convention on which the Luxembourg Treaty is based and did not make observations on the associated OECD commentary. The Respondent is attempting to use the GAAR to rewrite the terms of the Luxembourg Treaty negotiated by Canada and Luxembourg to alter the conditions imposed by Article 10(2) to obtain a lower rate of tax.

[206] The OECD model conventions and commentaries that existed when the Luxembourg Treaty and the Barbados Treaty were entered into demonstrate that the provisions applicable to dividends were intended to prevent conduits, agents and nominees from receiving the benefit of the lower withholding tax rate available under those treaties.

[207] Consequently, the tax rate under Part XIII of the ITA is reduced under Article 10(2) unless the recipient of the dividend is a company that (i) is not the beneficial owner, meaning a company that is a conduit, agent or nominee, or (ii) does not control, directly or indirectly, at least 10% of the voting power of the company paying the dividends. HWEI and LF Luxembourg satisfied the beneficial ownership and the control requirements and therefore, there can be no abuse of the ITA, the Luxembourg Treaty or the Barbados Treaty.

C. The Respondent's Submissions

[208] The Barbcos and the Luxcos implemented the securities lending arrangements in lockstep to avoid Canadian withholding taxes. All of the documentation was essentially the same for all of the corporations.

[209] The Barbcos' and Luxcos' motivation to enter into the securities lending arrangements was to avoid tax. The arrangements were not commercially motivated, and the Luxcos were not expected to generate sufficient income to cover the difference between the net amount of the Dividends received and the amount of the compensation payments to be made to the Barbcos.

[210] The real motivation behind the securities lending arrangements was to avoid Canadian tax as there was no need for the arrangements to avoid Barbados tax. Because of increases to the interest rates on related party loans effective January 2, 2003, the Barbcos had collective losses exceeding Can$308 million at the end of 2003.

[211] The securities lending arrangements were in addition to the interest rate increases rather than instead of these increases. The interest rate calculations addressed a possible challenge of the capital contributions to the Barbcos, and the interest rate was therefore higher than if the Dividends had been received by the Barbcos.

[212] The Luxcos' advisors advanced the position to the Luxembourg tax authorities that the Luxcos were not the economic owners of the Dividends under Luxembourg domestic law. The Luxembourg tax authorities agreed and issued a tax ruling to that effect.

[213] The Luxcos were not the beneficial owners of the Dividends but were conduits. The Luxcos had very narrow powers to use and enjoy the Dividends because they were contractually obligated to compensate the Barbcos for any dividends on the Shares. The flow of funds was predetermined. The fact that the Dividends did not retain their nature as dividends when paid to the Barbcos is not a relevant factor. The insignificant gross profits earned by the Luxcos are not a material factor, and these profits were offset by the requirement to pay the gross amount of the Dividends to the Barbcos.

[214] The foreign exchange risk was created by the Barbcos and Luxcos stipulating Canadian dollars in the OSLAs even though dividends from Husky had always been received by the Barbcos in US dollars. In addition, the foreign exchange risk was eliminated by hedging agreements.

[215] The Luxcos did not control directly or indirectly at least 10% of the voting power in Husky.[192]

[216] The use in Article 10(2) of direct or indirect control over voting power does not only speak to the legal entitlement to directly vote on the Shares, but also invites a broad inquiry into all the rights and agreements that have an indirect effect on the ultimate voting power in Husky.

[217] Clause 4.2.6 of the OSLAs requires the Luxcos to take all steps necessary to exercise the voting rights on the Shares in accordance with instructions from the Barbcos; therefore, the Luxcos did not directly or indirectly control at least 10% of the voting power in Husky. Consequently, the voting power in respect of the Shares remained with the Barbcos.

[218] The GAAR applies to deny the treaty benefits claimed by HWEI and LF Luxembourg in respect of the Dividends, and the reasonable consequence of that denial is to apply tax under Part XIII of the ITA to the Dividends at the 15% rate

[192] The Respondent has raised the position regarding voting power in its Amended Reply filed in the appeal of Husky but has not raised this position in its Further Amended Reply and Amended Reply filed in the appeals of HWLH and LFMI, respectively.

that would have applied under the Barbados Treaty if the Dividends had been paid to the Barbcos.

[219] Husky, UF Barbados and New LF Barbados all obtained a "tax benefit" as defined in subsection 245(1) of the ITA as a result of the reduction of the rate of tax imposed on the Dividends under Part XIII of the ITA from 15% to 5%.

[220] The tax benefit to the Barbcos was the reduction in the Part XIII tax imposed on the Dividends. If a reasonable alternative arrangement is required to establish this tax benefit, it is the 15% tax rate that would have applied if the Dividends had been paid to the Barbcos.

[221] The tax benefit to Husky was the reduction of the amount that it was required to withhold and remit under Part XIII of the ITA and therefore of the amount for which it was liable under subsection 215(6) of the ITA. Whether Husky participated in avoidance transactions is not relevant to whether Husky obtained this tax benefit as nothing in section 245 requires the person who undertook the avoidance transactions to be the person who obtains the tax benefit (*OSFC Holdings Ltd. v. Canada*, 2001 FCA 260 at paragraph 41).

[222] The securities lending arrangements were part of a series of transactions that included avoidance transactions. The series of transactions comprised the following transactions:

- the creation of LF Luxembourg;
- the Barbcos and the Luxcos entering into the OSLAs;
- the Luxcos issuing borrowing requests;
- Husky's board of directors approving the regular and special dividend;

the Barbcos lending their Husky shares to the Luxcos;

- the Barbcos renegotiating the interest rates on their loans from their parent companies (and making the new rates retroactive);
- Husky paying the regular and special dividends on its common shares to the Luxcos;
- the Barbcos giving notice for redelivery of their Husky shares to the Luxcos;

- the Luxcos subscribing for Class B or D preference shares of the Barbcos;
- the Luxcos paying a compensation amount equivalent to the gross amount of the Husky dividends to the Barbcos; and
- the Luxcos returning the borrowed Husky shares to the Barbcos.

[223] None of the transactions was entered into for a *bona fide* non-tax purpose. The avoidance of Barbados tax is not a *bona fide* non-tax purpose within the meaning of the GAAR.

[224] The desire to avoid a foreign tax in addition to Canadian tax does not prevent a transaction from being an avoidance transaction. The GAAR is concerned with the incidence of Canadian tax and not foreign tax: *MIL* at paragraph 8.

[225] Even if avoiding foreign tax is a *bona fide* non-tax purpose, the Appellants must prove that each transaction was required to achieve that purpose, which they have failed to do. The purpose of the transactions is to be determined on an objective basis (*1207192 Ontario Limited v. Canada*, 2012 FCA 259 at paragraph 20). An understanding of what steps are required to avoid Barbados income tax does not satisfy this requirement.

[226] Even if the understanding of Barbados tax law was correct, the securities lending arrangements were not required to avoid Barbados income tax as the Barbcos had sufficient interest expense to shelter the income from the Dividends. The Court should draw a negative inference from the failure to call Mr. Frank Sixt to explain the Barbcos' intentions in entering into the securities lending arrangements.

[227] Husky also participated in the series of transactions. Husky's chairman alerted its ultimate major shareholders that a large dividend was likely, and Husky facilitated the transfer of the Shares to the Luxcos. Husky knew of the securities lending arrangements and the fact that the Shares would be returned to the Barbcos within a short period of time.

[228] The Barbcos abused Article 10(2) by using the Luxcos as conduits in order to access treaty benefits that were not available to them directly.

[229] By agreeing to Article 10(2), Canada and Luxembourg restricted their right to tax dividends in the hopes of attracting the stable, long-term investment typical of a significant shareholding. The Luxcos did not make a stable long-term investment in Husky and held the Shares for only four months. In fact, the Luxcos made no investment in Husky.

[230] The Barbcos achieved an outcome that Article 10(2) seeks to prevent by indirectly obtaining the benefit of the lower tax rate under Article 10(2). The Barbcos also abused the Barbados Treaty by circumventing Article X of that treaty in a manner that frustrates its object, spirit or purpose.

[231] The Barbcos were the beneficial owners of the Dividends. Husky abused subsections 215(1) and (6) of the ITA, and subsection 10(6) of the *Income Tax Application Rules* (the "ITARs"), because it did not withhold at the 15% rate applicable under the Barbados Treaty.

V. The Relevant Provisions of the ITA, the Luxembourg Treaty and the Barbados Treaty

[232] The provisions of the ITA, the Luxembourg Treaty and the Barbados Treaty relevant to the issues in these appeals are reproduced in Appendix "B" of these reasons.

VI. Analysis

A. Tax under Part XIII of the ITA

The HWLH Assessment and the LFMI Assessment of Tax under Part XIII

[233] The HWLH Assessment assesses HWLH for Part XIII tax at the rate of 15% on its purported share of the Dividends and the LFMI Assessment assesses LFMI for Part XIII tax at the rate of 15% on its purported share of the Dividends.[193] The first issue raised by the Respondent in paragraph 15a) of the Further Amended Reply filed in the appeal of HWLH (the "HWLH Reply") and in paragraph 17a) of the Amended Reply filed in the appeal of LFMI (the "LFMI Reply") is whether HWLH and LFMI, as successors of UF Barbados and New LF Barbados, are liable

[193] The purported shares of HWLH and LFMI were equal to the amount of the HWEI Dividends and the LF Luxembourg Dividends, respectively.

to pay tax at the rate of 15% under Part XIII of the ITA on the dividends paid to them by Husky in 2003. The assumption underlying the Respondent's description of this issue is that Husky paid the Dividends to UF Barbados and New LF Barbados because they were the beneficial owners of the Dividends.

[234] The second issue raised by the Respondent in paragraph 15b) of the HWLH Reply and in paragraph 17b) the LFMI Reply is whether HWEI and LF Luxembourg were the beneficial owners of the HWEI Dividends and the LF Luxembourg Dividends, respectively, pursuant to Article 10 of the Luxembourg Treaty.

[235] Subsection 212(2) of the ITA states:

> Every non-resident person shall pay an income tax of 25% on every amount that a corporation resident in Canada pays or credits, or is deemed by Part I or Part XIV to pay or credit, to the non-resident person as, on account or in lieu of payment of, or in satisfaction of,
>
> (a) a taxable dividend (other than a capital gains dividend within the meaning assigned by subsection 130.1(4), 131(1) or 133(7.1)), or
>
> (b) a capital dividend.

[236] Paragraphs 40 to 43 of the PASF state:

> 40. On October 1, 2003, Husky paid the following dividends to Hutchison [i.e. HWEI] and LF Luxembourg:

Shareholder	Common shares	Gross Dividend Amount (CAD)
Hutchison	146,548,737	$161,203,610
LF Luxembourg	152,530,319	$167,783,350
		$328,986,960

> 41. Husky withheld and remitted to the Receiver General of Canada an amount equivalent to 5% of the dividends paid to Hutchison [i.e. HWEI] and LF Luxembourg in respect of Part XIII tax.
>
> 42. On October 1, 2003, Hutchison received a regular and a special dividend from Husky in the net amount of US$110,564,962.28. The net amount was the equivalent of CAD$153,143,430.17, which was CAD$1.10 per share on 146,548,737 common shares for a total gross amount of CAD$161,203,610.70,

> less 5% withholding tax of CAD$8,060,180.54 that was withheld and remitted to the Receiver General of Canada.
>
> 43. On October 1, 2003, LF Luxembourg received a regular and a special dividend from Husky in the net amount of US$115,077,818.55. The net amount of the LF Luxembourg Husky Dividends was the equivalent of CAD$159,394,183.35, which was CAD$1.10 per share on 152,530,319 common shares for a total gross amount of CAD$167,783,350.90, less 5% withholding tax of CAD$8,389,167.55 that was withheld and remitted to the Receiver General of Canada.

[Footnotes omitted.]

[237] There is no evidence that contradicts or calls into question the facts stated in paragraphs 40 through 43 of the PASF.[194] On the basis of the facts that Husky paid the HWEI Dividends to HWEI and that Husky paid the LF Luxembourg Dividends to LF Luxembourg,[195] the liability under Part XIII of the ITA for tax on these dividends falls on HWEI and LF Luxembourg as the non-resident persons to which Husky paid the dividends.

[238] Since HWEI and LF Luxembourg have not been assessed for Part XIII tax on the Dividends, the question of whether HWEI and LF Luxembourg beneficially owned the Dividends under Article 10(2) does not arise in the context of the tax payable by HWLH and LFMI under Part XIII of the ITA.

[239] The position of the Respondent that UF Barbados and New LF Barbados were the beneficial owners of the Dividends fails to recognize that the liability for tax under subsection 212(2) of the ITA does not rest on beneficial ownership. Only the relieving provisions in Article 10 of the Luxembourg Treaty (“Article 10”) and Article X of the Barbados Treaty (“Article X”) addressing dividends (collectively, the “Articles”) raise the issue of beneficial ownership.

[240] Consistent with the words of subsection 212(2) read in their entire context and in their grammatical and ordinary sense, the Articles each contain a basic requirement that a company resident in one of the contracting states has “paid” a

---

[194] *Hammill* at paragraph 31.
[195] The evidence also confirms that HWEI received the HWEI Dividends and that LF Luxembourg received the LF Luxembourg Dividends.

"dividend"[196] to a resident of the other contracting state. If that basic fact does not exist, the Articles do not apply to a dividend.

[241] Consequently, only Article 10(2) can apply to the Dividends and the only issue that this Article raises is whether HWEI and LF Luxembourg—the non-resident persons to which Husky paid the Dividends—were entitled to one or the other of the reduced rates of tax provided by that Article. Since the Minister has not assessed HWEI and LF Luxembourg for Part XIII tax on the Dividends, there is no reason at this stage of the analysis to consider the beneficial ownership issue under Article 10(2).

[242] I am of course aware that a proper interpretation of subsection 212(2) requires consideration of not only the ordinary and grammatical meaning of its words read in context, but also of the broader context in which the subsection is found and the purpose of the subsection.

[243] However, such considerations do not alter the clear and unambiguous requirement in the text of subsection 212(2) that a non-resident is liable for Part XIII tax under that subsection only if a corporation resident in Canada pays or credits (or is deemed to pay or credit) an amount as, on account or in lieu of payment of, or in satisfaction of, a dividend[197] to that non-resident person.

[244] Regardless of which entities were the beneficial owners of the Dividends, Husky did not pay or credit the Dividends to UF Barbados or New LF Barbados and, therefore, subsection 212(2) did not apply to impose Part XIII tax on UF Barbados and New LF Barbados, or on HWLH and LFMI as their successor companies.

[245] The context of subsection 212(2) fully supports this interpretation of the text of subsection 212(2). Subsection 212(1) states with respect to a wide range of payments:

> Every non-resident person shall pay an income tax of 25% on every amount that **a person resident in Canada <u>pays or credits</u>, or is deemed by Part I to <u>pay or credit</u>, to the non-resident person** as, on account or in lieu of payment of, or in satisfaction of,

---

[196] The term "dividend" is defined in the Articles in general to expand the class of amounts that constitute dividends.
[197] A dividend includes a deemed dividend: *Placements Serco Ltée v. R.* (1987), 93 NR 27, 87 DTC 5425 (Federal Court of Canada – Appeal Division).

[Emphasis and double emphasis added.]

[246] Similarly, subsection 212(5) states:

> Every non-resident person shall pay an income tax of 25% on every amount that **a person resident in Canada <u>pays or credits</u>, or is deemed by Part I to <u>pay or credit</u>, to the non-resident person** as, on account or in lieu of payment of, or in satisfaction of, payment for a right in or to the use of
>
> (a) a motion picture film, or
>
> (b) a film, video tape or other means of reproduction for use in connection with television (other than solely in connection with and as part of a news program produced in Canada),
>
> that has been, or is to be, used or reproduced in Canada to the extent that the amount relates to that use or reproduction.

[Emphasis and double emphasis added.]

[247] The broader context reveals that the approach taken to dividends in subsection 212(2) is consistent with the approach taken to the amounts specified in the other main charging provisions in Part XIII of the ITA. These charging provisions impose Part XIII tax on a non-resident person only if a specified amount is paid or credited (or is deemed to be paid or credited) by a resident of Canada to that non-resident person.

[248] With respect to purpose, technical notes released in November 1985 recognize the basic function of subsection 212(2):

> Subsection 212(2) of the Act imposes non-resident withholding tax on dividends paid to non-residents by a corporation resident in Canada.

[249] More generally, Part XIII taxes specified amounts paid or credited (or deemed to be paid or credited) by a resident of Canada to a non-resident person. The purpose of subsection 212(2) is to apply the taxing scheme in Part XIII to dividends on generally the same basis as Part XIII applies to other amounts caught by Part XIII. This purpose does not in any way suggest that subsection 212(2) should apply to UF Barbados or New LF Barbados (or to HWLH and LFMI as the successors of those corporations) when the Dividends were actually paid by Husky to HWEI and LF Luxembourg.

[250] There are complex rules in Part XIII to address specific concerns such as back-to-back arrangements,[198] to ensure that payments by non-residents that have a connection to Canada are caught by Part XIII,[199] to deem specified amounts to be of a certain nature so as to be caught by Part XIII[200] and to deem a non-resident to be a resident of Canada in specified circumstances.[201] However, these rules simply reinforce the basic proposition that under Part XIII Canada is entitled to tax identified amounts that have a connection to Canada when paid or credited (or deemed to be paid or credited) to a non-resident person.

[251] Here, the parties are not contesting the nature of the Dividends as dividends or the identity of the non-resident persons to which Husky paid the Dividends. Therefore, none of these various rules apply to the Dividends.

[252] On the basis of the foregoing, HWLH and LFMI, as successors of UF Barbados and New LF Barbados, are not liable to pay tax under Part XIII of the ITA on the Dividends.

The Husky Assessment of Tax Under Part XIII

[253] The Husky Assessment assesses Husky for tax under Part XIII of the ITA equal to the amount of the shortfall, which is $32,898,696.

[254] The first issue raised by the Respondent in paragraph 15a) of the Amended Reply filed in the appeal of Husky (the “Husky Reply”) is whether Husky is liable to pay tax at the rate of 15% under Part XIII of the ITA “on amounts that should have been deducted or withheld on the dividends paid”.[202]

[255] Subsection 215(1) required Husky to deduct or withhold from the Dividends paid to the Luxcos the full amount of Part XIII tax applicable to the Dividends and to remit that tax forthwith to the Receiver General on behalf of the Luxcos.

---

198 Most of the back-to-back rules are applicable to amounts paid after 2014 or 2016. See, for example, subsections 212(3.1) through (3.94).
199 For example, subsections 212(13) to (13.3).
200 For example, subsections 214(3) to (7.1) and (15) to (17).
201 For example, subsection 214(9).
202 Under subsection 215(1), Husky had an obligation to withhold or deduct the Part XIII tax that applied to the Dividends, so the description of the issue is not entirely accurate. However, I am satisfied that Husky fully understood the issue raised by the application of subsections 215(1) and (6) to Husky’s payment of the Dividends.

[256] Under subsection 215(6), if Husky did not withhold or deduct the full amount of the Part XIII tax that applied to the Dividends, Husky is liable to pay as tax under Part XIII the amount of the shortfall. Husky is also entitled to deduct or withhold from any amount paid or credited to the Luxcos, or to otherwise recover from the Luxcos, any amount paid by Husky (on behalf of the Luxcos) as tax under Part XIII.

[257] The obligations of Husky under subsections 215(1) and (6) are clear and unambiguous and are not subject to a due diligence defense.[203]

[258] On the basis of Husky's submissions, Husky understood the issues described in paragraphs 15a), b) and b.1) of the Husky Reply to be the rate of tax applicable to the Dividends under Part XIII as modified by the Luxembourg Treaty and subsection 10(6) of the ITARs. I discern no prejudice to Husky or the Respondent if I analyze the issues described in paragraphs 15a), b) and b.1) of the Husky Reply on that basis.

[259] The relevant portions of Article 10 state:

> 1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.
>
> 2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:
>
>> (a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which controls directly or indirectly at least 10 per cent of the voting power in the company paying the dividends;
>>
>> . . . ; and
>>
>> (c) 15 per cent of the gross amount of the dividends in all other cases.

[260] The crux of the issue is whether HWEI and LF Luxembourg qualified for the 5% tax rate provided by paragraph (a) of Article 10(2). The Respondent

---

[203] *Simon P.J. Dorey v. Canada Customs and Revenue Agency*, 2003 FC 1241, 2003 DTC 5696 at paragraphs 21 to 23, *Harrowston Corporation v. R*, 96 DTC 6544 (FCC-AD) and *Chilcott v. R*, 78 DTC 6111 (FC-TD). See, generally, *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299 at pages 1325 to 1326.

significantly confuses this issue by adopting the position that UF Barbados and New LF Barbados were the beneficial owners of the Dividends and that the correct rate is 15% under Article X.

[261] For the reasons already stated in the context of the HWLH Assessment and the LFMI Assessment, Article X cannot apply to the Dividends because Husky did not pay the Dividends to a resident of Barbados. Consequently, the Respondent's position that the applicable tax rate is 15% under Article X is not correct.[204]

[262] If, as the Respondent contends, HWEI and LF Luxembourg were not the beneficial owners of the Dividends, then no reduction of the tax rate under Part XIII of the ITA would be available under Article 10(2) and subsection 10(6) of the ITARs. This is because paragraphs (a) and (c) of Article 10(2) apply to dividends paid by a company resident in Canada to a resident of Luxembourg only if the resident of Luxembourg is the beneficial owner of the dividends. I note, however, that a finding that HWEI and LF Luxembourg were not the beneficial owners of the Dividends would not alter the amount of the Husky Assessment as this Court has no power to increase the Husky Assessment.[205]

[263] The question of whether HWEI and LF Luxembourg were the beneficial owners of the Dividends brings into play the proper interpretation of the term "beneficial owner" in Article 10(2).

[264] In *Prévost Car*, the Tax Court of Canada and the Federal Court of Appeal addressed the meaning of "beneficial owner" in the context of the *Canada–Netherlands Income Tax Convention*. I see no basis in the language of the Luxembourg Treaty, or in the relevant commentaries, for taking a different approach to the meaning of "beneficial owner" for the purposes of the Luxembourg Treaty.[206]

[265] The meaning adopted by Rip, A.C.J., as he then was, is summarized by the Federal Court of Appeal as follows:

---

[204] To be fair to the Respondent, this position clearly emanates from the Minister's position that the GAAR determines the tax consequences to the Appellant and that the reasonable tax consequences for the purposes of the GAAR should reflect the tax rate under Article X of the Barbados Treaty.
[205] *R. v. Last*, 2014 FCA 129 at paragraph 23 and *R. v. CBS Canada Holdings Co.*, 2020 FCA 4 paragraphs 40 to 44.
[206] See, also, *Alta Energy* at paragraphs 40, 41, 43 and 84.

> In the end the Judge determined, at par. 100 of his reasons, that " the "beneficial owner" of dividends is the person who receives the dividends for his or her own use and enjoyment and assumes the risk and control of the dividend he or she received". . . .
>
> The Judge's formulation captures the essence of the concepts of "beneficial owner", "bénéficiaire effectif" as it emerges from the review of the general, technical and legal meanings of the terms. Most importantly, perhaps, the formulation accords with what is stated in the OECD Commentaries and in the Conduit Companies Report.[207]

[266] The Federal Court of Appeal then stated:

> Counsel for the Crown has invited the Court to determine that "beneficial owner", "bénéficiaire effectif", "mean the person who can, in fact, ultimately benefit from the dividend". That proposed definition does not appear anywhere in the OECD documents and the very use of the word "can" opens up a myriad of possibilities which would jeopardize the relative degree of certainty and stability that a tax treaty seeks to achieve. The Crown, it seems to me, is asking the Court to adopt a pejorative view of holding companies which neither Canadian domestic law, the international community nor the Canadian government through the process of objection, have adopted.[208]

[267] The Respondent submits that HWEI and LF Luxembourg were conduits because they were contractually obligated to compensate the Barbcos for the Dividends and, therefore, the flow of funds from Husky to HWEI and LF Luxembourg and from those corporations to the Barbcos was predetermined.

[268] Each borrowing request states under the headings "Commercial Terms and Conditions of the Transaction" and "Supplemental terms and modifications to the Agreement", respectively:

> **The Borrower is obliged to pay to the Lender** an amount equal to and as compensation for all dividends, if any, paid on the borrowed Securities that would have been received by the Borrower if it had held the borrowed Securities throughout the period the borrowed Securities are lent to it together with an amount equivalent to any deduction, withholding or payment for or on account of tax made by the relevant issuer (or on its behalf) in respect of such dividends, if any. **Such amount shall be paid or settled** at such time as the parties may from

[207] 2009 FCA 57 at paragraphs 13 and 14.
[208] Ibid., paragraph 15.

time to time agree, **but in any event no later than the termination date of the Transaction**. Such amount shall be settled in a manner as agreed by the parties.

Clauses 4.2.1 to 4.2.4 [of the applicable OSLA, which address compensation for dividends] shall not apply to the Transaction.

. . .

The Parties agree that, unless terminated earlier in accordance with the Agreement, the Transaction shall terminate on 20th November, 2003.[209]

[Emphasis added.]

[269] It is clear from the above excerpts that, from the outset of the securities lending arrangements, the borrowing requests imposed on HWEI and LF Luxembourg a legal obligation to pay the amount of the Dividends to the Barbcos.

[270] In particular, HWEI was contractually obligated to pay to UF Barbados an amount equal to the HWEI Dividends and LF Luxembourg was contractually obligated to pay to LF Barbados and HF Barbados[210] an amount equal to the LF Luxembourg Dividends. HWEI and LF Luxembourg were contractually obligated to make these payments no later than November 20, 2003, which was approximately seven weeks after the payment of the Dividends by Husky.[211]

[271] The obligations of HWEI and LF Luxembourg under the borrowing requests stand in stark contrast to the findings of fact by Rip, A.C.J. in *Prévost Car*:

There is no evidence that PHB.V. was a conduit for Volvo and Henlys. It is true that PHB.V. had no physical office or employees in the Netherlands or elsewhere. It also mandated to TIM the transaction of its business as well for TIM to pay interim dividends on its behalf to Volvo and Henlys. **However, there is no evidence that the dividends from Prévost were *ab initio* destined for Volvo and Henlys with PHB.V. as a funnel of flowing dividends from Prévost**. The financial statements of PHB.V. for fiscal periods ending on December 31st in each of 1995, 1996 and 1997 and copies of PHB.V.'s corporate income tax returns for 1996, 1997, 1998, 1999 and 2000 reflect that PHB.V. owned assets and had liabilities. **For Volvo and Henlys to obtain dividends, the directors of PHB.V. had to declare interim dividends and subsequently shareholders had to approve the dividend**.

---

[209] See tabs 10 and 28 of the PSAF.

[210] At the time that LF Luxembourg made its compensation payment, LF Barbados and HF Barbados had amalgamated with a third corporation to form New LF Barbados.

[211] See the borrowing requests at tabs 10 and 28 of the PASF.

> **There was no predetermined or automatic flow of funds to Volvo and Henlys** even though Henlys' representatives were trying to expedite the process.[212]
>
> [Emphasis added.]

[272] Rip A.C.J. emphasizes that there was no evidence that the dividends paid by *Prévost* to PHB.V. were from the outset destined to Volvo and Henlys, and that further corporate acts were required to pass these dividends from PHB.V. to Volvo and Henlys. I infer from Rip A.C.J.'s analysis that the absence of evidence of terms that dictated the payment of the dividends to another together with the requirement for further corporate acts were central to his conclusion that *Prévost Car* was the beneficial owner of the dividends in issue in that case.

[273] In this case, the Dividends were, at the time of their payment by Husky, required to be paid by HWEI and LF Luxembourg to UF Barbados and New LF Barbados in the form of the compensation payments. Under the borrowing requests, this payment was mandatory and did not require any further action on the part of any person. In other words, under the contractual terms and conditions agreed to by HWEI and LF Luxembourg, each had only temporary custody of the Dividends rather than the use and enjoyment of the Dividends in any real sense.

[274] The important concern identified by the Federal Court of Appeal in *Prévost Car* regarding the Crown's argument that another "can ultimately benefit from the dividend" received by PHB.V. does not exist on the facts of this case. Unlike in *Prévost Car*, it is certain from the outset of the securities lending arrangements that the Barbcos "will" ultimately benefit from the Dividends as a result of the mandatory compensation payments.

[275] It is not relevant that the compensation payments required under the borrowing requests were not the Dividends *per se*. This will always be the case when a person receives a dividend for the benefit of another person and passes the amount of the dividend on to that other person. The transitory commingling or employment of funds received by the Luxcos in payment of the Dividends does not alter the source of substantially all of the compensation payments. The Luxcos received an amount equal to the Dividends less Part XIII tax and paid an amount to the Barbcos equal to the amount of the Dividends.

---

[212] 2008 TCC 231, paragraph 102. See, also, the summary of the Federal Court of Appeal in 2009 FCA 57 at paragraph 16(c).

[276] The Appellants submit that economic substance should not dictate the result under Article 10(2). However, the legal substance[213] of the securities lending arrangements is that the Barbcos agreed to lend their common shares in Husky to HWEI and LF Luxembourg under the explicit condition that they retain the full benefit of any dividends received by HWEI and LF Luxembourg on the borrowed shares during the term of the securities lending arrangements. The result under the securities lending arrangements is an economic result that is dictated by legal obligations. The result does not require the application of an economic substance over form approach to the securities lending arrangements.

[277] Under the securities lending arrangements, HWEI and LF Luxembourg enjoyed nothing more than temporary custodianship of the funds received in payment of the Dividends. The compensation payments were preordained by the terms of the borrowing requests, and this preordination ensured that at all times, the Barbcos retained their rights to the full economic value of the Dividends.

[278] The fact that, during the term of the securities lending arrangements, HWEI and LF Luxembourg each earned a nominal amount of interest on the funds paid by Husky in satisfaction of the Dividends does not alter the "legal reality"[214] that the benefit of the Dividends remained with the Barbcos throughout.

[279] From the perspective of the Barbcos, the forgone interest was a minor cost of a transitory arrangement with HWEI and LF Luxembourg that resulted in significant tax savings for the Barbcos. The Luxcos overcompensated the Barbcos for this minor cost by making compensation payments equal to the full amount of the Dividends.

[280] From the perspective of the Luxcos, the interest earned was trivial in comparison to the significant cost resulting from the requirement to pay to the Barbcos all amounts deducted or withheld in respect of the Dividends.

[281] The Appellants argue that the foreign exchange losses realized by HWEI and LF Luxembourg demonstrate that each took on the risk associated with the receipt of the Dividends. The foreign exchange losses resulted from the choice of Canadian dollars as the currency for the securities lending arrangements even though the evidence is that Husky always paid dividends to the Barbcos in United States

---

[213] I explained the meaning of "legal substance" in *Lee v. R.*, 2018 TCC 230 at paragraph 52 and footnote 26.
[214] See Timothy R. Hughes, *Income Tax Implications of the Non-Dispositive Transfer of Equity Securities*, (1999) 57 U.T. Fac. L. Rev. 43 ("Hughes") at paragraph 11 and footnote 15.

dollars. Moreover, the Luxcos mitigated the foreign exchange losses through foreign exchange arrangements with group corporations. Consequently, the foreign exchange losses are not evidence that HWEI and LF Luxembourg assumed risk consistent with being the beneficial owners of the Dividends.

[282] HWEI and LF Luxembourg each requested and obtained a tax ruling from the Luxembourg tax authorities.[215] The above characterization of the securities lending arrangements is consistent with the description of the arrangements provided to the Luxembourg tax authorities. In the ruling requests, PwC stated:

> The repayment of the Husky dividends received by [HWEI/LF Luxembourg] to [the Barbcos] will take place as follows:
>
> . . .
>
> [HWEI/LF Luxembourg] will not bear any material risk in connection with the Husky shares. The profits and the risks on the Husky shares will be ultimately borne by [the Barbcos].
>
> . . .
>
> In this transaction, paragraph 11 StAnpG should apply and [HWEI/LF Luxembourg] will not be considered as the economic owner of the Husky shares and/or any dividends received.
>
> On the other hand, all the dividends declared by Husky during the period of the SLA will be paid to [HWEI/LF Luxembourg] net of a 5 % withholding tax in accordance to Article 10.2(a) of the Canada-Luxembourg Treaty. However, under the SLA, [HWEI/LF Luxembourg] will be obliged to repay the gross amount of Husky dividends to [the Barbcos] without any deduction of taxes withheld. This 5% shortfall will be financed by [HWL (or one of its subsidiaries)] or [a group company] by means of an interest-free loan that will be subsequently waived.
>
> Therefore, except for the borrowing fee paid by [HWEI/LF Luxembourg] and possible income obtained from entering into this transaction (see below), the SLA will be neutral for [HWEI/LF Luxembourg] both from an accounting and tax perspective.

[Footnote omitted.]

---

[215] Tabs 84 and 85 of the PASF. The Luxembourg tax rulings are PwC's ruling requests with the stamp of approval of the Luxembourg tax authorities.

[283] With respect to the Dividends, PwC's description of the securities lending arrangements accurately reflects the legal terms and conditions agreed to by the Luxcos and the Barbcos. PwC's description also accurately reflects the economic effect of those legal terms and conditions. PwC's descriptions are entirely consistent with my conclusions above that, under the legal terms and conditions of the securities lending arrangements, the profits and the risks "will" be ultimately borne by the Barbcos, and that the Luxcos were not the beneficial owners of the Dividends.

[284] As a final point, I emphasize that I am not disregarding the separate corporate personality of the Luxcos. I base my conclusions regarding the effect of the securities lending arrangements on my examination of the agreements entered into by the Luxcos with the Barbcos. I am not piercing the corporate veil.[216]

[285] For the foregoing reasons, HWEI and LF Luxembourg were not the beneficial owners of the Dividends for the purposes of Article 10(2) because they were legally obligated from the outset of the securities lending arrangements to return the full amount of the Dividends to the Barbcos in the form of the compensation payments. This was to occur no later than approximately seven weeks after the commencement of the securities lending arrangements.

[286] Consequently, HWEI and LF Luxembourg were not entitled to the benefit of the reduced rates of Part XIII tax provided under Article 10(2) and, for the purposes of subsections 215(1) and (6), the amount of tax under Part XIII that Husky was required to withhold and remit in respect of the Dividends was 25% of the Dividends.

B. The Application of the GAAR

Introduction

[287] In light of my conclusion that HWEI and LF Luxembourg were not the beneficial owners of the Dividends for purposes of Article 10(2) and that Husky was therefore liable for Part XIII tax at the rate of 25% under subsections 215(1) and (6), the GAAR is only relevant to HWLH and LFMI.

---

[216] *Wolf v. R.*, 2019 FCA 283 at paragraph 16.

[288] In paragraphs 15c) and d) of the HWLH Reply and paragraphs 17c) and d) of the LFMI Reply, the Respondent describes the GAAR issues as follows:

> c) whether a tax benefit, an avoidance transaction and a misuse or abuse all exist such that s. 245 of the *Act* applies to deny the tax benefits resulting from the Series; and
>
> d) whether the reasonable tax consequences under s. 245(2) and 245(5) of the *Act* would be to apply the 15% tax rate applicable under Part XIII of the *Act*.

[289] The Respondent did not explain why the Minister chose not to assess HWEI and LF Luxembourg in addition to, or instead of, HWLH and LFMI. In any event, while the approach taken by the Minister unnecessarily lengthens and complicates the analysis, it is of no relevance to the analysis of the correctness of the Minister's assessments of HWLH and LFMI under the GAAR.

The Relevant Transactions

[290] The Appellants and the Respondents generally agree (albeit in different terms) on the transactions relevant to the GAAR analysis. I will adopt the description provided by the Respondent subject to the caveat that I am cognizant of HWLH's position that from its perspective, the creation of LF Luxembourg is not part of the relevant series of transactions. In the Respondent's written submissions, the Respondent describes the series of transactions as follows:

- the creation of LF Luxembourg;
- the Barbcos and the Luxcos entering into the OSLAs;
- the Luxcos issuing borrowing requests;
- Husky's board of directors approving the regular and special dividend;
- the Barbcos lending their Husky shares to the Luxcos;
- the Barbcos renegotiating the interest rates on their loans from their parent companies (and making the new rates retroactive);
- Husky paying the regular and special dividends on its common shares to the Luxcos;
- the Barbcos giving notice for redelivery of their Husky shares to the Luxcos;

- the Luxcos subscribing for Class B or Class D preference shares of the Barbcos;
- the Luxcos paying a compensation amount equivalent to the gross amount of the Husky dividends to the Barbcos; and
- the Luxcos returning the borrowed Husky shares to the Barbcos.[217]

[291] I will refer to these transactions collectively as the "Transactions".

The Relevant Case Law of the Supreme Court of Canada

[292] Until recently, the interpretation and application of the GAAR was informed and governed by the dictum of the Supreme Court of Canada in four cases: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 ("*Canada Trustco*"), *Lipson*, *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63 ("*Copthorne*") and *Alta Energy*.[218] The GAAR case law of the lower courts relies on the principles stated in one or more of *Canada Trustco*, *Lipson* and *Copthorne*. To date, *Alta Energy* has not been applied in a published GAAR judgment of this Court, but it is cited by the parties in these appeals.

[293] On May 26, 2023, the Supreme Court of Canada released its judgment in *Deans Knight Income Corp. v. Canada*, 2023 SCC 16 ("*Deans Knight*"). Like in *Lipson* and *Alta Energy*, the issue in *Deans Knight* was the application of subsection 245(4) of the GAAR.[219] However, unlike *Lipson* and *Alta Energy*, *Deans Knight* comprehensively reviews the history and application of the GAAR.[220]

[294] As *Deans Knight* is a judgment of the Supreme Court of Canada, I must take the principles stated by the Supreme Court in that case into consideration in my GAAR analysis. For this reason, following the release of *Deans Knight*, I requested and received supplemental submissions from the parties.

[295] The Respondent submits that *Deans Knight* stands for the proposition that the rationale (or object, spirit and purpose) of a provision is more than what the

---

[217] In paragraph 14ggg) of the HWLH Reply and the LFMI Reply, the Minister states the series of transactions as an assumption of fact in slightly different terms but to the same effect.
[218] A fifth case decided by the Supreme Court of Canada at the same time as *Canada Trustco* applies the approach adopted in *Canada Trustco*.
[219] *Lipson* at paragraph 23, *Alta Energy* at paragraph 28 and *Deans Knight* at paragraphs 39 and 56.
[220] *Deans Knight* at paragraphs 40 to 73.

provision attempts to achieve (i.e. the means employed by the drafters) and that this remains true when analyzing tax treaties.

[296] I do not agree with the Respondent. The majority decision in *Deans Knight* simply emphasizes that the means by which a provision achieves a particular objective will not always fully capture why Parliament enacted the provision. The majority makes this comment in the context of discussing legislative drafting, indicating that the majority is explaining why the text of a provision is not determinative of a provision's rationale.

[297] The majority also acknowledges that the rationale of a provision may be no broader than its text but emphasizes that this must be confirmed by applying the approach to statutory interpretation mandated by the GAAR, which is described by the majority with reference to the prior Supreme Court of Canada case law. In short, the majority is not introducing new interpretive principles. Rather, the majority is elaborating on the Supreme Court's approach to the GAAR in its earlier decisions.

The Principles Governing the Application of the GAAR

[298] Parliament enacted the GAAR as a provision of last resort in order to address abusive tax avoidance.[221] Parliament did not intend the GAAR to introduce uncertainty in tax planning.[222] However, some uncertainty is unavoidable whenever Parliament adopts a general rule. Parliament has achieved a reasonable degree of certainty through the balance struck within the GAAR itself such as the obligation on the Minister to demonstrate clearly the abuse alleged.[223] A proper application of the GAAR methodology serves to ensure reasonable certainty in tax planning.[224]

[299] The use of words like "misuse" and "abuse" in the GAAR does not imply that the action of a taxpayer in utilizing the provisions of the ITA in a creative way is morally offensive.[225] The GAAR is not a tool to sanction conduct that courts find immoral.[226] Under the principle recognized in *Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1 (H.L.) (the "*Duke of Westminster*"),

---

[221] *Canada Trustco* at paragraph 21, *Copthorne* at paragraph 66, *Alta Energy* at paragraphs 120 and 150 (dissenting reasons) and *Deans Knight* at paragraphs 48 and 62.
[222] *Canada Trustco* at paragraph 21.
[223] *Copthorne* at paragraph 123 and *Deans Knight* at paragraph 48.
[224] *Deans Knight* at paragraph 50.
[225] *Copthorne* at paragraph 65.
[226] *Deans Knight* at paragraph 50.

taxpayers are entitled to select courses of action or enter into transactions that will minimize their tax liability.[227] However, this principle is not absolute and Parliament has derogated from this principle through the GAAR.[228]

[300] For the GAAR to apply to a transaction, three elements must be met: (1) there must be a "tax benefit"; (2) the transaction must be an "avoidance transaction", meaning one that is not undertaken primarily for a *bona fide* non-tax purpose; and (3) the avoidance transaction giving rise to the tax benefit must be an "abuse" of the provisions of the ITA (or other specified enactments).[229] Consequently, the GAAR analysis requires me to answer three questions in respect of the Transactions:

1. Is there a tax benefit?
2. If there is a tax benefit, is there an avoidance transaction?
3. If there is an avoidance transaction, is the avoidance transaction abusive?

[301] If there is more than one tax benefit, the court conducts a GAAR analysis for each tax benefit.[230]

[302] A transaction, or a series of transactions of which the transaction is a part, may give rise to a tax benefit. The issue in each case is whether the transaction itself is an avoidance transaction.[231]

[303] Where a series of transactions gives rise to an overall tax result, the focus of the GAAR analysis is on each identified tax benefit in the context of the series of transactions.[232] Whether an avoidance transaction is abusive will only become apparent when the transaction is considered in the context of the series of which it is a part and the overall result that is achieved.[233]

---

[227] *Canada Trustco* at paragraph 11, *Copthorne* at paragraph 65, *Alta Energy* at paragraph 48 and *Deans Knight* at paragraph 46.
[228] *Lipson* at paragraph 21 and *Deans Knight* at paragraph 47.
[229] *Deans Knight* at paragraph 4.
[230] *Lipson* at paragraph 22.
[231] *Canada Trustco* at paragraph 18 and *Copthorne* at paragraph 39.
[232] *Lipson* at paragraph 34.
[233] *Lipson* at paragraphs 34, 36 and 37 and *Copthorne* at paragraph 71.

a) Is There a Tax Benefit?

[304] Parliament has amended the definition of "tax benefit" twice since the introduction of the GAAR on September 13, 1988. The first amendment, which was made in 2005, was deemed to come into force as of that date and applies to transactions entered into after September 12, 1988. The second amendment, which was made in 2022, is applicable (with one exception) to transactions that occur after April 6, 2022. *Canada Trustco* addresses the original wording of the definition of tax benefit,[234] which stated:

> "tax benefit" means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act;

[305] *Copthorne* and *Deans Knight* address the former definition of tax benefit that applies to these appeals,[235] which was defined in subsection 245(1) of the ITA as follows:

> "tax benefit" means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty;

[306] The interpretation of tax benefit in *Copthorne* is consistent with the approach of the Supreme Court in *Canada Trustco*. *Deans Knight* confirms the principles stated in paragraphs 18 to 20 of *Canada Trustco* and in paragraph 35 of *Copthorne*.[236]

[307] The existence or non-existence of a tax benefit is a question of fact.[237] The magnitude of the tax benefit is not relevant to the existence of a tax benefit.[238] The onus is on the taxpayer to refute the existence of a tax benefit.[239] This onus functions in the same way as it does in any proceeding in which the taxpayer

---

[234] *Canada Trustco* at paragraph 6.
[235] See Appendix B of *Copthorne* and the Appendix of *Deans Knight*.
[236] *Copthorne* at paragraphs 34 and 35 and *Deans Knight* at paragraph 53.
[237] *Canada Trustco* at paragraphs 19 and 63, *Lipson* at paragraph 22 and *Copthorne* at paragraph 34. The approach of the Supreme Court to this issue is the same as in *Graat v. R.*, [1982] 2 S.C.R. 819 at page 839, where the Supreme Court concluded that the legal definition of "impaired" did not require the application of a legal standard to facts because the legal standard described a purely factual question.
[238] *Canada Trustco* at paragraph 19.
[239] *Canada Trustco* at paragraph 63, *Lipson* at paragraph 21 and *Copthorne* at paragraph 34.

disputes the Minister's assessment and the assumptions of fact underlying that assessment.[240]

[308] In some cases, the tax benefit will be clear, such as where the taxpayer claims a deduction against taxable income.[241] In other cases, the determination may require a comparison of the taxpayer's situation with an alternative arrangement.[242]

[309] If a comparison is used, the alternative arrangement must be one that might reasonably have been carried out but for the existence of the tax benefit.[243]

[310] The definition of tax benefit requires me to determine whether the Barbcos reduced, avoided or deferred tax or another amount payable under the ITA, but for a tax treaty. The starting point for this determination is the Minister's assumptions of fact in paragraph 14fff) of the HWLH Reply and paragraph 16fff) of the LFMI Reply. These paragraphs state, respectively:

> 14 fff) the following tax benefits resulted from the predetermined series of transactions (the **Series**):
>
> > i) the reduction of withholding tax in the amount of $16,120,361 in respect of UF Barbados; and . . .
>
> and
>
> 16 fff) the following tax benefits resulted from the predetermined series of transactions (the Series):
>
> > i) the reduction of withholding tax in the amount of $16,778,335 in respect of LF Barbados; and . . .

[311] The onus falls on HWLH to disprove the assumption of fact in paragraph 14fff) of the HWLH Reply and on LFMI to disprove the assumption of fact in paragraph 16fff) of the LFMI Reply.[244] However, as the three appeals were heard on common evidence, HWLH and LFMI may rely on the evidentiary record as a whole to meet their respective onus.

---

[240] *Canada Trustco* at paragraph 63.
[241] *Canada Trustco* at paragraph 20 and *Deans Knight* at paragraph 53.
[242] *Canada Trustco* at paragraph 20, *Copthorne* at paragraph 35 and *Deans Knight* at paragraph 53.
[243] *Copthorne* at paragraph 35.
[244] *Van Steenis v. R.*, 2019 FCA 107 at paragraph 13.

[312] In my view, there is no evidence that refutes the assumptions of fact in paragraph 14fff) of the HWLH Reply and paragraph 16fff) of the LFMI Reply that the Barbcos obtained a tax benefit. Quite the contrary, the facts in the PASF and the evidence clearly support a finding that the Transactions resulted in a tax benefit to each of the Barbcos.

[313] Specifically, if it were not for the securities lending arrangements, the tax imposed on the Dividends by Part XIII of the ITA and subsection 10(6) of the ITARs would have been borne by the Barbcos at the 15% rate provided for by Article X(2). Consequently, the tax benefit to the Barbcos is the reduction of Part XIII tax on the Dividends from 15% to 0% resulting from the fact that because of the securities lending arrangements, Husky did not pay the Dividends to the Barbcos. The fact that the reduction in Part XIII tax is greater than the amounts assumed by the Minister is not relevant to the existence of the tax benefits.[245]

[314] The Minister's description of the tax benefit confuses the overall tax result achieved by the securities lending arrangements with the tax benefit to each of the Barbcos. Only a tax benefit can be denied under subsection 245(2).

[315] Assuming that paragraph (a) of Article 10(2) applied to the Dividends, the overall tax result was a reduction in the rate of Part XIII tax on the Dividends from 15% to 5%, but the tax benefit of the rate reduction under the Luxembourg Treaty accrued solely to the Luxcos, which were required to pay the full amount of the Dividends to the Barbcos in the form of the compensation payments.

[316] The Minister also assumed a tax benefit for Husky based on a reduction of Part XIII tax under Article 10(2) from 25% to 5%. In my view, it is unclear whether Husky in fact obtained a tax benefit because of the Transactions because under subsections 215(1) and (6), Husky would be liable for Part XIII tax only if it failed to withhold or deduct Part XIII tax at the correct rate.

[317] If the Transactions did not occur, Husky would be required to withhold at the 15% rate under the Barbados Treaty. The record shows that Husky withheld at the 15% rate on all dividends paid to the Barbcos. Therefore, in this scenario, Husky has no tax liability to reduce unless Husky fails to withhold at the applicable rate.

---

[245] The exact quantum of the tax benefits is not relevant at this stage of the analysis: *Canada Trustco* at paragraph 19.

[318] The Transactions do not reduce Husky's tax liability because that liability is determined solely by whether Husky withholds at the correct rate. If the Transactions achieved the tax result expected by the Luxcos and the Barbcos, Husky has no tax benefit because it withheld at the correct tax rate and no liability arises under subsections 215(1) and (6). If the Transactions did not achieve the tax result expected by the Luxcos and the Barbcos, Husky has a liability for Part XIII tax.

[319] In other words, unless one assumes that Husky would deliberately fail to withhold at the 15% rate on dividends paid to the Barbcos—an assumption that is not supported by the evidence—the Transactions could potentially create a tax liability for Husky (as I have already found) but could not reduce a tax liability that Husky would have if the Transactions did not occur. However, given my conclusion regarding the rate of Part XIII tax that applied to the Dividends, which obviates the need to apply the GAAR to Husky, I need not make a final determination on this issue.

[320] The Minister did not assume a tax benefit for the Luxcos in the HWLH Reply or the LFMI Reply. However, the PASF and the evidence clearly indicate that if paragraph (a) of Article 10(2) had applied to the Dividends, the Luxcos each would have obtained a tax benefit under the Luxembourg Treaty equal to the reduction of Part XIII tax from 25% to 5%.

b) Is There One or More Avoidance Transactions?

[321] A transaction will be an avoidance transaction if the transaction, or the series of transactions of which the transaction is a part, results in a tax benefit and the transaction is not undertaken primarily for a *bona fide* non-tax purpose.[246]

[322] If a transaction has both a tax purpose and a *bona fide* non-tax purpose, then I must objectively assess the relative importance of the driving forces of the transaction to determine the primary purpose of the transaction.[247] This in turn requires me to weigh the evidence to determine whether it is reasonable to conclude

[246] *Canada Trustco* at paragraphs 21 and 22 and *Copthorne* at paragraph 39. A transaction includes an arrangement or event: *Canada Trustco* at paragraph 22.
[247] *Canada Trustco* at paragraph 28 and *Copthorne* at paragraph 59.

that the transaction was not undertaken or arranged primarily for a *bona fide* non-tax purpose.[248]

[323] In particular, I must examine the relationships between the parties and the actual transactions that were executed between them.[249] Subsection 245(3) does not permit the recharacterization of a transaction for the purpose of determining whether or not it is an avoidance transaction.[250]

[324] The "primarily for a non-tax purpose" standard is not a business purpose test. The expression "non-tax purpose" has a broader scope than the expression "business purpose".[251] For example, transactions undertaken or arranged primarily for (*bona fide*) family or investment purposes are not avoidance transactions.[252]

[325] In paragraph 42 of *Pièces automobiles Lecavalier Inc. v. R.*, 2013 TCC 310, the Tax Court judge held that a transaction undertaken primarily for foreign tax motivations and reasons cannot be characterized as an avoidance transaction. Assuming that the transactions constitute *bona fide* foreign tax planning, this is no doubt correct given the long-accepted *Duke of Westminster* principle that taxpayers are entitled to arrange their affairs to minimize taxes. It would be at odds with the *Duke of Westminster* principle to conclude that arranging one's affairs in a *bona fide* manner to minimize foreign taxes is not a *bona fide* purpose. Whether such a purpose is the primary purpose of a transaction is a separate issue.

[326] In *Copthorne*, Rothstein J. summarized the issues where a tax benefit results from a series of transactions:

> Where, as here, the Minister assumes that the tax benefit resulted from a series of transactions rather than a single transaction, it is necessary to determine if there was a series, which transactions make up the series, and whether the tax benefit resulted from the series. If there is a series that results, directly or indirectly, in a tax benefit, it will be caught by s. 245(3) unless each transaction within the series could "reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain [a] tax benefit". If any

[248] *Canada Trustco* at paragraph 29.
[249] *Canada Trustco* at paragraph 30.
[250] *Canada Trustco* at paragraphs 30 and 31.
[251] *Canada Trustco* at paragraphs 32 and 33.
[252] *Canada Trustco* at paragraph 33.

> transaction within the series is not undertaken primarily for a *bona fide* non-tax purpose that transaction will be an avoidance transaction.[253]

[327] Paragraph 14hhh) of the HWLH Reply and paragraph 16hhh) of the LFMI Reply state that the Minister assumed the following facts:

> the transactions in the Series described in paragraph 14 ggg) were undertaken primarily for the purpose of obtaining the tax benefits referred to in paragraph 14 fff) and were not undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefits;
>
> and
>
> the transactions in the Series described in paragraph 16 ggg) were undertaken primarily for the purpose of obtaining the tax benefits referred to in paragraph 16 fff) and were not undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefits;[254]

[328] The onus is on HWLH and LFMI, respectively, to disprove the assumption of fact supporting the existence of an avoidance transaction by showing that a *bona fide* non-tax purpose primarily drove each of the Transactions.[255] As with the existence of a tax benefit, HWLH and LFMI may rely on the evidentiary record as a whole to meet this onus.

[329] HWLH and LFMI submit that they undertook the securities lending arrangements primarily to avoid Barbados income tax. However, the objective reality is that from the perspective of the Barbcos, the securities lending arrangements avoided entirely the obligation to pay Part XIII tax on the Dividends because they shifted this obligation to HWEI and LF Luxembourg. The question therefore is whether, notwithstanding this objective result, the evidentiary record supports the conclusion that the Barbcos undertook the securities lending transactions primarily to save Barbados income tax.

[330] The evidence is that the Barbcos took two approaches to address the incidence of Barbados income tax. The first approach was the securities lending arrangements, which moved the receipt of the Dividends from the Barbcos to the Luxcos and replaced the Dividends with a contribution to the capital of the Barbcos

---

[253] *Copthorne* at paragraph 40. See, also, *Deans Knight* at paragraph 55.
[254] As noted above, the Series described in paragraph 14ggg) of the HWLH Reply and paragraph 16ggg) of the LFMI Reply is in substance the same as the Transactions.
[255] *Canada Trustco* at paragraphs 29, 63 and 66 (items 1(2) and 2) and *Lipson* at paragraph 21.

equal to the amount of the Dividends. The second approach was increasing the interest rate on the intercompany debt of the Barbcos.

[331] Mr. Roberts testified that UF Barbados increased the interest rate on its intercompany debt as a "belt and braces" step to address the risk that the Barbados tax authorities would treat the capital contribution to UF Barbados as income.

[332] In cross-examination, Mr. Roberts agreed that he would ask the Canadian tax advisors to consider the Canadian tax consequences of whatever it was that they were planning to do. Mr. Roberts also had the following exchange with counsel for the Respondent:

> Q. Right. So but my question, it was to reduce as much as possible the taxation with respect to that dividend of Husky, and that included two components, one being the 36 per cent Barbados tax, the second one was the 15 per cent withholding tax. Is that a fair statement?
>
> A. It's a fair statement on the basis that we were always trying to reduce taxes. So if this is one of them, we will try to reduce it, yes.

[333] Part XIII tax was not the only Canadian tax issue for the Barbcos that was associated with the securities lending arrangements. In argument, I had the following exchange with counsel for HWLH regarding the borrowing of the Husky Shares:

> JUSTICE OWEN: This was a disposition of the shares by the shareholders to the borrower?
>
> MS. NIXON: There was a disposition at private law and section 260 of the Income Tax Act applied to deem there to be no disposition.
>
> In 2003, non-arm's length securities lending arrangements were only in draft form captured by section 260. In 2013 those amendments became law, retroactive to 2002. So there was not a disposition for Canadian tax purposes, but for private law purposes there was a full disposition of the legal and beneficial ownership of the Husky shares.
>
> JUSTICE OWEN: So the SLA rules at the back of the act overrode the private law analysis, if you like?

> MS. NIXON: That is correct, and they specifically apply to non-arm's-length SLAs like the one in this case.[256]

[334] Counsel's response to my question confirms a reasonable inference from the agreed facts and the evidence that in 2003, the Barbcos were relying on draft amendments to the securities lending arrangement rules in section 260 to avoid the disposition of the common shares in Husky owned by the Barbcos that would otherwise result from the securities lending arrangements.

[335] Husky summarizes its business in its 2003 Annual Report as follows:

> Husky Energy is a Canadian-based integrated energy and energy-related company. Our operations consist of three business segments: upstream, midstream and refined products.
>
> The upstream segment includes the exploration, development and production of crude oil and natural gas. Operations are focused in Western Canada, offshore the Canadian East Coast and China, and other international areas.
>
> Midstream includes the upgrading of heavy crude oil into premium quality synthetic crude oil, pipeline transportation, gas storage, cogeneration, and commodities marketing of crude oil, natural gas, natural gas liquids, sulphur and petroleum coke.
>
> Refined products includes the refining, marketing and distribution of gasoline, diesel, asphalt, ethanol, and ancillary services in Canada and the United States. Refined products also manages a network of over 550 retail outlets from Ontario to British Columbia and the Yukon.
>
> Husky Energy Inc. is headquartered in Calgary, Alberta, Canada and is listed on the Toronto Stock Exchange under the symbol HSE.[257]

[336] The financial statements included in the 2003 Annual Report indicate that significantly more than 50% of Husky's assets were property, plant and equipment in Canada.

[337] These facts raise a number of Canadian tax issues. For example, are the Barbcos' common shares in Husky taxable Canadian property? If they are, will the securities lending arrangements result in a disposition of these shares for Canadian

[256] Lines 21 to 28 of page 45 and lines 1 to 9 of page 46 of the Transcript of Proceedings for January 26, 2023.
[257] Tab 1 of the Joint Book.

income tax purposes? If they do, what is the potential Canadian income tax liability of each of the Barbcos under Part I of the ITA?

[338] On the basis of the evidence, I find that it is highly likely that the Barbcos considered these various Canadian income tax issues and that the Barbcos chose to rely on draft amendments to section 260 to avoid a taxable disposition of their Husky common shares under the ITA.[258]

[339] In contrast to the Canadian tax issues raised by the securities lending arrangements, increasing the interest rate on the intercompany debt would raise only a Barbados tax risk. I therefore find it unlikely that the Barbcos would rely on a draft amendment to section 260 to avoid potentially significant Canadian tax consequences to the Barbcos if the only objective of the securities lending arrangements was to avoid Barbados income tax.

[340] Mr. Fung testified that he did not calculate the interest rate required to shelter the Dividends if received by the Barbcos because the objective was to reduce Barbados income tax. I find it odd that in light of the potential Canadian income tax issues associated with the securities lending arrangements, the Barbcos did no calculations to determine this interest rate. Mr. Roberts and Mr. Fung both agreed that because of the tax credit for the Part XIII tax on the Dividends, the interest rate would be lower than the interest rate needed to shelter the capital contributions if the Barbados tax authorities treated the contributions as income in Barbados.

[341] In light of the fact that the securities lending arrangements raised potentially significant Canadian tax issues, if the objective of the Barbcos was solely to reduce Barbados income tax, I would have expected a thorough analysis of an alternative that did not raise any Canadian tax issues. The only reason I can identify for not doing such an analysis is that the Barbcos were seeking a favourable Canadian and Barbados tax result. The interest deduction alone did not accomplish that dual objective.

[342] The witnesses for HWLH and LFMI emphasized the Barbados tax risk associated with a high interest rate on the intercompany loans. However, the Appellants did not introduce expert evidence regarding the income tax laws of

[258] The evidence is that the Barbcos used the same tax advisors. Presumably, they received the same tax advice.

Barbados, arguing that it was not necessary given the simple Barbados tax issues involved.

[343] In my view, such expert evidence was necessary for two reasons. First, it was needed in order to explain the income tax regime in Barbados, including the availability or non-availability of foreign tax credits if Husky had paid the Dividends to the Barbcos. Second, this evidence was necessary to confirm that the Barbados tax risk associated with an interest rate increase was indeed a real and material tax risk as suggested by the witnesses for HWLH and LFMI.

[344] With respect to the first issue, Mr. Roberts's testimony to the effect that the Barbcos asked their Barbados advisors about foreign tax credits and that the answer was that foreign tax credits are not available does not constitute admissible evidence regarding the availability of Barbados foreign tax credits as the advice described by Mr. Roberts is hearsay on a matter of expert opinion.

[345] With respect to the second issue, the only evidence is the testimony of the witnesses for HWLH and LFMI, which either is hearsay regarding an expert opinion provided to them (i.e. hearsay regarding advice from Barbados tax advisors) or is their own assessment of the Barbados tax risk.

[346] Any such risk assessment must be contrasted with the objective fact that the Barbados tax authorities did not challenge the significantly increased interest expense claimed by the Barbcos, which resulted from a retroactive increase to 13.8% of the interest rate on intercompany debt, even though the Barbcos also treated the full amount of the compensation payments as tax-free contributions to capital.

[347] Together, these two strategies increased the expense and reduced the income of UF Barbados and New LF Barbados by Barb$294,878,074 and US$123,535,333.87 for UF Barbados and by Barb$307,533,315 and US$128,578,046.67 for New LF Barbados.[259] The net result for the 2003 taxation year of UF Barbados and New LF Barbados was a loss for Barbados tax purposes of Barb$232,759,206 for UF Barbados and of Barb$255,651,786 for New LF Barbados.[260]

[259] Paragraphs 47 and 53 and tabs 86 and 87 of the PASF.
[260] Tab 86 and 87 of the PASF.

[348] Notwithstanding this extraordinary level of tax reduction in Barbados, which carried forward for several years, the Barbados tax authorities took no issue with the filing positions of the Barbcos. In the absence of expert evidence to the contrary, I infer from this that the Barbados tax risk of a lesser interest rate increase sufficient to offset the Barbados tax on the Dividends was considerably lower than that suggested by the witnesses for HWLH and LFMI.

[349] In light of the Canadian tax issues associated with the securities lending arrangements and the lack of expert evidence regarding the Barbados tax risks, I am not convinced that the primary concern of the Barbcos with respect to the Dividends was Barbados income tax. The interest rate option would have sufficed to eliminate the Barbados income tax issue without raising any Canadian tax issues and without the need to rely on the tax-free status of the compensation payments. The only reason I can identify for taking on the Canadian tax issues and the additional Barbados tax issue associated with the securities lending arrangements is to achieve an overall 10% reduction in Part XIII tax.

[350] Consequently, consistent with the Minister's assumptions of fact, I find as a fact that the purpose of the transactions undertaken or arranged to carry out the securities lending arrangements was primarily to reduce Part XIII tax.

c) Is the Requirement for Abuse in Subsection 245(4) Satisfied?

(1) The Framework for the Abuse Analysis

[351] To determine whether the requirement for abuse is satisfied, for each avoidance transaction I must consider whether the transaction would result in abusive tax avoidance when viewed, where appropriate, in the context of the series of transactions of which the transaction is a part.[261] This analysis requires a single, unified approach to the textual, contextual and purposive interpretation of the provisions in issue[262] in order to determine whether there was abusive tax avoidance.[263] For the GAAR to apply to deny a tax benefit, the abusive nature of the transaction must be clear.[264]

---

[261] *Canada Trustco* at paragraph 43, *Lipson* at paragraph 34 and *Copthorne* at paragraph 71.
[262] I have avoided the use of the phrase "relied upon" since a tax strategy may involve reliance on one or more provisions or it may involve circumvention of one or more provisions, or both.
[263] *Canada Trustco* at paragraph 43 and *Copthorne* at paragraph 73.
[264] *Canada Trustco* at paragraphs 50 and 62, *Copthorne* at paragraph 68 and *Deans Knight* at paragraph 69.

[352] The heart of the abuse analysis lies in a contextual and purposive interpretation of the provision(s) in issue and the application of the properly interpreted provision(s) to the facts of the case.[265] The central question is, having regard to the text, context and purpose of these provision(s), whether the avoidance transaction frustrates or defeats the object, spirit or purpose of those provision(s).[266]

[353] The object, spirit and purpose of a provision, or of interrelated provisions, are the rationale that underlies that provision or those provisions.[267] This rationale is determined by applying the same textual, contextual and purposive approach used to interpret all statutory provisions but with particular focus on the object, spirit and purpose (rationale) of the provision(s).[268]

[354] It is critical to distinguish the rationale behind a provision from the means chosen to give that rationale effect within the provision because the means do not necessarily provide a full answer as to why Parliament adopted a particular provision. Even the most carefully drafted provision can be abused, which is why the GAAR exists to protect the provision's underlying rationale.[269]

[355] However, the determination of the rationale of a provision, or of interrelated provisions, must not be conflated with a value judgment of what is right or wrong nor with theories of what tax law ought to be or ought not to do.[270] As well, the court must not undertake a search for an overriding policy in the ITA not founded in the text, context and purpose of the provisions.[271]

[356] The Minister is required to identify the object, spirit or purpose of the provision or provisions that the Minister asserts have been frustrated or defeated.[272] The Minister must clearly demonstrate that the avoidance transaction is abusive, and the court must give the benefit of the doubt to the taxpayer.[273]

---

[265] *Canada Trustco* at paragraph 44, *Lipson* at paragraph 25, *Copthorne* at paragraphs 69 to 71 and *Deans Knight* at paragraph 56.
[266] *Canada Trustco* at paragraph 49 and *Alta Energy* at paragraph 90.
[267] *Canada Trustco* at paragraph 45, *Copthorne* at paragraph 69 and *Deans Knight* at paragraphs 57 and 58.
[268] *Canada Trustco* at paragraph 65, *Copthorne* at paragraph 70, *Alta Energy* at paragraphs 30 and 32 and *Deans Knight* at paragraphs 62, 63 and 68.
[269] *Deans Knight* at paragraph 59.
[270] *Copthorne* at paragraph 70 and *Deans Knight* at paragraph 63.
[271] *Canada Trustco* at paragraph 41, *Alta Energy* at paragraph 49 and *Deans Knight* at paragraph 63.
[272] *Canada Trustco* at paragraph 65 and *Alta Energy* at paragraph 32.
[273] *Copthorne* at paragraph 72 and *Alta Energy* at paragraph 33.

[357] In general, abusive tax avoidance will exist where (1) the transaction achieves an outcome that the statutory provision was intended to prevent; (2) the transaction defeats the underlying rationale of the provision; or (3) the transaction circumvents the provision in a manner that frustrates or defeats its object, spirit or purpose.[274] These considerations are not independent of one another and frequently overlap.[275]

(2) Are the Avoidance Transactions Abusive?

[358] For the purpose of this analysis, I will focus on the securities lending arrangements. As noted in the analysis of Part XIII and the Luxembourg Treaty, the securities lending arrangements had the effect of shifting the liability for Part XIII tax from the Barbcos to the Luxcos.

[359] The rate of Part XIII tax imposed on the Luxcos was determined by subsection 10(6) of the ITARs and Article 10(2). I have already concluded that the securities lending arrangements had the effect of increasing the rate of Part XIII tax on the Dividends from 15% under the Barbados Treaty to 25% under the Luxembourg Treaty. Consequently, although the Barbcos realized a tax benefit by eliminating their Part XIII tax liability, the overall result of the securities lending arrangements was an increase in Part XIII tax. Regardless of the object, spirit and purpose of the provisions in issue, I do not see how transactions that result in an increase in the rate of Part XIII tax on the Dividends can be considered abusive.

[360] Consequently, I find that the Transactions did not abuse the relevant provisions of the ITA, the Barbados Treaty or the Luxembourg Treaty because the Transactions did not result in any overall reduction of Part XIII tax. Rather, the Transactions shifted the liability for tax under Part XIII from the Barbcos to the Luxcos and increased that liability from 15% of the Dividends to 25% of the Dividends.

[361] However, to be complete, I will assume for the sake of argument that paragraph (a) of Article 10(2) did apply to the Dividends to reduce the rate of Part XIII tax from 15% under the Barbados Treaty to 5% under the

---

[274] *Canada Trustco* at paragraph 45, *Lipson* at paragraph 40, *Copthorne* at paragraph 72 and *Deans Knight* at paragraph 69.

[275] *Copthorne* at paragraph 72 and *Deans Knight* at paragraph 69.

Luxembourg Treaty. The Respondent argues that in such a scenario, the Barbcos have abused Article 10(2) and Article X.

(3) Assuming Article 10(2) Reduced the Rate of Part XIII Tax to 5%, Are the Transactions Abusive?

(a) Do the Transactions Abuse Article X of the Barbados Treaty?

[362] Articles X(1) and (2) of the Barbados Treaty state:

> Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.
>
> Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in the first-mentioned State, and according to the law of that State; but where a resident of the other Contracting State is the beneficial owner of the dividends, the tax so charged shall not exceed 15 per cent of the gross amount of the dividends.

[363] Article X of the Barbados Treaty applies only if a dividend is paid by a company (a “payer”) resident in a contracting state (the “payer state”) to a person (a “payee”) resident in the other contracting state (the “payee state”).

[364] Article X(1) of the Barbados Treaty permits the payee state to tax such a dividend. Article X(2) permits the payer state to tax the dividend but reduces the rate of tax to 15% if the payee is the beneficial owner of the dividend.

[365] The securities lending arrangements result in Husky paying the Dividends to the Luxcos.[276] The Respondent submits that the securities lending arrangements abuse the Barbados Treaty because they circumvent the application of Part XIII of the ITA and Article X of the Barbados Treaty to the Dividends when the Barbcos are the beneficial owners of the Dividends.

[366] Subsection 212(2) is not concerned with the identity of the non-resident to which Husky paid or credited the Dividends. The fact that the Barbados Treaty no longer applied to the Dividends had no bearing on the application of Part XIII tax to the Dividends. Subsection 212(2) applied to the Dividends regardless of whether

[276] As previously noted, this is an agreed fact that is consistent with the evidence.

Husky paid the Dividends to the Barbcos or to the Luxcos, that is to say, regardless of whether the securities lending arrangements occurred.

[367] The assumed overall reduction of Part XIII tax resulted from the application of subsection 10(6) of the ITARs and Article 10(2) to the Dividends. The tax benefits to the Barbcos (avoidance of Part XIII tax entirely) and the Luxcos (the reduction of Part XIII tax from 25% to 5%), which together yielded the overall tax result, did not result from the circumvention of the Barbados Treaty, the role of which, prior to the securities lending arrangements, was solely to reduce Part XIII tax from 25% to 15%. I therefore see no basis for concluding that the securities lending arrangements abuse the Barbados Treaty, regardless of the rationale of Article X.

(b) Do the Transactions Abuse Article 10(2) of the Luxembourg Treaty?

[368] The question therefore is whether the securities lending arrangements result in an abuse of Article 10(2). As stated by the Federal Court of Appeal in *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2020 FCA 43:

> Although the Crown raised the issue of whether there was an abuse of paragraph 115(1)(b) of the Act, the focus of the hearing was on whether there was an abuse of the relevant provisions of the Luxembourg Convention. The carve-out for treaty-protected property in paragraph 115(1)(b) of the Act simply reflects what Canada had agreed to do under the Luxembourg Convention, i.e. to not tax the gain realized on the dispositions of certain properties. Therefore, in my view, the proper focus for the GAAR analysis, in this case, is on the provisions of the Luxembourg Convention. If there is no abuse of the Luxembourg Convention, there would be no abuse of paragraph 115(1)(b) of the Act.[277]

[369] The Respondent submits that Article 10(2) represents a bargain between Canada and Luxembourg whereby each country agrees to lower the withholding rate on outgoing dividends in the hopes of attracting foreign direct investment. Here there is no foreign investment and therefore, the Barbcos have abused Article 10(2) by using the Luxcos as a conduit for the Dividends to access treaty benefits that were not otherwise available.

[370] I have difficulty accepting the Respondent's position. If the term "conduit" is interpreted in accordance with the interpretation of "beneficial owner" in

---

[277] *Alta Energy* 2020 FCA 43 at paragraph 31. This focus continued in the decision of the Supreme Court of Canada.

Prévost Car, then for the reasons already stated, the Luxcos are not the beneficial owners of the Dividends and there is no reduction in Part XIII tax, just a change in the identity of the person liable for that tax. Consequently, there is no abuse.

[371] Under the assumed hypothetical being considered, the Luxcos are resident in Luxembourg (the "residence requirement"), are the beneficial owners of the Dividends (the "beneficial owner requirement") and are each considered to control directly or indirectly at least 10% of the voting power in Husky (the "voting power requirement"). Consequently, the Luxembourg Treaty has on its face applied precisely as intended taking into consideration the interpretation of beneficial owner adopted in *Prévost Car*. After undertaking a comprehensive analysis of the Luxembourg Treaty, the majority in *Alta Energy* reached essentially the same conclusion regarding Article 13 of the Luxembourg Treaty.

[372] The Respondent submits that the securities lending arrangements circumvent the rationale of Article 10(2) because there is no investment in Husky by the Luxcos. The analysis and conclusions of the majority in paragraphs 72 to 74 of *Alta Energy* do not support that contention. While the majority finds that, in the case of Article 13(4) of the Luxembourg Treaty, the business property exemption was a departure from the theory of economic allegiance, indicating that that exemption had a different purpose, which the majority found was to attract foreign investment,[278] there is no basis on which to reach the same conclusion for Article 10(2).

[373] Shares in Canadian corporations frequently change hands without any investment in the corporation. In fact, it is generally only upon the original issuance of its shares that a Canadian corporation receives consideration from the person subscribing for the shares.

[374] If the principal intention of Canada and Luxembourg in agreeing to Article 10(2) was to attract investment to their respective countries, then the reduced rate of withholding would be limited to shares acquired by a resident of a contracting state from the treasury of a corporation resident in the other contracting state. As this is not the case, on the basis of the observation by the majority in *Alta Energy* that ". . . non-residents earning passive income [such as dividends and interest] owe little allegiance to the source state",[279] it seems unlikely that attracting foreign investment was a material reason for agreeing to the reduced rates of tax

[278] *Alta Energy* at paragraph 76.
[279] *Alta Energy* at paragraph 74.

in Article 10(2). The reasons are more likely to be those suggested by the majority in paragraphs 72 to 74 of *Alta Energy*.

[375] Even if attracting foreign investment was a material reason for Canada and Luxembourg agreeing to the reduced rates of tax in Article 10(2), in paragraphs 79, 81, 82 and 84 of *Alta Energy*, the majority stated:

> The remaining question is whether the contracting states intended that persons without "sufficient substantive economic connections" to their state of residence be able to take advantage of the carve-out to avoid paying any taxes. Put simply, **the question is whether the use of conduit corporations in this context perverts the bargain struck between Canada and Luxembourg. In my view, it does not**.
>
> . . .
>
> Luxembourg is a country well known for its broad tax treaty network and international tax haven regime, making it an attractive jurisdiction to set up a conduit corporation and take advantage of treaty benefits. As mentioned above, one can presume that Canada had knowledge of these features of Luxembourg's tax system when it entered into the *Treaty*. Canada nevertheless entered into a bilateral tax treaty with Luxembourg with only minimal safeguards and thereby ignored many of the OECD's suggestions. At that time, as discussed above, the "Commentary on Article 1" of the 1998 OECD *Model Treaty* set out a whole menu of potential anti-avoidance provisions that might have short-circuited the creation of conduit corporations in Luxembourg.
>
> I acknowledge that the absence of specific anti-avoidance rules that would have prevented the situation is not necessarily determinative of the application of the GAAR (see *Copthorne*, at paras. 108-11). Of course, one could always imagine a potential anti-avoidance rule that would have pre-empted the tax strategy at issue. If that were the standard, I agree that it would provide a full response in every case and gut the GAAR. In this case, the absence of specific anti-avoidance provisions represents, however, an enlightening contextual and purposive element as it sheds light on the contracting states' intention. This is not a case where Parliament did not or could not have foreseen the tax strategy employed by the taxpayer. Options to remediate the situation were available and known by the parties, but they made deliberate choices to guard some benefits against conduit corporations and to leave others unguarded. Had the parties truly intended to prevent such corporations from taking advantage of the carve-out, they could have done so.
>
> . . .

> Moreover, Luxembourg and Canada added provisions reserving the benefits of the *Treaty* to the beneficial owners of certain income, but only in respect of dividends, interest, and royalties, not capital gains (arts. 10 to 12). If the parties had applied the concept of beneficial ownership to the carve-out, it would have prevented conduit corporations from taking advantage of this benefit where their beneficial owners were residents of a third country . . . (see, e.g., *Prévost Car*).

[Emphasis added.]

[376] Given the absence of any rule in Article 10 or elsewhere in the Luxembourg Treaty to supplement the residence requirement, the beneficial owner requirement, and the voting requirement, it is reasonable to conclude that Canada and Luxembourg were satisfied with the protection against "conduits" and flow-through arrangements afforded by the inclusion in Article 10(2) of those requirements. In other words, the true intentions of Canada and Luxembourg are fully reflected in the scope of the concepts of residence, beneficial owner and voting power adopted in Article 10(2).[280]

[377] In submissions addressing *Deans Knight*, the Respondent puts forward the following proposition regarding the rationale of Article 10(2):

> . . . the rationale of article 10(2) of the Luxembourg Treaty is not fully captured by either the beneficial ownership or control condition found in the provision. The rationale of article 10 is part of a series of provisions to promote investments in Canada by Luxembourg by providing a preferential withholding tax rate to residents of Luxembourg. **However, the rationale of article 10(2) is to restrict such benefit to investors with substantial connections to the partner state, and to prevent conduits or flow-through access by residents of other states**. This rationale is borne out by both an intrinsic reading of the provision and a review of its context and purpose.

[Emphasis added.]

[378] The Respondent identifies the rationale of Article 10(2) in terms of two objectives. The first objective is the requirement for a substantial connection to a contracting state. The second objective is the prevention of conduits or flow-through access by residents of other states.

---

[280] *Alta Energy* at paragraphs 37 and 50.

[379] Canada and Luxembourg addressed the first objective by adopting the residence requirement and addressed the second objective by adopting the beneficial owner requirement and the voting requirement.

[380] The Respondent does not explain how the rationale described by the Respondent leads to the conclusion that Canada and Luxembourg intended that the connection to a contracting state be more than that required by the residence requirement. The Respondent also does not explain how this rationale leads to the conclusion that the prevention of conduit or flow-through arrangements be more than that required by the beneficial owner requirement and the voting requirement.

[381] The Respondent seems to suggest that under the guise of determining the rationale of Article 10(2), I may read into the Article requirements that are more onerous than the requirements that are actually included in the Article and that these more onerous requirements reveal the true rationale of Article 10(2).

[382] *Deans Knight* does not override the earlier GAAR decisions of the Supreme Court of Canada regarding the means of determining the object, spirit and purpose, or rationale, of the provisions of the Luxembourg Treaty.

[383] As already stated, the discussion of rationale in paragraph 59 of *Deans Knight* addresses the reality that even the most carefully drafted legislative provision may be abused, and that it is important to recognize that the means adopted by a provision will not always explain why a provision was enacted. This is simply another way of saying that the text of a provision read in context does not always reflect (or fully reflect) the rationale of the provision.

[384] A clear example is section 74.1, which is the attribution rule addressed in *Lipson*. The majority in *Lipson* found that the rationale of the attribution rules in the ITA is to prevent a higher income earner from shifting income to a non-arm's length lower income earner.[281] A specific avoidance rule in subsection 74.5(11) clearly supported this description of the rationale, but the Minister had not applied that rule.[282]

[385] Section 74.1 applied to the transfer of property from Mr. Lipson to his spouse and allocated the "income or loss" from that property to Mr. Lipson. This

---

[281] *Lipson* at paragraph 32.
[282] In one of two dissents, Rothstein J. found that the GAAR did not apply because the specific anti-avoidance rule pre-empted its application: *Lipson* at paragraph 102.

"means", in conjunction with other rules in the ITA, allowed Mr. Lipson—the higher income earner—to reduce his income. However, the means adopted in section 74.1 did not fully reflect the rationale of the rule, and on the basis of that rationale the majority found that the result achieved by Mr. Lipson was abusive avoidance.[283]

[386] The majority in *Deans Knight* is not advocating an approach that replaces the test adopted by a statutory provision with a new test that applies only to avoidance transactions, nor is the majority advocating rewriting a statutory provision. This is clear from the statements that follow in paragraphs 60 and 61:

> The object, spirit and purpose of a provision must be worded as a description of its rationale (*Copthorne*, at para. 69). When articulating the object, spirit and purpose of a provision, a court is not repeating the test for the provision, **nor is it crafting a new, secondary test that will apply to avoidance transactions**. **Discerning the object, spirit and purpose does not rewrite the provision**; rather, the court merely takes a step back to formulate a concise description of the rationale underlying the provision, against which a textually compliant transaction must be scrutinized (*Trustco*, at para. 57; *Copthorne*, at para. 69).
>
> For example, for a provision conferring a tax benefit, the rationale might relate to the basis for providing relief to taxpayers in such circumstances or, for targeted relief, the conduct that Parliament sought to encourage. Conversely, for a specific anti-avoidance rule, the rationale might relate to the specific result, or mischief, that Parliament sought to prevent.

[Emphasis added.]

[387] I accept that the majority in *Deans Knight* emphasized that the rationale (or the "why") of a provision is not always fully explained by the text of the provision. But I do not accept the Respondent's application of that observation to the relevant provisions of the Luxembourg Treaty.

[388] In *Lipson*, section 74.1 expressly provided for the attribution of losses, but in describing the rationale of the attribution rules, the majority implicitly found in the circumstances addressed in *Lipson* that the loss transfer aspect of the provision did not reflect its rationale.

[389] In *Deans Knight*, the text of subsection 111(5) expressly referred to the concept of control, the meaning of which was addressed by the Supreme Court of

[283] *Lipson* at paragraph 42.

Canada in *Duha*. Nevertheless, the majority described the rationale of subsection 111(5) without mentioning the concept of control:

> . . . I would formulate the object, spirit and purpose of s. 111(5) as follows: to prevent corporations from being acquired by unrelated parties in order to deduct their unused losses against income from another business for the benefit of new shareholders. In order to consider how this rationale flows from s. 111(5)'s text, context and purpose, I begin by analyzing the text.[284]

[390] The reason for the absence of any reference to control was the majority's conclusion that *de jure* control did not fully explain the rationale of subsection 111(5), and that other provisions in the ITA suggested that *de jure* control was not a perfect reflection or complete explanation of the mischief that Parliament sought to address.[285]

[391] The majority in *Deans Knight* was not ignoring or circumventing the text of subsection 111(5). Rather, the majority undertook a comprehensive review of the text, context and purpose of subsection 111(5) in support of the conclusion that the means by which loss trading was constrained by subsection 111(5) did not adequately describe the reason why Parliament enacted subsection 111(5). As in *Lipson*, the rationale identified by the majority in turn allowed the majority to conclude that the transactions in issue circumvented subsection 111(5) in a manner that was abusive:

> The conclusion that the series of transactions involving the appellant were abusive flows directly from a proper consideration of what s. 111(5) was designed to achieve **and how the appellant circumvented that outcome**.[286] . . .

[Emphasis added.]

[392] In this case, the text of Article 10 includes the residence requirement, the beneficial owner requirement and the voting power requirement. The Respondent does not undertake a textual, contextual and purposive analysis to support the conclusion that these "means" do not reflect (or fully reflect) the underlying rationale of Article 10(2). Consequently, the decision of the majority in *Deans Knight* does not support the approach taken by the Respondent.

---

[284] *Deans Knight* at paragraph 78.
[285] *Deans Knight* at paragraphs 94 and 95.
[286] *Deans Knight* at paragraph 123.

[393] Consistent with the comprehensive analysis of the Luxembourg Treaty by the majority in *Alta Energy*, I find that the rationale of Article 10 is to address the double taxation of dividends by allocating the right to tax dividends between Canada and Luxembourg in accordance with the theory of economic allegiance while retaining the protections against the use of conduit-type arrangements afforded by the beneficial owner requirement and the voting power requirement. I will endeavour to support this articulation of the rationale of Article 10(2).

[394] The majority's discussion of the Luxembourg Treaty in *Alta Energy* recognizes that a treaty has both statutory and contractual qualities and that consideration of the contractual element is crucial to the application of the GAAR.[287] The majority considers the statutory and contractual elements of the Luxembourg Treaty in detail. With respect to the residence requirement, the majority states:

> It is worth noting that the words "sufficient substantive economic connections" are conspicuous by their absence in the text of both arts. 1 and 4. Although the GAAR invites courts to go beyond the text to understand the object, spirit, and purpose of the provisions, there are limits to this exercise, especially when attempting to discern the intent of bilateral treaty partners. **In the face of a complete absence of express words, the inclusion of an unexpressed condition must be approached with circumspection. It must be remembered that the text also plays an important role in ascertaining the purpose of a provision.** The proper approach is one that *unifies* the text, context, and purpose, not a purposive one in search of a vague policy objective disconnected from the text (*Canada Trustco*, at para. 41).[288]

[Emphasis added.]

[395] The Respondent fails to address the beneficial owner requirement and the voting requirement in its analysis of the rationale of Article 10(2). The Respondent instead proposes, as the basis for the rationale of Article 10(2), a vague policy objective that is disconnected from the text of Article 10(2).

[396] As explained by the majority in *Alta Energy*, the provisions of the Luxembourg Treaty that distribute taxing rights are premised on the theory of

---

[287] *Alta Energy* at paragraph 36.
[288] *Alta Energy* at paragraph 58.

economic allegiance and the distinction between active and passive income. The majority states:

> The theory of economic allegiance is indeed the principle underlying the allocation of taxing rights, and giving effect to this principle thus constitutes the broad purpose of provisions of the *Treaty*, such as art. 13, that distribute the right to tax between the residence and source states (J. Li and F. Avella, "Article 13: Capital Gains", in *Global Tax Treaty Commentaries*, last reviewed May 30, 2020 (online), at s. 1.1.2.1). However, I disagree with the Minister's articulation of the theory in this case.
>
> Broadly speaking, the apportionment of taxing rights between the residence and source states under the OECD *Model Treaty*, which serves as a model for the *Treaty*, is centred on the distinction between active and passive income (Li and Cockfield, at p. 12; Avi-Yonah, Sartori and Marian, at p. 155). The source state has the primary right to tax active income (e.g. business profits and employment income), and the residence state has only residual rights. Pursuant to the theory of economic allegiance, the source state has a greater claim to tax active income because its economic environment has the closest connection with the origin of wealth (Malherbe, at p. 56; Li and Cockfield, at pp. 66 and 151). Non-residents owe allegiance to the source state as a result, and they are expected to pay tax for the public services from which they benefit in carrying on their active economic activities in the source state.
>
> Conversely, **the residence state has the primary right to tax passive income** (e.g. interest, **dividends**, and capital gains), **and the source state has only residual rights**. The source state's claim to tax passive income is considered weaker in comparison to that of the residence state because generating such income is assumed to require few public services from the source state. Moreover, the economic environment of the source state is considered less material to the earning prospect of passive investments, as such passive activities may be conducted in various jurisdictions without either improving or negatively affecting their earning prospect. **Therefore, non-residents earning passive income owe little allegiance to the source state.**[289]

[Emphasis added.]

[397] Consistent with this, Article 10 of the Luxembourg Treaty allocates the primary right to tax a dividend to the contracting state in which the recipient of the dividend is resident but also permits the source state to tax the dividend.

---

[289] *Alta Energy* at paragraphs 72 to 74.

[398] Article 10(2) reduces the rate of tax permitted to the source state to 15% if the recipient meets the beneficial owner requirement and to 5% if the recipient also meets the voting power requirement. These two requirements represent the only agreement between Canada and Luxembourg regarding conduit (or flow-through) issues associated with dividends.

[399] In *Prévost Car*, the Tax Court judge comprehensively addressed the proper interpretation of the beneficial owner requirement. The Federal Court of Appeal observed:

> In his search for the meaning of these terms, the Judge closely examined their ordinary meaning, their technical meaning and the meaning they might have in common law, in Québec's civil law, in Dutch law and in international law. He relied, *inter alia*, on the OECD Commentary for Article 10(2) of the Model Convention and on OECD documents issued subsequently to the 1977 Commentary, i.e. the OECD Conduit Companies Report adopted by the OECD Council on November 27, 1986 and the amendments made in 2003 by the OECD to its 1977 Commentary. He also had the benefit of expert evidence.[290]

[400] I do not see how one can simply disregard the analysis in *Prévost Car* on the basis of a description of the policy underlying Article 10(2) that is at odds with the analysis and conclusions of the majority in *Alta Energy*.

[401] I also find that subsequent OECD commentary cannot be used to justify a rationale for Article 10(2) that implies a broader interpretation of "beneficial owner" than that adopted in *Prévost Car*. In *Alta Energy*, the majority stated:

> Indeed, in *Prévost Car*, the Federal Court of Appeal held that subsequent Commentaries expanding or clarifying notions already captured by the OECD *Model Treaty* are relevant**, but not those** that extend the scope of provisions in a manner that could not have been considered by the drafters . . . .[291]

[Emphasis added.]

[402] The majority in *Alta Energy* concluded that to the extent the 2003 and 2017 OECD commentaries purported to expand, rather than merely clarify, the terms of the Luxembourg Treaty, they did not reflect the intentions of Canada and

[290] *Prévost Car* at paragraph 8.
[291] *Alta Energy* at paragraph 41.

Luxembourg.[292] I can discern nothing in the text, context and purpose of Article 10(2) that would require a different conclusion in this case.

[403] In conclusion, there is no basis to find that the rationale of Article 10(2) with respect to conduits diverges from the means adopted in Article 10(2) to address conduits.

[404] The second stage of the abuse analysis examines the factual context to determine whether an avoidance transaction defeated or frustrated the rationale of Article 10(2).

[405] The Respondent accepts that the Luxcos were resident in Luxembourg and therefore had the connection to Luxembourg required by the Luxembourg Treaty. The Respondent also accepts that because of the securities lending arrangements, Husky paid the Dividends to the Luxcos. Therefore, the only question that remains in the hypothetical being considered is whether the means by which the Dividends ended up in the hands of the Luxcos is abusive in light of the rationale of Article 10(2).

[406] The Respondent submits that because the Barbcos were the beneficial owners of the Dividends, the beneficial ownership requirement of Article 10(2) is abused. However, if the Luxcos are not the beneficial owners of the Dividends, as this position suggests, then as I have already found, the reduced rates of tax provided by Article 10(2) and subsection 10(6) of the ITARs do not apply. Consequently, the Respondent's position does not assist the abuse analysis.

[407] The question is whether the tax benefits obtained by the securities lending arrangements (being, for the, Barbcos the reduction of Part XIII tax from 15% to 0% and, for the Luxcos, the reduction of Part XIII tax from 25% to 5%) are abusive within the meaning of subsection 245(4). This is determined by consideration of the rationale of subsection 212(2) and Article 10(2) and how the Appellants achieved the tax benefits.

[408] The securities lending arrangements lasted approximately seven weeks, after which the Luxcos returned the common shares in Husky borrowed from the

---

[292] *Alta Energy* at paragraphs 42 to 45.

Barbcos.[293] The terms and conditions of the securities lending arrangements ensured that the full benefit of the Dividends remained with the Barbcos.

[409] Securities lending/borrowing is not in and of itself unusual, and there are rules in section 260 that facilitate such transactions. However, it is clear that the securities lending arrangements do not reflect the usual reasons for entering into such arrangements.

[410] The usual role of a securities lending/borrowing transaction is to facilitate the short sale of securities, the securing of financing and certain other market-related activities. The Office of the Superintendent of Financial Institutions Canada states in Guideline B-4:

> Traditionally, security loans have been short term transactions designed to assist the liquidity of securities markets by enabling dealers/brokers to cover failed deliveries or short sales.[294]

[411] A 2019 Bank of Canada publication states:

> Securities lending plays an important role in Canadian financial markets. It promotes market liquidity in fixed-income and equity markets, enhances price discovery, prevents settlement failures and supports a variety of trading strategies. It also provides access to funding for security holders and has been identified by the Bank of Canada as one of Canada's core funding markets (Fontaine, Selody and Wilkins 2009).[295]

[412] The securities lending arrangements did not relate to a market or financing transaction of any kind. The sole reason for the securities lending arrangements was to shift the receipt of the Dividends from the Barbcos to the Luxcos to achieve what was expected to be a more favourable overall tax result. Indeed, the witnesses for HWLH and LFMI conceded that the securities lending arrangements were entirely tax-motivated.

[413] In the hypothetical being considered, the securities lending arrangements resulted in the tax benefits obtained by the Barbcos and the Luxcos. The securities

---

[293] At the end of the securities lending arrangements, the Barbcos were UF Barbados and New LF Barbados.

[294] Guideline B-4 dated September 1996. The Guideline goes on to address the risks of longer-term lending arrangements.

[295] Bank of Canada Staff Discussion Paper 2019-5 dated July 2019, page 1.

lending arrangements also resulted in the overall tax result which flowed from these two tax benefits (i.e. the reduction of aggregate Part XIII tax from 15% to 5%).

[414] However, as previously stated, subsection 212(2) is not concerned with the identity of the non-resident recipient of a dividend paid by a company resident in Canada as the Part XIII tax applies because the dividend is paid or credited to a non-resident, not because of the identity of the non-resident. Moreover, in the hypothetical being considered, the Luxembourg Treaty has applied to the payment of the Dividends to residents of Luxembourg in the manner contemplated by Canada and Luxembourg.

[415] The fact that the Barbcos transferred their common shares in Husky to the Luxcos under atypical securities lending arrangements really has no bearing on whether the Transactions abuse Article 10(2). The rationale of Article 10(2) is to provide relief from double taxation by allocating the right to tax dividends between Canada and Luxembourg in accordance with the theory of economic allegiance while retaining the protections against the use of conduit-type arrangements afforded by the beneficial owner requirement and the voting power requirement.

[416] Consistent with the theory of economic allegiance described by the majority in *Alta Energy*, which recognizes that a recipient of passive income need not have any allegiance to the paying country, the focus of the rationale of Article 10(2) is not how the common shares of Husky came to be owned by the Luxcos, but whether the Luxcos satisfy the residence requirement, the beneficial owner requirement and the voting power requirement. Since the hypothetical being considered assumes these requirements have been satisfied, I see no basis on which to find that the securities lending arrangements abused Article 10(2).

VII. Conclusion

[417] For the foregoing reasons, the appeal of Husky is dismissed with costs to the Respondent, and the appeals of HWLH and LFMI are allowed with costs to HWLH and LFMI and the HWLH Assessment and the LFMI Assessment are vacated. While this is an unusual result, it flows from the fact that the Minister assessed the successors of the Barbcos and did not assess the Luxcos.

[418] The parties have 60 days to agree on costs. The parties should take into account the fact that all three appeals were heard together on common evidence.

[419] If no agreement on costs is reached by Husky and the Respondent, the Respondent has a further 30 days to provide written submissions on costs not to exceed 10 pages and Husky has a further 30 days to provide written submissions in response to the submissions of the Respondent not to exceed 10 pages. If no agreement is reached by HWLH or LFMI and the Respondent, HWLH and/or LFMI, as the case may be, has a further 30 days to provide written submissions on costs not to exceed 10 pages and the Respondent has a further 30 days to provide written submissions in response to the submissions of HWLH and /or LFMI not to exceed 10 pages.

[420] No further submissions by either party are to be made.

Signed at Ottawa, Canada, this 13th day of December 2023.

"J.R. Owen"

Owen J.

APPENDIX A
PASF

2017-1252(IT)G
2017-3776(IT)G
2018-388(IT)G

TAX COURT OF CANADA

BETWEEN:

HUSKY ENERGY INC.
HUTCHISON WHAMPOA LUXEMBOURG HOLDINGS S.À R.L.
L.F. MANAGEMENT AND INVESTMENT S.À R.L.

Appellants

- and -

HIS MAJESTY THE KING

Respondent

PARTIAL AGREED STATEMENT OF FACTS

PRELIMINARY MATTERS

1. For the purposes of these appeals, the appellants and respondent (each a "**Party**" and collectively, the "**Parties**") admit the following facts and agree that their admission of facts shall have the same effect as if the facts had been proved formally and accepted by the Court as true, with the following caveats:

   (a) The Parties do not believe there is any inconsistency between the facts in the Partial Agreed Statement of Facts and any facts admitted in response to a request to admit, and agree that both the facts as stated in the Partial Agreed Statement of Facts and any admissions otherwise made are true.

(b) Any admission of fact by a Party in this Partial Agreed Statement of Facts does not constitute an admission by such Party or by any other Party that it had knowledge of such fact at the time the relevant fact or event occurred.

(c) Each party reserves the right to adduce additional evidence that is relevant and probative of any issue before the Court and not inconsistent with the facts admitted herein.

2. For the purposes of these appeals, the Parties admit that the documents referenced in the Partial Agreed Statement of Facts are authentic, save the reservations listed in **Schedule "I"**.

3. Notwithstanding the reservations listed in **Schedule "I"**, the Parties agree that all documents referenced in this Partial Agreed Statement of Facts are relevant and may be, and are, tendered as evidence as a single joint exhibit (a book of documents comprised of two volumes separated by tabs (the "**BOD**")), without the need for a witness to identify or authenticate such documents.

4. The truth of the contents of the documents referenced in this Partial Agreed Statement of Facts is not admitted by the Parties.

5. The Parties agree that the inclusion of a fact or a document in this Partial Agreed Statement of Facts or the BOD is not a concession as to the weight or degree of relevance of the fact or document.

6. The Parties agree that the titles, the descriptions, the dates, and the times listed in the footnotes to this Partial Agreed Statement of Facts and the Table of Contents of the BOD are neither determinative nor a concession as to both the content of a document or the interpretation to be given to it.

FACTS

The Entities

(a) Husky Energy Inc.

7. At all material times, Husky Energy Inc. ("**Husky**") was a corporation resident in Canada which carried on a business in the oil and gas sector. Its shares were publicly traded on the Toronto Stock Exchange.

8. As at June 30, 2003, Husky had 418,800,683 common shares issued and outstanding. The common shares of Husky were owned as at June 30, 2003 by U.F. Investments (Barbados) Limited ("**UF Barbados**"), L.F. Investments (Barbados) Limited ("**LF Barbados**"), H.F. Investments (Barbados) Ltd. ("**HF Barbados**") and the general public as follows:

Shareholder	Common shares	Approximate Percentage
UF Barbados	146,548,737	35.0%
LF Barbados	137,576,366	32.9%
HF Barbados	14,953,953	3.6%
Public	119,721,627	28.5%

9. The directors of Husky in 2003 are listed in Appendix "A".

(b) UF Barbados

10. On November 22, 1994, UF Barbados was incorporated under the *Companies Act of Barbados*. At all material times, UF Barbados was resident in Barbados for the purposes of the *Agreement between Canada and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and on Capital* (the "**Canada–Barbados Tax Convention**").

11. The directors of UF Barbados in 2003 are listed in Appendix "A".

(c) Hutchison

12. On December 3, 1999, Hutchison Whampoa Europe Investments S.à r.l. ("**Hutchison**") was created under the laws of Luxembourg as a *Société à Responsabilité Limitée*. At all material times, Hutchison was resident in Luxembourg for the purposes of the *Convention Between The Government of Canada and The Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and on Capital* (the "**Canada–Luxembourg Tax Convention**").

13. The managers of Hutchison in 2003 are listed in Appendix "A".

(d) LF Barbados

14. On November 22, 1994, LF Barbados was incorporated under the *Companies Act of Barbados*. At all material times, LF Barbados was resident in Barbados for the purposes of the Canada–Barbados Tax Convention.

15. The directors of LF Barbados in 2003 before the amalgamation of LF Barbados and HF Barbados referred to in paragraph 14 below are listed in Appendix "A".

(e) HF Barbados

16. On November 22, 2000, HF Barbados was incorporated under the *Companies Act of Barbados*. At all material times, HF Barbados was resident in Barbados for the purposes of the Canada–Barbados Tax Convention.

17. The directors of HF Barbados in 2003 before the amalgamation of LF Barbados and HF Barbados referred to in paragraph 14 below are listed in Appendix "A".

(f) New LF Barbados

18. On September 25, 2003, LF Barbados, HF Barbados and LFCB Holdings Ltd. amalgamated to form the amalgamated entity known as L.F. Investments (Barbados)

Limited ("**New LF Barbados**").[1] At all material times, New LF Barbados was resident in Barbados for the purposes of the Canada–Barbados Tax Convention.

19. Upon amalgamation, the 10,000 Class B redeemable preference shares of LF Barbados and the 1,000 Class B redeemable preference shares of HF Barbados that were created on July 22, 2003 became 11,000 Class D redeemable preference shares of New LF Barbados.[2]

20. The directors of New LF Barbados in 2003 are listed in Appendix "A".

(g) LF Luxembourg

21. On July 16, 2003, L.F. Luxembourg S.à r.l. ("**LF Luxembourg**") was created under the laws of Luxembourg as a *Société à Responsabilité Limitée*. At all material times, LF Luxembourg was resident in Luxembourg for the purposes of the Canada–Luxembourg Tax Convention.

22. The managers of LF Luxembourg in 2003 are listed in Appendix "A".

<u>The Securities Lending Arrangements</u>

(a) UF Barbados and Hutchison

23. On July 22, 2003, the following transactions occurred:

(i) UF Barbados and Hutchison entered into an Overseas Securities Lender's Agreement ("**OSLA**").[3]

---

[1] Certificate of Amalgamation of New LF Barbados dated September 25, 2003 (BOD, Tab 1); Articles of Amalgamation of New LF Barbados dated September 25, 2003 (BOD, Tab 2).

[2] Amended Articles of LF Barbados dated September 24, 2003 (BOD, Tab 3); Amended Articles of HF Barbados dated September 24, 2003 (BOD, Tab 4); Articles of Amalgamation of New LF Barbados dated September 25, 2003 (BOD, Tab 2).

[3] UF Barbados Meeting Minutes dated July 22, 2003 at 9:45 a.m. (Barbados time) (BOD, 5); Hutchison Meeting Minutes dated July 22, 2003 at 3:35 p.m. (Luxembourg time) (BOD, 6); OSLA between Hutchison and UF Barbados dated July 22, 2003 (BOD, Tab 7).

(ii) The sole shareholder of UF Barbados resolved to amend the articles of UF Barbados to create 10,000 Class B redeemable preference shares without nominal or par value.[4]

(iii) Hutchison issued a borrowing request to UF Barbados. The terms included UF Barbados agreeing to lend 146,548,737 common shares of Husky to Hutchison and Hutchison agreeing to pay a borrowing fee of CAD$50,000.[5]

(iv) Hutchison and UF Barbados entered into a subscription agreement whereby Hutchison agreed to subscribe for, and UF Barbados agreed to issue to Hutchison, 10,000 Class B redeemable preference shares of UF Barbados.[6]

24. On July 24, 2003, UF Barbados transferred 146,548,737 Husky common shares to Hutchison.[7]

25. On November 17, 2003, UF Barbados gave a notice to Hutchison to call for redelivery on November 20, 2003 pursuant to the borrowing request and OSLA.[8]

26. On November 20, 2003, Hutchison transferred 146,548,737 Husky common shares to UF Barbados.[9]

27. On November 20, 2003, UF Barbados received from Hutchison US$123,535,333.87 (CAD$161,213,610.70).[10]

---

[4] UF Barbados Shareholder's Meeting Minutes dated July 22, 2003 (BOD, Tab 8); Amended Articles of UF Barbados dated September 24, 2003 (BOD, Tab 9).

[5] Borrowing Request from Hutchison to UF Barbados dated July 22, 2003 (BOD, Tab 10).

[6] UF Barbados Meeting Minutes dated July 22, 2003 at 10:05 a.m. (Barbados time) (BOD, Tab 11); Hutchison Meeting Minutes dated July 22, 2003 at 3:40 p.m. (Luxembourg time) (BOD, Tab 12); Agreement for the Subscription of Class B Redeemable Preference Shares in UF Barbados dated July 22, 2003 (BOD, Tab 13).

[7] Irrevocable Power of Attorney – Securities dated July 24, 2003 (BOD, Tab 14).

[8] Notice for Redelivery dated November 17, 2003 from UF Barbados to Hutchison (BOD, Tab 15).

[9] Irrevocable Power of Attorney – Securities dated November 20, 2003 (BOD, Tab 16).

[10] Letter from Hutchison to The Hongkong & Shanghai Banking Corp. Ltd. dated November 18, 2003 (BOD, Tab 17); CIBC Credit Advice for UF Barbados dated November 20, 2003 (BOD, Tab 18).

28. On November 20, 2003, Hutchison subscribed for 10,000 Class B preference shares of UF Barbados, and UF Barbados allotted and issued 10,000 Class B preference shares of UF Barbados to Hutchison.[11]

(b) LF Barbados, HF Barbados and LF Luxembourg

29. On July 22, 2003, the following transactions occurred:

(i) LF Barbados and LF Luxembourg entered into an OSLA.[12]

(ii) HF Barbados and LF Luxembourg entered into an OSLA.[13]

(iii) The shareholders of LF Barbados resolved to amend the articles of LF Barbados to create 10,000 Class B redeemable preference shares without nominal or par value.[14]

(iv) The sole shareholder of HF Barbados resolved to amend the articles of HF Barbados to create 1,000 Class B redeemable preference shares without nominal or par value.[15]

(v) LF Luxembourg issued a borrowing request to LF Barbados. The terms included LF Barbados agreeing to lend 137,576,366 common shares of Husky to LF Luxembourg and LF Luxembourg agreeing to pay a borrowing fee of CAD$50,000.[16]

---

[11] Register of Shareholders for UF Barbados (BOD, Tab 19).

[12] LF Barbados Meeting Minutes dated July 22, 2003 at 10:10 a.m. (Barbados time) (BOD, Tab 20); LF Luxembourg Meeting Minutes dated July 22, 2003 at 3:24 p.m. (Luxembourg time) (BOD, Tab 21); OSLA between LF Luxembourg and LF Barbados dated July 22, 2003 (BOD, Tab 22).

[13] HF Barbados Meeting Minutes dated July 22, 2003 at 10:25 a.m. (Barbados time) (BOD, Tab 23); LF Luxembourg Meeting Minutes dated July 22, 2003 at 3:16 p.m. (Luxembourg time) (BOD, Tab 24); OSLA between LF Luxembourg and HF Barbados dated July 22, 2003 (BOD, Tab 25).

[14] LF Barbados Shareholders' Meeting Minutes dated July 22, 2003 (BOD 26); Amended Articles of LF Barbados dated September 24, 2003 (BOD, Tab 3).

[15] HF Barbados Shareholder's Meeting Minutes dated July 22, 2003 (BOD, Tab 27); Amended Articles of HF Barbados dated September 24, 2003 (BOD, Tab 4).

[16] Borrowing Request from LF Luxembourg to LF Barbados dated July 22, 2003 (BOD, Tab 28).

(vi) LF Luxembourg issued a borrowing request to HF Barbados. The terms included HF Barbados agreeing to lend 14,953,953 common shares of Husky to LF Luxembourg and LF Luxembourg agreeing to pay a borrowing fee of CAD$5,000.[17]

(vii) LF Luxembourg and LF Barbados entered into a subscription agreement for the issuance of 10,000 Class B redeemable preference shares to LF Luxembourg for $1 per share.[18]

(viii) LF Luxembourg and HF Barbados entered into a subscription agreement for the issuance of 1,000 Class B redeemable preference shares to LF Luxembourg for $1 per share.[19]

30. On July 24, 2003, LF Barbados and HF Barbados transferred 137,576,366 and 14,953,953 Husky common shares, respectively, to LF Luxembourg.[20]

31. On November 17, 2003, New LF Barbados gave notice to LF Luxembourg, on behalf of its predecessors, LF Barbados and HF Barbados, to call for redelivery on November 20, 2003 pursuant to the borrowing requests and OSLAs.[21]

32. On November 20, 2003, LF Luxembourg transferred 152,530,319 (137,576,366 + 14,953,953) Husky common shares to New LF Barbados.[22]

---

[17] Borrowing Request from LF Luxembourg to HF Barbados dated July 22, 2003 (BOD, Tab 29).

[18] LF Barbados Meeting Minutes dated July 22, 2003 at 10:20 a.m. (Barbados time) (BOD, Tab 30); LF Luxembourg Meeting Minutes dated July 22, 2003 at 3:29 p.m. (Luxembourg time) (BOD, Tab 31); Agreement for the Subscription of Class B Redeemable Preference Shares in LF Barbados dated July 22, 2003 (BOD, Tab 32).

[19] HF Barbados Meeting Minutes dated July 22, 2003 at 10:35 a.m. (Barbados time) (BOD, 33); LF Luxembourg Meeting Minutes dated July 22, 2003 at 3:27 p.m. (Luxembourg time) (BOD, Tab 34); Agreement for the Subscription of Class B Redeemable Preference Shares in HF Barbados dated July 22, 2003 (BOD, Tab 35).

[20] Irrevocable Power of Attorney – Securities dated July 24, 2003 (BOD, Tab 36); Irrevocable Power of Attorney – Securities dated July 24, 2003 (BOD, Tab 37).

[21] Notice for Redelivery dated November 17, 2003 from New LF Barbados, as successor to LF Barbados, to LF Luxembourg (BOD, Tab 38); Notice for Redelivery dated November 17, 2003 from New LF Barbados, as successor to HF Barbados, to LF Luxembourg (BOD, Tab 39).

[22] Irrevocable Power of Attorney – Securities dated November 20, 2003 (BOD, Tab 40); Irrevocable Power of Attorney – Securities dated November 20, 2003 (BOD, Tab 41).

33. On November 20, 2003, New LF Barbados received from LF Luxembourg US$128,578,046.67 (CAD$167,794,350.90).[23]

34. On November 20, 2003, LF Luxembourg subscribed for 11,000 Class D preference shares of New LF Barbados, and New LF Barbados allotted and issued 11,000 Class D preference shares of New LF Barbados to LF Luxembourg.[24]

<u>The Husky Dividends</u>

35. Since the beginning of 2001, Husky had paid regular quarterly dividends of CAD$0.09 on its common shares according to its dividend policy.[25]

36. On July 23, 2003, Husky's board of directors declared a regular and a special dividend on its common shares of CAD$0.10 and CAD$1.00 per share, respectively, payable on October 1, 2003 to shareholders of record on August 29, 2003.[26]

37. Husky's special dividend declared was the first special dividend declared. Husky also declared special dividends in 2004, 2005 and 2007.[27]

38. On October 1, 2003, Husky Oil Operations Limited, a wholly owned subsidiary of Husky, paid Husky a dividend of $462,500,000.[28] Husky Oil Operations Limited borrowed approximately $192,000,000 to pay this dividend.

39. On October 1, 2003, Husky paid dividends of $0.10 and $1.00, as regular and special dividends, respectively, on each of its common shares.

40. On October 1, 2003, Husky paid the following dividends to Hutchison and LF Luxembourg:

[23] Letter from LF Luxembourg to CIBC dated November 20, 2003 (BOD, Tab 42); Letter from CIBC to LF Luxembourg dated November 20, 2003 (BOD, Tab 43).
[24] Share Certificate D1 (BOD, Tab 44).
[25] Husky's 2001 Annual Report, p. 49 (BOD, Tab 45), Husky's 2002 Annual Report, p. 107 (BOD, Tab 46).
[26] Husky Board Minutes dated July 23, 2003 (BOD, Tab 47).
[27] Husky News Releases dated July 24, 2003 (BOD, Tab 48).
[28] Husky Oil Operations Limited Board Resolution dated September 30, 2003 (BOD, Tab 49).

Shareholder	Common shares	Gross Dividend Amount (CAD)
Hutchison	146,548,737	$161,203,610
LF Luxembourg	152,530,319	$167,783,350
		$328,986,960

41. Husky withheld and remitted to the Receiver General of Canada an amount equivalent to 5% of the dividends paid to Hutchison and LF Luxembourg in respect of Part XIII tax.

42. On October 1, 2003, Hutchison received a regular and a special dividend from Husky in the net amount of US$110,564,962.28.[29] The net amount was the equivalent of CAD$153,143,430.17, which was CAD$1.10 per share on 146,548,737 common shares for a total gross amount of CAD$161,203,610.70, less 5% withholding tax of CAD$8,060,180.54 that was withheld and remitted to the Receiver General of Canada.[30]

43. On October 1, 2003, LF Luxembourg received a regular and a special dividend from Husky in the net amount of US$115,077,818.55.[31] The net amount of the LF Luxembourg Husky Dividends was the equivalent of CAD$159,394,183.35, which was CAD$1.10 per share on 152,530,319 common shares for a total gross amount of CAD$167,783,350.90, less 5% withholding tax of CAD$8,389,167.55 that was withheld and remitted to the Receiver General of Canada.[32]

Hutchison's Use of the Husky Dividends

44. Hutchison placed US$110,564,000 of the proceeds from the Husky dividends in a term deposit maturing October 6, 2003, yielding US$15,663.23 in interest.[33]

---

[29] Hutchison ING Account statement dated October 2, 2003 (BOD, Tab 50); Hutchison ING Account credit advice dated October 2, 2003 (BOD, Tab 51). As Hutchison maintained its books of account in Euro, Hutchison translated the amount of the Husky dividends into Euro in its accounting journals for 2003: see Hutchison Journal ING – USD for the period of October 2003 (BOD, Tab 52); Hutchison Journal Operations diverses for the period of December 2003 (BOD, Tab 53).

[30] "Share Investments and Dividends" (BOD, Tab 54).

[31] LF Luxembourg ING Account statement dated October 1, 2003 (BOD, Tab 55).

[32] "Share Investments and Dividends" (BOD, Tab 54).

[33] Letter from Hutchison to ING Luxembourg SA dated September 24, 2003 (BOD, Tab 56); Hutchison ING Account confirmation of term deposit dated October 1, 2003 (BOD, Tab 57); Hutchison ING Account statement dated November 4, 2003 (BOD, Tab 58). Hutchison translated the interest earned on the term deposit into Euro in its accounting journals for 2003: see Hutchison Journal ING – USD for the period of October 2003 (BOD, Tab 52).

45. On October 6, 2003, Hutchison transferred US$110,564,962.28 to Hutchison OMF Limited ("**HOMF**"), a group finance company, in partial repayment of an interest-bearing credit facility denominated in Euro (the "**HOMF Credit Facility**").[34]

Hutchison's Payment of the OSLA Compensation Amount

46. On November 20, 2003, Hutchison borrowed US$123,535,333.87 (CAD$161,213,610.70) from HOMF under the HOMF Credit Facility.[35]

47. On November 20, 2003, Hutchison transferred US$123,535,333.87 to UF Barbados.[36]

48. In its books of account for 2003, Hutchison recorded a foreign exchange loss of €9,441,350.59 in respect of its payment to UF Barbados.[37] Under the terms of a hedging agreement dated December 2000 between Hutchison and HOMF, the Hutchison foreign exchange loss was offset by a corresponding gain (and receivable) from HOMF.[38]

LF Luxembourg's Use of the Husky Dividends

49. On October 1, 2003, LF Luxembourg placed US$115,076,000.00 of the proceeds from the Husky dividends in a term deposit with ING Luxembourg SA maturing on October 8, 2003, yielding US$22,823.41 in interest.[39]

---

[34] Letter from Hutchison to ING Luxembourg SA dated September 25, 2003 (BOD, Tab 59); Hutchison ING Account debit advice dated November 4, 2003 (BOD, Tab 60); Hutchison ING Account statement dated November 4, 2003 (BOD, Tab 58); Credit Facility Agreement dated September 25, 2001 between Hutchison and HOMF (BOD, Tab 61). Hutchison translated the amount repaid to HOMF under the HOMF Credit Facility into Euro in its accounting journals for 2003: see Hutchison Journal ING – USD for the period of October 2003 (BOD, Tab 52) and Hutchison Journal Operations diverses for the period of December 2003 (BOD, Tab 53).

[35] Letter from HOMF to HSBC Bank plc dated November 18, 2003 (BOD, Tab 62); Letter from HOMF to ABN AMRO Bank dated November 18, 2003 (BOD, Tab 63); Credit Facility Agreement dated September 25, 2001 between Hutchison and HOMF (BOD, Tab 61). Hutchison translated the amount borrowed from HOMF under the HOMF Credit Facility into Euro in its accounting journals for 2003: see Hutchison Journal HSBC – USD for the period of November 2003 (BOD, Tab 64); Hutchison Journal Operations diverses for the period of December 2003 (BOD, Tab 53).

[36] Letter from Hutchison to The Hongkong & Shanghai Banking Corp. Ltd. dated November 18, 2003 (BOD Tab 17); CIBC Credit Advice for UF Barbados dated November 20, 2003 (BOD, Tab 18).

[37] Hutchison Journal Operations diverses for the period of December 2003 (BOD, Tab 53).

[38] Hutchison's Audited annual accounts for the year ended December 31, 2003, Annexe 1 to Tax Return for Hutchison for the period from January 1, 2003 to December 31, 2003 ("Dossier fiscal 2003") (BOD, Tab 65).

[39] Letter from LF Luxembourg to ING Luxembourg SA dated September 29, 2003 (BOD, Tab 66); LF Luxembourg ING Account statement dated October 2, 2003 (BOD, Tab 55); LF Luxembourg ING Account statement dated November 4, 2003 (BOD, Tab 67).

50. On October 8, 2003, LF Luxembourg transferred US$115,098,823.41 from the LF Luxembourg ING Account into an account held by LF Luxembourg with Canadian Imperial Bank of Commerce, Singapore Branch ("**CIBC Singapore**") (the "**LF Luxembourg CIBC Account**").[40]

51. LF Luxembourg placed the amount transferred (US$115,098,823.41) to the LF Luxembourg CIBC Account in a series of term deposits with CIBC Singapore from October 6, 2003 to November 20, 2003, yielding US$126,406.94 in interest.[41]

LF Luxembourg's Payment of the OSLA Compensation Amount

52. On November 20, 2003, LF Luxembourg borrowed US$13,352,816.36 from Castle (DT) Finance Limited ("**Castle**"), a related company, to pay the total amount due to New LF Barbados.[42]

53. On November 20, 2003, LF Luxembourg transferred US$128,578,046.67 to New LF Barbados.[43]

Inter-Company Loans Owing by UF Barbados

54. At the beginning of 2003, UF Barbados had the following inter-company loans outstanding:[44]

Creditor	**Principal Amount of Loan (Non-CAD amounts converted to CAD)**	**Interest Rate (per annum)**
U.F. Holdings Ltd.	$642,323,320	3.15%
U.F. Holdings Ltd.	$307,776,721	Interest-free

[40] LF Luxembourg ING Account statement dated October 8, 2003 (BOD, Tab 67); LF Luxembourg ING Account debit advice dated November 4, 2003 (BOD, Tab 68).
[41] LF Luxembourg CIBC Account statements dated October 8, October 15, October 22, October 30, and November 12, 2003 (BOD, Tab 69).
[42] Letter from Castle (DT) Finance Limited to CIBC Singapore dated November 20, 2003 (BOD, Tab 70); LF Luxembourg journal voucher dated November 20, 2003 (BOD, Tab 71).
[43] Letter from LF Luxembourg to CIBC Singapore dated November 20, 2003 (BOD, Tab 42); Letter from CIBC Singapore to LF Luxembourg dated November 20,2003 (BOD, Tab 43).
[44] "Accounting Entries" (BOD, Tab 72); UF Barbados 2003 Audited Financial Statements (BOD, Tab 73).

Union Faith Energy (HK) Ltd.	$142,368,890	Interest-free
Holodeck Limited	$291,257,879	7.75%
TOTAL	$1,383,726,810	

55. In August 2003, UF Barbados agreed to renegotiate the above-noted inter-company loans with its creditors. The following promissory notes were executed effective January 2, 2003:[45]

Creditor	**Principal Amount of Loan (CAD)**	**Interest Rate (per annum)**
U.F. Holdings Ltd.	$1,092,468,931	13.80%
U.F. Holdings Ltd.	$291,257,879	13.80%
TOTAL	$1,383,726,810	

<u>Inter-Company Loans Owing by LF Barbados and HF Barbados</u>

56. At the beginning of 2003, LF Barbados had the following inter-company loans outstanding:[46]

Creditor	**Principal Amount of Loan (Non-CAD amounts converted to CAD)**	**Interest Rate (per annum)**
L.F. Holdings Ltd.	$748,338,459 (= $230,000,000 + $229,660,000 + $288,678,459)	4.10%
L.F. Holdings Ltd.	$430,343,853	Interest-free

[45] Shareholders' Loans Restructuring and New Interest Rates Effective from 1 January 2003 (BOD, Tab 74); Promissory Note in the principal amount of CAD$291,257,878.79 dated January 2, 2003 (BOD, Tab 75); Promissory Note in the principal amount of CAD$1,092,468,930.76 dated January 2, 2003 (BOD, Tab 76).
[46] Shareholders' Loans Restructuring and New Interest Rates Effective from 1 January 2003 (BOD, Tab 74); LF Barbados 2003 Annual Report (BOD, Tab 77).

Manifact Holdings S.A.	$24,373,755	Interest-free
TOTAL	$1,203,056,067	N/A

57. In August 2003, LF Barbados renegotiated the above-noted inter-company loans with its creditors. The following promissory note was executed effective January 2, 2003:[47]

Creditor	Principal Amount of Loan (Non-CAD amounts converted to CAD)	Interest Rate (per annum)
L.F. Holdings Ltd.	$1,203,056,067	14.90%

58. At the beginning of 2003, HF Barbados's primary liability was a $171,021,205 loan (entered on December 6, 2000) with its parent company, H.F. Holdings Ltd. The interest rate on that loan was 1.95% per annum.[48]

59. In August 2003, HF Barbados renegotiated the above-noted loan with its parent company and executed the following promissory note effective January 2, 2003:[49]

Creditor	Principal Amount of Loan (Non-CAD amounts converted to CAD)	Interest Rate (per annum)
H.F. Holdings Ltd.	$170,836,081	11.30%

[47] Promissory Note for CAD$1,203,056,067.48 dated January 2, 2003 from LF Barbados to L.F. Holdings Ltd. (BOD, Tab 78).
[48] Loan Agreement dated December 6, 2000 between H.F. Holdings Ltd. and HF Barbados BOD, Tab 79).
[49] Promissory Note for CAD$170,836,081.50 dated January 2, 2003 from HF Barbados to H.F. Holdings Ltd. (BOD, Tab 80).

Luxembourg Tax Consequences

60. In its financial statements for the year ended December 31, 2003, Hutchison recorded for accounting purposes €103,708,900 as dividend income received on the Husky common shares.[50] Hutchison also recorded the following expenses for accounting purposes:

a. €103,708,900 described as reimbursement of the Husky dividend to UF Barbados ("*Remboursement dividende Husky à U.F.I.*");

b. €4,713,375 as Canadian withholding tax paid on the Husky dividend;[51] and

c. €31,160 as borrowing fee paid to UF Barbados.[52]

61. In its financial statements for the year ended December 31, 2003, LF Luxembourg recorded €103,277,812 as dividend income received on the Husky common shares. LF Luxembourg also recorded the following expenses:

a. €107,878,523 for "Interest and similar charges" (amount paid to LF Barbados equivalent to the gross amount of the dividend received on the Husky common shares before the Canadian withholding tax);[53]

b. €5,163,890 as "Other charges" (representing the Canadian withholding tax on the dividend);[54] and

c. €34,236 as borrowing fees paid to LF Barbados and HF Barbados.[55]

[50] Annexe 1 (Hutchison's Audited annual accounts for the year ended December 31, 2003) and Annexe 5 to Tax Return for Hutchison for the period from January 1, 2003 to December 31, 2003 ("Dossier fiscal 2003") (BOD, Tab 65). Equivalent to $161,203,610 in Canadian dollars at CAD 1.5544 to EUR 1.0000.
[51] Equivalent to $8,060,180 in Canadian dollars at CAD 1.7101 to EUR 1.0000.
[52] Annexe 5 to Tax Return for Hutchison for the period from January 1, 2003 to December 31, 2003 ("Dossier fiscal 2003") (BOD, Tab 65). Equivalent to $50,000 in Canadian dollars at CAD 1.6046 to EUR 1.0000.
[53] Equivalent to $167,783,350 in Canadian dollars at CAD 1.5553 to EUR 1.0000.
[54] Equivalent to $8,389,168 in Canadian dollars at CAD 1.6331 to EUR 1.0000.
[55] Equivalent to $55,000 in Canadian dollars at CAD 1.6065 to EUR 1.0000.

LF Luxembourg reported a loss of €9,678,967 in the Income Statement attached to its Luxembourg tax return for its year ended December 31, 2003.[56]

62. On July 17, 2003, Carlos Concha Carbadillo of PricewaterhouseCoopers, S.A.R.L. ("**PWC**") sent an email to Guy Peters of the Bureau d'imposition des Sociétés VI (Luxembourg) ("**Luxembourg Tax Authorities**") to confirm the Luxembourg tax treatment of the transactions contemplated in the securities lending agreement structure.[57]

63. On July 18, 2003, Carlos Concha sent a follow-up email to Mr. Peters concerning the proposed ruling.[58]

64. On July 30, 2003, PWC submitted a request to the Luxembourg Tax Authorities to confirm the Luxembourg tax treatment of the transactions contemplated in the securities lending agreement structure (the "**Luxembourg Rulings**").[59]

65. The Luxembourg Tax Authorities confirmed the tax treatment by granting the Luxembourg Rulings on August 6, 2003. The Luxembourg Rulings did not determine whether Hutchison and LF Luxembourg were the beneficial owners of the dividends to be received on Husky common shares for the purposes of the Canada–Luxembourg Tax Convention.

66. Hutchison and LF Luxembourg filed Luxembourg income tax returns for 2003.[60]

Barbados Tax Consequences

67. UF Barbados reported a loss of $231,608,074 (Barbados dollars) in its Barbados income tax return for 2003.[61] The Barbados tax authorities never challenged this loss.

---

[56] LF Luxembourg Annual Accounts for the period from July 16, 2003 (date of incorporation) to December 31, 2004 (BOD, Tab 81).
[57] Email dated July 17, 2003 from Carlos Concha Carbadillo to Luxembourg Tax Authorities (BOD, Tab 82).
[58] Email dated July 18, 2003 from Carlos Concha Carbadillo to Luxembourg Tax Authorities (BOD, Tab 83).
[59] Letter from Wim Piot and Carlos Concha to Marius Kohl dated July 30, 2003 re: Hutchison (BOD, Tab 84); Letter from Wim Piot to Carlos Concha to Marius Kohl dated July 30, 2003 re: LF Luxembourg (BOD, Tab 85).
[60] Tax Return for Hutchison for the period from January 1, 2003 to December 31, 2003 ("Dossier fiscal 2003") (BOD, Tab 65); Tax Return for LF Luxembourg for the period from July 16, 2003 to December 31, 2003 ("Dossier fiscal 2003") enclosed with LF Luxembourg Annual Accounts for the period from July 16, 2003 (date of incorporation) to December 31, 2004 (BOD, Tab 81).
[61] UF Barbados Corporation Tax Return for the year 2003 (BOD, Tab 86).

68. New LF Barbados reported a loss of $244,004,103 (Barbados dollars) in its Barbados income tax return for 2003.[62] The Barbados tax authorities never challenged this loss.

69. In relation to the OSLAs, UF Barbados and New LF Barbados included only the borrowing fee as income in their 2003 Barbados tax returns.

70. The Barbados tax authorities never challenged that UF Barbados and New LF Barbados did not include the compensation amounts in income for Barbados tax purposes.

71. The Barbados Department of Inland Revenue issued a Notice of Assessment dated November 10, 2004 to UF Barbados in respect of its 2003 taxation year.[63]

[Remainder of page left intentionally blank. Signature page follows.]

[62] Corporation Tax Return for the year 2003 for New LF Barbados (BOD, Tab 87).
[63] UF Barbados Notice of Assessment dated November 10, 2004 (BOD, Tab 88).

APPENDIX B

Relevant Provisions of the ITA, the Luxembourg Treaty and the Barbados Treaty

Income Tax Act

212.(1) Tax — Every non-resident person shall pay an income tax of 25% on every amount that a person resident in Canada pays or credits, or is deemed by Part I to pay or credit, to the non-resident person as, on account or in lieu of payment of, or in satisfaction of,

. . .

(2) Tax on dividends — Every non-resident person shall pay an income tax of 25% on every amount that a corporation resident in Canada pays or credits, or is deemed by Part I or Part XIV to pay or credit, to the non-resident person as, on account or in lieu of payment of, or in satisfaction of,

> (a) a taxable dividend (other than a capital gains dividend within the meaning assigned by subsection 130.1(4), 131(1) or 133(7.1)), or
>
> (b) a capital dividend.

. . .

245(1) Definitions — In this section,

"tax benefit" means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty;

"tax consequences" to a person means the amount of income, taxable income, or taxable income earned in Canada of, tax or other amount payable by or refundable to the person under this Act, or any other amount that is relevant for the purposes of computing that amount;

"transaction" includes an arrangement or event.

(2) General anti-avoidance provision [GAAR] — Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is

reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.

(3) Avoidance transaction — An avoidance transaction means any transaction

(a) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit; or

(b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.

(4) Application of subsec. (2) — Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction

(a) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of

(i) this Act,

(ii) the *Income Tax Regulations*,

(iii) the *Income Tax Application Rules*,

(iv) a tax treaty, or

(v) any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any amount that is relevant for the purposes of that computation; or

(b) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.

(5) Determination of tax consequences — Without restricting the generality of subsection (2), and notwithstanding any other enactment,

(a) any deduction, exemption or exclusion in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part,

(b) any such deduction, exemption or exclusion, any income, loss or other amount or part thereof may be allocated to any person,

(c) the nature of any payment or other amount may be recharacterized, and

(d) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored,

in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.

(6) Request for adjustments — Where with respect to a transaction

(a) a notice of assessment, reassessment or additional assessment involving the application of subsection (2) with respect to the transaction has been sent to a person, or

(b) a notice of determination pursuant to subsection 152(1.11) has been sent to a person with respect to the transaction,

any person (other than a person referred to in paragraph (a) or (b)) shall be entitled, within 180 days after the day of mailing of the notice, to request in writing that the Minister make an assessment, reassessment or additional assessment applying subsection (2) or make a determination applying subsection 152(1.11) with respect to that transaction.

(7) Exception — Notwithstanding any other provision of this Act, the tax consequences to any person, following the application of this section, shall only be determined through a notice of assessment, reassessment, additional assessment or determination pursuant to subsection 152(1.11) involving the application of this section.

(8) Duties of Minister — On receipt of a request by a person under subsection (6), the Minister shall, with all due dispatch, consider the request and, notwithstanding subsection 152(4), assess, reassess or make an additional assessment or determination pursuant to subsection 152(1.11) with respect to that person, except that an assessment, reassessment, additional assessment or determination may be

made under this subsection only to the extent that it may reasonably be regarded as relating to the transaction referred to in subsection (6).

Luxembourg Treaty

Article 10

Dividends

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:

(a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which controls directly or indirectly at least 10 per cent of the voting power in the company paying the dividends;

(b) notwithstanding the provisions of subparagraph (a), 10 per cent of the gross amount of the dividends if the dividends are paid by a non-resident-owned investment corporation that is a resident of Canada to a beneficial owner that is a company (other than a partnership) that is a resident of Luxembourg and that owns at least 25 per cent of the capital of the company paying the dividends; and

(c) 15 per cent of the gross amount of the dividends in all other cases.

The provisions of this paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. Notwithstanding the provisions of paragraph 2, dividends paid by a company that is a resident of Luxembourg shall not be taxable in Luxembourg if the beneficial owner of the dividends is a company that is a resident of Canada and that has had during an uninterrupted period of two years preceding the date of payment of the dividends, a direct shareholding of at least 25 per cent of the voting stock of the company paying the dividends. This provision only applies to dividends attributable to that part of the shareholding that has been owned without interruption by the beneficial owner during such two-year period. Furthermore, the provisions of this paragraph shall only apply if the distributed dividend is

derived from the active conduct of a trade or business in Luxembourg (other than the business of making or managing investments, unless such business is carried on by a banking or insurance company) and if such dividends are exempt in Canada.

4. Notwithstanding the provisions of paragraph 2, dividends arising in a Contracting State and paid to an organization that was constituted and is operated in the other Contracting State exclusively to administer or provide benefits under one or more pension, retirement or other employee benefit plans shall be exempt from tax in the first-mentioned State provided that:

(a) the organization is the effective owner of the shares on which the dividends are paid, holds those shares as an investment and is generally exempt from tax in the other State;

(b) the organization does not own directly or indirectly more than 5 per cent of the capital or 5 per cent of the voting stock of the company paying the dividends; and

(c) the class of shares of the company on which the dividends are paid is regularly traded on an approved stock exchange.

5. For the purposes of paragraph 4, the term “approved stock exchange” means:

(a) in the case of dividends arising in Canada, a Canadian stock exchange prescribed for the purposes of the Income Tax Act;

(b) in the case of dividends arising in Luxembourg, the Luxembourg Stock Exchange; and

(c) any other stock exchange agreed to in letters exchanged between the competent authorities of the Contracting States.

6. The term “dividends” as used in this Article means income from shares, “jouissance” shares or “jouissance” rights, mining shares, founders’ shares or other rights, not being debt-claims, participating in profits, as well as income which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident.

7. The provisions of paragraphs 1, 2 and 3 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.

8. Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of that other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor subject the company's undistributed profits to a tax on undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

9. Notwithstanding any provision in this Convention, Canada may impose on the earnings of a company attributable to permanent establishments in Canada, tax in addition to the tax which would be chargeable on the earnings of a company incorporated in Canada, provided that the rate of such additional tax so imposed shall not exceed 5 per cent. For the purpose of this provision, the term "earnings" means the profits attributable to such permanent establishments in Canada (including gains from the alienation of property forming part of the business property, referred to in paragraph 2 of Article 13, of such permanent establishments) in accordance with Article 7 in a year and previous years after deducting therefrom:

(a) business losses attributable to such permanent establishments (including losses from the alienation of property forming part of the business property of such permanent establishments) in such year and previous years;

(b) all taxes chargeable in Canada on such profits, other than the additional tax referred to herein;

(c) the profits reinvested in Canada, provided that the amount of such deduction shall be determined in accordance with the existing provisions of the law of Canada regarding the computation of the allowance in respect of investment in property in Canada, and any subsequent modification of those provisions which shall not affect the general principle hereof; and

(d) five hundred thousand Canadian dollars ($500,000) less any amount deducted:

(i) by the company, or

(ii) by a person related thereto from the same or a similar business as that carried on by the company,

under this subparagraph (d); for the purposes of this sub-paragraph (d), a company is related to another company if one company directly or indirectly controls the other, or both companies are directly controlled by the same person or persons, or if the two companies deal with each other not at arm's length.

The provisions of this paragraph shall also apply with respect to earnings from the alienation of immovable property in Canada by a company carrying on a trade in immovable property without a permanent establishment in Canada but only insofar as these earnings may be taxed in Canada in accordance with the provisions of Article 6 or paragraph 1 of Article 13.

Barbados Treaty

Article X

Dividends

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in the first-mentioned State, and according to the law of that State; but where a resident of the other Contracting State is the beneficial owner of the dividends, the tax so charged shall not exceed 15 per cent of the gross amount of the dividends.

3. In this Article, the term "dividends" in the case of Canada includes any income which under the tax law of Canada is treated as a dividend and, in the case of Barbados includes any item which under the law of Barbados is treated as a distribution of a company.

4. The provisions of paragraph 2 shall not apply if the recipient of the dividends, being a resident of a Contracting State, carries on in the other Contracting State of which the company paying the dividends is a resident, a business through a permanent establishment situated therein, and the holding by virtue of which the dividends are paid is effectively connected with that permanent establishment. In such a case, the dividends that are attributable to that permanent establishment shall be treated as if they were business profits, and the provisions of Article VII shall apply.

5. Where a company is a resident of only one Contracting State, the other Contracting State may not impose any tax on the dividends paid by the company to persons who are not residents of that other State, or subject the company to a tax on undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State. The provisions of this paragraph shall not prevent a Contracting State from taxing dividends beneficially owned by a person who is not a resident of that State if such dividends relate to a holding which is effectively connected with a permanent establishment of that person in that State.

6. Nothing in this Agreement shall be construed so as to prevent Canada from imposing on the earnings of a company attributable to a permanent establishment in Canada, tax in addition to the tax which would be chargeable on the earnings of a company which is incorporated in Canada, provided that any additional tax so imposed shall not exceed 15 per cent of the amount of such earnings which have not been subjected to such additional tax in previous taxation years. For the purpose of this provision, the term “earnings” means the profits attributable to a permanent establishment in Canada in a year and previous years after deducting therefrom all taxes, other than the additional tax referred to herein, imposed on such profits in Canada.

CITATION:	2023 TCC 167
COURT FILE NOS.:	2017-1252(IT)G 2017-3776(IT)G 2018-388(IT)G
STYLES OF CAUSE:	HUSKY ENERGY INC. AND HIS MAJESTY THE KING HUTCHISON WHAMPOA LUXEMBOURG HOLDINGS S.À.R.L. AND HIS MAJESTY THE KING L.F. MANAGEMENT AND INVESTMENT S.A.R.L. AND HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	January 9 to 12, 2023 January 16 to 19, 2023 January 23 and 26, 2023
REASONS FOR JUDGMENT BY:	The Honourable Justice John R. Owen
DATE OF JUDGMENT:	December 13, 2023

APPEARANCES:

Counsel for the Appellant Husky Energy Inc.:	Nicolas X. Cloutier, Dominic Bédard-Lapointe and Robert Celac
Counsel for the Appellant Hutchison Whampoa Luxembourg Holdings S.À.R.L.:	Margaret Nixon, Pierre-Louis Le Saunier and Zev Smith
Counsel for the Appellant L.F. Management and Investment S.A.R.L.:	Louise R. Summerhill, Josh Kumar and Monica Carinci
Counsel for the Respondent:	Pascal Tétrault, Montano Cabezas and David McLeod

COUNSEL OF RECORD:

For the Appellant Husky Energy Inc.:

Name:	Nicolas X. Cloutier, Dominic Bédard-Lapointe and Robert Celac
Firm:	McCarthy Tétrault S.E.N.C.R.L., s.r.l. Montréal, Quebec

For the Appellant Hutchison Whampoa Luxembourg Holdings S.À.R.L.:

Name:	Margaret Nixon, Pierre-Louis Le Saunier and Zev Smith
Firm:	Stikeman Elliott L.L.P. Toronto, Ontario

For the Appellant L.F. Management and Investment S.A.R.L.:

Name:	Louise R. Summerhill, Josh Kumar and Monica Carinci
Firm:	Aird & Berlis L.L.P. Toronto, Ontario

For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada