Federal Court of Appeal — Cour d'appel fédérale

Date: 20250929

Dockets: A-10-24 (lead file)
A-11-24
A-16-24

Citation: 2025 FCA 176

CORAM: **BOIVIN J.A.**
ROUSSEL J.A.
GOYETTE J.A.

Docket: A-10-24

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

HUTCHISON WHAMPOA LUXEMBOURG HOLDINGS S.À R.L.

Respondent

Docket: A-11-24

AND BETWEEN:

HIS MAJESTY THE KING

Appellant

and

L.F. MANAGEMENT AND INVESTMENT S.À R.L.

Respondent

Docket: A-16-24

AND BETWEEN:

HUSKY ENERGY INC.

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on December 3, 2024.

Judgment delivered at Ottawa, Ontario, on September 29, 2025.

REASONS FOR JUDGMENT BY:	GOYETTE J.A.
CONCURRED IN BY:	BOIVIN J.A. ROUSSEL J.A.

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REASONS FOR JUDGMENT

GOYETTE J.A.

[1] Canada imposes withholding tax on dividends Canadian corporations pay to non-residents. Although the statutory rate of withholding is 25%, Canada invariably reduces that rate through bilateral tax treaties it enters into with other countries. But the reduction is not the same for all treaties. For instance, provided that certain criteria are met, the withholding tax rate under the treaty between Canada and Barbados can be reduced to 15% while the rate under the treaty between Canada and Luxembourg can be reduced to 5%.

[2] In 2003, shortly before Husky Energy Inc. paid significant dividends, three of its shareholders, resident in Barbados, loaned their shares to related Luxembourg corporations under securities lending agreements. Husky paid the dividends to the Luxembourg corporations and the latter then returned the shares to the Barbados shareholders, along with the gross amount of the dividends. The question the Tax Court of Canada faced was whether the Luxembourg

corporations were the beneficial owners of the dividends and so eligible for the 5% withholding rate provided for in Canada's treaty with Luxembourg. The Tax Court concluded they were not: *Husky Energy Inc. v. The King*, 2023 TCC 167 (the Tax Court Decision). I agree and would dismiss the appeals.

I. Background

[3] Before describing the details of the transactions in issue, a summary of the applicable statutory and treaty provisions is useful.

A. *Legal Background*

[4] Subsection 212(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) provides that every non-resident person shall pay an income tax of 25% on dividends paid by a Canadian resident corporation to the non-resident person. A tax treaty between Canada and another country may provide for a lower rate.

[5] For example, under Canada's treaty with Barbados, when the beneficial owner of the dividend is a resident of Barbados, the rate of the Canadian tax is reduced to 15%: Article X(2) 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*, Can. T.S. 1980 No. 29 (enacted in Canada by the *Canada-Barbados Income Tax Agreement Act, 1980*, S.C. 1980-81-82-83, c. 44, Sch. IX) (*Barbados Treaty*).

[6] Similarly, under Canada's treaty with Luxembourg, the rate is reduced to 5% when the beneficial owner of the dividend is a resident of Luxembourg that meets certain ownership or voting power thresholds: Article 10(2)(a) 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*, Can.T.S. 2000 No. 22 (enacted in Canada by the *Income Tax Conventions Implementation Act*, *1999*, S.C. 2000, c. 11, Sch. IX) (*Luxembourg Treaty*).

[7] Where a treaty provides for a rate lower than the 25% rate in the *Income Tax Act*, the lower rate prevails: subsection 10(6) of the *Income Tax Application Rules*, R.S.C. 1985, c. 2 (5th Supp.).

[8] Subsection 215(1) of the *Income Tax Act* requires a corporation that pays a dividend to a non-resident person to withhold the tax payable and remit it to the Receiver General of Canada on the non-resident's behalf. Thus, if a Canadian corporation pays a $100 dividend beneficially owned by a resident of Barbados, the Canadian corporation shall withhold and remit $15 to the Receiver General. If the beneficial owner of the dividend is a resident of Luxembourg that meets the other conditions in Article 10(2)(a) of the *Luxembourg Treaty*, the Canadian corporation must withhold and remit $5.

[9] Finally, subsection 215(6) of the *Income Tax Act* provides that if a Canadian corporation fails to withhold the proper amount, it is liable to pay, on behalf of the non-resident, the whole of the amount that should have been deducted and withheld.

[10] The relevant provisions of the *Income Tax Act* and treaties are reproduced in Appendix A to these reasons.

B. *Factual Background*

[11] The Tax Court's decision sets out the facts in detail. The present reasons focus on the key relevant facts and simplify them. Although some payments were in fact made in US dollars, for simplicity, these reasons use the equivalent Canadian dollar amounts based on the exchange rate in the Partial Agreed Statement of Facts (PASOF): Common Appeal Book at 301.

[12] During the relevant period, Husky was a publicly traded corporation resident in Canada that carried on a business in the oil and gas sector. Collectively, its shares, all common shares, were worth between $15 and $20 billion: Tax Court Decision at para. 45.

[13] As of June 30, 2003, three corporations resident in Barbados—the "Barbcos"—owned approximately 71.5% of Husky's shares. Specifically, U.F. Investments (Barbados) Limited ("Barbco #1") owned 35%, and L.F. Investments (Barbados) Limited and H.F. Investments (Barbados) Ltd. (hereinafter together referred to as "Barbco #2") collectively owned 36.5%. The public owned the remaining 28.5%: PASOF at para. 8.

[14] In early July 2003, Husky communicated its intention to declare a special dividend in an amount considerably higher than the quarterly dividends it paid: Tax Court Decision at paras. 2, 81, 124. If Husky paid the special dividend to the Barbcos, subsections 212(2) and 215(1) of the *Income Tax Act* and Article X(2) of the *Barbados Treaty* would require Husky to withhold and

remit 15% of the dividend. To lower this tax rate, the Barbcos retained the tax advisors who devised the plan described in the following paragraphs: Opinion from accounting firm Ernst & Young dated January 7, 2004, Common Appeal Book at 2287; Tax Court Decision at paras. 125–127, 153.

[15] On July 22, 2003, each Barbco entered into a securities lending agreement with a corporation resident in Luxembourg to which it was related, that is, a corporation whose indirect controlling shareholders were the same as those indirectly controlling the particular Barbco. In the case of Barbco #1, this meant entering into a securities lending agreement with an existing corporation: Hutchison Whampoa Europe Investments S.à.r.l. ("Luxco #1"). For Barbco #2, this meant entering into a securities lending agreement with a corporation created for the purpose of the plan: L.F. Luxembourg S.à.r.l. ("Luxco #2"): PASOF at paras. 23, 29.

[16] As emphasized by Husky, the securities lending agreements in issue (the "Securities Lending Agreements") were based on the standard form of overseas securities lender's agreement published by the International Securities Lending Association. The standard form provided that the Barbcos would lend Husky shares to the Luxcos and deliver the necessary instruments to vest title to the shares in the Luxcos upon receipt of borrowing requests specifying the description, title and number of shares required as well as the duration of the loan. Additionally, the standard form obligated the Luxcos to provide collateral for the loans and to return equivalent shares to the Barbcos in accordance with the agreement: Securities Lending Agreements, Common Appeal Book at 390, 477, 515.

[17] On July 22, 2003, the Luxcos also sent borrowing requests to the Barbcos (the "Borrowing Requests") to borrow all the Husky shares the Barbcos owned until no later than November 20, 2003: PASOF at paras. 23, 25, 29, 31. The Borrowing Requests required each Luxco to pay the relevant Barbco a "borrowing fee" of $50,000. Additionally, the Borrowing Requests required the Luxcos to pay the Barbcos, "as compensation for all dividends", an amount equal to the gross dividends paid on the borrowed Husky shares during the borrowing period. In other words, if Husky withheld tax in respect of a dividend paid on the borrowed shares, the Luxcos nonetheless had to pay the Barbcos an amount equal to the pretax dividend: Borrowing Requests, Common Appeal Book at 437, 556, 560.

[18] On July 23, 2003, Husky's board of directors declared a special dividend payable on October 1, 2003, to shareholders of record on August 29, 2003: PASOF at para. 36.

[19] On July 24, 2003, the Barbcos transferred their Husky shares to the Luxcos: PASOF at paras. 24, 30.

[20] On October 1, 2003, Husky paid dividends of $328,986,960 to the Luxcos (the "Dividends"). Husky withheld 5% of the Dividends as tax and remitted that amount to the Receiver General: PASOF at paras. 40–41. As previously explained, the 5% tax rate is provided for by Article 10(2)(a) of the *Luxembourg Treaty*.

[21] Luxco #1 placed nearly the entire net amount of the Dividends it received in a term deposit maturing on October 6, 2003, yielding interest of $21,693. On October 6, 2003,

Luxco #1 transferred the net amount of the Dividends it received to a related corporation, Hutchinson OMF Limited, in partial repayment of an interest-bearing credit facility. However, the partial repayment of the existing credit facility only lasted a few weeks. On November 20, 2003, Luxco #1 reborrowed that same amount plus the amount of the withholding tax on its Dividends to comply with its obligation to pay the gross amount of its Dividends to Barbco #1. It was understood from the beginning that Hutchinson OMF would waive repayment of the portion of the loan corresponding to the withholding tax and it did. Furthermore, by virtue of a hedge agreement, Hutchinson OMF indemnified Luxco #1 for the foreign exchange loss that it realized because Husky paid the Dividends in United States dollars, but the currency under the Securities Lending Agreements was the Canadian dollar: PASOF at paras. 43–48; Tax Court Decision at para. 282; Hedge Agreement, Common Appeal Book at 2274.

[22] To state the obvious: except for the $50,000 borrowing fee, the $21,693 of earned interest, and the non-accrual of interest for a few weeks on the repaid portion of the Hutchinson OMF credit facility, the Securities Lending Agreements and the Borrowing Requests had no monetary consequences for Luxco #1. Prior to the transactions, Luxco #1 owed money to Hutchinson OMF and after the transactions, it essentially owed the same amount.

[23] Luxco #2 entered into very similar, albeit simpler (no temporary credit facility repayment), transactions with nearly identical results: PASOF at paras. 49–53.

[24] On November 20, 2003, the Luxcos returned the borrowed Husky shares to the Barbcos, together with a payment equal to the gross Dividends paid by Husky and the borrowing fees: PASOF at paras. 26–27, 32–33.

C. *Assessments*

[25] On the assumption that the Barbcos were the beneficial owners of the Dividends, the Minister of National Revenue assessed Husky pursuant to subsection 215(6) of the *Income Tax Act* for having failed to withhold tax on the Dividends it paid to the Luxcos at the 15% rate under Article X(2) of the *Barbados Treaty*, rather than the 5% tax withheld. The resulting shortfall was $32,898,696.

[26] On the same assumption that the Barbcos were the beneficial owners of the Dividends and, therefore, liable for the tax on the Dividends under subsection 212(2) of the *Income Tax Act* and Article X(2) of the *Barbados Treaty*, the Minister also assessed the successors to the Barbcos, Hutchison Whampoa Luxembourg Holdings S.à.r.l. and L.F. Management and Investment S.à.r.l., for the shortfall. As nothing turns on the fact the successors were assessed, for simplicity, these reasons proceed as if the Barbcos were assessed and refer to these assessments as the Barbcos' assessments and the appeals of those assessments as the Barbcos' appeals.

[27] Husky and the Barbcos appealed their assessments to the Tax Court.

II. The Tax Court's decision

[28] The Tax Court of Canada issued one set of reasons for the Husky and Barbcos' appeals.

A. *The Barbcos' Assessments*

[29] As previously stated, subsection 212(2) of the *Income Tax Act* provides that every non-resident person shall pay an income tax of 25% on the "amount that a corporation resident in Canada pays … to the non-resident as … a taxable dividend". The Tax Court interpreted this provision to mean that the "non-resident" in question is the non-resident to whom the dividend is paid, not the beneficial owner of the dividend. On this interpretation, because the Dividends were paid to the Luxcos, only they were liable for the tax on the Dividends and could be assessed for the shortfall. Hence, the Tax Court allowed the Barbcos' appeals: Tax Court Decision at paras. 233–252.

B. *Husky's Assessment*

[30] To determine whether Husky had failed to withhold and remit the proper percentage of tax on the Dividends paid to the Luxcos, the Tax Court first had to determine whether the Luxcos were the beneficial owners of the Dividends. This is because Article 10(2)(a) of the *Luxembourg Treaty* will not reduce the rate of tax to 5% unless a resident of Luxembourg is the beneficial owner of the dividend.

[31] The Tax Court found that the Luxcos were not the beneficial owners of the Dividends: Tax Court Decision at paras. 283, 285, 287.

[32] In so finding, the Tax Court primarily relied on *Prévost Car Inc. v. Canada*, 2009 FCA 57 [*Prévost Car*], affirming *Prévost Car Inc. v. The Queen*, 2008 TCC 231 [*Prévost Car TCC*]. In that case, a Canadian corporation paid dividends to a Dutch corporation, which in turn declared and paid similar dividends to its shareholders. The question was whether the Dutch corporation was eligible for a 5% treaty withholding rate which required it to be the beneficial owner of the dividends. This Court said that the Tax Court captured the essence of the concept of "beneficial ownership" when it said that the beneficial owner of a dividend is "the person who receives the [dividend] for his or her own use and enjoyment and assumes the risk and control of the dividend he or she received": *Prévost Car* at paras. 13–14.

[33] In the present matter, the Tax Court determined that the Luxcos did not have beneficial ownership of the Dividends fundamentally because the Borrowing Requests obligated the Luxcos to pay the amount of the Dividends to the Barbcos in the form of compensation payments: Tax Court Decision at paras. 269–270. The Tax Court contrasted this obligation with the circumstances in *Prévost Car* where (1) there was no evidence that the dividends were, from the beginning, destined for another entity and (2) additional corporate acts were required to transfer the dividends to another entity: Tax Court Decision at paras. 271–273. Here, the legal substance of the transactions was such that the Barbcos always retained their rights to the full economic value of the Dividends: Tax Court Decision at paras. 274–276. And so, the Tax Court

characterized the Luxcos as “temporary custodians” of the funds received in payment of the Dividends: Tax Court Decision at para. 277.

[34] The Tax Court’s conclusion that the Luxcos were not the beneficial owners of the Dividends led it to decide that the 5% rate in the *Luxembourg Treaty* did not apply to the Dividends. Since the Tax Court had also decided that the Minister could not rely on subsection 212(2) of the *Income Tax Act* to tax the Barbcos, the *Barbados Treaty* could not apply to reduce the tax rate on the Dividends. Consequently, the Tax Court determined that subsections 215(1) and (6) of the *Income Tax Act* required Husky to withhold and remit tax at the 25% rate. However, because of the long-standing principle that a taxpayer’s appeal cannot result in an increased assessment, the Tax Court did not vary the assessment: Tax Court Decision at paras. 261–262, 286.

[35] Having found that subsection 212(2) did not apply, the Tax Court addressed the Crown’s alternative argument that the general anti-avoidance rule applied to impose tax on the Barbcos and oblige Husky to withhold tax at the rate of 15%: Tax Court Decision at para. 287. The Tax Court determined that the general anti-avoidance rule did not apply.

[36] The general anti-avoidance rule is found in section 245 of the *Income Tax Act*. It applies when a tax benefit results from a transaction or series of transactions that includes an “avoidance transaction” and the transaction or series results in a misuse or abuse of the *Income Tax Act* or a tax treaty.

[37] Here, the Tax Court found that the transactions provided a tax benefit to the Barbcos: a reduction of the tax rate from 15% to 0% resulting from the fact that Husky did not pay the Dividends to the Barbcos: Tax Court Decision at para. 313. It also found that avoidance transactions were at play because the primary purpose of the Securities Lending Agreements was to reduce the tax on the Dividends: Tax Court Decision at para. 350. However, the Tax Court determined these transactions were not abusive. It reasoned that reliance on the general anti-avoidance rule would be necessary only if a reduced rate applied because the Luxcos were the beneficial owners of the Dividends. Under that scenario, there could be no abuse of Article 10(2)(a) of the *Luxembourg Treaty* since the conditions of that Article—dividend paid to a beneficial owner who meets the ownership or voting power thresholds—would be met: Tax Court Decision at paras. 359–360, 367, 413–416.

[38] On the above basis, the Tax Court dismissed Husky's appeal but allowed the Barbcos' appeals and ordered the Barbcos' assessments vacated.

III. Appeals to this Court

[39] Husky appeals the Tax Court's decision dismissing its appeal.

[40] The Crown appeals on a protective basis the Tax Court's decision vacating the Barbcos' assessments. More precisely, the Attorney General submits the Crown's appeals should be allowed only if this Court concludes that the Luxcos were the Dividends' beneficial owners and,

on that basis, allows Husky's appeal. In those circumstances, the Attorney General argues that the Barbcos' assessments should be upheld based on the general anti-avoidance rule.

[41] While I do not entirely agree with the Tax Court's analysis, I agree with its conclusion that the Luxcos were not the beneficial owners. Thus, there is no need to address the general anti-avoidance rule.

IV. Issues

[42] On appeal, Husky essentially raises two issues:

1. Did the Tax Court err in concluding that the Luxcos were not the beneficial owners of the Dividends under Article 10(2)(a) of the *Luxembourg Treaty*?

2. Did the Tax Court err in concluding that Husky was required to withhold and remit a tax corresponding to 25% of the Dividends?

V. Analysis

A. *Did the Tax Court err in concluding that the Luxcos were not the beneficial owners of the Dividends under Article 10(2)(a) of the Luxembourg Treaty?*

[43] Husky acknowledges that the Tax Court correctly identified the test set out in *Prévost Car* as the test used to determine beneficial ownership for purposes of Article 10(2)(a) of the

Luxembourg Treaty. However, it says the Tax Court altered the test by (a) erroneously identifying *Prévost Car*'s decisive factors; (b) considering the economic results of the Securities Lending Agreements; and (c) going beyond the concept of beneficial ownership as described in the Organisation for Economic Co-operation and Development ("OECD") Commentaries affirmed in *Prévost Car*. These alterations, according to Husky, constitute errors of law that call for this Court's intervention as the Tax Court's conclusions are incorrect: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at paras. 44–45; *Smith v. Canada*, 2019 FCA 173 at para. 30.

[44] Husky adds that the Tax Court committed a palpable and overriding error when it analyzed whether the Luxcos incurred risk with respect to the Dividends.

[45] I disagree with Husky's assertions.

(1) There was no palpable and overriding error in the risk analysis

[46] As a starting point, the Tax Court did not commit the palpable and overriding error asserted by Husky.

[47] In *Prévost Car*, this Court agreed 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": *Prévost Car* at para. 13; *Prévost Car TCC* at para. 100.

[48] The Tax Court rejected Husky's submission that the foreign exchange losses the Luxcos realized demonstrated that they assumed the risk associated with receipt of the Dividends. Among the Tax Court's reasons was the Luxcos' mitigation of their foreign exchange losses through hedge agreements with related entities. Husky says that the Tax Court made a palpable and overriding error in coming to this conclusion because the Luxcos' need to mitigate risk proves that they faced risk. This argument has no traction given the circumstances of this matter. To understand why, it is useful to begin with a few words on hedging.

[49] Hedging is like taking out an insurance policy in that a hedge—usually a financial instrument known as a derivative—will protect against a given risk. In most situations, a hedge will not eliminate the risk but will mitigate the financial loss that one would incur if the given risk materialized. Like an insurance policy, a hedge is not free.

[50] For example, the owner of shares in Corporation X may want to hedge against the possibility the value of the shares will fall. To this end, the owner could purchase a put option, that is, an option giving the owner the right to sell the shares at a predetermined price. To obtain a put option, the owner would have to pay a premium.

[51] Although a "perfect hedge" eliminates all risk in a position or in respect of an asset, it is difficult to achieve and, like any other hedge, has a cost: Bryan A. Garner, ed, *Black's Law Dictionary*, 12th ed (St. Paul, MN: Thomson Reuters, 2024) *sub verbo* "hedge"; Jerry White et al, eds, *Canadian Dictionary of Finance and Investment Terms*, 2nd ed (Hauppauge, NY: Barron's, 2000) *sub verbo* "hedge/hedging"; "Hedge: Definition and How It Works in Investing"

Investopedia (16 May 2025), online: <investopedia.com>; “Beginner’s Guide to Hedging: Definition and Example of Hedges in Finance” *Investopedia* (27 April 2025), online: <investopedia.com>.

[52] In the present matter, the hedge agreement between each Luxco and a related corporation provided that the related corporation would pay the Luxco an amount *equal* to the foreign exchange loss that the Luxco would incur. Furthermore, the hedge agreement made no mention of any costs that the Luxco would pay for the hedging of the foreign exchange losses related to the Securities Lending Agreement. Thus, the Luxcos benefited from hedge agreements that are seemingly unavailable to others: perfect hedges at no cost.

[53] This atypical situation, together with the loans made by related lenders to enable the Luxcos to pay the gross Dividends—and waiver of their repayment—explains the Luxcos’ position before the Luxembourg tax authorities. In their requests for a Luxembourg tax ruling regarding the tax consequences of the Securities Lending Agreements, the Luxcos represented that they would “not bear any material risk in connection with the Husky shares” and that “profits and risks on the Husky shares will be ultimately borne by [related] companies”: Luxembourg Tax Rulings, Common Appeal Book at 2764, 2768.

[54] Under these circumstances, the Tax Court committed no palpable and overriding error in rejecting Husky’s argument that the hedge agreements prove that the Luxcos faced risk.

[55] The Luxcos' lack of risk may also explain why in its analysis the Tax Court did not mention *Velcro Canada Inc. v. The Queen*, 2012 TCC 57 as Husky says it should have. While *Velcro* dealt with beneficial ownership in a similar context, there is one significant difference. Contrary to the circumstances here, there the Tax Court identified risks that were not reduced by agreements: *Velcro* at para. 40. Accordingly, *Velcro* does not support Husky's position on risk.

(2) The Tax Court applied factors approved by this Court

[56] Let us now turn to the errors of law raised by Husky. The first such error relates to the *Prévost Car* factors.

[57] In *Prévost Car TCC,* the Tax Court relied on various factors to conclude that the dividend recipient was their beneficial owner. These included the absence of evidence that the dividends were, from the beginning, destined for another entity and the need for additional corporate acts by the dividend recipient before it could transfer funds to its shareholders by way of dividends: *Prévost Car TCC* at para. 102.

[58] Husky says that the Tax Court erroneously identified these two factors as decisive. Again, this argument has no traction in the circumstances of this matter.

[59] Given that this Court previously approved consideration of the factors in issue (*Prévost Car* at paras. 16(c)–18), the Tax Court cannot be faulted for having considered them. Moreover, reading the Tax Court's reasons holistically reveals that although these factors weighed in the Tax Court's decision, they were not the only ones. The Tax Court also gave weight to the fact

that the Luxcos did not incur risk in respect of the Dividends. In this regard, the Tax Court found support in the Luxcos' requests for the Luxembourg tax ruling discussed above: Tax Court Decision at paras. 282–283.

(3) The legal substance of the transaction must be considered

[60] The second error of law raised by Husky is that the Tax Court altered the *Prévost Car* test by applying an "economic result" test.

[61] It is true that the Tax Court said that the economic result under the Securities Lending Agreements was that the Barbcos retained the full benefit of the Dividends. But the Tax Court went on to say that this "economic result [was] dictated by legal obligations": Tax Court Decision at paras. 276–277, 283.

[62] Although perhaps not clearly articulated, reading the Tax Court's reasons in context reveals that it was concerned with the legal substance of the agreements, not their economic substance. Legal substance refers to interpreting contracts and considering all the circumstances to determine the legal rights and obligations arising from a transaction. This process, approved by the Supreme Court of Canada, ensures that the *true* legal relationship or the *true* legal effects of a transaction will govern rather than the formal description or nomenclature used: *Continental Bank Leasing Corp. v. Canada*, [1998] 2 SCR 298 at paras. 21, 25; Brian A. Felesky and Sandra E. Jack, "Is There Substance to 'Substance Over Form' in Canada?" in *Report of Proceedings of the Forty-Fourth Tax Conference*, 1992 Conference Report (Toronto: Canadian Tax Foundation, 1993), 50:1 at 50:5. See also *Canada v. Vaillancourt-Tremblay*, 2010 FCA 119 at para. 39.

[63] Applying that test, the Tax Court found that two factors absent in *Prévost Car* but present here made it certain from the outset of the Securities Lending Agreements that the Barbcos would benefit from the Dividends: (1) the Borrowing Requests imposed a legal obligation on the Luxcos to pay the Barbcos, as compensation, an amount equal to the gross dividends paid on the Husky shares during the borrowing period; and (2) this payment had to be made no later than seven weeks after Husky paid the Dividends: Tax Court Decision at paras. 268–274. Taken in isolation, this approach is problematic as it could have unintended consequences for true securities lending agreements.

[64] To appreciate what is meant by "unintended consequences" on "true securities lending agreements", it is useful to recall that the Securities Lending Agreements were based on the standard form of overseas securities lender's agreement. This standard form requires the borrower to pay the lender a sum of money or property equivalent to the dividends paid during the borrowing period regardless of whether the borrower holds the shares when the dividends are paid. So, if a borrower has disposed of the borrowed shares, say to sell them to a third party, the borrower nonetheless must compensate the lender even though the third-party purchaser will have received the dividends. In this scenario, no one would question that the purchaser is the beneficial owner of the dividends paid during the borrowing period. Yet, the Tax Court's approach suggests that the lender would be the beneficial owner of these dividends.

[65] These unintended consequences are avoided when the agreements in issue are interpreted and the surrounding circumstances are considered, as the doctrine of legal substance requires: *Continental Bank* at paras. 23, 25. Doing so reveals that the Securities Lending Agreements are

not true securities lending agreements: they do not reflect the parties' intentions and are devoid of a fundamental characteristic of securities lending agreements.

[66] To begin, the preamble of the Securities Lending Agreements states that the parties entered into these agreements "in order to enable the Borrower [*i.e*. the Luxcos] … to fulfil a contract to sell [the Husky shares] or to on lend such [shares] to a third party to enable such party to fulfil a contract to sell such [shares]": Securities Lending Agreements, Common Appeal Book at 392, 479. However, two elements make clear that the parties never intended for the Luxcos to sell or on lend the borrowed Husky shares.

[67] First, the Tax Court, relying on witness testimony, found that the Securities Lending Agreements "did not relate to a market or financing transaction of any kind." Rather, "the sole reason for the securities lending arrangements was to shift the receipt of the Dividends from the Barbcos to the Luxcos to achieve … a more favourable overall tax result": Tax Court Decision at para. 412.

[68] Second, to accept that the Barbcos agreed to allow the Luxcos to sell or lend 71.5% of Husky's shares, worth between $10.7 and $14.3 billion, to third parties to enable the latter to sell the shares would defy common sense. Lending 71.5% of the Husky shares for that purpose would have seismic consequences such as bringing about a change of control of Husky, volatility in the shares' value and a significant drop in that value. It could also have securities law implications. Besides, it is difficult—if not impossible—to fathom how the Luxcos would fulfill their obligation to return equivalent Husky shares at the end of the borrowing period. How do

two borrowers of shares—for a maximum period of four months—sell or on lend for sale 71.5% of the shares of a public corporation, and later buy back or borrow the equivalent number of shares to fulfil their obligation to return them to the lender?

[69] Reading only the very first paragraph of the Securities Lending Agreements and considering the circumstances, it is evident that the true legal relationship between the Luxcos and the Barbcos cannot be characterized as one between parties to a security lending agreement.

[70] But there is more. Borrowers under securities lending agreements typically provide collateral (other securities, cash or property) to the lender: Jonathan W. Willson, "Securities Lending: An Overview and Update for Domestic and Cross-Border Transactions" in *Report of Proceedings of the Sixty-First Tax Conference*, 2009 Tax Conference (Toronto: Canadian Tax Foundation, 2010), 9:1 at 9:22–9:23. An overseas lender's securities agreement based on the standard form contains numerous clauses regarding the borrower's obligation to provide collateral for the loan. These clauses seek to protect the lender in case the borrower fails to return the borrowed or equivalent securities at the end of the borrowing period. Indeed, it is common for securities lender's agreements to be overcollaterized: Jesse Johal, Joanna Roberts and John Sim, "Canadian Securities Lending Market Ecology — Bank of Canada Staff Discussion Paper 2019-5" (July 2019) online: https://www.bankofcanada.ca/wp-content/uploads/2019/07/sdp2019-5.pdf at 7, 9, 20 –21, 27. For instance, clause 6.8.1 of the standard form the Luxcos and Barbcos used provides that, unless the parties agree otherwise, the borrower of securities shall deliver collateral of a value equal to the value of borrowed securities together with an additional amount based on a percentage defined in the schedule to the agreement. In the present matter, this would

seemingly represent collateral worth at least between $10.7 and $14.3 billion. Yet, no collateral was provided. Why? Because the Borrowing Requests removed the Luxcos' obligation to provide collateral under the Securities Lending Agreements: Borrowing Requests, Common Appeal Book at 438, 557, 561.

[71] Although the standard form overseas securities lender's agreement provides that parties can agree otherwise, in a case like the present one, it is inconceivable that no collateral would be demanded when shares worth billions are loaned. Indeed, the lack of collateral is another indication that the legal substance of the transaction between the Luxcos and Barbcos was not that of a securities lending agreement: no lender would agree to lend such valuable shares without any protection unless it was understood that no action posing a risk, certainly not selling or on lending the shares to third parties, would occur during the borrowing period such that the shares would certainly be returned to the lender. The lack of any collateral here is explained by the only purpose of the arrangements, to "shift the receipt of the Dividends from the Barbcos to the Luxcos" and—it should be added—for the Luxcos to pay the gross amount of the Dividends to the Barbcos.

[72] Accordingly, analyzing the issue of beneficial ownership having regard to the true legal relationship between the parties is not an alteration or misapplication of the *Prévost Car* test. To the contrary, identifying the legal substance of the agreements is necessary to properly apply *Prévost Car*.

(4) The Luxcos were not the beneficial owners

[73] The third and last error of law raised by Husky relates to the OECD Commentaries.

[74] To understand the relevance of the OECD Commentaries, one must first refer to the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 (*Vienna Convention*) to which Canada adheres. Article 31 of the *Vienna Convention* sets out the general principles applicable to the interpretation of treaties. It provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

[75] As discussed in detail below, Husky says that the Tax Court's interpretation of the concept of beneficial ownership does not accord with one of these principles: the context of the *Luxembourg Treaty*. Husky's argument is best addressed by considering two additional principles of interpretation set out in the *Vienna Convention*, namely, the intention of the parties to the *Luxembourg Treaty* and international jurisprudence.

(a) *Intention of the parties to the Luxembourg Treaty*

[76] The *Vienna Convention* requires courts to consider the true intention of the treaty parties when interpreting Article 10(2)(a) of the *Luxembourg Treaty*. The Supreme Court of Canada did so in *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 at paras. 37, 42–43, 50, 62, 66, 79–89 and *Crown Forest Industries Ltd. v. Canada*, [1995] 2 SCR 802 at paras. 22, 43–44. The *Alta Energy* findings are particularly relevant to the present matter.

[77] In *Alta Energy*¸ the majority of the Supreme Court found that Canada and Luxembourg intended that corporations acting as conduits could benefit from a provision of the *Luxembourg Treaty* dealing with the taxation of capital gains: *Alta Energy* at paras. 79–89. The majority contrasted this intention with the two countries' intention regarding the taxation of certain other income, including dividends: through Article 10(2)(a), Luxembourg and Canada chose to reserve the benefits of the treaty to the "beneficial owner" of dividends. The majority highlighted that such a measure prevents "conduit corporations from taking advantage of [the benefit of a treaty provision] where their beneficial owners [are] residents of a third country": *Alta Energy* at para. 84.

(b) *The OECD Commentaries*

[78] The context of the *Luxembourg Treaty* further supports Canada and Luxembourg's intention regarding Article 10(2)(a) as identified by the Supreme Court in *Alta Energy*.

[79] Article 31(2)(b) of the *Vienna Convention* provides that the context of a treaty comprises instruments made by one or more parties in connection with the treaty. Such instruments include the OECD's *Model Tax Convention on Income and on Capital*, a model for the negotiation, interpretation and application of tax treaties, as well as its accompanying Commentaries and reports prepared by the OECD Committee on Fiscal Affairs: *Crown Forest* at paras. 54–55; *Alta Energy* at para. 38; *Prévost Car* at para. 10.

[80] The *Luxembourg Treaty*, based on the *Model Convention*, was signed in 1999. Accordingly, the Commentaries published prior to the signature of the *Luxembourg Treaty*, as

well as the OECD report titled “Double Taxation Conventions and the Use of Conduit Companies” (OECD, *International Tax Avoidance and Evasion: Four Related Studies*, Issues in International Taxation no. 1 (Paris: OECD, 1987) (the “Conduit Report”), are relevant to its interpretation: *Prévost Car* at paras. 8, 12. Consistent with the jurisprudence, the parties agree that the 2003 Commentaries on Article 10 elicit the views expressed in prior Commentaries and are, therefore, also relevant to the interpretation of the *Luxembourg Treaty*: *Alta Energy* at paras. 40–43; *Prévost Car* at para. 11. They disagree, however, on how the Commentaries and the Conduit Report apply to this matter.

[81] The Crown views the 2003 Commentaries on Article 10 and the Conduit Report as confirming that the beneficial ownership requirement “ensures that conduits [here the Luxcos] cannot take advantage of treaty benefits”.

[82] For Husky, the 2003 Commentaries on Article 10 and the Conduit Report as interpreted in *Prévost Car* “make it clear that the beneficial ownership test was intended only to prevent agents, nominees, and conduits with absolutely no discretion over the use of dividends from obtaining the benefit of a lower withholding tax rate on dividends under a tax treaty.” Husky argues that because the Luxcos were not agents, nominees or conduits with absolutely no discretion, the Tax Court “went well beyond the concept of beneficial ownership as described in the relevant OECD Commentaries” in concluding that the Luxcos were not the beneficial owners of the Dividends: Husky’s Memorandum of Fact and Law at paras. 73–74.

[83] Husky's argument is at odds with how the Commentaries and the Conduit Report apply to this matter.

[84] Paragraphs 12 and 12.1 of the 2003 Commentaries on Article 10 explain that "[t]he term 'beneficial owner' is not used in a narrow technical sense, rather, it should be understood, [namely,] in light of the object and purposes of the [treaty], including avoiding double taxation and the prevention of fiscal evasion and avoidance." The Commentaries further explain that if an agent or nominee receives a dividend on behalf of someone else, it would be inconsistent with the purpose of a tax treaty for the source country (*i.e.* the country of residence of the corporation paying the dividend—here, Canada) to apply the lower treaty rate. The reason is that the country of residence of the agent or nominee would not treat them as the owner of the dividend and, therefore, would not tax them. In other words, a country should not limit its taxing power when there is no risk of double taxation: OECD, *Model Tax Convention on Income and on Capital*, condensed version (Paris: OECD, January 2003), Commentary on Article 10.

[85] Applying this idea to the present matter, one first notes that the rationale for Canada limiting the availability of the lower withholding rate in the *Luxembourg Treaty* aligns with the facts of this case: under Luxembourg tax law, the Luxcos are not the economic owners of the Dividends and Luxembourg does not tax the Dividends. This is because section 11 of the Luxembourg *Tax Adaptation Law* (*Steueranpassungsgesetz*) (the "StAnpG") attributes income derived from an asset to its 'economic owner' rather than the 'legal owner': Expert Witness Opinion concerning § 11 of Luxembourg's Tax Adaptation Law of 1934, Common Appeal Book at 3603. In general terms, the economic owner is 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." Specifically, section 11 of the StAnpG provides that when a person (transferor) transfers an asset to a person who holds and manages the assets on behalf of the transferor, the transferor is considered the owner of the asset: Tax Court Decision at paras. 168–171.

[86] The Luxcos relied on the application of this very provision in their ruling request to the Luxembourg tax authorities. Under the heading "Beneficial ownership of the Husky stock", the Luxcos stated that section 11 of the StAnpG should apply because they were not the economic owners of the "Husky shares and/or any dividends received." In this regard, the Luxcos highlighted that the profits and risks on the Husky shares will be borne by the Barbcos and their parent corporations. The Luxembourg tax authorities agreed with the Luxcos and approved the requested ruling: Luxembourg Tax Rulings, Common Appeal Book at 2762, 2766.

[87] Since Luxembourg does not consider the Luxcos to be the economic owners of the Dividends and therefore does not tax them, the 2003 Commentaries support a conclusion that it would run counter to the purposes of the *Luxembourg Treaty* for Canada to treat the Luxcos as the beneficial owners of the Dividends.

[88] This conclusion is in line with the Supreme Court of Canada's teachings in *Crown Forest* which concerned Canada's tax treaty with the United States: *Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital*, Can.T.S. 1984 No. 15 (enacted in law in Canada by the *Canada-United States Tax Convention Act, 1984*, S.C. 1984, c. 20, Sch. I) (*US Treaty*). In *Crown Forest*, the Supreme Court had to determine whether

Norsk, a corporation incorporated in the Bahamas, was a resident of the United States under Article IV(1) of the *US Treaty*. Under that article, a resident of the United States included a person liable to tax in the United States "by reason of [its] domicile, residence, place of management, place of incorporation or any other criterion of a similar nature". If Norsk were resident of the United States, it would have been entitled to the treaty's reduced rate of withholding tax in respect of rental income it earned in Canada.

[89] The Supreme Court held that Norsk was not a resident of the United States under Article IV(1) of the *US Treaty* because none of the criteria listed in Article IV(1) made it liable to comprehensive taxation in the United States: *Crown Forest* at paras. 34–36, 40, 68(1)(2). Rather, Norsk's tax liability in the United States was limited to its income from a trade or business in the United States: *Crown Forest* at para. 28. Moreover, by virtue of agreement with the Bahamas, the United States exempted Norsk's rental income from taxation: *Crown Forest* at para. 49. This situation led the Supreme Court to underscore, in *obiter*, that there was no need to prevent double taxation: *Crown Forest* at para. 48. Writing for the majority, Iacobucci J. said:

> Allowing Norsk to benefit from the Convention in this case would actually lead to the avoidance of tax on the rental income because the liability for tax asserted by the Canadian authorities would be reduced notwithstanding that the United States chooses not to impose any tax thereon or does not even have the jurisdiction therefor.
>
> The goal of the Convention is not to permit companies incorporated in a third party country (the Bahamas) to benefit from a reduced tax liability on source income merely by virtue of dealing with a Canadian company through an office situated in the United States.
>
> …
>
> "Treaty shopping" might be encouraged in which enterprises could route their income through particular states in order to avail themselves of benefits that were designed to be given only to residents of the contracting states. This result would be patently contrary to the basis on which Canada ceded its jurisdiction to tax as

> the source country, namely that the U.S. as the resident country would tax the income.
>
> [*Crown Forest* at paras. 48–49, 52]

[90] The 2003 Commentaries provide that it would be equally inconsistent with the object and purpose of the *Luxembourg Treaty* for Canada to grant relief or an exemption when income is paid to a resident of a treaty country "who simply acts as a conduit for another person who in fact receives the benefit of the income concerned." Thus, the Commentaries endorse the Conduit Report's assertion that "a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, <u>very narrow powers</u> which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties": 2003 Commentaries on Article 10 at para 12.1 (emphasis added) citing para. 14b) of the Conduit Report.

[91] Husky posits that the Luxcos could not be conduits, that is, entities channelling the Dividends from Husky to the Barbcos, because they had the obligation to pay an amount equal to the gross Dividends even if they disposed of the Husky shares and the Dividends were paid to the owner of the shares. But the analysis at paragraph [68] above makes it plainly evident that the Luxcos would never have disposed of the shares.

[92] A similar response is warranted in respect of Husky's allegation that the Luxcos had full discretion or power over use of the Dividends. There was no intention for the Luxcos to use the Dividends in any meaningful way, other than to earn trivial interest and, for Luxco #1, to realize minimal savings from satisfying an inter-company loan while waiting to pay the compensation

amount (*i.e.* the gross amount of the Dividends) to the Barbcos: Tax Court Decision at paras. 278–284. As the Tax Court put it, the Luxcos did not have “the use and enjoyment of the Dividends in any real sense”: Tax Court Decision at paras. 273, 277.

[93] Analyzing the issue of beneficial ownership in light of the legal substance of the agreements between the Barbcos and Luxcos and the 2003 Commentaries, one can only conclude that the Luxcos were conduits with very narrow powers in respect of the Dividends.

[94] Attentive readers will have noticed the reference to “narrow powers”, the phrase used in the 2003 Commentaries, rather than “absolutely no discretion”, the phrase from paragraph 100 of *Prévost Car TCC* on which Husky relies. While this Court endorsed the Tax Court’s analysis (*Prévost Car* at paras. 13–14), in doing so, it cannot be understood as overriding the language in the 2003 Commentaries. This language, it bears repeating, provides that “[one] cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties”: 2003 Commentaries on Article 10 at para 12.1. Not only did this Court embrace the OECD Commentaries, noting that they represent a “widely accepted guide to the interpretation and application” of treaty provisions, it also rejected the proposed definition of the term “beneficial owner” put forward by the Crown because “it [did] not appear anywhere in the OECD documents”: *Prévost Car* at paras. 8–12, 15.

[95] In view of the above, the OECD Commentaries and the Conduit Report do not support Husky’s submission that the Luxcos were the beneficial owners of the Dividends.

(c) *International Jurisprudence*

[96] The same can be said of a judicial decision from Switzerland.

[97] Although not binding on Canadian courts, international jurisprudence may assist in interpreting tax treaties: *Crown Forest* at para. 54; David A. Ward, "Use of Foreign Court Decisions in Interpreting Tax Treaties" in *Courts and Tax Treaty Law*, 161–187 at 179–180. In this regard, a decision of the Swiss Federal Supreme Court is of interest: 2C_209/2017 (Switzerland, Federal Tribunal).

[98] Like the present matter, the Swiss case involved a securities lending agreement. The agreement was between a financial institution resident in the United Kingdom (UK Bank) and an affiliated financial institution resident in Luxembourg (Lux Bank). Under the agreement, UK Bank lent shares of a Swiss resident corporation (SwissCo shares) to Lux Bank, and Lux Bank undertook to pay compensation to UK Bank equal to the dividends paid on the SwissCo shares during the borrowing period.

[99] The Swiss case differs from the present matter in two respects: (a) as the agreement required, Lux Bank provided cash collateral in an amount corresponding to the value of the borrowed SwissCo shares, and (b) the UK Bank earned substantial interest on the collateral. Nevertheless, the Swiss tax authorities denied the lower rate of withholding tax on the dividends paid on the SwissCo shares provided for in the treaty between Switzerland and Luxembourg.

[100] The Federal Supreme Court referred to its own jurisprudence that the recipient of a dividend who has a contractual or legal obligation to forward said dividend to another person is not the beneficial owner. The Federal Supreme Court agreed with the lower court that Lux Bank had such an obligation and that there was never an intention to transfer the SwissCo shares to a third party as provided in the securities lending agreement. In fact, selling the shares would have been incompatible with the implied contractual obligation to pass-on the dividends. For these reasons, the Federal Supreme Court found that Lux Bank was not the beneficial owner of the dividends.

[101] Although the Swiss and Canadian approaches to the determination of beneficial ownership may differ, the Swiss decision demonstrates that the above analysis and its resulting outcome are not exceptional.

(d) *Conclusion*

[102] The interpretation of the *Luxembourg Treaty* in accordance with the applicable principles set forth in the *Vienna Convention* drives home the conclusion that the Luxcos were not the beneficial owners of the Dividends under Article 10(2)(a) of the *Luxembourg Treaty.* The same conclusion is arrived at when applying *Prévost Car* in light of the legal substance of the Securities Lending Agreements as the Luxcos cannot be said to have “receive[d] the [Dividends] for [their] own use and enjoyment and assume[d] the risk and control of the [Dividends they] received”: *Prévost Car* at paras. 13–14.

B. *Did the Tax Court err in law in concluding that Husky was required to withhold and remit 25% of the Dividends?*

[103] As noted above, the Tax Court acknowledged that a tax law principle prevented it from increasing the amount of Husky's assessment to 25% of the Dividends. As a result, the second issue raised by Husky—whether the Tax Court erred in law in concluding that Husky was required to withhold and remit 25% of the Dividends—is moot as far as Husky's appeal is concerned in that a decision on this issue would have no practical effects on the rights of the parties: *Borowski v. Canada (Attorney General),* [1989] 1 SCR 342 at 353.

[104] The same cannot be said of the Crown's appeals of the Tax Court's decision vacating the Barbcos' assessments. For that purpose, whether the Tax Court erred in concluding that subsection 212(2) of the *Income Tax Act* does not apply to tax the Barbcos because they were not the direct recipients of the Dividends remains relevant.

[105] The problem is that the Crown has not appealed the Tax Court's conclusion that subsection 212(2) does not apply to tax the Barbcos and made no argument in this regard before this Court. Rather, the Crown appealed the Tax Court's decision on the basis that the Tax Court erred in concluding that the general anti-avoidance rule did not apply to tax the Barbcos at the rate of 15%. Moreover, and as previously mentioned, the Crown appeals the Tax Court's decision vacating the Barbcos' assessments on a protective basis and has advised that the appeals should be dismissed if this Court if Husky's appeal is dismissed.

[106] The Crown’s position is troubling as it seemingly contradicts the Minister’s statutory duty to assess and make decisions based on the facts and the law and to not make deals or take positions that are divorced from these considerations: *Harris v. Canada*, [2000] 4 F.C. 37 (C.A.) at para. 37; *CIBC World Markets Inc. v. Canada*, 2012 FCA 3 at paras. 22–24; *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600 (C.A.) at 602. This duty ensures that the law is applied consistently, and that Canadians can have confidence in the administration and enforcement of their tax system: Daniel Sandler, “Settling Tax Disputes: Is it All About the Money?” in Pooja Mihailovich and John Sorensen, ed., Tax Disputes in Canada: The Path Forward (Toronto: Canadian Tax Foundation, 2022) at 422. This duty also ensures that the government and therefore Canadians have the money to which they are entitled.

[107] The Crown’s position is all the more troubling because the Tax Court’s decision has ramifications beyond this matter. Indeed, the Tax Court’s interpretation of subsection 212(2) of the *Income Tax Act* could negatively impact ordinary commercial transactions where the direct recipient of a dividend is not its beneficial owner. Suffice to think of the following situation: a Canadian corporation pays a dividend to a custodian—a financial institution that holds and safeguards the shareholder’s securities. That custodian is a non-resident of Canada, but it is not resident in the same country as the shareholder who is also a non-resident. The treaty between Canada and the custodian’s country provides for a withholding tax rate of 15% while the treaty between Canada and the shareholder’s country provides for a rate of 5%. Under the Tax Court’s interpretation, subsection 212(2) of the *Income Tax Act* applies solely to the direct recipient of a dividend (*i.e.* the custodian) with the consequence that the beneficial owner of a dividend (*i.e.*

the shareholder) is not entitled to the reduced withholding tax rate of 5% provided for in the treaty between his country of residence and Canada.

[108] Yet, among other considerations, the Tax Court's interpretation did not address:

a) whether the Luxcos were acting as the Barbcos' agents when they received the Dividends, and if they were, whether this was relevant for purposes of interpreting subsection 212(2) of the *Income Tax Act*;

b) the fact that when Canada enters into a tax treaty, Parliament adopts a statute that implements the treaty and gives it force of law in Canada. The implementing statutes provide that in case of inconsistency between the provisions of the treaty and those of any other law, the provisions of the treaty prevail. Subsection 26(2) of the statute implementing the *Barbados Treaty*, referred to in paragraph [5] above, is such a provision. The Tax Court should have considered the impact of subsection 26(2) on the interpretation of subsection 212(2) of the *Income Tax Act* given that the Article X(2) of the *Barbados Treaty* reduces the withholding tax rate where the beneficial owner of a dividend is a resident of Barbados; and

c) whether subsection 10(6) of the *Income Tax Application Rules* impacts the interpretation of subsection 212(2). Subsection 10(6), referred to in paragraph [7] above, says that when a treaty between Canada and another country provides for a lower withholding rate in respect of an amount paid or credited or deemed to be paid or credited to a resident of the other country, any reference to a tax

> rate in the *Income Tax Act* shall be read as a reference to the rate specified in the treaty.

[109] While these omissions, among others, cast doubt on the Tax Court's analysis, identifying them is insufficient for this Court to decide whether the Tax Court erred in law in concluding that subsection 212(2) did not apply to tax the Barbcos. Rather, addressing this issue requires comprehensive submissions well beyond what the parties provided to the Court.

[110] Undoubtedly, the Court would seek submissions if not ruling on the application of subsection 212(2) to the Barbcos would result in the Minister contravening his duty to make decisions based on the facts and the law and thereby deprive the government and Canadians of the taxes to which they are entitled. But this is not the result here.

[111] The Minister assessed Husky for the shortfall of tax (*i.e.* the 15% rate of tax under Article X(2) of the *Barbados Treaty* minus the 5% tax withheld by Husky) and these reasons do not vary that assessment in any way. A conclusion that subsection 212(2) of the *Income Tax Act* applies to tax the Barbcos as beneficial owners of the Dividends would not result in any more taxes. It would only provide the Minister with an additional avenue to collect the shortfall. In this connection, it is worth noting that it is not uncommon for the Minister to assess only the Canadian corporation paying a dividend for the withholding tax: see for example *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63.

[112] In these circumstances, this Court need not decide whether the Tax Court erred in law in concluding that subsection 212(2) only applies to tax the direct recipient of a dividend. This issue is better left for another day when the Court has appropriate submissions. That said, these reasons should by no means be understood as endorsing the Tax Court's interpretation of subsection 212(2) of the *Income Tax Act*.

VI. Conclusion

[113] For the foregoing reasons, I would dismiss Husky's appeal in file A-16-24 with costs. I would also dismiss the Crown's appeals in files A-10-24 and A-11-24 with costs.

[114] These reasons apply to all three appeals. The original reasons shall be filed in proceeding A-10-24 and a copy shall be filed in proceedings A-11-24 and A-16-24.

"Nathalie Goyette"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Sylvie E. Roussel J.A."

Appendix A: Relevant Provisions

Income Tax Act

Tax on dividends

212 (2) 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.

Withholding and remittance of tax

215 (1) When a person pays, credits or provides, or is deemed to have paid, credited or provided, an amount on which an income tax is payable under this Part, or would be so payable if this Act were read without reference to subparagraph 94(3)(a)(viii) and to subsection 216.1(1), the person shall, notwithstanding any agreement or law to the contrary, deduct or withhold from it the amount of the tax and forthwith remit that amount to the Receiver General on behalf of the non-resident person on account of the tax and shall submit with the remittance a statement in prescribed form.

Loi de l'impôt sur le revenu

Impôt sur dividendes

212 (2) Toute personne non-résidente paie un impôt sur le revenu de 25 % sur toute somme qu'une société résidant au Canada lui paie ou porte à son crédit ou est réputée, selon les parties I ou XIV, lui payer ou porter à son crédit, au titre ou en paiement intégral ou partiel :

> **a)** d'un dividende imposable (autre qu'un dividende sur les gains en capital, au sens que donne à cette expression le paragraphe 130.1(4), 131(1) ou 133(7.1));
>
> **b)** d'un dividende en capital.

Déduction et paiement de l'impôt

215 (1) La personne qui verse, crédite ou fournit une somme sur laquelle un impôt sur le revenu est exigible en vertu de la présente partie, ou le serait s'il n'était pas tenu compte du sous-alinéa 94(3)a)(viii) ni du paragraphe 216.1(1), ou qui est réputée avoir versé, crédité ou fourni une telle somme, doit, malgré toute disposition contraire d'une convention ou d'une loi, en déduire ou en retenir l'impôt applicable et le remettre sans délai au receveur général au nom de la personne non-résidente, à valoir sur l'impôt, et l'accompagner d'un état selon le formulaire prescrit.

Liability for tax

(6) Where a person has failed to deduct or withhold any amount as required by this section from an amount paid or credited or deemed to have been paid or credited to a non-resident person, that person is liable to pay as tax under this Part on behalf of the non-resident person the whole of the amount that should have been deducted or withheld, and is entitled to deduct or withhold from any amount paid or credited by that person to the non-resident person or otherwise recover from the non-resident person any amount paid by that person as tax under this Part on behalf thereof.

Assujettissement à l’impôt

(6) Lorsqu’une personne a omis de déduire ou de retenir, comme l’exige le présent article, une somme sur un montant payé à une personne non-résidente ou porté à son crédit ou réputé avoir été payé à une personne non-résidente ou porté à son crédit, cette personne est tenue de verser à titre d’impôt sous le régime de la présente partie, au nom de la personne non-résidente, la totalité de la somme qui aurait dû être déduite ou retenue, et elle a le droit de déduire ou de retenir sur tout montant payé par elle à la personne non-résidente ou portée à son crédit, ou par ailleurs de recouvrer de cette personne non-résidente toute somme qu’elle a versée pour le compte de cette dernière à titre d’impôt sous le régime de la présente partie.

Income Tax Application Rules

Limitation on non-resident’s tax rate

10 (6) Notwithstanding any provision of the amended Act, where an agreement or convention between the Government of Canada and the government of any other country that has the force of law in Canada provides that where an amount is paid or credited, or deemed to be paid or credited, to a resident of that other country the rate of tax imposed thereon shall not exceed a specified rate,

Règles concernant l'application de l'impôt sur le revenu

Restriction du taux de l’impôt des non-résidents

10 (6) Malgré les autres dispositions de la loi modifiée, lorsqu’un accord ou une convention intervenue entre le gouvernement du Canada et celui d’un pays étranger et ayant force de loi au Canada prévoit que lorsqu’une somme est payée ou créditée, ou est réputée être payée ou créditée à un résident de ce pays étranger, le taux de l’impôt payé sur cette somme ne peut dépasser un taux stipulé, les règles suivantes s’appliquent :

(a) any reference in Part XIII of the amended Act to a rate in excess of the specified rate shall, in respect of such an amount, be read as a reference to the specified rate; and

(b) except where the amount can reasonably be attributed to a business carried on by that person in Canada, that person shall, for the purpose of the agreement or convention in respect of the amount, be deemed not to have a permanent establishment in Canada.

a) toute mention dans la partie XIII de la loi modifiée d’un taux supérieur au taux stipulé est, à l’égard de ce paiement, interprétée comme une mention du taux stipulé;

b) sauf lorsqu’il est raisonnable d’attribuer la somme à une entreprise exploitée par cette personne au Canada, dans le cadre de cet accord ou de cette convention, cette personne est réputée, à l’égard de ce paiement, ne pas avoir un établissement stable au Canada.

Barbados Treaty

Article X

Dividends

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.

Traité avec la Barbade

Article X

Dividendes

2. Les dividendes payés par une société qui est un résident d’un État contractant à un résident de l’autre État contractant sont imposables dans le premier État contractant et selon la législation de cet État; mais lorsqu’un résident de l’autre État contractant est le bénéficiaire effectif des dividendes, l’impôt ainsi établi ne peut excéder 15 p. 100 du montant brut de ces dividendes.

Luxembourg Treaty

Article 10

Dividends

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,

Traité avec le Luxembourg

Article 10

Dividendes

2. Toutefois, ces dividendes sont aussi imposables dans l’État contractant dont la société qui paie les dividendes est un résident, et selon la législation de cet État, mais 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 l0 per cent of the voting power in the company paying the dividends; …

si le bénéficiaire effectif des dividendes est un résident de l’autre État contractant, l’impôt ainsi établi ne peut excéder :

a. 5 p. 100 du montant brut des dividendes si le bénéficiaire effectif est une société (autre qu’une société de personnes) qui contrôle directement ou indirectement au moins 10 p. 100 des droits de vote de la société qui paie les dividendes; […]

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-10-24 (lead file), A-11-24, A-16-24
DOCKET:	A-10-24
STYLE OF CAUSE:	HIS MAJESTY THE KING v. HUTCHISON WHAMPOA LUXEMBOURG HOLDINGS S.À.R.L.
AND DOCKET:	A-11-24
STYLE OF CAUSE:	HIS MAJESTY THE KING v. L.F. MANAGEMENT AND INVESTMENT S.À.R.L.
AND DOCKET:	A-16-24
STYLE OF CAUSE:	HUSKY ENERGY INC. v. HIS MAJESTY THE KING
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 3, 2024
REASONS FOR JUDGMENT BY:	GOYETTE J.A.
CONCURRED IN BY:	BOIVIN J.A. ROUSSEL J.A.
DATED:	SEPTEMBER 29, 2025

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Docket A-10-24

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Docket A-11-24

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Docket A-16-24

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