

Citation: 2006TCC441
Date: 20070222
Docket: 2005-4286(IT)G

BETWEEN:

FORD CREDIT CANADA LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

**(These Reasons for Judgment are issued in substitution for
the Reasons for Judgment signed on August 4, 2006)**

Bowman, C.J.

[1] These appeals are from assessments for the 2001, 2002 and 2003 taxation years. The assessments were made under Part I.3 of the *Income Tax Act*.

[2] The issue is whether the appellant is required by subsection 181.3(3) of the *Income Tax Act* to include the amount of its Class C retractable preferred shares in its capital for the purposes of the Large Corporations Tax (“LCT”). The appellant did not do so and says that it did not have to. The respondent says that it should have.

[3] The parties filed a statement of agreed facts and it is attached as Schedule A to these reasons. In addition the appellant called an expert accounting witness.

[4] Subsection 181.1(1) imposes a tax on certain types of corporations. The tax is a percentage of the corporation’s “taxable capital employed in Canada in the year” less its “capital deduction”.

[5] The appellant is prescribed to be a “financial institution” for the purposes of Part I.3. The taxable capital of a financial institution under subsection 181.3(2) is its capital for the year less its investment allowance.

[6] Paragraph 181.3(3)(a) reads as follows:

(3) The capital of a financial institution for a taxation year is

(a) in the case of a financial institution, other than an authorized foreign bank or an insurance corporation, the amount, if any, by which the total at the end of the year of

(i) the amount of its long-term debt,

(ii) the amount of its capital stock (or, in the case of an institution incorporated without share capital, the amount of its members' contributions), retained earnings, contributed surplus and any other surpluses, and

(iii) the amount of its reserves for the year, except to the extent that they were deducted in computing its income under Part I for the year,

exceeds the total of

(iv) the amount of its deferred tax debit balance at the end of the year,

(v) the amount of any deficit deducted in computing its shareholders' equity at the end of the year, and

(vi) any amount deducted under subsection 130.1(1) or 137(2) in computing its income under Part I for the year, to the extent that the amount can reasonably be regarded as being included in the amount determined under subparagraph (i), (ii) or (iii) in respect of the institution for the year;

[7] The relevant portions of that provision are “(i) the amount of its long-term debt,” [and] “(ii) the amount of its capital stock ...”. The question is whether the amount of the 1,170,000 Class C special shares issued by the appellant to Ford Credit Canadian Lending LP fall within “the amount of its capital stock”. Although, as set out below, the accountant treated the Class C shares as “debt” for balance sheet purposes and, as an accounting matter, as long term debt, they are not “long term debt” within the definition of that expression in subsection 181(1).

[8] Paragraphs 7, 8, 9 and 10 of the agreed statement of facts read:

7. On July 23, 2001, the issuance of up to 1,400,000 Class C Special Shares was duly authorized by the Appellant (the "Class C Special Shares"). The Class C Special Shares are retractable at the option of the holder.

Joint Book of Documents, Tab 3 at
pages 24-30

8. On July 25, 2001, Ford Credit Canadian Lending, LP by its general partner, Ford Credit International, Inc. subscribed for 1,170,000 of the Class C Special Shares at an amount of \$1,000 per share.

Joint Book of Documents, Tab 4 at
pages 31-32

9. Paragraph (b) of Note 5 to the Appellant's financial statements for its 2001 fiscal year and paragraph (c) of Note 6 to the Appellant's financial statements for its 2002 and 2003 fiscal years state as follows:

On July 31, 2001, Ford Credit Canada Limited issued 1,170,000 authorized shares of non-cumulative voting redeemable retractable Class C special shares at \$1,000 per share; these shares are held indirectly by Ford Credit. The Class C special shares are entitled to a non-cumulative dividend of up to 10% of the stated capital of the shares and as a class, have 10% voting rights of the outstanding shares of the Company. Since the preferred shares are retractable at the option of the holder at any time after July 31, 2002, they are classified as a liability for financial reporting purposes.

Joint Book of Documents, Tabs 5, 6
and 7 at pages 43, 62 and 81

10. PricewaterhouseCoopers LLP offered the following audit opinion in respect of the Appellant's consolidated financial statements for its 2001 fiscal year:

In our opinion, these consolidated financial statements present fairly, in all material respects, the financial position of Ford Credit Canada Limited as at December 31, 2001 and 2000 and the results of its operations and its cash flows for the years then ended in accordance with Canadian generally accepted accounting principles.

Joint Book of Documents, Tab 8 at
page 88

[9] The same opinion was expressed by PricewaterhouseCoopers LLP with respect to the appellant's 2002 and 2003 fiscal years. Moreover, it is agreed by the parties that the balance sheets for each of the 2001, 2002 and 2003 fiscal years

were prepared in accordance with generally accepted accounting principles ("GAAP").

[10] Mr. Robert Lefrançois, FCA, was called by the appellant as an expert accounting witness. He is a partner in the National Office of Deloitte & Touche LLP.

[11] His report and oral testimony were comprehensive. He was not cross-examined. I shall describe his evidence somewhat more fully below but its essence was that the treatment of the Class C special shares on the consolidated balance sheet of the appellant as "debt" rather than shareholders' equity was in accordance with GAAP. The relevance of this conclusion within the context of this case is found in subsection 181(3) of the *Income Tax Act* which reads in part:

For the purposes of determining the carrying value of a corporation's assets or any other amount under this Part in respect of a corporation's capital, investment allowance, taxable capital or taxable capital employed in Canada for a taxation year or in respect of a partnership in which a corporation has an interest,

- (a) the equity and consolidation methods of accounting shall not be used;
and
- (b) subject to paragraph (a) and except as otherwise provided in this Part, the amounts reflected in the balance sheet
 - (i) presented to the shareholders of the corporation (in the case of a corporation that is neither an insurance corporation to which subparagraph (ii) applies nor a bank) or the members of the partnership, as the case may be, or, where such a balance sheet was not prepared in accordance with generally accepted accounting principles or no such balance sheet was prepared, the amounts that would be reflected if such a balance sheet had been prepared in accordance with generally accepted accounting principles, ...

shall be used.

[12] In other words, the balance sheet presentation must be accepted and if the balance sheet presentation is not in accordance with GAAP the amounts must be as reflected on a balance sheet as if it were prepared in accordance with GAAP.

[13] Mr. Lefrançois's evidence was unequivocal that the Class C shares had to be shown as debt and that an accountant preparing the financial statements would

have no option and no discretion to treat the Class C shares in any other way, such as shareholders' equity.

[14] The reason for this accounting treatment is, according to Mr. Lefrançois, that for accounting purposes, substance prevails over form. His report sets out the salient features of the Class C shares that in his view justify their balance sheet treatment as debt. It is probably unnecessary to repeat the provisions — the shares are redeemable and retractable — but the specific provisions will make the accounting conclusions somewhat more meaningful. The following appears in the expert's report:

a) What are the relevant features of the Company's Class C Special Shares as far as GAAP is concerned?

A detailed description of the terms of the 1,400,000 Class C Special Shares authorized by the Company is found in the Certificate of Amendment under the *Canada Business Corporations Act*, dated July 24, 2001. As far as the appropriate presentation under GAAP is concerned, their salient features are as follows:

* * *

6.3 Redemption — The Corporation may from time to time upon prior written notice to the holders of such shares to be redeemed, specifying the number of shares to be redeemed and a date for such redemption not more than 30 days nor less than 5 days following the giving of such notice, redeem on or after such date any or all of the Class C Special Shares at the Redemption Price. If less than all of the Class C Special Shares are to be redeemed, such shares shall be redeemed pro rata according to the number of Class C Special Shares then held by each holder or in such other manner as the directors determine with the consent of all holders of Class C Special Shares. On and after such date for redemption a holder of any such shares to be redeemed shall have no rights in respect of such shares, irrespective of any prior record date, unless payment therefor shall not be made as hereinafter provided in which case (in addition to any other rights or remedies) the rights of such holder shall remain unimpaired, except to receive payment of the Redemption Price, without interest, within 5 days following due presentation and surrender of certificates therefor at the registered office of the Corporation.

6.4 Retraction — Any holder of Class C Special Shares may from time to time upon prior written notice to the Corporation after July 31, 2002, specifying the number of shares to be redeemed and a date for such redemption not more than 30 days nor less than 5 days following the giving of such notice, require the Corporation to

redeem any or all of the Class C Special Shares then held by such holder at the Redemption Price. On and after such date for redemption such holder shall have no rights in respect of such shares to be redeemed, irrespective of any prior record date, unless payment therefor shall not be made as hereinafter provided in which case (in addition to any other rights or remedies) the rights of such holder shall remain unimpaired, except to receive payment of the Redemption Price, without interest, within 5 days following due presentation and surrender of certificates therefor at the registered office of the Corporation.

* * *

6.6 Dissolution – In the event of the liquidation, dissolution or winding-up of the Corporation, whether voluntary or involuntary, or any other distribution of the assets of the Corporation among its shareholders for the purpose of winding up its affairs, each holder of Class C Special Shares shall be entitled, after payment or provision for payment of the debts and other liabilities of the Corporation and the amounts payable in such event to the holders of Class A Special Shares and Class B Special Shares, but before any distribution to the holders of Common Shares, to payment of an amount equal to the aggregate stated capital of all Class C Special Shares then held by such holder together with all unpaid dividends declared on such shares, but shall not be entitled to share in any further distribution of the assets of the Corporation. If the amount available for payment is not sufficient to pay all holders of Class C Special Shares in full, such holders shall share ratably in the amount available in proportion to the amounts which would be paid to such holders, respectively, if the amounts otherwise payable to such holders were paid in full.

6.7 Redemption Price – For the purposes of the foregoing provisions, "Redemption Price" means an amount per Class C Special Share redeemed equal to the stated capital per Class C Special Share, plus an amount equal to any unpaid dividends declared thereon, at the date of payment for such share.

[15] The Class C shares having the characteristics described above must, according to the expert witness, under GAAP be treated as liabilities and not as equity on the balance sheet. The Handbook of the Canadian Institute of Chartered Accountants (the "CICA") that was in effect in the years in question contained the following definitions:

DEFINITIONS

The following terms are used in this Section with the meanings specified:

- (a) A **financial instrument** is any contract that gives rise to both a financial asset of one party and a financial liability or equity instrument of another party.
- (b) A **financial asset** is any asset that is:
 - (i) cash;
 - (ii) a contractual right to receive cash or another financial asset from another party;
 - (iii) a contractual right to exchange financial instruments with another party under conditions that are potentially favourable; or
 - (iv) an equity instrument of another entity.
- (c) A **financial liability** is any liability that is a contractual obligation:
 - (i) to deliver cash or another financial asset to another party; or
 - (ii) to exchange financial instruments with another party under conditions that are potentially unfavourable.
- (d) An **equity instrument** is any contract that evidences a residual interest in the assets of an entity after deducting all of its liabilities.
- (e) **Monetary financial assets and financial liabilities** (also referred to as monetary financial instruments) are financial assets and financial liabilities to be received or paid in fixed or determinable amounts of money.

PRESENTATION

Liabilities and equity

The issuer of a financial instrument should classify the instrument, or its component parts, as a liability or as equity in accordance with the substance of the contractual arrangement on initial recognition and the definitions of a financial liability and an equity instrument.

[JAN. 1996]

The substance of a financial instrument, rather than its legal form, governs its classification on the issuer's balance sheet. While substance and legal form are commonly consistent, this is not always the case. For example, some financial instruments take the legal form of equity but are liabilities in substance and others may combine features associated with equity instruments and features associated with financial liabilities. The classification of an instrument is made on the basis of an assessment of its substance when it is first recognized. That classification continues at each subsequent reporting date until the financial instrument is removed from the entity's balance sheet.

The critical feature in differentiating a financial liability from an equity instrument is the existence of a contractual obligation on one party to the financial instrument (the issuer) either to deliver cash or another financial asset to the other party (the holder) or to exchange another financial instrument with the holder under conditions that are potentially unfavourable to the issuer. When such a contractual obligation exists, that instrument meets the definition of a financial liability regardless of the manner in which the contractual obligation will be settled. A restriction on the ability of the issuer to satisfy an obligation, such as lack of access to foreign currency or the need to obtain approval for payment from a regulatory authority, does not negate the issuer's obligation or the holder's right under the instrument.

When a financial instrument does not give rise to a contractual obligation on the part of the issuer to deliver cash or another financial asset or to exchange another financial instrument under conditions that are potentially unfavourable, it is an equity instrument. Although the holder of an equity instrument may be entitled to receive a pro rata share of any dividends or other distributions out of equity, the issuer does not have a contractual obligation to make such distributions. Thus the terms and conditions of certain preferred shares may be such that they meet the definition of an equity instrument and are classified accordingly.

When a preferred share provides for mandatory redemption by the issuer for a fixed or determinable amount at a fixed or determinable future date or gives the holder the right to require the issuer to redeem the share at or after a particular date for a fixed or determinable amount, the instrument meets the definition of a financial liability and is classified as such. A preferred share that does not establish such a contractual obligation explicitly may establish it indirectly through its terms and conditions. For example, a preferred share that does not provide for mandatory redemption or redemption at the option of the holder may have a contractually provided accelerating dividend such that, within the foreseeable future, the dividend yield is scheduled to be so high that the issuer will be economically compelled to redeem the instrument. In these circumstances, classification as a financial liability is appropriate because the issuer has little, if any, discretion to avoid redeeming the instrument. Similarly, if a financial instrument labelled as a share gives the holder an option to require redemption upon the occurrence of a future event that is highly likely to occur, classification as a financial liability on initial recognition reflects the substance of the instrument.

[16] Mr. Lefrançois traced the evolution since 1996 of the accounting rules with respect to the balance sheet presentation of financial instruments such as the Class C special shares. Nothing in the changes that have taken place over the years casts any doubt on the proposition that the treatment of these shares as debt in the years in question in the balance sheet not only was in accordance with GAAP but was the only treatment permissible under GAAP.

[17] The treatment under GAAP is hardly surprising. It is similar to what the courts have recognized for over half a century that the position of preference shareholders is in many respects economically if not legally more closely approximated to that of debenture holders.

[18] In *In re The Isle of Thanet Electricity Supply Co. Ltd.*, [1950] 1 Ch. 161 at 175, Evershed M.R. said at p. 175:

I think, for myself, that during the sixty years which have passed since *Birch v. Cropper* (6) was before the House of Lords the view of the courts may have undergone some change in regard to the relative rights of preference and ordinary shareholders, and to the disadvantage of the preference shareholders, whose position has, in that interval of time, become somewhat more approximated to the role which Sir Horace Davey attempted to assign to them, but which Lord Macnaghten rejected in *Birch v. Cropper* (6), namely, that of debentureholders.

[19] Mr. Erlichman argues with considerable force that notwithstanding the wording of subsection 181(3) “capital stock” in paragraph 181.3(3)(a) means capital stock and the fact the share capital in the form of the redeemable retractable Class C special shares is treated for balance sheet purposes as debt is of no consequence. I would agree with Mr. Erlichman were it not for subsection 181(3). I see nothing in the cases cited by Mr. Spiro under the heading in his written submissions “The Judicial Interpretation of Provincial Capital Tax Legislation without the Equivalent of Subsection 181(3)” that would support the view that without subsection 181(3) “capital stock” should not be given its ordinary legal meaning. Without subsection 181(3) the Class C special shares would be capital stock notwithstanding the fact that as a matter of economic substance, accountants may treat them as debt. It is true that undefined accounting concepts should generally be given a meaning that accountants would assign to them: *Canfor Limited v. Minister of Finance for British Columbia*, [1976] C.T.C. 429 at 431; [1977] C.T.C. 269; [1978] 1 S.C.R. 1047; *Upper Lakes Shipping Ltd. v. M.N.R.*, [1998] 3 C.T.C. 281; *Reford v. M.N.R.*, 71 DTC 5053. Nonetheless, the principles stated in those cases do not, in the absence of specific statutory direction, allow accounting treatment to prevail over the legal meaning of words in the *Income Tax Act*. In other words, accounting concepts are to be given in appropriate circumstances a meaning that is familiar to accountants. This is not, however, the same as saying that if words have a clear meaning in law, the fact that accountants may, on the substance over form principle, treat them as having a different

meaning, the legal meaning can be ignored. If, however, Parliament wishes us to do just that, it is clearly within its power to do so.

[20] The only basis upon which the Appellant can succeed is subsection 181(3).

[21] The Appellant reproduced subsection 181(3) as follows:

For the purposes of determining the carrying value of a corporation's assets or any other amount under this Part in respect of a corporation's capital, investment allowance, taxable capital or taxable capital employed in Canada for a taxation year ...,

(a) the equity and consolidation methods of accounting shall not be used; and

(b) subject to paragraph (a) and except as otherwise provided in this Part, the amounts reflected in the balance sheet

(i) presented to the shareholders of the corporation ...
prepared in accordance with generally accepted accounting principles ...

shall be used.

[22] I have reproduced subsection 181(3) in its entirety above and I think the deletion of portions can be a little misleading. The deletions leave the impression that the words "prepared in accordance with generally accepted accounting principles" modify the words "balance sheet" in subparagraph (b) that immediately precedes clause (i). It may be a necessary inference from reading subsection 181(3) as a whole that that is what is meant, on the basis that the balance sheet presented to the shareholders is prepared in accordance with GAAP because if it is not we have to hypothesize how the amounts would have been presented if the balance sheets were prepared in accordance with GAAP. It may come to the same thing but there is a subtle change in emphasis from "prepared in accordance with GAAP" to "presented to the shareholders". ("les montants ... soit ceux qui figurent au bilan présenté aux actionnaires ...").

[23] At all events we have here a balance sheet that is clearly prepared in accordance with GAAP and the "amount" of the Class C special shares is shown as debt (but not "long-term debt" as defined in section 181) not as capital stock.

[24] Mr. Erlichman has put forward every argument that is available but I do not think, with respect, that he can overcome the fact that Parliament has in this instance given a role to the accountants and to GAAP that neither Parliament nor the courts have seen fit to do absent a specific provision. Generally speaking the Canadian courts in tax matters show little deference to GAAP (see *Ikea Limited v. The Queen*, 94 DTC 1112 (TCC), 96 DTC 6526 (FCA), 98 DTC 6092 (SCC)). In Part I.3 they are required to do so. Mr. Erlichman in paragraph 23 of his written argument said:

If the Court accepts that the Class C Special Shares are excluded by operation of subsection 181(3) of the Act and that deference should be given to accounting principles even when terms are not specific to accounting, it is respectfully submitted that the effect would be to surrender the determination of the fiscal base of the LCT to a non-elected group of accountants.

[25] This prospect may be a little upsetting to lawyers and judges but I think that that is precisely what Parliament has said should be done, and what this court and the Federal Court of Appeal have done.

[26] We are not, in Part I.3, dealing with the computation of income, a function that courts have jealously guarded to themselves. We are dealing with a tax on capital and the base upon which the tax is to be computed. It is not surprising if Parliament were to direct us to look to the manner in which accountants measure that base. As Archambault J., said in *Oerlikon Aérospatiale Inc. v. The Queen*, [1998] 4 C.T.C. 2821 at 2838 :

. . . I believe that accounting principles must be used to determine not only the value, but also the nature of the elements set out in subsection 181.2(3) of the *Act*. The value appearing in a balance sheet has meaning only when it is linked to a specific heading.

[27] At 2834, he said:

As to the scope of the term “reserves”, it should be noted that the *Act* provides a definition of this term in section 181. However, that definition contains the very word that is to be defined, “reserves” being stated to mean “*the amount of all of the corporation’s reserves*”. This definition specifically states however that the word “reserves”, as used in Part I.3, includes “provisions” and “any provision in respect of deferred taxes”, but not allowances for depreciation or depletion.

The definition does not specify what a reserve is for the purposes of Part I.3. We must therefore look to the ordinary meaning of this term as it is used in accounting. The Canadian Institute of Chartered Accountants, as well as the Ordre des experts comptables de France and the Institut des Réviseurs d'Entreprises de Belgique have collaborated in preparing the *Dictionnaire de la comptabilité et de la gestion financière (Dictionnaire de la comptabilité)*, which gives, at page 631, three meanings for the English term "reserve", two of which are relevant here:

[28] The Tax Court of Canada's decision was upheld in the Federal Court of Appeal [1999] 4 C.T.C. 358.

[29] In *Manufacturers Life Insurance Company v. The Queen*, [2000] 1 C.T.C. 2481, O'Connor J. of this court held that the Minister of National Revenue was bound to accept the characterization in the balance sheets for the purpose of determining the taxpayer's capital base. In upholding this decision, Rothstein J. of the Federal Court of Appeal, said at page 175:

Nonetheless, the Minister argues that some more general definition of reserves or surpluses should govern. The only basis for this argument seems to be a reference in *Oerlikon Aérospatiale Inc. c. R.*, (1999), 99 D.T.C. 5318 (Alta. C.A.), where an "advance" was to be reflected in capital because it contributed to "the financial resources available to the appellant". The Minister says unamortized realized gains are financial resources available to the respondent in this case. However, the Minister's argument ignores precisely what was said by Noël J.A. in *Oerlikon*:

The effect of an advance, be it in the sense of a payment on account or a loan, is to make the amount of money it represents available to the person or corporation which receives it. In the instant case, the advances were an integral part of the financial resources available to the appellant at the end of its 1989 fiscal year according to the financial statements it filed, and nothing either in the legislation or the tax policy which led to its enactment indicates that Parliament intended to exclude advances from the tax under Part I.3.

In the present case, unamortized realized gains were not shown as financial resources available to the respondent according to its financial statements.

[30] To the same effect, Bowie J. of this court in *PCL Construction Management Inc. v. The Queen*, [2001] 1 C.T.C. 2132 at page 2147, said:

Subject to specific direction to the contrary elsewhere in Part I.3 of the *Act*, GAAP applies to determine "amounts". That seems a strong indication that if not GAAP then at least "the language accountants speak" must govern the characterization of amounts for the purposes of this Part.

[31] In *Royal Trust Company v. The Queen*, [2001] 3 C.T.C. 2268, Sarchuk J. said at pages 2291 to 2292:

I am satisfied that the appropriate characterization to be given to the undefined term "tangible property" is dependent upon the context of the surrounding text and upon Part I.3 of the *Act* as a whole. This part of the *Act* relies on balance sheets and GAAP in the determination of a corporation's "taxable capital employed in Canada". It seems only reasonable to conclude that the technical terms referable to the balance sheet ought to be defined and characterized for the purposes of Part I.3 of the *Act* by reference to accounting terminology. Accordingly, the Appellants were correct in not including the carrying values of the Assets in their respective "taxable capital employed in Canada" because each Appellant had no "tangible property" for the purposes of subsection 181.3(1).

[32] The effect of these decisions and indeed of the plain meaning of subsection 181(3) is that the accounting characterization of terms in the balance sheet is to be accepted in determining the components of a corporation's capital for the purposes of Part I.3. In specifically giving a function to accounting principles that is somewhat unique in income tax matters, Parliament intended that deference be given to the accounting characterization in the balance sheet of items that make up a corporation's capital.

[33] The appeals are allowed with costs and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the amount of \$1,170,000,000 in respect of the Class C special shares that is reflected in the balance sheets as a liability is not to be included in the appellant's capital for the purposes of Part I.3 of the *Income Tax Act*.

Signed at Ottawa, Canada, this 22nd day of February 2007.

"D.G.H. Bowman"

Bowman, C.J.

CITATION: 2006TCC441

COURT FILE NUMBER: 2005-4286(IT)G

STYLE OF CAUSE: Ford Credit Canada Limited v.
Her Majesty The Queen

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 4, 2006

REASONS FOR JUDGMENT BY: The Honourable D.G.H. Bowman,
Chief Justice

DATE OF JUDGMENT AND REASONS FOR JUDGMENT: August 4, 2006

AMENDED REASONS FOR JUDGMENT: February 22, 2007

APPEARANCES:

Counsel for the Appellant: David E. Spiro

Counsel for the Respondent: Harry Erlichman and
Catherine Letellier de St-Just

COUNSEL OF RECORD:

Counsel for the Appellant
Name: David E. Spiro
Firm: Blake, Cassels & Graydon LLP
Toronto, Ontario

Counsel for the Respondent John H. Sims, Q.C.
Deputy Attorney General of Canada

STATEMENT OF AGREED FACTS

The parties agree that for the purpose of this proceeding and any further appeals, the facts set out below are true. Either party is free to lead other admissible evidence, including expert evidence, that is not inconsistent with the facts or documents referred to below. The parties also agree on the authenticity of the documents referred to below, but either party is free to prove any additional documents to the extent that they are not inconsistent with the documents or the facts referred to below.

1. The Appellant was incorporated on July 23, 1962 under the laws of Canada and was continued under the *Canada Business Corporations Act* on December 5, 1980.

Joint Book of Documents, Tab 1 at
pages 1-13

2. All of the Appellant's authorized and issued shares are owned by Ford Credit International, Inc., a wholly owned subsidiary of Ford Motor Credit Company ("Ford Credit"). Ford Credit is an indirect wholly owned subsidiary of Ford Motor Company.

3. At all relevant times, the Appellant provided wholesale financing and capital loans to authorized Ford Motor Company of Canada, Limited vehicle dealers and purchased retail instalment sale contracts and retail leases from them. The Appellant also made loans to vehicle leasing companies, the majority of which are affiliated with those dealers.

4. The Appellant is a financial institution within the meaning of subsection 181(1) of the *Income Tax Act* (the "Act") and is subject to tax under Part 1.3 of the Act.

5. On December 5, 1980, the issuance of up to 410,630 Class A Special Shares was duly authorized by the Appellant (the "Class A Special Shares"). The Class A Special Shares are not retractable at the option of the holder.

Joint Book of Documents, Tab 1 at
pages 1-13

6. On July 9, 1981, the issuance of up to 2,400 Class B Special Shares was duly authorized by the Appellant (the "Class B Special Shares"). The Class B Special Shares are not retractable at the option of the holder.

Joint Book of Documents, Tab 2 at
pages 14-23

7. On July 23, 2001, the issuance of up to 1,400,000 Class C Special Shares was duly authorized by the Appellant (the "Class C Special Shares"). The Class C Special Shares are retractable at the option of the holder.

Joint Book of Documents, Tab 3 at
pages 24-30

8. On July 25, 2001, Ford Credit Canadian Lending, LP by its general partner, Ford Credit International, Inc. subscribed for 1,170,000 of the Class C Special Shares at an amount of \$1,000 per share.

Joint Book of Documents, Tab 4 at
pages 31-32

9. Paragraph (b) of Note 5 to the Appellant's financial statements for its 2001 fiscal year and paragraph (c) of Note 6 to the Appellant's financial statements for its 2002 and 2003 fiscal years state as follows:

On July 31, 2001, Ford Credit Canada Limited issued 1,170,000 authorized shares of non-cumulative voting redeemable retractable Class C special shares at \$1,000 per share; these shares are held indirectly by Ford Credit. The Class C special shares are entitled to a non-cumulative dividend of up to 10% of the stated capital of the shares and as a class, have 10% voting rights of the outstanding shares of the Company. Since the preferred shares are retractable at the option of the holder at any time after July 31, 2002, they are classified as a liability for financial reporting purposes.

Joint Book of Documents, Tabs 5, 6
and 7 at pages 43, 62 and 81

10. PricewaterhouseCoopers LLP offered the following audit opinion in respect of the Appellant's consolidated financial statements for its 2001 fiscal year:

In our opinion, these consolidated financial statements present fairly, in all material respects, the financial position of Ford Credit Canada Limited as at December 31, 2001 and 2000 and the results of its operations and its cash flows for the years then ended in accordance with Canadian generally accepted accounting principles.

Joint Book of Documents, Tab 8 at page 88

11. PricewaterhouseCoopers LLP offered the following audit opinion in respect of the Appellant's consolidated financial statements for its 2002 fiscal year:

In our opinion, these consolidated financial statements present fairly, in all material respects, the financial position of the company as at December 31, 2002 and 2001 and the results of its operations and its cash flows for the years then ended in accordance with Canadian generally accepted accounting principles.

Joint Book of Documents, Tab 9 at page 106

12. PricewaterhouseCoopers LLP offered the following audit opinion in respect of the Appellant's consolidated financial statements for its 2003 fiscal year:

In our opinion, these consolidated financial statements present fairly, in all material respects, the financial position of the company as at December 31, 2003 and 2002 and the results of their operations and their cash flows for the years then ended in accordance with Canadian generally accepted accounting principles.

Joint Book of Documents, Tab 10 at page 128

13. The balance sheet for each of the 2001, 2002 and 2003 fiscal years was presented to the sole shareholder of the Appellant, Ford Credit, and was prepared in accordance with GAAP.

14. The Appellant filed returns for its 2001, 2002 and 2003 taxation years on the basis that the amount of its "capital stock", within the meaning of subparagraph 181.3(3)(a)(ii) of the Act, did not include the amount of the Class C Special Shares.

15. By Notice of Reassessment dated December 13, 2004 in respect of the Appellant's 2001 taxation year, the Minister of National Revenue (the "Minister") reassessed the Appellant \$2,553,069 of additional Large Corporations Tax ("LCT"), along with interest on that amount.

Joint Book of Documents, Tab 11 at pages 149-155

16. By Notice of Reassessment dated December 13, 2004 in respect of the Appellant's 2002 taxation year, the Minister reassessed the Appellant \$2,632,500 of additional LCT, along with interest on that amount.

Joint Book of Documents, Tab 12 at pages 156-162

17. By Notice of Reassessment dated December 13, 2004 in respect of the Appellant's 2003 taxation year, the Minister reassessed the Appellant \$2,632,500 of additional LCT, along with interest on that amount.

Joint Book of Documents, Tab 13 at pages 163-171

18. The basis for each of the reassessments is that the amount of the Appellant's "capital stock" for the 2001, 2002 and 2003 taxation years, within the meaning of subparagraph 181.3(3)(a)(ii) of the Act, included the amount of the Class C Special Shares.

19. On March 11, 2005, the Appellant objected to the reassessments for its 2001, 2002 and 2003 taxation years by serving Notices of Objection on the Minister of National Revenue under subsection 165(1) of the Act.

Joint Book of Documents, Tab 14 at pages 172-185

20. On October 21, 2005, the Minister confirmed the reassessments under subsection 165(3) of the Act.

Joint Book of Documents, Tab 15 at page 186

21. The issue to be determined is whether the amount of the Appellant's "capital stock" for its 2001, 2002 and 2003 taxation years, within the meaning of subparagraph 181.3(3)(a)(ii) of the Act, included the amount of the Class C Special Shares. The Respondent says that it did, while the Appellant says that it did not.

Dated at Toronto this 26th day of May, 2006.



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