Docket: 2012-4038(IT)G

BETWEEN:

CANADIAN FOREST NAVIGATION CO. LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Determination hearing held on September 30, 2015
in Montreal, Quebec.

Before: The Honourable Associate Chief Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Stéphane Eljarrat Joel Scheuerman Leïla Côté
Counsel for the Respondent:	Diana Aird Rita Araujo

DETERMINATION

Whereas the appellant made a motion to this Court for an order under section 58 of the *Tax Court of Canada Rules* (*General Procedure*) that a question of law be determined before the hearing;

And whereas by order dated February 19, 2015, Graham J. of this Court ordered in the following terms that the following question of law be determined:

> WHEREAS the Appellant's foreign affiliates transferred amounts to the appellant during the 2004, 2005 and 2006 years and declared such transfers to be dividends;
>
> WHEREAS foreign rectification orders were rendered by the Supreme Court of Barbados and the District Court of Nicosia, Cyprus on March 28, 2001 [*sic*] and August 13, 2010 respectively;

WHEREAS the foreign rectification orders declared that the amount transferred from the Appellant's foreign affiliates to the Appellant are not dividends but rather, are transfers that resulted in indebtedness by the Appellant to the foreign affiliates in the amount of the transfers;

WHEREAS in computing its Canada income tax, the Minister of National Revenue (the "Minister") assessed the Appellant on the basis that the transfers were dividends within the meaning of sections 12 and 90 of the *Income Tax Act*;

WHEREAS the assessments are the subject of this Appeal; and

WHEREAS one of the issues in this Appeal is whether or not the transfers are taxable as dividends:

Is the Minister required to not treat the transfers as dividends, or to not take the position that the transfers are dividends in this Appeal, by virtue of the foreign rectification orders, but rather to treat the transfers as resulting in indebtedness by the Appellant to the foreign affiliates in the amount of the transfers?

In accordance with the attached reasons, the answer to the question raised by the parties is no and the Court concludes that the respondent is not bound by the foreign judgments since they have not been recognized in Canada by a court of competent jurisdiction, and therefore the respondent is not precluded from taking the position at trial that the appellant received dividends, rather than amounts in the form of loans and other indebtedness, during the period at issue.

The respondent is entitled to her costs on the motion.

Signed at Ottawa, Canada, this 12th day of February 2016.

"Lucie Lamarre"

Lamarre A.C.J.

Citation: 2016 TCC 43
Date: 20160212
Docket: 2012-4038(IT)G

BETWEEN:

CANADIAN FOREST NAVIGATION CO. LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR DETERMINATION

Lamarre A.C.J.

[1] By order dated February 19, 2015, Graham J. of this Court ordered that a question of law be determined before the hearing of the appeal, in the following terms:

> WHEREAS the Appellant's foreign affiliates transferred amounts to the appellant during the 2004, 2005 and 2006 years and declared such transfers to be dividends;
>
> WHEREAS foreign rectification orders were rendered by the Supreme Court of Barbados and the District Court of Nicosia, Cyprus on March 28, 2001 [*sic*] and August 13, 2010 respectively;
>
> WHEREAS the foreign rectification orders declared that the amount transferred from the Appellant's foreign affiliates to the Appellant are not dividends but rather, are transfers that resulted in indebtedness by the Appellant to the foreign affiliates in the amount of the transfers;
>
> WHEREAS in computing its Canada income tax, the Minister of National Revenue (the "Minister") assessed the Appellant on the basis that the transfers were dividends within the meaning of sections 12 and 90 of the *Income Tax Act*;
>
> WHEREAS the assessments are the subject of this Appeal; and

> WHEREAS one of the issues in this Appeal is whether or not the transfers are taxable as dividends:
>
> Is the Minister required to not treat the transfers as dividends, or to not take the position that the transfers are dividends in this Appeal, by virtue of the foreign rectification orders, but rather to treat the transfers as resulting in indebtedness by the Appellant to the foreign affiliates in the amount of the transfers?

[2] In support of the motion, the parties have filed a Statement of Agreed Facts, which is reproduced at the end of these Reasons for Determination.

[3] The appellant submits that this Court should answer the above question in the affirmative. According to the appellant, the Barbadian and Cypriot judgments (**Foreign Judgments**) declared the transfers made to it by its subsidiaries, Canfornav Inc. (**Barbados Subco**) and Canfornav Limited (**Cyprus Subco**), which transfers were declared initially as dividends in its 2005 and 2006 taxation years, to be retroactively rectified as being loans and other debt (resulting in indebtedness of the appellant toward its subsidiaries). In the appellant's view, those Foreign Judgments constitute the judicial reality, which should not be ignored by the respondent. Consequently, the respondent is bound to take into account the Foreign Judgments and is precluded from taking the position that the appellant received dividends rather than amounts in the form of loans and other indebtedness.

[4] The respondent, on the other hand, asks this Court to answer the question in the negative. She submits that the appellant resorted to the foreign rectification proceedings without notifying the Minister of National Revenue (M**inister**) after having been audited and advised that the dividend deductions claimed pursuant to paragraph 113(1)(*a*) of the *Income Tax Act* (**ITA**) would be denied. In her view, the appellant used the foreign rectification proceedings to recharacterize the dividends as loans or other indebtedness for the purpose of avoiding unanticipated Canadian tax consequences. The respondent's position is that she is not bound by the Foreign Judgments because they were obtained without notice to the Minister, constitute retroactive tax planning and have not been recognized in Canada by a court of competent jurisdiction.

[5] For the reasons that follow, I will answer the question raised in this motion in the negative.

Analysis

[6] The parties agree that the only Canadian province with which the appellant has a nexus is the province of Quebec. Therefore, the application of the Foreign Judgments before this Court is subject to the law of that province, hence to the *Civil Code of Québec* (CCQ) and the *Quebec Code of Civil Procedure*.

[7] The relevant articles are sections 2822, 3155 and 3158 CCQ, which read as follows:

> **2822.** An act purporting to be issued by a competent foreign public officer makes proof of its content against all persons and neither the quality nor the signature of the officer need be proved.
>
> Similarly, a copy of a document of which the foreign public officer is the depositary makes proof of its conformity to the original against all persons and substitutes for the original, if it purports to be issued by that officer.
>
> **3155.** A decision rendered outside Québec is recognized and, where applicable, declared enforceable by the Québec authority, except in the following cases:
>
> (1) the authority of the State where the decision was rendered had no jurisdiction under the provisions of this Title;
>
> (2) the decision, at the place where it was rendered, is subject to an ordinary remedy or is not final or enforceable;
>
> (3) the decision was rendered in contravention of the fundamental principles of procedure;
>
> (4) a dispute between the same parties, based on the same facts and having the same subject has given rise to a decision rendered in Québec, whether or not it has acquired the authority of a final judgment (*res judicata*), is pending before a Québec authority, in first instance, or has been decided in a third State and the decision meets the conditions necessary for it to be recognized in Québec;
>
> (5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
>
> (6) the decision enforces obligations arising from the taxation laws of a foreign State.

> **3158** The Québec authority confines itself to verifying whether the decision with respect to which recognition or enforcement is sought meets the requirements prescribed in this Title, without considering the merits of the decision.

[8] The author Henri Kélada (*Reconnaissance et exécution des jugements étrangers* (Cowansville, Que: Éditions Yvon Blais, 2013) at p. 37) explains:

> **La décision étrangère est considérée comme un fait**
>
> La décision étrangère constitue un fait dont les effets ne peuvent être ignorés par nos tribunaux québécois, et ce, même en l'absence de reconnaissance par voie d'action en exemplification[128]. En tant qu'*instrumentum*, le jugement étranger peut aussi être utilisé comme moyen de preuve (art. 2822 C.c.Q.). Le juge québécois devra tenir compte du fait qu'il a été rendu[129].
>
> [128] J.-G. CASTEL, *Droit international privé québécois*. Toronto, Butterworths, 1980, p.846.
>
> [129] S. GAUDET et P. FERLAND, « Les effets indépendants de la procédure de reconnaissance », dans Collection de droit 2008-2009, *Contrats, sûretés, publicité des droits et droit international privé*, Cowansville, Éditions Yvon Blais, 2008. Voir *G.C. c. A.Ca.*, EYB 2011-187198 (C.S.), juge Michel Girouard.

[9] This means that foreign judgments, even without being homologated by a local court in the province, constitute a fact which cannot be ignored by the courts in the province. A foreign judgment may be used as evidence and the Quebec judge will have to acknowledge that a foreign judgment has been rendered.

[10] However, under Quebec private international law, foreign judgments are not enforceable in and of themselves. Article 3155 CCQ states that, except where certain exceptions apply, any foreign judgment is recognized by the Quebec court that declares it to be enforceable in the Quebec legal system. The application for enforcement is a judicial demand that gives rise to an adversarial relationship. Even though article 3158 CCQ provides that the Quebec court may not examine the merits of the foreign decision, this rule does not change the legal nature of the application for enforcement (*Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, [2010] 2 S.C.R. 571, at par. 20).

[11] This procedure is even more necessary in the case of a non-money foreign judgment. A domestic court enforcing that kind of judgment may have to interpret and apply another jurisdiction's law. The recognition and enforcement of such judgments will require a balanced measure of restraint and involvement by the domestic court that is otherwise unnecessary when the court merely agrees to use its enforcement mechanisms to collect a debt. This means that the domestic court may have to consider relevant factors so as to ensure that the foreign judgments do not disturb the structure and integrity of the Canadian legal system and do not conflict with domestic law (*Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at par. 13-18).

[12] In *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, at paragraph 43, the Supreme Court of Canada stated: "Canadian law recognizes that the purpose of an action to recognize and enforce a foreign judgment is to allow a pre-existing obligation to be fulfilled; that is, to ensure that a debt already owed by the defendant is paid." At paragraph 48, the Supreme Court of Canada added: "The enforcing court has no interest in adjudicating the original rights of the parties. Rather, the court merely seeks to assist in the enforcement of what has already been decided in another forum." This reflects the principle of comity, which is grounded on the concepts of order and fairness. At paragraph 54, the Supreme Court went on to say: ". . . in recognition and enforcement proceedings, order and fairness are protected by ensuring that a real and substantial connection existed between the foreign court and the underlying dispute. If such a connection did not exist, or if the defendant was not present in or did not attorn to the foreign jurisdiction, the resulting judgment will not be recognized and enforced in Canada."

[13] Thus, relying on comity is a balancing exercise. It requires a careful review of the relief ordered by the foreign court. "This review ensures that the Canadian court does not extend judicial assistance if the Canadian justice system would be used in a manner not available in strictly domestic litigation." (*Pro Swing*, *supra*, par. 30)

[14] In Canada, rectification orders requested by the parties to a transaction in order to rectify the transaction following unforeseen tax consequences are not automatically granted. Basically, it is open to the courts to intervene to find that the amendments made by the parties to the acts at issue are legitimate and necessary (*Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC

65, [2013] 3 S.C.R. 838 at par. 51) (*AES*). However, the judicial recognition of the validity of the amendments made by the parties in the context of tax planning is to be approached cautiously. In *AES*, the Supreme Court of Canada stated at paragraph 54: "Taxpayers should not view this recognition of the primacy of the parties' internal will – or common intention – as an invitation to engage in bold tax planning on the assumption that it will always be possible for them to redo their contracts retroactively should that planning fail. A taxpayer's intention to reduce his or her tax liability would not on its own constitute the object of an obligation within the meaning of art. 1373 *C.C.Q.*, since it would not be sufficiently determinate or determinable."

[15] In *Canada (Attorney General) v. Groupe Jean Coutu (PJC) inc.*, 2015 QCCA 838 (leave to appeal to the Supreme Court of Canada granted on November 19, 2015), the Quebec Court of Appeal analyzed the *AES* decision and sated the following:

> [28] Accordingly, in my view, the judgment of the Supreme Court in *AES & Riopel* is authority for the proposition that as between related parties, who choose to effect a legitimate corporate transaction for the purpose of avoiding, deferring or minimizing tax and who commit an error in giving effect to such transaction (for example, by miscalculating the ACB, by the timing of certain corporate steps or the attributions of a new class of shares) may correct that error to achieve the tax consequence originally and specifically intended and agreed upon.
>
> [29] However, LeBel J. did not set aside all the previous case law in tax matters, to the effect that the parties cannot rewrite history and change their transactions because of unintended tax consequences. Those principles continue to apply.
>
> [30] Even though the tax authorities have no acquired rights in civil law, LeBel J., in my view, does not sanction a general license to travel back through time with the benefit of hindsight to reverse or correct unintended tax consequences of commercial dealings. LeBel J. merely approved the parties restoring their agreement to what it should have been in circumstances where there was no mistake in the transaction itself but rather a mistake in the way the transaction had been expressed in writing.
>
> [31] Tax liability is based on what happened and not on what a party in retrospect would have rather done.
>
> . . .

> [38] . . .The general intent of the Respondents that their transaction be "tax neutral" is not sufficiently determinate, in the words of Justice LeBel, to serve as the basis of a modified agreement which a court should recognize with retroactive effect to cancel unintended tax consequences. . . .

[16] The *AES* case was governed by Quebec civil law and the Supreme Court of Canada did not find it appropriate in that case to reconsider the common law remedy of rectification, which appears to have been given a broader scope of application in tax cases.

[17] The Supreme Court also stated in *AES* that "[t]he revenue agencies were impleaded, as they had to be, in accordance with art. 5 *C.C.P* and the fundamental rules of procedure." (par. 51)

[18] Considering all of the above, it may well be that a Quebec court would enforce the Foreign Judgments as between the parties concerned in those judgments (i.e., as between Canfornav Inc. and the appellant and as between Canfornav Limited and the appellant), as the court's role would then be limited to facilitating the execution of the obligation validated by the Foreign Judgments on the consent of both parties (for example, if Canfornav Inc. or Canfornav Limited were asking the appellant to repay the amount of the debt initially declared as a dividend).

[19] The situation is different, however, when only one of the parties at which a foreign order is directed is asking the court to enforce that order for the purposes of cancelling unintended tax consequences. As seen above, the Canadian case law in the matter of rectification of transactions for tax purposes is not linear and the courts will follow it or not on a case-by-case basis. For instance, in *AES*, the Supreme Court had to decide whether the parties' juridical acts which led to the notices of assessment were consistent with their true common intention. This raised an interpretation issue. In *AES*, the Supreme Court approved a correction to allow the parties to avoid a tax consequence that their transactions were originally intended to avoid. On the other hand, in *Groupe Jean Coutu*, the Quebec Court of Appeal found that the commercial transaction initially entered into achieved the intended purpose of neutralizing the effect of exchange fluctuations. The Court accordingly refused to rectify the transaction, doing so on the basis that the general intent of the taxpayer that the transaction be "tax neutral" was not sufficiently

determinate to serve as the basis of a modified agreement that a court should recognize with retroactive effect to cancel unintended tax consequences.

[20] In the present case, the appellant argues that the Foreign Judgments were requested because the intent had been, from the beginning, to take the profits out of the Barbados Subco and the Cyprus Subco on a tax-free basis, in order to comply with the international shipping rules set out in subsection 250(6) of the ITA.

[21] In my view, the approach that must be taken in the present case is the same as that which would be applicable for non-money foreign judgments. This means that, as stated in *Pro Swing*, *supra*, the domestic court may have to consider relevant factors so as to ensure that the Foreign Judgments do not disturb the structure and integrity of the Canadian legal system and do not conflict with domestic law. It is not merely a matter of facilitating the execution of a debt or an obligation that was adjudicated upon by the foreign tribunal. A careful review of the Foreign Judgments is required in order to ensure that the Canadian court does not extend judicial assistance if the Canadian justice system would be used in a manner not available in strictly domestic litigation.

[22] That is why I conclude that the Foreign Judgments would have to be homologated by a competent tribunal in the province of Quebec in order to bind the respondent. This is all the more true since the respondent never had a chance to intervene to present her own arguments or to test the stated common intentions of the parties at the time the transfers of money occurred (or to ensure that all necessary information and all the tax ramifications were squarely before the foreign courts), especially given that the context was one in which the Foreign Judgments were issued after the Canada Revenue Agency had sent a notice of proposed reassessment (in the case of the Barbados application) and notices of reassessment (in the case of the Cyprus application) with respect to taxing the dividend income that was intended to be distributed tax-free (see *AES*, *supra*, at par. 51; *Dale v. Canada*, [1997] 3 F.C. 235, at par. 50, [1997] F.C.J. No. 476 (QL), at par. 17; *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, at par. 62; *Aim Funds Management Inc. v. Aim Trimark Corporate Class Inc.*, [2009] O.J. No. 2408 (QL) (Ontario Superior Court of Justice), at par. 22; *A c. B*, 2013 QCCS 575, at par. 42-43 and 50).

[23] Unfortunately, this Court does not have jurisdiction to grant an equitable remedy of rectification. Nevertheless, it is still open to the appellant to rely on the

Foreign Judgments in presenting its evidence before this Court at trial, and it will be up to the presiding judge to determine the weight to be given to the Foreign Judgments when ruling on the correctness or incorrectness of the assessments being appealed.

[24] For all these reasons, I answer in the negative to the question raised by the parties in this section 58 motion, and I conclude that the respondent is not bound by the Foreign Judgments and is not precluded from taking the position that the appellant received dividends rather than amounts in the form of loans and other indebtedness during the period at issue.

[25] The respondent is entitled to her costs on the motion.

Signed at Ottawa, Canada, this 12th day of February 2016.

"Lucie Lamarre"

Lamarre A.C.J.

2012-4038(IT)G

TAX COURT OF CANADA

BETWEEN:

CANADIAN FOREST NAVIGATION CO. LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

STATEMENT OF AGREED FACTS

(R. 58 Question of Law Application)

The parties to this rule 58 motion admit, unless otherwise stated, and for the purposes of this motion only, the truth of the facts set out in this Statement of Agreed Facts and the authenticity of the documents cited herein, within the meaning of section 129 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (the "***Rules***").

Canadian Forest Navigation Co. Limited

1. Canadian Forest Navigation Co. Limited ("**CFN**") is, and was during the "Relevant Period",[1] a Canadian-controlled private corporation, as defined in subsection 125(7) of the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) (the "***Act***"), incorporated on April 14, 1976.

2. During the Relevant Period, CFN was a resident of Canada and its head office and place of business was located in Montreal, Quebec.

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[1] The " Relevant Period" is the period from April 1, 2004 to December 31, 2006 that covers the subject taxation years ending March 31, 2005, March 31, 2006 and December 31, 2006.

3. Prior to 2000, CFN's principal business was the operation of ships used primarily in transporting goods in international traffic. During the Relevant Period, it was not.

4. During the Relevant Period, the shareholders of CFN and their shareholdings were as follows:

SHAREHOLDERS	SHAREHOLDINGS	
	Class "A" common shares	Class "E" preference shares
Knud Jensen Holdings Inc.	45	500,000
J. Lorenzen Holdings Inc.	25	250,000
Mihag Holding Ltd.	25	250,000
3032485 Canada Inc.	5	----

5. During the Relevant Period, all of CFN's shareholders were Canadian-controlled private corporations resident in Canada:

   a. Knud Jensen Holdings Inc.'s sole shareholder was Knud Jensen ("Mr. Jensen");

   b. J. Lorenzen Holdings Inc.'s sole shareholder was Jurgen Lorenzen ("Mr. Lorenzen");

   c. Mihag Holding Ltd.'s sole shareholder was Michael Hagn ("Mr. Hagn"); and

   d. 3032485 Canada Inc.'s sole shareholder was René Van Den Ende ("Mr. Van Den Ende").

Barbados Subco

6. Canfornav Inc. ("**Barbados Subco**") was incorporated in 2004 under the laws of Barbados and was during the Relevant Period an International Business Corporation under the *International Business Companies Act*.

7. During the Relevant Period, Barbados Subco was a foreign affiliate of CFN. CFN was the sole shareholder of Barbados Subco.

8. During the Relevant Period, the directors and officers of Barbados Subco were Messrs. Hagn, Jensen and Lorenzen, all of whom were resident in Canada.

9. Since its incorporation, Barbados Subco's principal business was the operation of ships used primarily in transporting goods in international traffic.

10. During the Relevant Period, all or substantially all of Barbados Subco's gross revenues consisted of revenues from the operation of ships in transporting goods in international traffic.

11. On August 18, 2005, by Resolution of its Board of Directors, Barbados Subco declared dividends in the amount of $25,000,000 USD payable to CFN.[2]

12. On or about August 18, 2005, Barbados Subco paid dividends in the amount of $25,000,000 USD to CFN.

13. On January 1, 2006, by Resolution of its Board of Directors, Barbados Subco declared dividends in the amount of $110,263,855 CDN payable to CFN.[3]

14. On or about January 1, 2006, Barbados Subco paid dividends in the amount of $15,280,307.86 USD to CFN and $80,114,028.14 USD was paid or distributed to CFN by way of transferring marketable securities owned by Barbados Subco.

15. On December 13, 2006, by Resolution of its Board of Directors, Barbados Subco declared dividends in the amount of $10,000,000 USD payable to CFN.[4]

16. On or about December 13, 2006, Barbados Subco paid dividends in the amount of $10,000,000 USD to CFN.

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[2] Resolution of Barbados Subco's Board of Directors adopted on August 18, 2005, Tab 1, Joint Book of Documents.

[3] Resolution of Barbados Subco's Board of Directors adopted on January 1, 2006, Tab 2, Joint Book of Documents.

[4] Resolution of Barbados Subco's Board of Directors adopted on December 13, 2006, Tab 3, Joint Book of Documents.

17. During the taxation years ending March 31, 2006 and December 31, 2006, CFN received amounts totalling $151,589,355 CDN from Barbados Subco (i.e. the total of all the amounts paid, reflected in Canadian currency, by Barbados Subco to CFN as set out in paragraphs 12, 14 and 16 above).

18. In computing income for its taxation year ended March 31, 2006, CFN included the amount of $140,021,355 CDN, paid and received from Barbados Subco (i.e. the total of the amounts paid, reflected in Canadian currency, by Barbados Subco to CFN as set out in paragraphs 12 and 14 above), as dividends and claimed a corresponding deduction pursuant to paragraph 113(1)(a) of the *Act*.

19. In computing income tax for its taxation year ended December 31, 2006, CFN included the amount of $11,568,000 CDN, paid and received from Barbados Subco (i.e. the amount paid, reflected in Canadian currency, by Barbados Subco to CFN as set out in paragraph 16 above), as dividends and claimed a corresponding deduction pursuant to paragraph 113(1)(a) of the *Act*.

Cyprus Subco

20. Canfornav Limited (**"Cyprus Subco"**) was incorporated on February 25, 2000 as a limited liability company under the laws of Cyprus.

21. During the Relevant Period, CFN was a foreign affiliate of CFN. Until January 31, 2005, CFN was the sole shareholder of Cyprus Subco. As of January 31, 2005, CFN indirectly owned all of the Cyprus Subco shares through Barbados Subco.

22. During the Relevant Period, the directors and officers of Cyprus Subco were Messrs. Hagn, Jensen and Lorenzen, all of whom were resident in Canada.

23. During the Relevant Period, Cyprus Subco's principal business was the operation of ships used primarily in transporting goods in international traffic.

24. During the Relevant Period, all or substantially all of Cyprus Subco's gross revenues consisted of revenues from the operation of ships in transporting goods in international traffic.

25. On April 5, 2004, by Resolution of its Board of Directors, Cyprus Subco declared dividends in the amount of $1,000,000 USD payable to CFN.[5]

26. On or about April 5, 2004, Cyprus Subco paid dividends in the amount of $1,000,000 USD to CFN.

27. On June 15, 2004, by Resolution of its Board of Directors, Cyprus Subco declared dividends in the amount of $5,000,000 USD payable to CFN.[6]

28. On or about June 15, 2004, Cyprus Subco paid dividends in the amount of $5,000,000 USD to CFN.

29. On August 10, 2004, by Resolution of its Board of Directors, Cyprus Subco declared dividends in the amount of $370,000 USD payable to CFN.[7]

30. On or about August 10, 2004, Cyprus Subco paid dividends in the amount of $370,000 USD to CFN.

31. On January 31, 2005, by Resolution of its Board of Directors, Cyprus Subco declared dividends in the amount of $75,500,000 USD payable to CFN.[8]

32. On or about January 31, 2005, Cyprus Subco paid dividends in the amount of $75,500,000 USD to CFN.

33. During the 2004 and 2005 years, CFN received amounts totalling $102,326,866 CDN from Cyprus Subco (i.e. the total of the amounts paid, reflected in Canadian currency, by Cyprus Subco to CFN as set out in paragraphs 26, 28, 30 and 32 above).

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[5] Resolution of Cyprus Subco's Board of Directors adopted on April 5, 2004, Tab 4, Joint Book of Documents.

[6] Resolution of Cyprus Subco's Board of Directors adopted on June 15, 2004, Tab 5, Joint Book of Documents.

[7] Resolution of Cyprus Subco's Board of Directors adopted on August 10, 2004, Tab 6, Joint Book of Documents.

[8] Resolution of Cyprus Subco's Board of Directors adopted on January 31, 2005, Tab 7, Joint Book of Documents.

34. In computing income for its taxation year ended March 31, 2005, CFN included the amount of $102,326,866 CDN paid and received from Cyprus Subco, as dividends and claimed a corresponding deduction pursuant to paragraph 113(1)(a) of the *Act*.

Foreign Rectification Orders

35. On June 22, 2010, Barbados Subco and CFN filed an Application for Rectification in the Supreme Court of Barbados in the High Court of Justice (the "**Barbados Application**") requesting that the dividends paid from Barbados Subco to CFN in 2005 and 2006 be retroactively "rectified and replaced, *nunc pro tunc*, by resolutions" resulting instead in indebtedness by CFN in favour of Barbados Subco. The amount of such indebtedness was to equal the amount of the dividends.[9]

36. The Barbados Application was heard in the Supreme Court of Barbados in the High Court of Justice on August 5, 2010.

37. CFN did not give notice of the Barbados Application to the Canada Revenue Agency (the "**Agency**").

38. The Supreme Court of Barbados granted the Barbados Application by judgment dated August 13, 2010 without the Agency's participation.[10]

39. CFN advised the Agency of the August 13, 2010 Barbados judgment on September 16, 2010,[11] subsequent to the Agency's reassessment proposal letter proposing to deny the deductions claimed by CFN pursuant to subsection 113(1)(a) of the *Act* as set out in paragraphs 18 and 19 above.[12]

40. In early 2011, Cyprus Subco and CFN filed an Application for Rectification in the District Court of Nicosia, Cyprus (the "**Cyprus Application**") requesting that the

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[9] Barbados Application, Tab 8, Joint Book of Documents.

[10] Judgment of the Supreme Court of Barbados dated August 13, 2010, Tab 9, Joint Book of Documents.

[11] Letter from CFN to CRA dated September 16, 2010 enclosing the August 14, 2010 judgment, Tab 10, Joint Book of Documents.

[12] Reassessment proposal letter dated June 23, 2010, Tab 11, Joint Book of Documents.

dividends paid from Cyprus Subco to CFN in 2004 and 2005 be retroactively "rectified and replaced, *nunc pro tunc*, by resolutions" resulting instead in indebtedness by CFN in favour of Cyprus Subco. The amount of the indebtedness was to equal the amount of the dividends.[13]

41. The Cyprus Application was heard in the District Court of Nicosia, Cyprus on March 28, 2011.

42. CFN did not give notice to the Agency of the Cyprus Application.

43. The District Court of Nicosia, Cyprus granted the Cyprus Application by judgment dated March 28, 2011 without the Agency's participation.[14]

44. CFN advised the Agency of the March 28, 2011 Cyprus judgment on October 26, 2011, subsequent to the issuance of the "Reassessments" (as defined below) denying the deductions claimed by CFN pursuant to subsection 113(1)(a) of the *Act* as set out in paragraph 34 above.

Reassessments, Objections and Appeal

45. The audit of the Relevant Period was commenced in early 2008.

46. By notices dated December 29, 2010, the Minister of National Revenue (the "**Minister**") reassessed CFN's taxation years ended March 31, 2005, March 31, 2006 and December 31, 2006 to disallow the deductions claimed by CFN pursuant to subsection 113(1)(a) of the *Act* as set out in paragraphs 18, 19 and 34 above.[15]

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[13] Cyprus Application, Tab 12, Joint Book of Documents.

[14] Judgment of the District Court of Nicosia, Cyprus dated March 28, 2011, Tab 13, Joint Book of Documents.

[15] Corporate Reassessments dated December 29, 2010 for taxation years ended March 31, 2005, March 31, 2006 and December 31, 2006, Tab 14, Joint Book of Documents.

47. On March 28, 2011, CFN filed notices of objection against the December 29, 2010 reassessments on the basis that the Minister erred in treating the amounts received from Barbados Subco and Cyprus Subco as dividends.[16]

48. By notices dated July 29, 2011, the Minister reassessed CFN's taxation years ended March 31, 2006 and December 31, 2006 to make further adjustments but did not reverse the disallowed deductions claimed by CFN pursuant to subsection 113(1)(a) of the *Act*.[17]

49. On October 25, 2011, CFN filed notices of objection against the July 29, 2011 reassessments.[18]

50. On October 2, 2012, CFN filed a Notice of Appeal of the reassessment dated December 29, 2010 for its taxation year ended March 31, 2005, and the reassessments dated July 29, 2011 for its taxation years ended March 31, 2006 and December 31, 2006 (the "Reassessments"). Among other things, CFN appeals the Reassessments on the basis that the Minister erred in treating the amounts received from Barbados Subco and Cyprus Subco as dividends.

DATED at the City of Toronto, Ontario, on this 30th day of ~~February~~ March, 2015.

William F. Pentney Q.C.
Deputy Attorney General of Canada
Solicitor for the Respondent

Per: Henry A. Gluch / Rita Araujo
Department of Justice
Counsel for the Respondent

[16] Notices of Objection dated March 28, 2011, Tab 15, Joint Book of Documents.

[17] Corporate Reassessments dated July 29, 2011 for taxation years ended March 31, 2006 and December 31, 2006, Tab 16, Joint Book of Documents.

[18] Notices of Objection dated October 25, 2011, Tab 17. Joint Book of Documents.

DATED at the City of Montréal, Québec, on this 3 day of March, 2015.

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PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	September 30, 2015
REASONS FOR DETERMINATION BY:	The Hon. Associate Chief Justice Lucie Lamarre
DATE OF DETERMINATION:	February 12, 2016

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