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FEDERAL COURT OF APPEAL

BETWEEN:

HUSKY ENERGY INC.

Appellant

and

HIS MAJESTY THE KING

Respondent

NOTICE OF APPEAL

(under subsection 27(1.1) of the Federal Courts Act)

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Appellant.
The relief claimed by the Appellant appears below.

THIS APPEAL will be heard by the Federal Court of Appeal at a time and place to be fixed by the Judicial Administrator. Unless the court directs otherwise, the place of hearing will be as requested by the Appellant. The Appellant requests that this appeal be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the Appellant's solicitor or, if the Appellant is self-represented, on the Appellant, **WITHIN 10 DAYS** after served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the judgment appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-996-6795) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

January 11, 2024

Issued by:

(Registry Officer)

Address of local office: Federal Court of Appeal
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TO: **ATTORNEY GENERAL OF CANADA**

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APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the judgment (Court File No. 2017-1252(IT)G) of the Honourable Justice John R. Owen of the Tax Court of Canada dated December 13, 2023 by which its appeal from the assessment made under Part XIII of the *Income Tax Act* (the “**ITA**”) on January 15, 2015 (the “**Assessment**”), was dismissed with costs (the “**Part XIII Appeal**”). More precisely, the Part XIII Appeal related to the determination of the applicable withholding tax rate on dividends paid by the Appellant to Hutchison Whampoa Europe Investments S.à.r.l. and L.F. Luxembourg S.à.r.l. (together the “**Non-Resident Corporations**”) on October 1, 2003 (the “**Dividends**”).

THE APPELLANT ASKS that:

1. The appeal be allowed with costs in this Court and in the Tax Court of Canada;
2. The judgment of the Tax Court of Canada be set aside and an order be granted allowing the Part XIII Appeal in its entirety;
3. The Assessment be vacated; and
4. Such further and other relief as counsel may request and which this Court deems appropriate.

THE GROUNDS OF APPEAL are as follows:

1. The Honourable Tax Court Judge erred in law and in fact in his interpretation and application of subsections 212(2), 215(1), and 215(6) of the ITA, subsection 10(6) of the *Income Tax Application Rules* (the “**ITARs**”), and Article 10(2) of the *Convention between the Government of Canada and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (the “**Luxembourg Convention**”), including by determining that the Non-Resident Corporations were not the beneficial owners of the Dividends.
2. The Honourable Tax Court Judge erred in law in his interpretation and application of the term “beneficial owner” by, *inter alia*:
 - a. Failing to apply, or in the alternative, misapplying the long-standing approach developed in *Prévost Car Inc. v. R.*, 2008 TCC 231 (affirmed by this Court in 2009 FCA 57), to the determination of the beneficial ownership of the Dividends, including based on an analysis of the normal incidents of ownership, i.e. (i) possession, (ii) use, (iii) risk and (iv) control;
 - b. Failing to characterize the transactions based on their legal form; and

- c. Determining the beneficial ownership of the Dividends based on the economic outcome of the transactions.
3. The Honourable Tax Court Judge made palpable and overriding errors when making findings of fact in respect of his conclusion that the Non-Resident Corporations were not, in the circumstances, the beneficial owners of the Dividends, including, *inter alia*:
 - a. Concluding that the Non-Resident Corporations did not have the use and enjoyment of the Dividends in “any real sense”; and
 - b. Concluding that under the securities lending arrangements, the profits and the risks were not borne by the Non-Resident Corporations.
4. In the alternative, the Honourable Tax Court Judge erred in law and in fact and exceeded his jurisdiction by upholding the Assessment, made pursuant to subsection 215(6) of the ITA, on the basis that it was made in respect of taxes on behalf of the Non-Resident Corporations, when the Assessment was not made by the Minister in respect of the Non-Resident Corporations.
5. In the alternative, the Honourable Tax Court Judge erred in law in his interpretation and application of subsections 212(2), 215(1) and 215(6) of the ITA and subsection 10(6) of the ITARs, and by failing to apply Article X of the *Agreement Between Canada and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (the “**Barbados Convention**”), in respect of his conclusion that if the Non-Resident Corporations were not the beneficial owners of the Dividends (which is expressly denied), the amount of tax under Part XIII that the Appellant was required to withhold and remit in respect of the Dividends was 25% of the Dividends.

THE APPELLANT RELIES on:

1. The pleadings and proceedings in the Part XIII Appeal below;
2. The *Federal Courts Act*;
3. The *Federal Courts Rules*;
4. The ITA;
5. The ITARs;
6. The Luxembourg Convention;
7. The Barbados Convention;

8. The *Model Tax Convention on Income and on Capital of the Organisation for Economic Co-operation and Development*; and
9. Such further and other grounds as the Appellant may advise and this Court may permit.

DATED at Montreal, Quebec, the 11th day of January, 2024.



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