Docket: 2020-1513(IT)G

BETWEEN:

OLDCASTLE BUILDING PRODUCTS CANADA INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion heard on April 17, 2025, at Toronto, Ontario

Before: The Honourable Justice John C. Yuan

Appearances:

Counsel for the Appellant:	Geneviève Léveillé Rémi Danylo Steven Huryn
Counsel for the Respondent:	Dany Leduc Sara Jahanbakhsh, Caroline Berthelet

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ORDER

The Appellant's motion for an order allowing an amended pleading to be filed pursuant to section 54 of the *Tax Court of Canada Rules (General Procedure)* is allowed.

The Respondent's amended pleading shall be titled "Second Amended Reply" and contain the content of the proposed Reamended Reply but will also include the Respondent's concession that the timing of the $52 million equity injection occurred at the start of 2013 (which requires a modification to the content of paragraph 27.1(e) and possibly paragraphs 29(c) and 50 of the proposed Reamended Reply).

The Appellant shall have until August 22, 2025 to file and serve the Second Amended Reply.

Should the Appellant wish to file an Answer to the Second Amended Reply, the Appellant shall have until 30 days after service of the Second Amended Reply to file and serve its Answer in response to the amendments reflected in the Second Amended Reply.

Costs will be in the cause.

Signed this 6th day of August 2025.

"John C. Yuan"

Yuan J.

Citation: 2025 TCC 107
Date: 20250806
Docket: 2020-1513(IT)G

BETWEEN:

OLDCASTLE BUILDING PRODUCTS CANADA INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Yuan J.

[1] This is a motion made by the Respondent for an order pursuant to section 54 of the *Tax Court of Canada Rules (General Procedure)* allowing an amended pleading to be filed.

BACKGROUND

Pleadings History

[2] On April 27, 2020, the present appeal was filed as one that joined (i) an appeal of an assessment by the Minister of National Revenue for failure to withhold and remit non-resident tax under Part XIII of the *Income Tax Act* (**"Act"**) in the 2012 calendar year by notice of assessment dated March 14, 2018 (**"Part XIII Assessment"**), and (ii) an appeal of a determination made by the Minister pursuant to the general anti-avoidance rule (under subsections 245(8) and 152(1.11) of the Act) concerning the paid-up capital of the Appellant's common shares as at September 12, 2012 by notice of determination dated March 28, 2018 (**"GAAR Determination"**).

[3] The Part XIII Assessment and the GAAR Determination were assessing actions that the Minister took after applying the general anti-avoidance rule to a

series of transactions that occurred between July 28, 2011 and September 13, 2012 (**"Series of Transactions"**).

[4] On March 2, 2021, the Appellant expanded the scope of the appeal by filing an amended notice of appeal to join appeals of reassessments issued by the Minister under Part I of the Act for the 2012 taxation year, by notice of reassessment dated July 24, 2020, and the 2013 and 2014 taxation years, by notices of reassessment dated October 15, 2020 (collectively, **"Part I Reassessments"**). The Part I Reassessments disallowed the Appellant's deduction of interest expense on debt obligations that the Appellant inherited or incurred concurrently with the Series of Transactions.

[5] On May 10, 2021, the Respondent filed its Reply.

[6] On August 23, 2022, the Respondent filed an Amended Reply with the consent of the Appellant to make two minor amendments that are not relevant to the matters at issue in this motion.

The Part I Reassessments – Interest Deductibility

[7] As pled in the Amended Reply, the Part I Reassessments reflected an increase to the Appellant's income as a consequence of the Minister's disallowance of interest expense that the Minister regarded as being attributable to borrowed money that was not used by the Appellant for the purpose of earning income from property or a business for purposes of paragraph 20(1)(c) of the Act.

[8] More particularly, the Minister issued the Part I Reassessment on the basis that $300,000,000 of the Appellant's outstanding borrowings during the 2012, 2013, and 2014 taxation years was used for the purpose of funding a $300,000,000 return of capital on the Appellant's common shares on September 13, 2012, which was an ineligible purpose in the Appellant's circumstances, according to the Minister.

[9] In 2022, the Appellant conducted examination for discovery of the Respondent's representative by written questions and, at the time, the Respondent's position on interest deductibility was the one expressed in the Amended Reply.

[10] By January 2023, the parties had completed the discovery steps in the Court-ordered litigation timetable for the appeal.

RESPONDENT'S PROPOSED AMENDMENT TO THE AMENDED REPLY

[11] Sometime in the first half of 2024, the Respondent sought the Appellant's consent to further amend its Amended Reply to plead the thin capitalization rules in subsections 18(4) and (5) of the Act as an alternative basis for supporting the disallowance of interest expense under the Part I Reassessments (**"Thin Cap Amendments"**).

[12] Having failed to secure the Appellant's consent to permit the filing of the further amended pleading, on July 31, 2024, the Respondent filed its notice of motion for leave from this Court to do so. The amended pleading that the Respondent seeks leave from this Court to file is the Reamended Reply attached to these reasons as Appendix A.

[13] While the Thin Cap Amendments do identify the thin capitalization rules as an alternative legal basis for disallowing the Appellant's interest expense, they also identify the Minister's reliance on the general anti-avoidance rule to adjust the paid-up capital in the Appellant's common shares to nil pursuant to the GAAR Determination as part of the factual context to which the Minister would apply the thin capitalization rules in the Appellant's circumstances.[1] Consequently, the Respondent's alternative argument for disallowing interest expense does not just rely on the thin capitalization rules in the Act but also the application of the general anti-avoidance rule to adjust the tax attributes of the Appellant's common shares for purposes of the numerical computations required under the thin capitalization rules.

PARTIES' POSITIONS

[1] See the first bullet point of paragraph 49 of the proposed Reamended Reply.

[14] The Respondent's position in support of its motion is that (i) subsection 152(9) of the Act allows the Minster to rely on the thin capitalization rules as an alternative argument or basis to support the denial of interest expense on $300,000,000 of borrowings that is already in issue in the appeal, and (ii) the applicable jurisprudence allows a party to amend its pleadings at any stage of proceedings if it (a) assists the tribunal in determining the real questions in controversy, (b) does not result in injustice to the other party not compensable by costs, and (c) serves the interest of justice.[2]

[15] The Appellant's position in resisting the proposed amendment is that the Thin Cap Amendments should not be allowed because (i) notwithstanding subsection 152(9) of the Act and the permissive tenor of the jurisprudence towards allowing a party to amend its pleadings at any stage of proceedings, the relevant jurisprudence prohibits the Minister from amending its pleadings to advance the positions reflected in the Thin Cap Amendments, and (ii) the Appellant would suffer prejudice that would not be compensable by costs.

DISCUSSION

Interest Deductibility and The Thin Capitalization Rules

[16] Where a taxpayer has borrowed money while carrying on a business, interest paid on the borrowing is deductible in computing income pursuant to paragraph 20(1)(c) of the Act, provided that the requirements of that provision are met. Among the requirements in paragraph 20(1)(c) is that the borrowing be used for the purpose of earning income from a business or property. As noted earlier, the Amended Reply pleads the Respondent's position that the Appellant's use of $300,000,000 of borrowed money on September 13, 2012 was for an ineligible purpose.

[17] Section 18 of the Act enumerates various limitations on the claiming of deductions when computing income from a business or property, including limitations on the deduction of interest expense pursuant to the thin capitalization rules in subsections 18(4) to (8).

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[2] The Respondent relies on the Federal Court of Appeal decisions in *Canderel Ltd.*, [1994] 1 FC 3, and *Polarsat Inc.*, 2023 FCA 247.

[18] The thin capitalization rules are designed to address the fact that, when a non-resident shareholder capitalizes a Canadian subsidiary with both equity and interest-bearing debt, there is significantly less combined Canadian Part I and Part XIII income tax imposed on corporate earnings that are distributed to the non-resident as interest on the shareholder debt when compared to an after-tax distribution of those earnings as a dividend on the non-resident's shares.[3] To discourage a non-resident shareholder from capitalizing a Canadian corporation with interest-bearing debt that exceeds the amount that Parliament considers to be reasonable in relation to the equity that the non-resident shareholder directly or indirectly holds in the Canadian corporation, the thin capitalization rules operate to deny the Canadian corporation's deduction for interest expense on any portion of its aggregate debt to the non-resident shareholder (or non-resident persons who do not deal at arm's length with the non-resident shareholder) that exceeds the permitted debt-to-equity ratio under the thin capitalization rules. Currently, the permitted debt-to-equity ratio is 1.5 to 1 (*i.e.*, 60% debt and 40% equity).

[19] Subsection 18(4) of the Act contains the main charging provision for disallowing interest expense under the thin capitalization rules. As noted above, a taxpayer's interest expense on debt to certain non-residents is disallowed to the extent such interest is attributable to a portion of the debt that exceeds 1.5 times shareholder equity in the taxpayer corporation for the year. However, subsections 18(4) to (8) contain various definitions and formulae that need to be applied and evaluated to determine whether, and the extent to which, the thin capitalization rules operate to deny interest expense in any given taxpayer situation.

Is the Minister's Reliance on the Thin Capitalization Rules a Permissible Alternative Basis or Argument under Subsection 152(9) of the Act?

[20] Subsection 152(9) of the Act provides as follows:

> (9) At any time after the normal reassessment period, the Minister may advance an alternative basis or argument – including that all or any portion of the income to which an amount relates was from a different source – in support of all or any portion of the total amount determined on assessment to be payable or remittable by a taxpayer under this Act unless, on an appeal under this Act

[3] The thin capitalization rules were extended in 2012 and 2013 to apply to Canadian partnerships and Canadian-resident trusts, respectively.

> (a) there is relevant evidence that the taxpayer is no longer able to adduce without leave of the court; and
>
> (b) it is not appropriate in the circumstances for the court to consider that the evidence be adduced.

[21] This version of subsection 152(9) came into force December 15, 2016 and applies to appeals that were instituted after the coming-into-force date, such as the present appeal.

[22] The Department of Finance Technical Notes issued concurrently with the release of the current version of subsection 152(9)[4] indicate that the 2016 amendments were made to address a then recent decision of the Federal Court of Appeal in *Last*[5] and ensure that, on a court appeal of the Minister's reassessment under the Act, the Minister is entitled to support the reassessment using any new bases or arguments, provided that the total amount assessed as being payable by the taxpayer under the new basis or argument does not increase.

[23] In *Last*, the taxpayer was appealing both income tax and GST/HST reassessments in connection with his activities over several years. On the income tax side, the taxpayer was appealing the Minister's reassessments to include additional income from (i) the operation of a car-related business, (ii) short-term rental of his personal residence property, and (iii) the disposition of shares of a technology company. The Minister had assessed the share disposition on the basis that the gain was a capital gain but the Tax Court found that the gain arose from the taxpayer's business of dealing in those shares; the taxpayer was seeking to have the gain treated as business income to facilitate the deduction of certain items as expenses incurred in the course of operating that business.

[24] The *Last* case is a meaningful one for the interpretation of the previous version of subsection 152(9) because of how the Tax Court and the Federal Court of Appeal each addressed the Minister's position that, in light of the Tax Court's finding that the taxpayer was carrying on a business of trading in the company shares, the portion of the gain that was previously regarded as the non-taxable portion of a capital gain

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[4] Department of Finance Technical Notes for Amendments to subsection 152(9) of the *Income Tax Act* (October 21, 2016).

[5] 2014 FCA 129.

should instead be treated as additional business income for the year. In taking this position, the Minister was not seeking to increase the total tax payable in the reassessment under appeal but was instead looking to offset the additional deductions that the Tax Court was planning to allow in connection with the taxpayer's car business and the short-term rental of his personal residence.

[25] The wording of subsection 152(9) applicable to the *Last* case was the same as it was when the provision was introduced into the Act in 1999, as follows:

> (9) The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act
>
> (a) there is relevant evidence that the taxpayer is no longer able to adduce without leave of the court; and
>
> (b) it is not appropriate in the circumstances for the court to consider that the evidence be adduced.

[26] The Tax Court in *Last* found that, notwithstanding the language in former subsection 152(9) of the Act, the Federal Court of Appeal decisions in *Pedwell*[6] and *Loewen*[7] applied to prevent the Tax Court from ordering the Minister to reassess to increase the taxpayer's income attributable to the share disposition. The Federal Court of Appeal upheld the Tax Court's conclusion on the point, finding that, although the issue in an appeal of a reassessment is the correctness of the amount assessed, the jurisprudence had also established that a taxpayer cannot be liable for more tax than the amount assessed in the reassessment under appeal and that the question of whether more tax would result must be evaluated on a source-by-source basis.[8] The Federal Court of Appeal found that, notwithstanding the permissive language in subsection 152(9), the guiding principle is that there can be no increase to the amount of the assessment under the alterative argument and, since the Federal Court of Appeal determined that the question had to be examined on a source-by-source basis, the Minister's alternative argument that the full gain from the share

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6 [2000] 4 FC 616 (FCA).

7 2004 FCA 146.

8 *Supra*, note 5, para. 31.

disposition was business income offended that rule, since that position would have caused the income from dealing in the shares to go from $301,565 to $601,135.

[27] When one compares the current version of subsection 152(9) to that of its predecessor, it becomes readily apparent that the 2016 amendment was intended to legislatively overrule the source-by-source approach applied in the *Last* appeal and give the Minister the ability to rely on subsection 152(9) to advance an alternative argument to support a reassessment, even if the alternative argument pertains to a different source from the one that caused the Minister to issue the reassessment under appeal.

[28] The 2016 amendment introduced two other changes. First, the 2016 amendment changed the wording of the scope of subsection 152(9) from an "alternative argument" to an "alternative basis or argument". The 2016 amendment did not include any guidance for distinguishing between an alternative argument and an alternative basis and this aspect of the amendment is not referenced in the Department of Finance Technical Notes. One can only assume that the Department of Finance was concerned that the phrase "alternative argument" could be (or was being) judicially restricted to new assessing positions that supported an increase of tax in connection with the same set of facts that led the Minister to determine the amount of tax originally assessed. Second, seemingly to underscore that the focus of the Minister's right under subsection 152(9) is in relation to the amount assessed under an assessment, the 2016 amendment replaced "in support of an assessment" with "in support of all or any portion of the total amount determined on an assessment to be payable or remittable by a taxpayer under this Act".

[29] The Technical Notes make it clear to me that, aside from overriding the holding from *Last* that the Minister cannot rely on subsection 152(9) of the Act to make alternative arguments that involve different sources of income, the changes to subsection 152(9) were also made to reflect the government's view that the issue in an appeal of an assessment is the dollar amount assessed, and to allow the Minister to support a reassessment using the broadest range of possible alternative approaches, subject to the express limitations set out in paragraphs 152(9)(a) and (b), provided that the amount payable under the reassessment does not increase.

[30] As previously noted, under the Part I Reassessments, the Minister reassessed the Appellant to disallow interest expense on $300,000,000 of borrowing on the basis that the purpose test in paragraph 20(1)(c) of the Act was not met. It is clear to

me the Respondent's assertion that subsection 18(4) of the Act could also apply to disallow the Appellant's deduction of some or all of that same interest expense is an alternative argument to support that very adjustment.

[31] I find that the Respondent's proposed amendment to the Amended Reply to include the Thin Cap Amendments reflects an alternative basis or argument that is allowed by current subsection 152(9) of the Act, particularly when subsection 152(9) is interpreted with an understanding of how and why that provision was amended in 2016, as discussed above.

[32] Before leaving the discussion under this heading, I want to address the Appellant's submission that, if the full effect of the thin capitalization rules are applied to the entirety (and not just $300,000,000) of the Appellant borrowings in the manner contemplated by the Thin Cap Amendments, the Appellant's deductible interest expense should be reduced beyond the amount disallowed in the Part I reassessment for the 2012 taxation year by a further $753,436.[9] However, in paragraphs 29(c) and 50 of the Respondent's proposed Reamended Reply, the Respondent pleads that it relies on the thin capitalization rules to support only the amount of interest expense that was already disallowed under the Part I reassessments for the 2012 and 2013 taxation years and all but $1,400,000 of the amount that was already disallowed for the 2014 taxation year. Therefore, even though the thin capitalization rules could theoretically apply to increase the amount of interest expense disallowed for the 2012 taxation year from the amount reflected in the Part I reassessment of the Appellant for 2012, the Respondent is not relying on the Thin Cap Amendments to increase the amount of Part I tax that is payable from the amount assessed under any of the Part I Reassessments.

Do the Thin Cap Amendments Reflect an Assessment of Tax for a Different Transaction? ... And Would It Matter If That Was the Case?

[33] A considerable portion of the Appellant's written and oral submissions were directed at trying to demonstrate to the Court that the denial of interest expense on a borrowing on the basis of the thin capitalization rules would be an assessment of a

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9 See paragraph 87 of the Appellant's Written Submissions.

different transaction from the one that was assessed under the Part I Reassessments to disallow interest expense on the Appellant's borrowings.

[34] The Appellant did so because it relies on the Federal Court of Appeal's decision in *TPine Leasing Capital Corporation*,[10] which canvassed the previous jurisprudence of that court concerning the amendment of pleadings by the Minister to raise new arguments and then stated that "[t]his Court has not allowed the Minister to raise a new argument based on a transaction that did not form the basis on which a taxpayer was assessed."[11]

[35] However, while the current version of subsection 152(9) of the Act is the one that applied to the taxpayer's appeal in the *TPine Leasing* case, the Federal Court of Appeal in that case addressed the question of whether the Minister was entitled to amend its pleading on the basis of the pre-2016 version of subsection 152(9). The Federal Court of Appeal's rationale for doing so was, as follows:

> [39] Since there are a number of decisions that address the prior version of subsection 152(9) of the Act, the starting point will be to determine if the proposed amendment to the Minister's reply would have been allowed under the prior version of subsection 152(9) of the Act. If so, then since the amended version of subsection 152(9) does not impose any further restrictions on what alternative argument may be raised, there would be no need to consider what additional argument or basis would be permitted based on the amended version of subsection 152(9) of the Act.

[36] The Federal Court of Appeal thus found that, since the previous version of subsection 152(9) would have allowed the Minister to raise the alternative argument that it was seeking to make through the amendment of its pleading, it did not need to go on to consider what the analysis would have been under the amended version of subsection 152(9) because the 2016 amendments broadened the Minster's rights to rely on alternative basis or argument for assessment.

[37] With respect to the concept from the earlier jurisprudence that an alternative argument would have to reflect the tax consequences from the same transaction as

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10 2024 FCA 83.

11 *Ibid*., at paragraph 85.

the original argument, the Federal Court of Appeal in *TPine Leasing* stated, as follows [underlining added]:

> [90] To what extent the amendments to subsection 152(9) of the Act would allow the Minister to advance an alternative basis or argument will be decided on a case-by-case basis. The principles that the Minister cannot appeal an assessment and the Minister cannot reassess beyond the normal reassessment period are still valid principles that would need to be taken into account in determining what alternative basis or argument the Minister may advance. In interpreting and applying the previous version of the Act, this Court has also limited an alternative argument to the same transaction that is in dispute. It is not clear how the amendments [to subsection 152(9)] would alter this principle.

[38] From the foregoing excerpt, it is clear that the Federal Court of Appeal did not take a position on whether the 2016 amendments to subsection 152(9) overrode the concept that the alternative argument must relate to the same transaction.

[39] I find that the 2016 amendments were effective to override any prior limitation that had developed in the case law about alternative arguments being limited to the same transaction. If, as discussed earlier, Parliament expressly states that the Minister is allowed to construct an alternative argument pursuant to subsection 152(9) based on facts that relate to a entirely different source of income from the one that was the original basis for the assessment, in my view, it is not possible thereafter to maintain an interpretation of subsection 152(9) that requires an alternative argument to be built around the same transaction on which the Minister originally relied to issue the reassessment under appeal.

[40] However, should I be incorrect in finding that the 2016 amendment to subsection 152(9) overrode the requirement from prior case law that the tax under the alternative argument had to be derived from the same transaction that produced the originally assessed tax, I have no difficulty concluding that the transaction that creates the additional Part I tax payable for the Appellant under the argument outlined in the Thin Cap Amendments is the same transaction that produced the additional Part I tax payable under the Part I Reassessments; in each case, the relevant transaction is the outstanding borrowing of $300 million incurred in the course of carrying on a business, which carried with it the legal obligation to pay interest for the use of that borrowed money.

[41] Of course, when one is considering whether interest expense meets the requirements of the purpose test in paragraph 20(1)(c) of the Act, on one hand, and the thin capitalization rules, on the other hand, the set of facts that are relevant for evaluating the requirements in each instance are not the same. For example, among the facts that are relevant to an argument based on the thin capitalization rules are certain tax or tax-related attributes – such as paid-up capital of the Appellant's common shares or the portion of the Appellant's outstanding debts to specified non-residents – that are derived from transactions that are not relevant to the paragraph 20(1)(c) purpose test. But, under both arguments, the transaction that is the subject of the assessment disallowing the interest expense remains the same, which is the borrowing that established the Appellant's obligation to pay the interest expense in the first place.

[42] I understood the Appellant to be arguing that an assessment disallowing interest expense based on the thin capitalization rules involves a different transaction because there are several transactions that must be taken into account when computing the relevant tax attributes for applying the thin capitalization rules and those other transactions were never contemplated by the Minister as part of the examination of the taxpayer's purpose for the borrowing. However, this would be akin to arguing that, where the Minister reassessed a taxpayer to increase the capital gain on the disposition of capital property on the basis of underreported proceeds, a new argument based on the cost for the property being lower than reported would somehow involve the assessment of a different transaction because the transactions that are relevant for establishing the taxpayer's cost for the property were not part of the Minister's process of quantifying the amount of the proceeds from the sale. That would be an untenable argument to make in that situation and the Appellant's assertion that disallowance on interest expense based on the thin capitalization rules involves the assessment of a different transaction in the context of the Part I Reassessments in this motion is equally untenable.

Would Allowing the Thin Cap Amendments Result in Prejudice to the Appellant?

[43] I accept that the Appellant has the onus of proving that it would suffer prejudice from allowing the amendment to the Respondent's pleading that is not compensable by costs.

[44] The only potential prejudice that the Appellant has identified was the fact that the Appellant no longer has possession of the corporate minute books at the present time to demonstrate that a $52 million subscription for equity in the Appellant was made in March 2013.

[45] However, in its oral and written submissions, the Respondent stated that it was prepared to concede that the equity injection occurred at the start of 2013 or on March 28, 2013,[12] respectively. In light of the Respondent's concession, there will be no prejudice to the Appellant arising from the fact that the Appellant does not have access to the relevant minute books to use as evidence at the hearing of the appeal.

[46] Since there are no other instances of potential prejudice that the Appellant has sought to prove in connection with the Thin Cap Amendments, this cannot be a basis for denying the Respondent's filing of the proposed amendments to the Amended Reply.

DISPOSITION

[47] For the reasons outlined above, the Respondent's motion is allowed and the Respondent will be permitted to file the proposed Reamended Reply as an amended pleading, but shall reflect the Respondent's concession that the timing of the $52 million equity injection occurred at the start of 2013 (which requires a modification to the content of paragraph 27.1(e) and possibly paragraphs 29(c) and 50 of the Reamended Reply).

[48] To ensure that the Respondent's amended pleading conforms with the requirements of subsection 55(1) of *the Tax Court of Canada Rules (General Procedure)*, the Respondent shall file its amended pleading with the title "Second Amended Reply".

[49] The Appellant shall have until August 22, 2025 to file and serve the Second Amended Reply.

[50] If the Appellant wishes to file a pleading in response to the Second Amended Reply, the appropriate pleading would be an Answer. Should the Appellant wish to

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[12] Paragraph 77 of the Respondent's Written Submissions.

do so, the Appellant shall have until 30 days after service of the Second Amended Reply to file and serve its Answer in response to the amendments reflected in the Second Amended Reply.

[51] Costs of the motion will be in the cause.

Signed this 6th day of August 2025.

"John C. Yuan"

Yuan J.

APPENDIX A – REAMENDED REPLY

2020-1513(IT)G

TAX COURT OF CANADA

BETWEEN:

OLDCASTLE BUILDING PRODUCTS CANADA INC.

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

REAMENDED REPLY TO THE AMENDED NOTICE OF APPEAL

In reply to the Appellant's Amended Notice of Appeal with respect to the 2012, 2013 and 2014 taxation years, the Attorney General of Canada says:

A. STATEMENT OF FACTS

1. With respect to paragraphs 1, 2 and 3, under the heading "Overview" in the Amended Notice of Appeal, the Attorney General of Canada (**AGC**) admits the summary of facts stated by the Appellant.

2. With respect to paragraphs 4, 5, 6 and 7, under the heading "Overview" in the Amended Notice of Appeal, the AGC submits that they do not contain facts but are allegations in the nature of argument. The AGC denies the merits of these arguments, and should there be any facts contained in these paragraphs, denies such facts.

3. With respect to paragraph 8, under the heading "Overview" in the Amended Notice of Appeal, the AGC admits the summary of facts stated by the Appellant.

4. With respect to paragraph 9, under the heading "Overview" in the Amended Notice of Appeal, the AGC submits that it does not contain facts, but contains allegations in the nature of argument. The AGC denies the merits of these arguments.

5. The AGC admits the facts stated in paragraphs 10, 11, 12, 13, 14, 15, 16 and 17 of the Amended Notice of Appeal.

6. The AGC has no knowledge and therefore puts in issue the facts stated in paragraphs 18 and 19 of the Amended Notice of Appeal.

7. As for the facts stated at paragraph 20 of the Amended Notice of Appeal, the AGC admits that Van Neerbos Groep B.V. (**Van Neerbos**) was a corporation resident in and incorporated under the laws of the Netherlands, but has no knowledge and therefore puts in issue the remaining facts of the paragraph.

8. As for the facts stated at paragraph 21 of the Amended Notice of Appeal, the AGC admits that Van Neerbos wholly owned CRH Europe Holding B.V. (**CRH Europe**), a corporation resident in the Netherlands. However, he has no knowledge and therefore puts in issue the remaining facts of the paragraph.

9. As for the facts stated at paragraph 22 of the Amended Notice of Appeal, the AGC admits that Oldcastle Building Products Canada Inc. (**Oldcastle 1**) was a Canadian resident corporation established under the laws of New Brunswick and was wholly owned by CRH Europe at least from April 27, 2001 onward. However, the AGC has no knowledge if Oldcastle 1 was a wholly owned subsidiary of CRH Europe before this date and therefore puts this fact in issue.

10. The AGC admits the facts stated in paragraphs 23 and 24 of the Amended Notice of Appeal, but specifies, with respect to paragraph 24, that the PUC of the 1,100

common shares of 658842 N.B. Inc. (**658 NB**) was $547,000,100, but for the application of the general anti-avoidance rule (**GAAR**).

11. As for the facts stated in paragraph 25 of the Amended Notice of Appeal, the AGC admits that CRH Europe was converted into CRH Europe Holding Coöperatief U.A. (**CRH Co-op**), but denies the other facts stated. The AGC submits that the registration for conversion was filed on or about September 29, 2011 and became legally effective on October 12, 2011.

12. As for the facts stated in paragraph 26 of the Amended Notice of Appeal, the AGC admits that CRH Co-op was dissolved, but denies the other facts stated. The AGC submits that the liquidation process commenced on October 15, 2011 and that the CRH Co-op was dissolved on December 16, 2011.

13. As for the facts stated in paragraph 27 of the Amended Notice of Appeal, the AGC admits that as part of the dissolution of CRH Co-op, the shares of Oldcastle 1 owned by CRH Co-op were distributed to 658 NB without any consideration received by CRH Co-op, but has no knowledge and therefore puts in issue the other facts stated.

14. The AGC admits the facts stated in paragraph 28 of the Amended Notice of Appeal.

15. The AGC admits the facts stated in paragraphs 29, 30, 31, 32, 33 and 34 of the Amended Notice of Appeal.

16. The AGC takes notice of the Appellant's definition of "Reorganization" as stated in paragraph 35 of the Amended Notice of Appeal and refers the Court to the Respondent's definition of such Reorganization, at paragraphs 27 e) to 27 r) of the Reply to the Amended Notice of Appeal, below.

17. The AGC admits the facts stated in paragraphs 36, 37 and 38 of the Amended Notice of Appeal, but denies that the portion of $300,000,000 from the loan of $350,000,000 is for income-earning purposes, as stated in the heading.

18. The AGC denies the facts stated in paragraph 39 of the Amended Notice of Appeal.

19. The AGC admits the facts stated in paragraphs 40, 41 and 42 of the Amended Notice of Appeal.

20. The AGC denies the facts stated in paragraph 43 of the Amended Notice of Appeal.

21. The AGC admits the facts stated in paragraph 44 of the Amended Notice of Appeal.

22. The AGC admits the facts stated in paragraph 45 of the Amended Notice of Appeal, except for the expression "normal operation of the Act", which is denied.

23. With respect to the facts stated in paragraph 46 of the Amended Notice of Appeal, the AGC admits that, on March 14, 2018, an amount of $15,000,000 in withholding tax under Part XIII was assessed for the Appellant's 2012 taxation year, but denies any other fact stated that would be in contradiction with the assessment of March 14, 2018, which speaks for itself.

24. The AGC admits the facts stated in paragraph 47 and 48 of the Amended Notice of Appeal, except for the expression "normal operation of the Act", which is denied, and the AGC refers to the determination, which speaks for itself.

25. The AGC admits the facts stated in paragraphs 49, 50 and 51 of the Amended Notice of Appeal.

26. The AGC admits the facts stated in paragraphs 52, 53, 54, 55 and 56 of the Amended Notice of Appeal, but specifies that the Appellant appealed these reassessments pursuant to paragraph 169(1)(b) of the *Income Tax Act* (**Act**) before the Minister of National Revenue (**Minister**) could respond to the Appellant's objections for these same years.

27. In determining the Appellant's tax liability for the 2012, 2013 and 2014 taxation

years, the Minister made the following assumptions of fact:

a) Van Neerbos is a private company with limited liability, incorporated under the laws of the Netherlands.

b) Van Neerbos is the beneficial owner of 100 % of the 110,676 common shares of CRH Europe.

c) Oldcastle 1 is a corporation incorporated under the laws of the province of New Brunswick and a resident of Canada. Its shares are wholly owned by CRH Europe at least since April 27, 2001.

d) The fair market value (**FMV**) of Oldcastle 1's shares owned by CRH Europe was $547,000,000. The adjusted cost base (**ACB**) and the paid-up capital (**PUC**) of these shares was $100.[1]

The Reorganization

e) On July 28, 2011, 658 NB was incorporated under the laws of the Province of New Brunswick as a wholly owned subsidiary of Van Neerbos.

f) Van Neerbos subscribed for 100 common shares of 658 NB.[2]

g) On August 31, 2011, 658 NB purchased from Van Neerbos the shares it held in CRH Europe for an amount of $547,000,000, which represented the FMV of these shares. The purchase price was paid by issuing to Van Neerbos 1,000 common shares of 658 NB.[3]

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[1] The relevant corporate structure of Oldcastle 1 is illustrated in Schedule 1, attached.

[2] The PUC and *FMV* of the 100 common shares of 658 NB shares was $100. The relevant corporate structure on July 28, 2011 is illustrated in Schedule 2, attached.

[3] Van Neerbos now held 1,100 common shares of 658 NB, which had a PUC of $547,000,100, but for the application of the GAAR, and a FMV of $547,000,100. In turn, 658 NB now held all common shares of CRH Europe, which had a FMV of $547,000,000 and a PUC of nominal value. The relevant corporate structure on August 31, 2011 is illustrated in Schedule 3, attached.

h) On or about September 29, 2011, CRH Europe filed registration for conversion into CRH Co-op, a co-operative under the laws of Netherlands. The conversion became legally effective on October 12, 2011.

i) On October 15, 2011, CRH Co-op commenced its liquidation process and was dissolved on December 16, 2011.

j) The ownership of the common shares of Oldcastle 1 was transferred to 658 NB upon the dissolution of CRH Co-op.[4]

k) On December 30, 2011, at 6:10 am, Van Neerbos made a loan in the amount of $547,000,000 (**Loan 1**) to 658 NB, in exchange for a promissory note.

l) On December 30, 2011, at 6:20 am, 658 NB used Loan 1 to subscribe to 100 common shares of Oldcastle 1 at a subscription price of $5,470,000 per share. An amount of $547,000,000 was added to the stated capital account of the Oldcastle 1's common shares.[5]

m) On December 30, 2011, at 6:30 am, Oldcastle 1 reduced the stated capital on its common shares from $547,000,100 to $100, without any payment to its shareholder.

n) On December 30, 2011, at 6:40 am, Oldcastle 1 declared and paid a dividend on its common shares to 658 NB, in the amount of $547,000,000, using the proceed of subscription it had received at 6:20 am.

o) On December 30, 2011, at 6:50 am, 658 NB reduced the stated capital of its 1,100 common shares held by Van Neerbos from $547,000,100 to $100

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[4] Oldcastle 1's common shares remained with a PUC of $100 and a FMV of $547,000,000. The relevant corporate structure before and after CRH Europe was converted into CRH Co-op and then dissolved, is illustrated in Schedule 4, attached.

[5] 658 NB now held 200 common shares of Oldcastle 1, which had a PUC of $547,000,100, but for the application of the GAAR, and a FMV of $1,094,000,000.

and distributed the amount of $547,000,000 as a return of capital to Van Neerbos.[6]

p) On January 1, 2012, 658 NB and Oldcastle 1 were amalgamated under the laws of New Brunswick to form the Appellant.[7]

q) On January 2, 2012, Loan 1 was settled by the issuance of 547,000,000 common shares of the Appellant to Van Neerbos at a price of $1 per share.[8]

r) On September 13, 2012, the Appellant distributed $300,000,000 to Van Neerbos as a return of capital on its common shares.

The General Anti-Avoidance Rule

s) The transactions described in subparagraphs 27(e) to 27(r) above, constitute a series of transactions (**Series of Transactions**).

t) The Series of Transactions resulted, directly or indirectly, in a tax benefit to the Appellant: Through series of transactions circumventing the application of 212.1, the Appellant was able to make a return of capital of $300,000,000 to its non-resident shareholder, avoiding the payment of Part XIII withholding tax that would have otherwise applied.

u) The following transactions (**Avoidance Transactions**) were undertaken primarily to obtain the tax benefit:

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[6] Van Neerbos now held 1,100 common shares of 658 NB, which had a PUC of $100 and a nil FMV. 658 NB now held 200 common shares of Oldcastle 1, which had a PUC of $100, but for the application of the GAAR. The transactions which occurred on December 30, 2011 are illustrated in Schedule 5, attached.

[7] The corporate structure of Oldcastle 1 on December 30, 2011 and of the Appellant on January 1, 2012, is illustrated in Schedule 6, attached.

[8] The common shares of the Appellant had a PUC of $547,000,100, but for the application of the GAAR, and a FMV of $547,000,000. The relevant corporate structure of the Appellant on January 2, 2012 is also illustrated on Schedule 6, attached.

i. The incorporation of 658 NB and the subscription by Van Neerbos to 100 of its common shares, on July 28, 2011;

ii. The purchase by 658 NB of the shares held by Van Neerbos in CRH Europe for $547,000,000 in exchange for 1000 common shares of 658 NB, on August 31, 2011;

iii. The conversion of CRH Europe into CRH Co-op followed by the dissolution of CRH Co-op;

iv. The transfer of Oldcastle 1 shares to 658 NB, upon the dissolution of CRH Co-op;

v. The Loan of $547,000,000 from Van Neerbos to 658 NB in exchange for a promissory note, on December 30, 2011;

vi. The subscription by 658 NB to 100 common shares of Oldcastle 1, on December 30, 2011;

vii. The reduction of the stated capital of Oldcastle 1's common shares, without payment to 658 NB, on December 30, 2011;

viii. The declaration and payment of a dividend of $547,000,000 on the common shares of Oldcastle 1 to 658 NB, on December 30, 2011;

ix. The reduction of the stated capital of 658 NB's common shares and the distribution of $547,000,000 to Van Neerbos as a return of capital, on December 30, 2011;

x. The amalgamation of Oldcastle 1 and 658 NB to form the Appellant, on January 1, 2012;

xi. The repayment of the Loan to Van Neerbos by the Appellant by the issuance of 547,000,000 common shares of the Appellant, on January 2, 2012;

xii. The distribution of $300,000,000 by the Appellant to Van Neerbos as a return of capital on the common shares, on September 13, 2012.

v) The primary purpose and result of the Avoidance Transactions was to circumvent the application of section 212.1 of the Act.

w) The Avoidance Transactions may reasonably be considered to have resulted, directly or indirectly, in a misuse or abuse of section 212.1, having regard to the Act read as a whole.

~~x)~~a) ~~The Minister considered that the underlying rationale of section 212.1 is to prevent the tax-free distribution of a corporation's retained earnings to a non-resident corporation through non-arm's length transactions to the extent that the amount distributed is in excess of tax paid funds.~~

Additional facts with respect to the Interest deductions issue

~~y)~~x) After Oldcastle 1 declared and paid a dividend of $547,000,000 on the common shares of Oldcastle 1 to 658 NB, on December 30, 2011, at 6:40 am, which occurred in the course of the Reorganization described at paragraphs 27(e) to 27(r) above, Oldcastle 1 had paid out completely its retained earnings and had a deficit of about $339,729,434.

~~z)~~y) On January 1, 2012, upon the amalgamation of 658 NB and Oldcastle 1 to form the Appellant, the latter became responsible to repay Loan 1 without receiving any contribution or investment of funds.

~~aa)~~z) On January 2, 2012, the PUC of the Appellant's common shares increased from $100 to $547,000,100 due to the settlement of Loan 1 in return of shares issued to Van Neerbos.

~~bb)~~aa) The PUC increase of the Appellant's common share, but for the application of the GAAR, occurred without any contribution or investment of funds to further the carrying on of the Appellant's business.

~~ee)~~bb) On September 13, 2012, one hour prior to the distribution of $300,000,000 by the Appellant to Van Neerbos as a return of capital, CRH America Inc. made a loan in the amount of $350,000,000 to the Appellant, bearing interest rate of 5 % (**Loan 2**).

~~dd)~~cc) CRH America Inc. was a corporation resident of the United States of America and was indirectly under the control of the same group as Van Neerbos.

~~ee)~~dd) The Appellant still had no retained earnings and was in a deficit situation at the time of Loan 2.

~~ff)~~ee) Loan 2 was made for the primary purposes of distributing $300,000,000 to Van Neerbos as return of capital, and reducing the bank overdraft of the Appellant by the amount of $50,000,000.

~~gg)~~ff) On September 13, 2012, the Appellant used $300,000,000 of Loan 2 to make a payment to Van Neerbos as a return of capital on its common shares.

~~hh)~~gg) The amount of $300,000,000 was not loaned and used for the commercial activities of the Appellant.

~~ii)~~hh) For its 2012, 2013 and 2014 taxation years, the Appellant deducted the following amounts of interest with respect to loan 2:

2012	2013	2014
$5,273,972	$17,500,000	$17,500,000

~~jj)~~ii) The amounts of interest deducted which relate to the portion of $300,000,000 of Loan 2 are the following:

2012	2013	2014
$4,520,547	$15,000,000	$15,000,000

27.1 The AGC also relies on the following facts with respect to the interest deductions issue:

a) The entirety of Loan 2 remained an outstanding debt payable by the Appellant to CRH America Inc. during the 2012, 2013 and 2014 taxation years.

b) CRH plc, a corporation resident in Ireland, indirectly wholly-owned the shares of Van Neerbos and CRH America Inc. and is the ultimate shareholder of both corporations.

c) At the beginning of the 2012, 2013 and 2014 taxation years, the Appellant had no retained earnings and was in a deficit situation in the amounts that follow:

2012	2013	2014
($339,729,434)	($291,581,108)	($288,153,604)

d) The average of all amounts each of which is the Appellant's contributed surplus[9] by a specified non-resident shareholder of the Appellant at the beginning of a calendar month that ends in each of the 2012, 2013 and 2014 taxation years is as follows:

2012	2013	2014
$0	$0	$0

[9] Other than any portion of that contributed surplus that arose in connection with an investment, as defined in subsection 212.3(10), to which subsection 212.3(2) applies.

e) The average of all amounts each of which is the Appellant's paid-up capital at the beginning of a calendar month that ends in each of the 2012, 2013 and 2014 taxation years is as follows:

2012	2013	2014
$100	$100	$52,000,100

28. The Minister considered that the underlying rationale of section 212.1 is to prevent the tax free distribution of a corporation's retained earnings to a non-resident corporation through non-arm's length transactions to the extent that the amount distributed is in excess of tax paid funds.

B. ISSUES TO BE DECIDED

~~28.~~29. The issues to be decided are whether:

a) The GAAR found at section 245 of the Act applies to the Series of Transactions such that;

i. The Appellant may be assessed Part XIII tax on a deemed dividend of $300,000,000, pursuant to the application of the GAAR and subsection 212(2), 215(1) and 215(6) of the Act, as well as Article X(2)a of the *Convention between Canada and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With respect to Taxes on Income* (***Canada-Netherlands Tax Treaty***);

ii. The PUC of the common shares of the Appellant may be reduced from $247,000,000 to $100.

b) The Minister correctly disallowed the following amounts of interest expenses paid in respect of $300,000,000 of Loan 2, for its 2012, 2013 and 2014 taxation years, pursuant to paragraph 20(1)(c) of the Act;

2012	2013	2014
$4,520,547	$15,000,000	$15,000,000

c) Alternatively, if the above-mentioned amounts of interest are deductible pursuant to 20(1)(c) of the Act, do subsections 18(4) and 18(5) of the Act apply to limit the interest that can be deducted in respect of $300,000,000 of Loan 2 to the following amounts:

2012	2013	2014
$0	$0	$1,400,000

C. STATUTORY PROVISIONS RELIED ON

~~29.~~30. The AGC relies on sections 84.1, 212.1 and 245, on subsections 18(4), 18(5), 89(1), 152(1.11), 152(1.3), 152(9), 212(2), 215(1), 215(6), 248(1), ~~and~~ 248(10), 251(1), 251(2) and 256(6.1) as well as on paragraphs 18(1)(b) and 20(1)(c) of the *Income Tax Act*, R.S.C. 1985, c 1 (5th Supp.), as amended. The AGC also relies on Article X of the *Canada-Netherlands Tax Treaty*, as applicable to the year at issue.

D. GROUNDS RELIED ON AND RELIEF SOUGHT

GAAR

~~30.~~31. The framework to apply the GAAR is well established. Three conditions must be met for its application:

i. There must be a tax benefit resulting from a transaction or a series of transactions;

ii. The transactions or, in the case of a series of transactions, at least one of the transactions in the series, must be an avoidance transaction (not undertaken primarily for *bona fide* non-tax purpose);

iii. The avoidance transactions must be abusive, meaning that they circumvent, frustrate or defeat the object, spirit and purpose of the relevant provisions giving rise to the tax benefit.

~~31.~~32. The AGC submits that the transactions described in subparagraphs 27(e) to 27(r) constitute a series of transactions, within the meaning of that term found at paragraph 248(10) of the Act.

~~32.~~33. The AGC submits that the Series of Transactions resulted in a tax benefit for the Appellant within the meaning found at subsections 245(1) and 245(2) of the Act, namely the avoidance of Part XIII withholding tax that would have been payable had section 212.1, subsection 212(2), as well as subsection 89(1) of the Act not been circumvented.

~~33.~~34. The AGC submits that none of the avoidance transactions can reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit, and are consequently avoidance transactions within the meaning of subsections 245(2) and 245(3) of the Act.

~~34.~~35. The AGC submits that the underlying rationale of section 212.1 of the Act is to prevent the tax-free distribution of a corporation's retained earnings to a non-resident corporation through non-arm's length transactions, to the extent that the amount distributed is in excess of tax-paid funds.

~~35.~~36. The AGC submits that the underlying rationale of the notion of PUC found at subsection 89(1) of the Act, is that the surplus that can be removed tax-free from

a corporation by its shareholders is restricted to the amount of their initial tax-paid investment into the corporation.

~~36.~~37. Before the Series of Transactions, the Appellant was held indirectly by Van Neerbos, its non-resident shareholder, and the PUC of the common shares of the Appellant was nominal. After the Series of Transactions, the Appellant was held directly by Van Neerbos. The PUC of the common shares of the Appellant had increased by $547,000,000 without any net injection of new funds and the Appellant had distributed net $300,000,000 to Van Neerbos, without any withholding tax applicable under Part XIII of the Act.

~~37.~~38. The Avoidance Transactions were therefore abusive within the meaning of subsection 245(4) of the Act. They may reasonably be considered to have resulted, directly or indirectly, in a misuse and abuse of section 212.1 and subsection 212(2), as well as subsections 89(1) of the Act, having regard to the Act as a whole.

~~38.~~39. In the circumstances, the reasonable tax consequences, in order to deny the tax benefit resulting from the Avoidance Transactions, pursuant to subsection 245(2) of the Act, are:

i. To deem the distribution of $300,000,000 from the Appellant to Van Neerbos to be dividend, and impose an amount of $15,000,000 of withholding tax (which represents a 5 % tax on the dividend), pursuant to subsections 212(2), 215(1) and 215(6) of the Act and Article X(2)a of the *Canada-Netherlands Tax Treaty*;

ii. To reduce the PUC of the common shares of the Appellant from $247,000,000 to $100.

Interest deductions / principal argument

~~39.~~40. The AGC states that interest is a capital expenditure that is not deductible pursuant to paragraph 18(1)(b) of the Act, unless it is specifically allowed under paragraph 20(1)(c) of the Act.

~~40.~~41. The AGC submits that the interest paid on the portion of $300,000,000 of Loan 2, is not deductible under 20(1)(c) of the Act, since that amount was not used for the purpose of earning income from a business or a property.

~~41.~~42. The AGC submits the amount of $300,000,000 of Loan 2 was used to make a payment to Van Neerbos as a return of capital on the Appellant's common shares.

~~42.~~43. The funds injected by Van Neerbos with Loan 1 on December 30, 2011 were returned to Van Neerbos on the same day as reduction of capital, thereby reducing the FMV of 658 NB to nil. The series of transactions, which occurred on December 30, 2011, did not leave any additional funds in Oldcastle 1.

~~43.~~44. The AGC further submits that the amount of $300,000,000 of Loan 2 was not used by the Appellant to replace its:

i. contributed capital provided by a shareholder, or;

ii. accumulated profits; ~~that was being used to commence or otherwise further the carrying on of the Appellant's business.~~

that was being used to commence or otherwise further the carrying on of the Appellant's business.

~~44.~~45. The AGC submits that the Minister correctly disallowed the following amounts of interest expenses paid in respect of $300,000,000 of Loan 2, for its 2012, 2013 and 2014 taxation years, pursuant to paragraph 20(1)(c) of the Act

2012	2013	2014
$4,520,547	$15,000,000	$15,000,000

Interest deductions / alternative argument

46. Alternatively, the AGC submits that for the 2012, 2013 and 2014 taxation years, CRH America Inc. and Van Neerbos were controlled by the same non-resident shareholder, that is CRH plc. Therefore, they were related persons pursuant to subparagraph 251(2)(c)(i) of the Act and deemed not to deal with each other at arm's length pursuant to paragraph 251(1)(a) of the Act.

47. The AGC also submits that Van Neerbos was a "specified shareholder" of the Appellant, in accordance with the definition of that expression found at subsection 18(5) of the Act.

48. Therefore, the AGC submits that Loan 2 was an "outstanding debt to specified non-resident", in accordance with the definition of that expression found at subsection 18(5) of the ITA.

49. Moreover, the AGC submits that:

- because of the application of the GAAR and the determination made by the Minister pursuant to section 245 and subsection 152(1.11) of the Act, the PUC of the Appellant's common shares held by Van Neerbos after the settlement of Loan 1, on January 2, 2012, was decreased to $100;

- the Appellant had no retained earnings for its 2012, 2013, and 2014 taxation years;

- the Appellant had no contributed surplus for its 2012, 2013 and 2014 taxation years.

50. Consequently, the AGC submits that subsections 18(4) and 18(5) of the Act apply to limit the amount that can be deducted by the Appellant in respect of interest paid or payable to CRH America Inc. on the portion of $300,000,000 of Loan 2, to the following amounts:

2012	2013	2014
$0	$0	$1,400,000

WHEREFORE, the AGC requests that the appeal be dismissed with costs.

DATED at the city of Montreal, in the Province of Quebec, this ~~May 10, 2021~~ ~~August 24, 2022~~ and Reamended on July 31, 2024.

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