

## BARBADOS JURISDICTION GETS 'STAMP OF APPROVAL' IN CANADIAN COURT CASE



[Andrew Thornhill](#)

**A**s a result of a recent decision of the Tax Court of Canada in CIT Group Securities (Canada) Inc. v. The Queen, the stamp of approval has been given to the use of the IBFS sector as an avenue for international corporate and financial planning that is tax efficient.

### Structure/Regime

The decision highlights the importance of an effective regulatory framework, as such a framework gives legitimacy to the entities that come within the purview of its jurisdiction. In order to qualify for a certain exception from Canada's passive income rules (referred to as the "FAPI" rules), CCG had to prove that its activities as a foreign bank (or as a trust company) were regulated under the laws of Barbados. In this case the regulator was the Central Bank of Barbados ("the Bank"), and the approving conclusions of Owen J. with respect to the self-contained regulatory mechanisms of both the Financial Intermediaries Regulatory Act, Chapter 324A of the Laws of Barbados ("FIRA"), and the Financial Institutions Act, Chapter 324A of the Laws of Barbados ("FIA"), as also the regulatory oversight by the Central Bank, were highlighted. In addition, the learned judge also lauded the approach of the Central Bank with respect to its circumspection regarding inquiries made by unknown persons.

### Factual Outline

The Appellant, CIT Group Securities (Canada) Inc., is the Canadian parent corporation of CCG Trust Corporation ("CCG") which is a regular Barbados company licensed to carry on business pursuant to the *Financial Institutions Act*, Chapter 324 of the Laws of Barbados. The principal business of CCG was entering into financing transactions that resulted in the holding of high quality long-term debt. Where CCG was unable to realize this business objective, it would temporarily invest its available cash in short-term debt such as short-term deposits and convertible asset swaps until a better opportunity arose.

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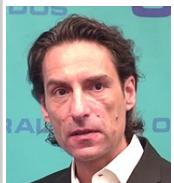


[Sadie Dixon](#)

### The significance of this judgment:

"Justice Owen's erudite decision has not only acknowledged the legitimacy of the Central Bank of Barbados as a sound regulator but has appropriately recognized the taxpayer's right to engage in tax structuring within the confines of the law. His insightful and analytical dissection of the relevant sections of the Canadian Income Tax Act is indicative of his thorough understanding of the proper application of the statute and his respect for the law and for the sovereignty of Barbados."

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[Angelo Nikolakakis](#)

"With this decision, Owen J. has set a standard for statutory interpretation that will be very difficult to exceed."

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**BARBADOS JURISDICTION, continued from page 1.**

CCG is owned by nine international business companies, all incorporated under the *Companies Act*, Chapter 308 of the Laws of Barbados and licensed pursuant to the *International Business Companies Act*, Chapter 77 of the Laws of Barbados.

The Appellant was reassessed for each of its taxation years 2003 to 2009 inclusive (the "Taxation Years"). The reassessments included in the income of the Appellant, as income from shares, amounts in respect of income earned by CCG during each of the Taxation Years on the basis that such income was 'foreign accrual property income' ("FAPI") rather than "income from an active business as defined in subsection 95(1) of the Income Tax Act of Canada. The aggregate amount assessed for the Taxation Years exceeded \$200m.

CCG had sufficient substance and met other conditions so that its business was not a passive "investment business" as defined, such that the legal conclusions depended in part on more technical issues, under a separate deeming rule in paragraph 95(2)(l) of the statute, such as whether CCG carried on its business as a "foreign bank" and whether its business was "regulated" under Barbados law." Based on a very detailed textual, contextual and purposive interpretation, Owen J. concluded that these conditions were also met so the exception to this separate deeming rule was applicable. Thus, CCG's income was "income from an active business" and not FAPI.

In reviewing the case, Owen J. cited from the decision of the Supreme Court of Canada in *Shell Canada Ltd. v. Canada (1999)*, where that court opined as follows:

*"... this Court has made it clear in more recent decisions that, absent a specific provision to the contrary, it is not the courts' role to prevent taxpayers from relying on the sophisticated structure of their transactions, arranged in such a way that the particular provisions of the Act are met, on the basis that it would be inequitable to those taxpayers who have not chosen to structure their transactions that way. ... Unless the Act provides otherwise, a taxpayer is entitled to be taxed based on what it actually did, not based on what it could have done, and certainly not based on what a less sophisticated taxpayer might have done.*

*Inquiring into the "economic realities" of a particular situation, instead of simply applying clear and unambiguous provisions of the Act to the taxpayer's legal transactions, has an unfortunate practical effect. This approach wrongly invites a rule that where there are two ways to structure a transaction with the same economic effect, the court must have regard only to the one without tax advantages. With respect, this approach fails to give appropriate weight to the jurisprudence of this Court providing that, in the absence of a specific statutory bar to the contrary, taxpayers are entitled to structure their affairs in a manner that reduces the tax payable: "... An unrestricted application of an "economic effects" approach does indirectly what this Court has consistently held Parliament did not intend the Act to do directly."*

**The Expert Testimony**

In addressing the regulation by the Bank, the expert witnesses, Sir Trevor Carmichael, Q.C. and Ms. Mary Mahabir, Q.C., testified that in the course of their law practices in Barbados they had regular contact with the Bank over a period of decades. Owen J. opined that the Bank was a model regulator as the evidence established that it does not relinquish sensitive details regarding its licensees on a mere request of a lawyer from the Canadian Department of Justice but rather shared such information with senior attorneys with whom it has a sound relationship characterised by trust and longevity, as in the case of the two expert witnesses of the appellant, and this was considered appropriate and laudable.

The expert evidence was significant in establishing the substance of the regulatory regime and the status of CCG as a regulated entity. This aspect of the case was raised because the Department of Justice's lawyers took the unusual step of challenging the evidence of CCG having the status of a licensed entity, going so far as to try to exclude written evidence to that effect. That type of approach did not impress the Court.

The Court noted the form of regulation, the conduct of audits, the requirements for filings under the law and the compliance by the local entity CCG which were, in Justice Owen's words "both enforced and satisfied".

*Article Continues on page 3, CONCLUSION—BARBADOS JURISDICTION*

## HOW TO BREXIT ? A THREE-POINT PLAN



[Françoise Hendy](#)

*This article first appeared in the online blog, "Fran Hendy Attorney's Weekly Reports", posted on June 27, 2016.*

**J**ust because you are a member of the European Union (EU) doesn't mean that you have to 'remain' a member forever. Article 50 of the Treaty of the European Union provides for any member to withdraw from the Union in accordance with its own constitutional requirements.

**STEP 1: NOTIFICATION.** According to the 'remain' campaign the required notification could be evidenced by the outcome of the 'in/out' referendum which has been won by the 'leave' campaign. This does not seem appropriate, nor practical, as states do not generally notify each other of such weighty matters other than by formal communique. This tends to be the case even if the correspondence stipulates the date from which such notification is to take effect. Arguably, in the case of BREXIT it could be the date of the results of the poll.

This seems unlikely as it would unnecessarily truncate the time framework for working through the 'exit' process. In any event, the EU may refuse to commence the withdrawal procedure without formal notification under Article 50 of the Treaty of the European Union ('The Treaty') without reference to some event prior to the date of notification. After all it takes at least two to negotiate.

**STEP 2: NEGOTIATION.** Next the withdrawing member will enter into negotiations with the European Council, under power delegated to the Council by the European Union to undertake such talks. The objective of the talks is to agree on a transitional arrangement with the leaving member and any future arrangements with the EU. The time frame for this is two years during which time the status quo remains.

**STEP 3: TAKE IT OR LEAVE IT.** As such the member who is withdrawing would be expected to participate in other EU business as normal, but it would not participate in internal EU discussions, or decisions on its own withdrawal. On the EU side, the agreement would be negotiated by the European Commission following a mandate from EU ministers and concluded by EU governments "acting by a qualified majority, after obtaining the consent of the European Parliament."

The withdrawing member has no standing in the negotiations and is not part of the eventual outcome of the terms of withdrawal. Since the withdrawing member plays no part in the negotiations around the agreement it is presented with a *fait accompli* at the end of the negotiations. Any trade deal must also be approved by the European Parliament and can only be approved by qualified majority vote. However, if the agreement is reached on a 'mixed' one it would have to be approved by all the remaining members.

**Footnote:** *I suspect that in the case of BREXIT this will be where the 'real' negotiations will start.*

### **CONCLUSION—BARBADOS JURISDICTION, continued from page 2.**

#### **Conclusion**

The decision of the Tax Court of Canada may be appealed to the Federal Court of Canada, so the outcome of this dispute remains unclear at this point. Nevertheless, it is a welcome sign to see quality legal analysis that strikes an appropriate balance between the text, context and purpose of the law and the taxpayer's right to arrange his or her affairs within the confines of the law.

Recent amendments to Canada's FAPI rules and such court challenges, as well as broader international developments, have created concerns in the sector, so it is quite positive that Canadian courts apply such high standards of quality.



## CHINA OFFERING INVESTMENT, TOURISM PROSPECTS

**T**he Chinese are very sympathetic to the impact of tightening international financial regulations on small International Financial Centres like Barbados, and they have promised to reflect our concerns in meetings with the Financial Stability Board (FSB).

The People's Republic Bank of China expressed these views in meetings with a Barbadian delegation in China, headed by Central Bank Governor, Dr. DeLisle Worrell and including Senator Sir Trevor Carmichael, His Excellency Dr. Chelston Brathwaite, Barbados' Ambassador to China, Geoffrey Bell, Barbados' Advisor in the United States of America on Capital Markets and the Bank's Public Affairs Officer, Novaline Brewster.

In subsequent meetings with the Hong Kong Monetary Authority while on that same trip to the East, the officials of the Authority confided that their financial services sector was feeling the effects of de-risking. They reported that with only international banks operating in Hong Kong, banking services were being cut, clients, dropped and operations ceased as Bank's sought to protect their operations against a background of a tightening and more costly regulatory framework. Governor Worrell and the Hong Kong Monetary Authority agreed to work through the Financial Stability Board and the Regional Consultative Groups to resolve these issues.

### **Business opportunities for Barbados**

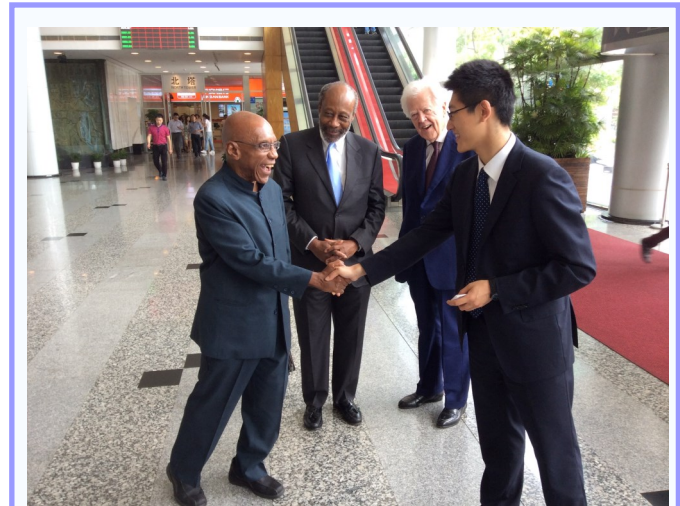
With a rapidly growing Chinese middle class, basking in world travel and acquiring homes abroad, a research institute suggested that there could be opportunities for Barbados.

"China's middle class population is estimated at 439 million.

"China has a rapidly growing middle class, with deep pockets. They are looking for a better life that includes world travel." Pelin Liu, Deputy Director General and Senior Research Fellow with the DRC Development Research Center of State Council, Department of Development Strategy and Regional Economy, explained.

Governor Worrell acknowledged that a small proportion of these new travellers could make significant difference to our tourism prospects, given that we are a small destination. The Chinese cautioned, however, that proper tourism planning was necessary to comfortably accommodate the Chinese and avoid being overwhelmed as happened in Fiji now that the Chinese are flocking there.

Another opportunity for Chinese investment is in the acquisition of Barbadian real estate. The Barbadian contingent explained that Barbados welcomed such investment and had in place a High Net worth Programme, under which foreigners, above age 50, who purchased land in Barbados, obtained a special resident's permit but they could not hold a Barbadian passport.



*Top: (from left) Central Bank Governor DeLisle Worrell, Senator Sir Trevor Carmichael, and Geoffrey Bell are greeted by Hu Wen of the Shanghai Stock Exchange.*

*Below: With over 23 million inhabitants, Shanghai is China's most populous city.*

**Article continues on page 3, CHINA OFFERINGS.**



## FINANCE PROFESSIONALS LEARN FROM CHINA

A group of finance professionals from Barbados also travelled to China recently to participate in a Seminar for Financial Management, sponsored by the Government of the People's Republic of China. The two-week seminar was organised by the Shangahi Education and Training Centre of Commerce.

Key seminar topics included: Challenges and Opportunities for Small and Medium-Sized Banks Under the New Situation, Financial Institutions and Risk Management, Risk Control and China's Banking Industry, and China's Current Foreign Exchange Management. China's macro-financial reforms were examined, and other sessions compared the approaches of China and Barbados to the management of their respective foreign exchange markets.

In addition to the academic component of the experience, participants gained insight into the history and culture of China, its geography and administrative regions, urbanisation trends, and the relationship between China's fifty-six ethnic groups.

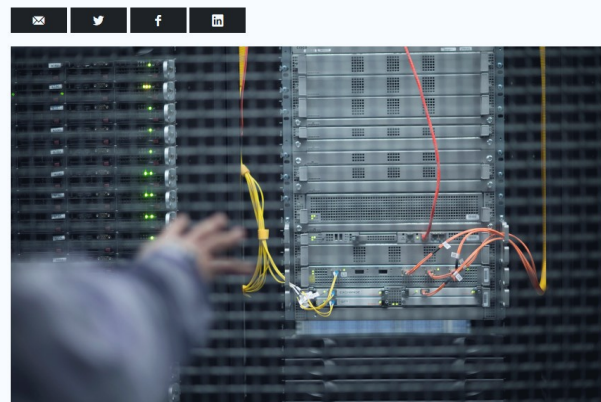
Their trip revealed a country which is rapidly developing and has a world-class transportation system. Indeed, China is one of the few countries which possesses a high speed rail network. Furthermore, with two international financial centres (Shanghai, and Hong Kong) and a burgeoning scientific sector (China now has the greatest number of supercomputing clusters in the world), it seems inevitable that the importance of this nation will grow. In addition, the country has significant natural beauty as evidenced by forays in the Three Gorges dam area, a massive internal tourism sector and a culture whose many facets are unknown to persons outside the country. The seminar therefore provided a most useful bridge between the two cultures.



*Chinese Bullet Trains can reach speeds as high as 310 mph.*

### China Beats the U.S. In Supercomputing Prowess

by Jonathan Vanian @JonathanVanian JUNE 20, 2016, 3:27 PM EDT



*A recent [article](#) from Fortune Magazine highlights China's high number of supercomputers.*

#### **CHINA OFFERINGS, continued from page 2.**

Amidst international concerns about a slowing Chinese economy, the Chinese remain quite upbeat about their economic growth prospects. "We will build a moderately prosperous economy over the next five years 2016 to 2020," Mr. Pelin asserted. The Chinese have identified 25 targets to achieve this economic prosperity. The two principal targets are annual economic growth over the next five years of 6.5 percent and poverty alleviation for fifty million Chinese.

China's per capita GDP stands at US\$8,000, compared to US\$50,000 in the United States of America and US\$25,000 in South Korea. By 2020 China hopes to join the ranks of these high income countries, a target and task they say they are very much up to.

The Embassy for the People's Republic of China in Barbados and China's Ministry of Foreign Affairs organized the familiarization visit to China. The contingent met with several officials, businesses and academics in the mainland, and later a smaller group went on to Hong Kong for similar interactions.

## NEW AUDIT REPORTING RULE : A 'GAME-CHANGER'



*Bruce McClean*



The International Auditing and Assurance Standards Board (IAASB) has released a new standard that is game-changing for shareholders and the audit profession. The issuance of IAS700 Revised – Forming an opinion and reporting on financial statements, will ensure that audit opinions are now more informative and transparent. The standard applies to audits of financial statements for periods ending on or after December 15, 2016, and the new reports.

The reporting rules now allow for the value and relevance of the audit to be made clear with a focus on reinforcing trust in the audit so as to underpin confidence in reported financial information. They allow for relevant reports from a relevant profession. The changes being introduced centre around three key aims:

### Insight: Key audit matters

The most significant innovation in the new standard is the introduction of 'key audit matters' (ISA 701). This section will shed light on those matters that, in the auditor's judgement, were of the most significance in the audit of the financial statements of the current period.

### Transparency

To enhance transparency inclusion of an explicit statement regarding the auditor's independence in all audit reports and identifying the engagement partner's name in audit reports for listed entities has been introduced.

### Readability

The new auditor's report has been restructured to put audit and entity-specific information at the front of the report – in particular, putting the audit opinion first. Standardised wording in the report – such as the descriptions of the auditor's responsibilities and what's involved in an audit—can be placed at the end of the report, or even in an appendix, or refer to a common website (such as that of a standard-setter or regulator).

Going concern will also be given more visibility in the auditor's report. Both management's and auditor's responsibilities regarding going concern will be described in the new reports. When there is a material uncertainty about the entity's ability to continue as a going concern, this will now be highlighted in a separate, clearly identified section of the report.

The new standard will be as new to management, audit committees and users as they are to auditors. Illustrations of these reports can be found in the Appendix to the Standard on the IAASB website and further guidance for local practitioners will soon be issued by the Institute of Chartered Accountants of Barbados (ICAB).

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## NEW INITIATIVES FOR BARBADOS BAR ASSOCIATION

The Barbados Bar Association has a new Executive Committee, which intends to continue seeking out collaborative projects with stakeholder agencies, and as well as maintain a strong public education thrust. These and other ideas were shared by incoming President, Liesel Weekes, in a recent interview with the *IBFS Newsletter*.

According to Ms. Weekes, the Association will continue to organise professional development seminars for members in partnership with such agencies as the Central Bank of Barbados and the Financial Services Commission, which focus on international business and compliance issues, respectively. Similar programmes have been successfully held in the past, and public education initiatives are also expected to continue. The Association has previously used a regular newspaper column and press conferences to sensitize the public to developments in the local judicial and legal services sector.

In addition to President Liesel Lewis, other Executive Committee members of the Barbados Bar Association Executive are: Vice President Sean Lewis, Treasurer Shane Thompson, Secretary Stewart Mottley, and Assistant Secretary Kristin Turton. These officers, along with twelve additional Council Members, will hold office until June 2017.

Established by statute in 1940 (Cap 363), the Barbados Bar Association presently has more than 1,000 members on its roll and it is also represented on the BIBA (Barbados International Business Association) Legal Professions Committee.



*The 2012 Barbados Bar Association seminar, "International Business 101" targeted newer attorneys interested in servicing the International Business and Financial Services Sector.*

## NEW RESEARCH EXAMINES DE-RISKING IMPACT ON REGION

De-risking, or the severing of correspondent banking relationships, has affected the Caribbean in a major way. Cognizant of this growing threat, the CARICOM Central Bank Governors Group assembled a working group, chaired by economist Dr. Allan Wright, to fully assess the impact of de-risking on the region and has produced a comprehensive report, "De-Risking and Its Impact: The Caribbean Perspective".



*Dr. Allan Wright*

In many instances, the terminations being experienced in the region are not based on any wrongdoing on the part of businesses, but rather are the result of the increasingly high cost of compliance with the regulatory framework outlined by Basel, the Foreign Account Tax Compliance Act (FATCA), the Global Forum and other bodies. Correspondent banks are also challenged by guidelines that are unclear or inconsistently applied. Many of these banks have weighed the marginal profits earned from doing business against the potential large fines and penalties due to lack of compliance as well as the reputational damage that could result and deemed it too much of a risk to continue to pursue business in certain jurisdictions.

The consequence of this, say the research team, is that many businesses and individuals have been cut off from their money and new businesses are finding it difficult to establish operations. The Caribbean Project on De-Risking undertook to document and analyze the impact of de-risking strategies on Caribbean financial systems, and to prepare a position that will inform a Caribbean perspective on this matter. The report offers useful insights gained from discussions with local regulators, central bankers and sector specialists, and also presents surveyed information from Barbados, Belize, the Cayman Islands, The Bahamas, Turks and Caicos, the Eastern Caribbean Currency Union, Guyana, Haiti, Jamaica and Trinidad and Tobago. The research paper, published by the Caribbean Centre for Money and Finance, is accessible [here](http://www.centralbank.org.bb).

## BARBADOS APPOINTS BUSINESS FACILITATION CZAR

**L**et's Talk Business Facilitation with Senator Darcy Boyce" was the topic of a luncheon presentation organised recently by the Barbados International Business Association (BIBA). Prime Minister Freundel Stuart recently announced that the portfolio of Senator the Hon. Darcy Boyce, Minister in the Office of the Prime Minister's Office with responsibility for Energy, Immigration, Telecommunications and Invest Barbados, would be expanded to include troubleshooting business facilitation issues. Mr. Stuart said that under this new designation, Senator Boyce would be required to identify blockages in the system and have them removed or clarified where possible, or brought to the Prime Minister's attention.



*Senator Darcy Boyce*

The move is in keeping with a promise made during the Prime Minister's address to the Barbados Chamber of Commerce and Industry earlier this year. Senator Boyce told the BIBA audience that during the next six months, he will seek to be an active intermediary between his Ministerial colleagues and the business sector, tackling unresolved cases to find mutually acceptable solutions. He invited the audience to identify cases worth of intervention, pledging his pursuit of 1—clearer communication, 2—mutual understanding, and 3—respectful cooperation. He encouraged each person in the audience to do the same.

Stressing that the new initiatives will not create yet another layer of bureaucracy, Senator Boyce said that he is not planning for his office to become a hub for private sector interactions with government departments, and he also suggested that disaffected international business clients should consult with Invest Barbados 'as much as possible, as they are a strong team able to carry more load'. His role is to unlock bottlenecks—the last resort before the Prime Minister. He will neither be a watchdog nor a complaints bureau, he added, but he will assist in bringing cases to the front of a queue. Nor will he use his new portfolio to act as a tribunal or an arbitrator.

Members of the audience sought solutions and highlighted procedures within the Departments of Immigration and Customs, the Corporate Affairs and Intellectual Property Office, and the Licensing Authority as well as experiences trying to obtain special entry permits, work permits and drivers licenses.

### IBFS News Editorial Team

***We continue to welcome relevant submissions from new contributors, and representatives of stakeholder agencies. Please direct submissions, comments and other feedback to the Editor.***

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