Federal Court of Appeal  Cour d'appel fédérale

Date: 20170714

Dockets: A-180-16
A-181-16
A-182-16
A-183-16
A-184-16
A-185-16
A-186-16

Citation: 2017 FCA 156

[ENGLISH TRANSLATION]

CORAM : **NOËL C.J.**
SCOTT J.A.
BOIVIN J.A.

Docket: A-180-16

BETWEEN:

MARIO MONTMINY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-181-16

AND BETWEEN:

ALBERTO GALEGO

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-182-16

AND BETWEEN:

SERGE LATULIPPE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-183-16

AND BETWEEN:

RÉMI DUTIL

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-184-16

AND BETWEEN:

ÉRIC HACHÉ

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-185-16

AND BETWEEN:

PHILIPPE BEAUCHAMP

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-186-16

AND BETWEEN:

JACQUES BENOIT

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on June 6, 2017.

Judgment delivered at Ottawa, Ontario, on July 14, 2017.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: SCOTT J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] These are seven appeals from judgments rendered by Justice D'Auray of the Tax Court of Canada (the TCC judge) confirming in a single set of reasons the notices of assessment issued against the appellants (*Montminy v. The Queen*, 2016 TCC 110). These assessments disallowed the deduction claimed by the appellants for the 2007 taxation year under paragraph 110(1)(*d*) of

the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the ITA) following the sale of shares issued by their employer under a stock option plan.

[2] The TCC judge concluded that the appellants had not incurred, with regard to the shares sold, the necessary risk to be entitled to the deduction claimed. The appellants argue that in coming to this conclusion, the TCC judge neglected to consider the risk incurred while they held their options.

[3] For the reasons presented below, I am of the opinion that the TCC judge should have considered this risk and, if she had, would have concluded differently. I would therefore allow the appeals.

[4] An order consolidating the appeals was issued July 28, 2016, with Montminy (A-180-16) being designated as the lead appeal. In accordance with this order, these reasons dispose of the seven appeals. To this end, the original shall be filed in the lead appeal, and a copy thereof shall be filed in each of the related appeals to stand as reasons in those cases.

[5] The legislative provisions relevant to the analysis are reproduced in an appendix to these reasons.

RELEVANT FACTS

[6] At the relevant time, 9178-4488 Québec Inc. (Cybectec) was a Canadian-controlled private corporation (CCPC). In December 2001, the appellants were granted stock options for

shares of Cybectec's capital stock. This grant put an end to a bonus system which had been in place until then (Appeal Book, Vol. IV, p. 106). The terms of the employee stock option plan (the agreement or the plan) initially provided that the holder of an option could not exercise it unless there was a public offering by Cybectec or a sale of all the shares of its capital stock issued and in circulation (Appeal Book, Vol. I, p. 12).

[7] In 2007, Cybectec received an unsolicited offer from Cooper Industries (Electrical) Inc. (Cooper) to acquire the bulk of its assets (Appeal Book, Vol. I, p. 21). On January 10, 2007, the agreement was modified to include this type of event as a trigger for the right to exercise the options (Appeal Book, Vol. I, p. 13). At the same time, the appellants committed to selling, and Cybectec undertook to insure that its parent company would redeem the shares upon their issuance (obligation to redeem) (Appeal Book, Vol. I, pp. 22-23).

[8] On January 26, 2007, Cooper acquired Cybectec's assets (Appeal Book, Vol. I, p. 15). Two days later, the appellants were issued shares in Cybectec at 20¢ per share, the exercise price set out in the agreement, and then sold them the same day to Cybectec's parent company for $1.2583 per share (Appeal Book, Vol. I, p. 13). The exercise price was established in accordance with the terms of the agreement based on the fair market value (FMV) of the shares at the time the options were granted in December of 2001.

[9] Further to this transaction, the appellants declared a taxable benefit of $1.0583 per share, that is the difference between the exercise price and the proceeds of disposition of the shares.

They also claimed a deduction equal to 50% of the taxable benefit pursuant to paragraph 110(1)(*d*) of the ITA (Appeal Book, Vol. I, p. 15).

[10] On November 16, 2010, the Minister of National Revenue (the Minister) reassessed against the appellants, disallowing the deduction claimed on the ground that the appellants had not incurred the necessary risk to meet the requirements of paragraph 110(1)(*d*) of the ITA given that they sold the shares as soon as they were issued. At the objection stage, the Minister established the FMV of the shares at the time the option was granted at $0.3246 rather than 20¢ per share, thereby raising a further ground for disallowing the deduction claimed (see clause 110(1)(*d*)(ii)(A) of the ITA).

DECISION OF THE TAX COURT OF CANADA JUDGE

[11] The TCC judge first considered the conditions precedent for the deductions claimed. After focussing on 110(1)(*d*)(i)(A) of the ITA, which requires that qualifying shares be "prescribed" under section 6204 of the *Income Tax Regulations*, C.R.C., c. 945 (Regulation), the TCC judge devoted the better part of her analysis on this requirement.

[12] At paragraph 79 of her reasons, she explained that paragraph 6204(1)(*b*) of the Regulation stands as a bar to the deduction claimed because the owner of a prescribed share cannot "reasonably be expected to, within two years after the time the share is sold or issued, as the case may be, redeem, acquire or cancel the share in whole or in part" (the two-year reasonable expectation). Given that the appellants were aware that the shares would be redeemed the day on which they were issued, this condition was problematic from the outset.

[13] This is the context in which the TCC judge considered whether paragraph 6204(2)(*c*) of the Regulation exempted the Cybectec shares from the requirement relating to the two-year reasonable expectation (Reasons, para. 89). This provision is of particular relevance to shares held in CCPC's, given that there is typically no market in which they can be traded. In analyzing the interaction between subsections 6204(1) and 6204(2) of the Regulation, the TCC judge found that the paragraphs of subsection 6204(2) applied to subsection 6204(1) only to the extent that there is a logical connection between them, even if the introductory language of subsection 6204(2) provides that the exception applies to subsection 6204(1) generally, without any particular limitation (Reasons, para. 88).

[14] In her view, the exception set out in paragraph 6204(2)(*c*) does not extend to paragraph 6204(1)(*b*) given that the two paragraphs are not logically connected (Reasons, para. 98). Indeed, the application of paragraph 6204(1)(*b*) turns on the factual question whether there is a reasonable expectation that the shares will be redeemed, acquired or cancelled in the two years following the issue of the shares (Reasons, para. 95). It is therefore this reasonable expectation that triggers the paragraph, rather than the existence of the right or obligation to redeem, acquire or cancel the shares (Reasons, para. 94). In her view, paragraph 6204(2)(*c*) provides that these rights and obligations must be disregarded, but not the two-year reasonable expectation requirement set out in paragraph 6204(*b*) (Reasons, para. 96).

[15] In her opinion, this conclusion is supported by the context surrounding the promulgation of the Regulation, which shows that this two-year reasonable expectation was inserted in order to

ensure that employees subscribing to a stock option plan are, like any investor, exposed to the risk of seeing the value of their shares fluctuate (Reasons, paras. 100-101):

> [100] Parliament opted to extend the same treatment to employees who have purchased shares from their employer under a stock option plan as to taxpayers who purchase shares without recourse to a stock option plan and who, at the time of the disposition, pay tax on 50% of the gain. However, the conditions of section 6204 of the Regulations must be fulfilled.
>
> [101] The tax policy underlying paragraphs 110(1)(*d*) of the Act and 6204(2)(*b*) of the Regulations is to prevent the turning of stock option plans into forms of additional remuneration and to ensure that the employees subscribing for these shares are exposed to a certain level of risk. In my opinion, I would have arrived at the same outcome following a contextual approach, since it is clear from the legislative context that the two-year holding period is associated with risk. Indeed, under a stock option plan, employees do not incur any risk until they exercise their stock options. Moreover, pursuant to paragraph 110(1)(*d*), the two-year reasonable expectation is not applicable if the evidence shows that at the time of issuing the share, the corporation or related corporation had no expectation to redeem, acquire or cancel the share as prescribed in paragraph 6204(1)(*b*).

[16] On the strength of this, the TCC judge concluded that the Cybectec shares were not prescribed shares.

[17] The TCC judge then determined that the price of 20¢ per share indeed corresponded to the FMV of the Cybectec shares on the date the stock option was granted (Reasons, para. 185). This finding is not challenged by the Minister in the context of this appeal.

APPELLANTS' ARGUMENTS

[18] From the onset, the appellants note that the question under appeal hinges on a pure question of law, namely the interpretation of various provisions, in particular paragraph 6204(1)(*b*), which they characterize as an anti-avoidance provision (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8 [*Housen*]).

[19] Relying on the decision of this Court in *Canada v. Lehigh Cement Limited*, 2014 FCA 103, [2015] 3 F.C.R. 117, at paras. 59-61 [*Lehigh*], the appellants note that a purposive approach is preferable when interpreting anti-avoidance provisions. Although often drafted in broad terms, the scope of an anti-avoidance provision can be reduced in order to avoid inconsistencies with Parliamentary intention (Appellants' Memorandum, para. 22, citing *Lehigh*, at para. 61).

[20] According to the appellants, the 50% deduction provided under paragraphs 110(1)(*d*) and 110(1)(*d.1*) of the ITA aims to [TRANSLATION] "prevent unfair treatment of employees who receive options, as compared with non-employees who hold options" (Appellants' Memorandum, para. 24). The provisions intend to redress the situation where an employee earns a 100% taxable benefit on a stock option received from his employer, but another taxpayer, not an employee of the company, who acquires the same option, realizes a 50% taxable capital gain (Appellants' Memorandum, para. 25). The inequity results from the fact the employee is subject to a risk comparable to that of a regular investor, who profits from the option if the underlying share rises in value or, conversely, incurs a loss if the share falls in value or becomes worthless (Appellants' Memorandum, para. 26).

[21] The appellants maintain that [TRANSLATION] "it would not be difficult to develop structures under which the employer pays what is essentially a salary by issuing options" (Appellants' Memorandum, para. 27). This is why Parliament attached many conditions to paragraphs 110(1)(*d*) and 110(1)(*d.1*) of the ITA. Nothing of the sort is alleged in this case. Cybectec's option plan was adopted on May 1, 2001, following which the holders of those options were exposed to the same type of risk as any other investor (Appellants' Memorandum, para. 28).

[22] The appellants also note that section 7 of the ITA sets out when a benefit derived from a stock option plan must be declared. Under paragraph 7(1)(*a*), an employee must include the benefit when the option is exercised unless the issuing company is a CCPC, in which case subsection 7(1.1) defers taxation until the shares are disposed of (Appellants' Memorandum, paras. 30-31).

[23] In their opinion, to grasp the scope of paragraph 110(1)(*d*), one must first understand the scope of paragraph 110(1)(*d.1*). It provides that an employee who keeps the share for a two-year period following the exercise of the option can claim the 50% deduction regardless of whether the share is preferred or issued for an exercise price below the FMV (Appellants' Memorandum, para. 37).

[24] Conversely, if an employee wishes to redeem a share before the end of the two-year period and still benefit from the 50% deduction, the conditions set out in paragraph 110(1)(*d*) must be met (Appellants' Memorandum, para. 38). This is the provision on which the appellants

rely. In their view, paragraph 110(1)(*d*) does not impose a holding period. Indeed, [TRANSLATION] "it is not even necessary for the employee to exercise the option and obtain the shares to be entitled to the 50% deduction" (Appellants' Memorandum, para. 42). Clause 110(1)(*d*)(i)(B) provides that an employee may benefit from the deduction if the employer redeems the option, in which case the employee will never have held the shares (*idem*).

[25] According to the appellants, the objective underlying paragraph 110(1)(*d*) is to [TRANSLATION] "prevent employers from using stock option plans to pay what is, essentially, a salary, thereby allowing the employees to receive half their regular compensation without having to pay income tax" (Appellants' Memorandum, para. 40).

[26] These conditions are, first, that the exercise price must be equal to the FMV of the shares at the time of the grant of the option and, second, that the shares must be prescribed shares – i.e. prescribed by regulation. In this latter regard, the appellants explain that section 6204 of the Regulation complements paragraph 110(1)(*d*) by establishing the characteristics of a prescribed share. In their view, section 6204 embodies two main parts: subsection 6204(1) first lists the requirements for a share to be prescribed, and then subsections 6204(2) to 6204(4) provide the exceptions or qualifications to the requirements set out in that subsection (Appellants' Memorandum, para. 44).

[27] Paragraph 6204(1)(*a*) of the Regulation lists the basic requirements that ensure that [TRANSLATION] "no yield guarantee can be granted to the holder" of the option (Appellants' Memorandum, para. 46). In respect of the other paragraphs of subsection 6204(1), including

paragraph 6204(1)(*b*), the appellants submit that they are [TRANSLATION] "anti-avoidance provisions that apply to situations in which a taxpayer might try to avoid the requirements described" in paragraph 6204(1)(*a*) (Appellants' Memorandum, para. 47). More specifically, [TRANSLATION] "paragraph 6204(1)(b) aims to prevent avoidance of the requirements under subparagraphs 6204(1)(a)(iv) to (vi) by relying, for example, on a common practice or an informal and unenforceable agreement", thereby circumventing the spirit of the requirement stated at paragraph 6204(1)(*a*) (Appellants' Memorandum, para. 49).

[28] It follows that when a share is exempted from subparagraphs 6204(1)(*a*)(iv) to (vi), paragraph 6204(1)(*b*) cannot then be invoked to deny the deduction (Appellants' Memorandum, para. 51). Given that the Cybectec shares are exempted from subparagraph 6204(1)(*a*)(iv) through the exception provided under paragraph 6204(2)(*c*), as the TCC judge found, the two-year reasonable expectation does not apply.

[29] The appellants ask that their appeals be allowed and that the deduction claimed be awarded to them given that the obligation to redeem is the Minister's sole basis in support of the exception.

MINISTER'S ARGUMENTS

[30] The Minister, on the other hand, without addressing the arguments raised by the appellants, asks that the appeal be dismissed. The Minister maintains that the obligation to redeem could be taken into consideration to establish the existence of the two-year reasonable expectation for the purposes of paragraph 6204(1)(*b*) of the Regulation despite the exception

under paragraph 6204(2)(*c*). To this end, the Minister, at paragraphs 33 to 55 of her Memorandum, restates the TCC judge's reasons as already laid out in the preceding paragraphs.

ANALYSIS AND DECISION

[31] The TCC judge readily accepted that the reason why the obligation to redeem was entered into was to provide the appellants with a market for their shares with the result that the exception under paragraph 6204(2)(*c*) of the Regulation applies. She then asked whether this exception, beyond applying to subparagraph 6204(1)(*a*)(iv), also overrides the two-year reasonable expectation in paragraph 6204(1)(*b*), as the appellants suggested (Reasons, para. 68).

[32] The TCC judge seems to have concluded that because paragraph 6204(1)(*b*) of the Regulation and paragraph 110(1)(*d.1*) of the ITA both refer to a two-year period, they share a common purpose – i.e. to ensure the existence of a risk comparable to that incurred by an investor by requiring a two year holding period. In the case of paragraph 6204(1)(*b*), this requirement is inferred by reason of the fact that the reasonable expectation only gives rise to a disqualification if it is likely to materialize within two years (Reasons, paras. 100-101). Because this is distinct from the requirement set out in subparagraph 6204(1)(*a*)(iv), it operates notwithstanding the exception found under paragraph 6204(2)(*c*).

[33] To determine the interaction between the provisions in question, the TCC judge conducted a textual analysis followed by a contextual analysis. Her textual analysis led her to conclude that there was no logical connection between paragraphs 6204(1)(*b*) and 6204(2)(*c*) such that the exception provided in the second paragraph would not allow for the requirements

set out in the first to be disregarded (Reasons, para. 98). The contextual analysis she conducted confirmed this finding (Reasons, paras. 99 to 104). In sum, the obligation to redeem results in the appellants having at the very least a reasonable expectation that their shares would be redeemed within two years, thereby triggering the application of paragraph 6204(1)(*b*) (Reasons, para. 97).

[34] The question whether this obligation to redeem can form the basis of a reasonable expectation under paragraph 6204(1)(*b*), despite the exception under paragraph 6204(2)(*c*), is a matter of statutory interpretation. It follows that the answer the TCC judge gave to this question is subject to the standard of correctness (*Housen*, at para. 8).

[35] The Supreme Court of Canada set out the interpretative approach with respect to such questions in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10:

> […] The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words pays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases, the court must seek to read the provisions of an Act as a harmonious whole.

[36] With this approach in mind, I propose to review the textual analysis conducted by the TCC judge before turning to her contextual analysis.

- *Textual analysis*

[37] The textual analysis led the TCC judge to find that despite the introductory words of subsection 6204(2) of the Regulation – i.e. "For the purposes of subsection (1)" – the paragraphs in subsection 6204(2) will only apply to subsection 6204(1) if there is a logical connection (Reasons, para. 88).

[38] In her opinion, there is no logical connection between paragraphs 6204(1)(*b*) and 6204(2)(*c*). It is not the presence of the obligation to redeem that engages paragraph 6204(1)(*b*), but whether the facts establish the existence of a two-year reasonable expectation. In other words, paragraph 6204(2)(*c*) requires that consideration not be given to the obligation to redeem in applying subparagraph 6204(1)(*a*)(iv), but allows for such consideration to be given in order to establish the expectation under paragraph 6204(1)(*b*).

[39] This conclusion goes against the language of paragraph 6204(2)(*c*) because it considers the obligation to redeem "[f]or the purposes of subsection [6204](1)", whereas it is specifically provided that this paragraph must apply "without reference to [an] obligation to redeem" (paragraph 6204(2)(*c*); emphasis added).

[40] The TCC judge conceded that there was a logical connection between paragraph 6204(2)(*c*) and subparagraph 6204(1)(*a*)(iv), but based her reasoning on the lack of a logical connection between paragraph 6204(2)(*c*) and paragraph 6204(1)(*b*). That said, she does not seem to have considered the logical connection between paragraph 6204(2)(*c*) and

paragraph 6204(1)(*b*) through subparagraph 6204(1)(*a*)(iv), which connection is clear if, as the appellants claim, paragraph 6204(1)(*b*) is an anti-avoidance provision intended to ensure full compliance with subparagraph 6204(1)(*a*)(iv).

[41] On this point, the TCC judge recognized that paragraph 6204(1)(*c*) serves to prevent the avoidance of paragraph 6204(1)(*a*) by amending the terms and conditions of the shares during the two year period following their issuance. Based on its wording, it seems clear that paragraph 6204(1)(*b*) plays the same role in respect of subparagraph 6204(1)(*a*)(iv).

[42] This anti-avoidance purpose which the appellants attribute to paragraph 6204(1)(*b*) allows for a reading of paragraph 6204(2)(*c*) that is in line with its wording, and is even more compelling if one considers that the two-year reasonable expectation is aimed at preventing the same abuses as subparagraph 6204(1)(*a*)(iv). In this context, the idea that the existence of a reasonable expectation raises a question of fact that is addressed independently of the question raised by the obligation to redeem supports the view that paragraph 6204(1)(*b*) and subparagraph 6204(1)(*a*)(iv) complement one another, rather than the opposite (Reasons, para. 97).

[43] It follows, contrary to the TCC judge's assertion at paragraph 97 of her reasons, that "the fact that paragraph 6204(1)(b) is applicable in cases where there is no […] obligation to redeem" does not justify a reading that ignores the language of paragraph 6204(2)(*c*), which specifically requires that no reference be given to the obligation to redeem. A reading of the text that is consistent with the words can be made if one accepts that paragraph 6204(1)(*b*) is an anti-avoidance provision which supports the object pursued by subparagraph 6204(1)(*a*)(iv).

- *Contextual analysis*

[44] The TCC judge supported her reading by attributing a different purpose to paragraph 6204(1)(*b*). Referring to the period mentioned therein, she concluded that the objective was to impose a two-year holding period in order to subject employees to a risk comparable to that of an investor. With respect, while this risk requirement is also present under paragraph 110(1)(*d*) of the ITA, it does not result from the imposition of a two-year holding period.

[45] The TCC judge correctly stated that the policy objective is to ensure that employees are subject to a certain risk and that stock option plans are not used to pay disguised salaries. In her opinion, the first of these goals was not met in this case because "employees do not incur any risk until they exercise their stock options" (Reasons, para. 101). This assertion underpins her decision (Reasons, paras. 100 to 104).

[46] However, the TCC judge neglected to consider the risk incurred by the appellants between 2001 and 2007 while they held their options. This period must also be considered in order to determine whether the appellants meet Parliament's requirements in this regard.

[47] Each of paragraphs 110(1)(*d*) and 110(1)(*d.1*) of the ITA give access to the 50% deduction, but through different mechanisms. In order to properly grasp the policy objective underlying these provisions, one must understand the difficulty Parliament faced in allowing employees to benefit from the 50% deduction. Indeed, there are certain situations where the

favourable capital gains treatment would be inappropriate. In this respect, it is possible to develop structures under which the employer could, through the grant of options, pay what is essentially salary – for instance, by granting options with an exercise price below the FMV of the shares at the time of the grant; or by allowing for the acquisition of shares that offer fixed and guaranteed dividends or that contain an obligation to redeem. A strategic use of these features could enable an employee to benefit from the 50% deduction in circumstances that do not justify this treatment.

[48] Paragraph 110(1)(*d.1*) differs from paragraph 110(1)(*d*) in that it does not include any restriction as to the type of qualifying shares, except that they must be issued by a CCPC (subparagraph 110(1)(*d.1*)(i)). The other distinctive feature is the minimum holding period of two years following the acquisition of the shares, which is intended to ensure that the employee incurs a risk comparable to that of an investor during that period (subparagraph 110(1)(*d.1*)(ii)).

[49] Paragraph 110(1)(*d*) of the ITA, which applies to shares issued by both a CCPC or a public corporation, addresses the issue of risk differently. It allows for the 50% deduction by reference to features relating to the type of share in issue and the exercise price of the option. Under paragraph 6204(1)(*a*) of the Regulation, prescribed shares have to be "plain vanilla common shares" (Reasons, para. 75) – i.e. without redemption or conversion rights or fixed dividends.

[50] It is common ground that the shares issued according to the terms of the agreement following the exercise of the option met these requirements. The sole basis for the disallowance

of the deduction claimed is the two-year reasonable expectation which, according to the TCC judge, resulted from the obligation to redeem that had been negotiated a few days prior to the exercise of the options in order to create a market for the appellants' shares.

[51] The fact that a prescribed share must be "plain vanilla" prevents the improper use of particular share features once they are issued. For example, excluding shares with a right to redeem prevents the repeated grant of options followed by successive redemptions during periods of rapid growth.

[52] The other distinction that is of particular interest in this case relates to the exercise price of the option. Specifically, paragraph 110(1)(*d*) requires this price to be at least equal to the FMV of the shares under the option at the time of its grant (see subparagraph 110(1)(*d*)(ii) of the ITA). In this case, this price was 20¢ per share with the result that the option had no intrinsic value at the time of its grant.

[53] This requirement ensures that the growth of the value of the options held by the appellants between the time they were granted and the exercise date – i.e. from 20¢ to $1.2583 – is attributable solely to the growth of Cybectec between those two dates. It follows that in this case the option, which was without value the day of its grant because it was issued at par, fluctuated from that point on until the day of the exercise. Thus, insofar as the options are concerned, the appellants are in the same position as an investor holding this type of property. In both cases, the value of the options fluctuates according to the economic performance of the

issuer, and the hope is that at the time of exercise, the shares will have a greater value than they did at the time of their grant.

[54] This is to be contrasted with paragraph 110(1)(*d.1*) which allows the exercise price of the option to be set below the value of the shares at the time of the grant. Under this scenario, there is no guarantee that the employee will be subject to a risk comparable to that of an investor until the shares underlying the option are issued.

[55] The fact that the appellants were exposed to a risk from the moment when the options were granted and that the shares described under the terms of the plan were in all respects prescribed shares explain why they could have claimed the 50% deduction if they had simply sold their options to Cybectec, instead of exercising them and having the shares redeemed (see clause 110(1)(*d*)(i)(B)). It also explains why the appellants could have sold the shares to Cooper, a non-specified person, and benefitted from the 50% deduction (subsection 6204(3) of the Regulation). It seems clear that this favourable treatment would not be warranted if the appellants had not met the risk requirement.

[56] This shows that for the purposes of paragraph 110(1)(*d*) of the ITA, it is not the imposition of an holding period that ensures the existence of a risk element, but the particular characteristics of a prescribed share and the minimum price at which the option must be exercised.

[57] The TCC judge, in coming to the opposite conclusion, was necessarily influenced by the two-year period mentioned in paragraph 6204(1)(*b*), which coincides with the period set out in paragraph 110(1)(*d.1*) of the ITA. However, in providing for this limit in paragraph 6204(1)(b), Parliament was not seeking to impose a holding period.

[58] In this regard, paragraph 6204(1)(*b*) must be read with subparagraph 6204(1)(*a*)(iv). This subparagraph prevents the deduction from being claimed with respect to shares which embody an obligation to redeem. Paragraph 6204(1)(*b*) broadens the scope of this disqualification by extending it to situations where, for instance, an established practice makes the redemption of the shares reasonably predictable. It seems clear that these two provisions complete one another and that the latter is intended to prevent employees from benefitting from the deduction in circumstances where they can have their shares redeemed at will in concert with the employer or a specified person, even if no formal or legally enforceable obligation can be pointed to.

[59] That said, paragraph 6204(1)(*b*), given its otherwise ongoing and permanent effect, had to be subject to some time limitation. The two-year period was set out for this purpose. Given that prescribed shares issued by a CCPC would qualify under paragraph 110(1)(*d.1*) if reasonably expected to be redeemed only after the expiration of that period, the choice of two years can be readily understood.

[60] Since subparagraph 6204(1)(*a*)(iv) and paragraph 6204(1)(*b*) share the same objective, the “logical connection” which the TCC judge could not establish with paragraph 6204(2)(*c*) is

present in both cases. It follows that paragraph 6204(1)(*b*), like subparagraph 6204(1)(*a*)(iv), must be applied "without reference to" the obligation to redeem.

[61] Looking at the matter from a different perspective, because paragraph 6204(1)(*b*) is intended to prevent the avoidance of subparagraph 6204(1)(*a*)(iv), it was not open to the TCC judge to rely on paragraph 6204(1)(*b*) as a basis for denying the deduction claimed in circumstances where subparagraph 6204(1)(*a*)(iv) was not avoided.

- *Disposition*

[62] For these reasons, I would allow the appeals with costs in the lead appeal, and rendering the judgments which the TCC judge should have rendered, I would allow the appeals and remit the seven assessments back to the Minister for reassessment on the basis that the appellants are entitled to the deduction claimed pursuant to paragraph 110(1)(*d*) of the ITA with respect to their 2007 taxation year.

"Marc Noël"
Chief Justice

"I agree
A.F. Scott J.A."

"I agree
Richard Boivin J.A."

Translation

ANNEX

***Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.)**	***Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.)**
Agreement to issue securities to employees	**Émission de titres en faveur d'employés**
7 (1) Subject to subsection (1.1), where a particular qualifying person has agreed to sell or issue securities of the particular qualifying person (or of a qualifying person with which the particular qualifying person does not deal at arm's length) to an employee of the particular qualifying person (or of a qualifying person with which the particular qualifying person does not deal at arm's length),	**7 (1)** Sous réserve des paragraphes (1.1) et (8), lorsqu'une personne admissible donnée est convenue d'émettre ou de vendre de ses titres, ou des titres d'une personne admissible avec laquelle elle a un lien de dépendance, à l'un de ses employés ou à un employé d'une personne admissible avec laquelle elle a un lien de dépendance, les présomptions suivantes s'appliquent :
(a) if the employee has acquired securities under the agreement, a benefit equal to the amount, if any, by which	***a*)** l'employé qui a acquis des titres en vertu de la convention est réputé avoir reçu, en raison de son emploi et au cours de l'année d'imposition où il a acquis les titres, un avantage égal à l'excédent éventuel de la valeur des titres au moment où il les a acquis sur le total de la somme qu'il a payée ou doit payer à la personne admissible donnée pour ces titres et de la somme qu'il a payée pour acquérir le droit d'acquérir les titres;
…	[…]
Employee stock options	**Options d'achat d'actions accordées à des employés**
(1.1) Where after March 31, 1977 a Canadian-controlled private corporation (in this subsection referred to as "the corporation") has agreed to sell or issue a share of the capital stock of the corporation or of a Canadian-controlled private corporation with which it does not deal at arm's length to an employee of the corporation or of a Canadian-controlled private corporation with which it does not deal at arm's length	**(1.1)** Lorsque, après le 31 mars 1977, une société privée sous contrôle canadien (appelée l'« émetteur » au présent paragraphe) est convenue d'émettre une action de son capital-actions, ou du capital-actions d'une société privée sous contrôle canadien avec laquelle elle a un lien de dépendance, en faveur d'un de ses employés ou d'un employé d'une société privée sous contrôle canadien avec laquelle elle a un lien de

and at the time immediately after the agreement was made the employee was dealing at arm's length with

dépendance, ou de vendre une telle action à un tel employé, et que, immédiatement après la conclusion d'une telle convention, l'employé n'avait aucun lien de dépendance :

(a) the corporation,

***a*)** avec l'émetteur;

(b) the Canadian-controlled private corporation, the share of the capital stock of which has been agreed to be sold by the corporation, and

***b*)** avec la société privée sous contrôle canadien dont l'émetteur est convenu de vendre l'action du capital-actions;

(c) the Canadian-controlled private corporation that is the employer of the employee,

***c*)** avec la société privée sous contrôle canadien qui est son employeur,

pour l'application de l'alinéa (1)*a*) à l'acquisition de cette action par l'employé, le passage « au cours de l'année d'imposition où il a acquis les titres » à cet alinéa est remplacé par « au cours de l'année d'imposition où il a disposé des titres ou les a échangés ».

DIVISION C

SECTION C

Deductions permitted

Calcul du revenu imposable

Déductions

110 (1) For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted such of the following amounts as are applicable

110 (1) Pour le calcul du revenu imposable d'un contribuable pour une année d'imposition, il peut être déduit celles des sommes suivantes qui sont appropriées :

Employee options

Options d'employés

(d) an amount equal to 1/2 of the amount of the benefit deemed by subsection 7(1) to have been received by the taxpayer in the year in respect of a security that a particular qualifying person has agreed after February 15, 1984 to sell or issue under an agreement, or in respect of the transfer or other disposition of rights under the agreement, if

***d*)** la moitié de la valeur de l'avantage que le contribuable est réputé par le paragraphe 7(1) avoir reçu au cours de l'année relativement à un titre qu'une personne admissible donnée est convenue, après le 15 février 1984, d'émettre ou de vendre aux termes d'une convention, ou relativement au transfert ou à une autre forme de disposition des droits prévus par la convention, dans le cas où les conditions suivantes sont réunies :

(i) the security was acquired under the agreement by the taxpayer or a person not dealing at arm's length with the taxpayer in circumstances described in paragraph 7(1)(c),

(i) le titre, selon le cas :

(i.1) the security

(A) is a prescribed share at the time of its sale or issue, as the case may be,

(A) est une action visée par règlement au moment de sa vente ou de son émission,

(B) would have been a prescribed share if it were issued or sold to the taxpayer at the time the taxpayer disposed of rights under the agreement,

(B) aurait été une action visée par règlement s'il avait été vendu au contribuable, ou émis en sa faveur, au moment où il a disposé de ses droits prévus par la convention,

(C) would have been a unit of a mutual fund trust at the time of its sale or issue if those units issued by the trust that were not identical to the security had not been issued, or

(C) aurait été une part d'une fiducie de fonds commun de placement au moment de sa vente ou de son émission si les parts émises par la fiducie qui n'étaient pas identiques au titre n'avaient pas été émises,

(D) would have been a unit of a mutual fund trust if

(D) aurait été une part d'une fiducie de fonds commun de placement si, à la fois :

(I) it were issued or sold to the taxpayer at the time the taxpayer disposed of rights under the agreement, and

(I) il avait été vendu au contribuable, ou émis en sa faveur, au moment où celui-ci a disposé de ses droits prévus par la convention,

(II) those units issued by the trust that were not identical to the security had not been issued,

(II) les parts émises par la fiducie qui n'étaient pas identiques au titre n'avaient pas été émises,

(ii) where rights under the agreement were not acquired by the taxpayer as a result of a disposition of rights to which subsection 7(1.4) applied,

(ii) si les droits prévus par la convention n'ont pas été acquis par le contribuable par suite d'une disposition de droits à laquelle le paragraphe 7(1.4) s'applique, à la fois :

(A) the amount payable by the taxpayer to acquire the security under the agreement is not less than the amount by which

(A) le montant que le contribuable doit payer pour acquérir le titre aux termes de la convention est au moins égal à l'excédent du montant visé à la subdivision (I) sur le montant visé à la subdivision (II) :

(I) the fair market value of the security at the time the agreement was made exceeds

(II) the amount, if any, paid by the taxpayer to acquire the right to acquire the security, and

(B) at the time immediately after the agreement was made, the taxpayer was dealing at arm's length with

(I) the particular qualifying person,

(II) each other qualifying person that, at the time, was an employer of the taxpayer and was not dealing at arm's length with the particular qualifying person, and

(III) the qualifying person of which the taxpayer had, under the agreement, a right to acquire a security, and

(iii) where rights under the agreement were acquired by the taxpayer as a result of one or more dispositions to which subsection 7(1.4) applied,

(A) the amount payable by the taxpayer to acquire the security under the agreement is not less than the amount that was included, in respect of the security, in the amount determined under subparagraph 7(1.4)(c)(ii) with respect to the most recent of those dispositions,

(B) at the time immediately after the agreement the rights under which were the subject of the first of those dispositions (in this subparagraph referred to as the "original agreement") was made, the taxpayer was dealing at arm's length with

(I) la juste valeur marchande du titre au moment de la conclusion de la convention,

(II) le montant éventuel que le contribuable a payé pour acquérir le droit d'acquérir le titre,

(B) immédiatement après la conclusion de la convention, le contribuable n'avait de lien de dépendance avec aucune des personnes suivantes :

(I) la personne admissible donnée,

(II) chacune des autres personnes admissibles qui, immédiatement après la conclusion de la convention, était un employeur du contribuable et avait un lien de dépendance avec la personne admissible donnée,

(III) la personne admissible dont le contribuable avait le droit d'acquérir un titre aux termes de la convention,

(iii) si les droits prévus par la convention ont été acquis par le contribuable par suite d'une ou de plusieurs dispositions auxquelles le paragraphe 7(1.4) s'applique, à la fois :

(A) le montant que le contribuable doit payer pour acquérir le titre aux termes de la convention est au moins égal au montant qui a été inclus, relativement au titre, dans le montant total payable visé à l'alinéa 7(1.4)*c*) à l'égard de la plus récente de ces dispositions,

(B) immédiatement après la conclusion de la convention prévoyant les droits qui ont fait l'objet de la première de ces dispositions (appelée « convention initiale » au présent sous-alinéa), le contribuable n'avait de lien de

	dépendance avec aucune des personnes suivantes :
(I) the qualifying person that made the original agreement,	**(I)** la personne admissible ayant conclu la convention initiale,
(II) each other qualifying person that, at the time, was an employer of the taxpayer and was not dealing at arm's length with the qualifying person that made the original agreement, and	**(II)** chacune des autres personnes admissibles qui, immédiatement après la conclusion de la convention, était un employeur du contribuable et avait un lien de dépendance avec la personne admissible ayant conclu la convention initiale,
(III) the qualifying person of which the taxpayer had, under the original agreement, a right to acquire a security,	**(III)** la personne admissible dont le contribuable avait le droit d'acquérir un titre aux termes de la convention initiale,
(C) the amount that was included, in respect of each particular security that the taxpayer had a right to acquire under the original agreement, in the amount determined under subparagraph 7(1.4)(c)(iv) with respect to the first of those dispositions was not less than the amount by which	**(C)** le montant qui a été inclus, relativement à chaque titre donné que le contribuable avait le droit d'acquérir aux termes de la convention initiale, dans le montant payable visé à l'alinéa 7(1.4)*c*) à l'égard de la première de ces dispositions était au moins égal à l'excédent du montant visé à la subdivision (I) sur le montant visé à la subdivision (II) :
(I) the fair market value of the particular security at the time the original agreement was made exceeded	**(I)** la juste valeur marchande du titre donné au moment de la conclusion de la convention initiale,
(II) the amount, if any, paid by the taxpayer to acquire the right to acquire the security, and	**(II)** le montant éventuel que le contribuable a payé pour acquérir le droit d'acquérir le titre,
(D) for the purpose of determining if the condition in paragraph 7(1.4)(c) was satisfied with respect to each of the particular dispositions following the first of those dispositions,	**(D)** pour ce qui est de déterminer si la condition énoncée à l'alinéa 7(1.4)*c*) a été remplie à l'égard de chacune des dispositions données suivant la première de ces dispositions, le montant visé à la subdivision (I) était au moins égal au montant visé à la subdivision (II) :
(I) the amount that was included, in respect of each particular security that	**(I)** le montant qui a été inclus, relativement à chaque titre donné

could be acquired under the agreement the rights under which were the subject of the particular disposition, in the amount determined under subparagraph 7(1.4)(c)(iv) with respect to the particular disposition was not less than

pouvant être acquis aux termes de la convention prévoyant les droits qui ont fait l'objet de la disposition donnée, dans le montant payable visé à l'alinéa 7(1.4)*c*) à l'égard de la disposition donnée,

(II) the amount that was included, in respect of the particular security, in the amount determined under subparagraph 7(1.4)(c)(ii) with respect to the last of those dispositions preceding the particular disposition;

(II) le montant qui a été inclus, relativement au titre donné, dans le montant total payable visé à l'alinéa 7(1.4)*c*) à l'égard de la dernière de ces dispositions précédant la disposition donnée;

Idem

Idem

(d.1) where the taxpayer

***d*.1)** la moitié de la valeur de l'avantage dans le cas où le contribuable, à la fois :

(i) is deemed, under paragraph 7(1)(a) by virtue of subsection 7(1.1), to have received a benefit in the year in respect of a share acquired by the taxpayer after May 22, 1985,

(i) est réputé, selon l'alinéa 7(1)*a*) à cause du paragraphe 7(1.1), avoir reçu un avantage au cours de l'année au titre d'une action qu'il a acquise après le 22 mai 1985,

(ii) has not disposed of the share (otherwise than as a consequence of the taxpayer's death) or exchanged the share within two years after the date the taxpayer acquired it, and

(ii) n'a pas disposé de l'action (autrement que par suite de son décès) ou ne l'a pas échangée dans les deux ans suivant la date où il l'a acquise,

(iii) has not deducted an amount under paragraph 110(1)(d) in respect of the benefit in computing the taxpayer's taxable income for the year,

(iii) n'a pas déduit de montant en vertu de l'alinéa d) pour l'avantage, dans le calcul de son revenu imposable pour l'année;

an amount equal to 1/2 of the amount of the benefit;

***Income Tax Regulations*, C.R.C., c. 945**

***Règlement de l'impôt sur le revenu*, C.R.C., ch. 945**

6204 (1) For the purposes of subparagraph 110(1)(d)(i) of the Act, a share is a prescribed share of the capital stock of a corporation at the time of its sale or issue, as the case

6204 (1) Pour l'application de l'alinéa 110(1)*d*) de la Loi, une action est une action visée du capital-actions d'une société à la date de sa vente ou de son émission, selon le cas, si à

may be, if, at that time,

(a) under the terms or conditions of the share or any agreement in respect of the share or its issue,

(i) the amount of the dividends (in this section referred to as the "dividend entitlement") that the corporation may declare or pay on the share is not limited to a maximum amount or fixed at a minimum amount at that time or at any time thereafter by way of a formula or otherwise,

(ii) the amount (in this section referred to as the "liquidation entitlement") that the holder of the share is entitled to receive on the share on the dissolution, liquidation or winding-up of the corporation is not limited to a maximum amount or fixed at a minimum amount by way of a formula or otherwise,

(iii) the share cannot be converted into any other security, other than into another security of the corporation or of another corporation with which it does not deal at arm's length that is, or would be at the date of conversion, a prescribed share,

(iv) the holder of the share cannot at that time or at any time thereafter cause the share to be redeemed, acquired or cancelled by the corporation or any specified person in relation to the corporation, except where the redemption, acquisition or cancellation is required pursuant to a conversion that is not prohibited by subparagraph (iii),

(v) no person or partnership has, either absolutely or contingently, an obligation to reduce, or to cause the corporation to reduce, at that time or at any time thereafter, the paid-up

cette date :

a) conformément aux conditions de l'action ou à un accord relatif à l'action ou à son émission :

(i) le montant des dividendes — appelé « part des bénéfices » au présent article — que la société peut déclarer ou verser sur l'action n'est pas limité à un montant maximum ni fixé à un montant minimum, à cette date ou ultérieurement, par une formule ou autrement,

(ii) le montant — appelé « part de liquidation » au présent article — que le détenteur de l'action a le droit de recevoir sur celle-ci à la dissolution ou liquidation de la société n'est pas limité à un montant maximum ni fixé à un montant minimum, par une formule ou autrement,

(iii) l'action ne peut être convertie en une autre valeur, sauf s'il s'agit d'une valeur de la société ou d'une autre société avec laquelle elle a un lien de dépendance qui est une action visée ou qui le serait à la date de la conversion,

(iv) le détenteur de l'action ne peut, à cette date ou ultérieurement, faire en sorte que l'action soit rachetée, acquise ou annulée par la société ou par une personne apparentée à la société, sauf si le rachat, l'acquisition ou l'annulation est exigé aux termes d'une conversion que le sous-alinéa (iii) n'interdit pas,

(v) aucune personne ou société de personnes n'a l'obligation, conditionnelle ou non, de réduire ou de faire en sorte que la société réduise, à cette date ou

capital in respect of the share, except where the reduction is required pursuant to a conversion that is not prohibited by subparagraph (iii), and

ultérieurement, le capital versé au titre de l'action, sauf si la réduction est exigée aux termes d'une conversion que le sous-alinéa (iii) n'interdit pas,

(vi) neither the corporation nor any specified person in relation to the corporation has, either absolutely or contingently, the right or obligation to redeem, acquire or cancel, at that time or any later time, the share in whole or in part other than for an amount that approximates the fair market value of the share (determined without reference to any such right or obligation) or a lesser amount;

(vi) ni la société ni une personne apparentée à elle n'ont le droit ou l'obligation, conditionnel ou non, de racheter, d'acquérir ou d'annuler, à cette date ou ultérieurement, tout ou partie de l'action, sauf en contrepartie d'un montant qui correspond approximativement à la juste valeur marchande de l'action, déterminée compte non tenu d'un tel droit ou d'une telle obligation, ou d'un montant inférieur;

(b) the corporation or a specified person in relation to the corporation cannot reasonably be expected to, within two years after the time the share is sold or issued, as the case may be, redeem, acquire or cancel the share in whole or in part, or reduce the paid-up capital of the corporation in respect of the share, otherwise than as a consequence of

b) on ne peut raisonnablement s'attendre à ce que, dans les deux ans suivant la vente ou l'émission de l'action, la société ou une personne apparentée à celle-ci rachète, acquière ou annule l'action en tout ou en partie, ou réduise le capital versé de la société au titre de l'action, autrement que par suite :

(i) an amalgamation of a subsidiary wholly-owned corporation,

(i) soit de la fusion d'une filiale à cent pour cent,

(ii) a winding-up to which subsection 88(1) of the Act applies, or

(ii) soit d'une liquidation à laquelle s'applique le paragraphe 88(1) de la Loi,

(iii) a distribution or appropriation to which subsection 84(2) of the Act applies; and

(iii) soit d'une distribution ou attribution à laquelle s'applique le paragraphe 84(2) de la Loi;

(c) it cannot reasonably be expected that any of the terms or conditions of the share or any existing agreement in respect of the share or its sale or issue will be modified or amended, or that any new agreement in respect of the share, its sale or issue will be entered

c) il n'est pas raisonnable de s'attendre à ce que les modalités de l'action ou une convention concernant l'action ou sa vente ou son émission soient modifiées, ou à ce qu'une nouvelle convention concernant l'action, sa vente ou son

into, within two years after the time the share is sold or issued, in such a manner that the share would not be a prescribed share if it had been sold or issued at the time of such modification or amendment or at the time the new agreement is entered into.

émission soit conclue, dans les deux ans suivant la date de la vente ou de l'émission de l'action, de telle sorte que l'action n'aurait pas été une action visée si elle avait été vendue ou émise à la date d'une telle modification ou à la date où la nouvelle convention est conclue.

(2) For the purposes of subsection (1),

(2) Pour l'application du paragraphe (1) :

(a) the dividend entitlement of a share of the capital stock of a corporation shall be deemed not to be limited to a maximum amount or fixed at a minimum amount where it may reasonably be considered that all or substantially all of the dividend entitlement is determinable by reference to the dividend entitlement of another share of the capital stock of the corporation that meets the requirements of subparagraph (1)(a)(i);

a) la part des bénéfices liée à une action du capital-actions d'une société est réputée ne pas être limitée à un montant maximum ni fixée à un montant minimum, lorsqu'il est raisonnable de croire que la totalité ou presque de cette part peut être déterminée par comparaison à la part des bénéfices liée à une autre action du capital-actions de la société, qui répond aux exigences du sous-alinéa (1)*a*)(i);

(b) the liquidation entitlement of a share of the capital stock of a corporation shall be deemed not to be limited to a maximum amount or fixed at a minimum amount where it may reasonably be considered that all or substantially all of the liquidation entitlement is determinable by reference to the liquidation entitlement of another share of the capital stock of the corporation that meets the requirements of subparagraph (1)(a)(ii); and

b) la part de liquidation d'une action du capital-actions d'une société est réputée ne pas être limitée à un montant maximum ni fixée à un montant minimum, lorsqu'il est raisonnable de croire que la totalité ou presque de cette part peut être déterminée par comparaison à la part de liquidation d'une autre action du capital-actions de la société, qui répond aux exigences du sous-alinéa (1)*a*)(ii);

(c) the determination of whether a share of the capital stock of a particular corporation is a prescribed share shall be made without reference to a right or obligation to redeem, acquire or cancel the share, or to cause the share to be redeemed, acquired or cancelled, where

c) la question de savoir si une action du capital-actions d'une société donnée est une action visée est déterminée compte non tenu du droit ou de l'obligation de racheter, d'acquérir ou d'annuler l'action ou de faire en sorte qu'elle soit rachetée, acquise ou annulée, si les conditions

	suivantes sont réunies :
(i) the person (in this paragraph referred to as the "holder") to whom the share is sold or issued is, at the time the share is sold or issued, dealing at arm's length with the particular corporation and with each corporation with which the particular corporation is not dealing at arm's length,	**(i)** au moment de la vente ou de l'émission de l'action, la personne (appelée détenteur au présent alinéa) à qui l'action est vendue ou émise n'a de lien de dépendance ni avec la société donnée ni avec les sociétés avec lesquelles celle-ci a un lien de dépendance,
(ii) the right or obligation is provided for in the terms or conditions of the share or in an agreement in respect of the share or its issue and, having regard to all the circumstances, it can reasonably be considered that	**(ii)** le droit ou l'obligation est prévu par les modalités de l'action ou dans une convention concernant l'action ou son émission et, compte tenu de toutes les circonstances, il est raisonnable de considérer :
(A) the principal purpose of providing for the right or obligation is to protect the holder against any loss in respect of the share, and the amount payable on the redemption, acquisition or cancellation (in this subparagraph and in subparagraph (iii) referred to as the "acquisition") of the share will not exceed the adjusted cost base of the share to the holder immediately before the acquisition, or	**(A)** soit que le droit ou l'obligation est prévu principalement en vue de garantir le détenteur contre les pertes pouvant résulter de l'action et que la somme à payer lors du rachat, de l'acquisition ou de l'annulation (appelés « acquisition » au présent sous-alinéa et au sous-alinéa (iii)) de l'action ne dépassera pas le prix de base rajusté de l'action pour le détenteur immédiatement avant l'acquisition,
(B) the principal purpose of providing for the right or obligation is to provide the holder with a market for the share, and the amount payable on the acquisition of the share will not exceed the fair market value of the share immediately before the acquisition, and	**(B)** soit que le droit ou l'obligation est prévu principalement en vue de fournir au détenteur un marché pour l'action et que la somme à payer lors de l'acquisition de l'action ne dépassera pas la juste valeur marchande de l'action immédiatement avant l'acquisition,
(iii) having regard to all the circumstances, it can reasonably be considered that no portion of the amount payable on the acquisition of the share is directly determinable by reference to the profits of the particular corporation, or of another corporation with which the particular	**(iii)** compte tenu de toutes les circonstances, il est raisonnable de considérer qu'aucune partie de la somme à payer lors de l'acquisition de l'action n'est déterminable directement en fonction des bénéfices de la société donnée ou d'une autre société avec laquelle celle-ci a un lien

corporation does not deal at arm's length, for all or any part of the period during which the holder owns the share or has a right to acquire the share, unless the reference to the profits of the particular corporation or the other corporation is only for the purpose of determining the fair market value of the share pursuant to a formula set out in the terms or conditions of the share or the agreement in respect of the share or its issue, as the case may be.

de dépendance, pour tout ou partie de la période au cours de laquelle le détenteur est propriétaire de l'action ou a le droit de l'acquérir, sauf si la mention des bénéfices de la société donnée ou de l'autre société ne sert qu'à établir la juste valeur marchande de l'action suivant une formule prévue par les modalités de l'action ou dans la convention concernant l'action ou son émission, selon le cas.

(3) For the purposes of subsection (1), *specified person*, in relation to a corporation, means

(3) Pour l'application du paragraphe (1), « personne apparentée » à une société s'entend des personnes suivantes :

(a) any person or partnership with whom the corporation does not deal at arm's length otherwise than because of a right referred to in paragraph 251(5)(b) of the Act that arises as a result of an offer by the person or partnership to acquire all or substantially all of the shares of the capital stock of the corporation, or

a) une personne ou une société de personnes avec laquelle la société a un lien de dépendance sauf en raison d'un droit visé à l'alinéa 251(5)*b*) de la Loi qui découle de l'offre de la personne ou de la société de personnes d'acquérir la totalité ou la presque totalité des actions du capital-actions de la société;

(b) any partnership or trust of which the corporation (or a person or partnership with whom the corporation does not deal at arm's length) is a member or beneficiary, respectively.

b) une société de personnes ou une fiducie dont la société (ou une personne ou une société de personnes avec laquelle elle a un lien de dépendance) est respectivement associé ou bénéficiaire.

(4) For the purposes of subsection (3), the Act shall be read without reference to subsection 256(9) of the Act.

(4) Pour l'application du paragraphe (3), il n'est pas tenu compte du paragraphe 256(9) de la Loi.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKETS:	A-180-16, A-181-16, A-182-16, A-183-16, A-184-16, A-185-16 AND A-186-16

(APPEALS FROM SEVEN JUDGMENTS OF THE TAX COURT OF CANADA RENDERED BY THE HONOURABLE MADAME JUSTICE D'AURAY, DATED MAY 3, 2016, DOCKET NOS. 2012-2142(IT)G, 2012-2144(IT)G, 2012-2145(IT)G, 2012-2146(IT)G, 2012-2147(IT)G, 2012-2148(IT)G, and 2012-2150(IT)G).

DOCKET:	A-180-16
STYLE OF CAUSE:	MARIO MONTMINY v. HER MAJESTY THE QUEEN
AND DOCKET:	A-181-16
STYLE OF CAUSE:	ALBERTO GALEGO v. HER MAJESTY THE QUEEN
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STYLE OF CAUSE:	JACQUES BENOIT v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JUNE 6, 2017
REASONS FOR JUDGMENT BY:	NOËL C.J.
CONCURRED IN BY:	SCOTT J.A. BOIVIN J.A.
DATE OF REASONS:	JULY 14, 2017

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