Federal Court of Appeal  Cour d'appel fédérale

Date: 20161125

Dockets: A-372-16, A-370-16, A-371-16, A-373-16, A-374-16, A-375-16, A-376-16, A-377-16, A-378-16, A-379-16, A-380-16, A-381-16, A-382-16, A-383-16, A-384-16, A-385-16

Citation: 2016 FCA 299

[ENGLISH TRANSLATION]

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

BETWEEN:

LINE DUROCHER (2011-1393(IT)G)
XAVIER VALLERAND (2011-1274(IT)G)
MARIE-PIER BLONDEAU (2011-1358(IT)G)
OLIVIER RINGUET (2011-1365(IT)G)
GENEVIÈVE LAGARDE (2011-1352(IT)G)
LOIK VALLERAND (2011-1272(IT)G)
MARISOL RINGUET (2011-1357(IT)G)
FRANCINE BUSSIÈRES (2011-1360(IT)G)
G.MARIUS BÉRUBÉ (2011-1284(IT)G)
CATHERINE SANSOUCY (2011-1314(IT)G)
CLAUDINE LAGARDE (2011-1349(IT)G)
NATHALIE MONETTE (2011-1356(IT)G)
AISHA BLONDEAU (2011-1305(IT)G)
FRANCIS S. LABONTÉ (2011-1351(IT)G)
VINCENT LAGARDE (2011-1363(IT)G)
ÉLISE LAGARDE (2011-1350(IT)G)

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on October 27, 2016.

Judgment delivered at Ottawa, Ontario, on November 25, 2016.

REASONS FOR JUDGMENT BY:	NOËL C.J.
CONCURRED IN BY:	TRUDEL J.A.
	SCOTT J.A.

Federal Court of Appeal | Cour d'appel fédérale

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REASONS FOR JUDGMENT

NOËL C.J.

[1] There are 16 appeals against judgments rendered by the Tax Court of Canada judge (TCC judge) confirming 16 notices of assessment issued against the appellants (*Durocher v. the Queen*, 2015 TCC 297), based on a single set of reasons. These assessments deny the appellants the capital gains deduction provided for in subsection 110.6(2.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th suppl.) (the ITA). The taxation years at issue are between 2006 and 2008, and vary among the appellants.

[2] The appeals were consolidated by an order made on October 19, 2016, as amended on November 23, 2016, with the Line Durocher docket (A-372-16) designated as the main case. In accordance with that order, the reasons which follow dispose of the 16 appeals. The original version will be filed in the main docket, and a copy will be filed in each related docket as reasons for judgment therein.

[3] In support of their appeals, the appellants submit that the call option underlying the refusal of the deduction which they claimed is absolutely null and void and that the TCC judge erred in law by failing to reach this conclusion.

[4] For the reasons set out below, I am of the opinion that the TCC judge correctly concluded that this option was not null and void and that the appeals must therefore be dismissed.

[5] The statutory provisions relevant to the analysis are set out in the appendix.

THE RELEVANT FACTS

[6] There were initially nine Gestion RJCG Inc. (RJCG) shareholders, but following a transfer to family trusts in early April 2005, the number of individuals for which the trusts held these shares increased to 16.

[7] In April 2006, the 16 appellants realized a taxable capital gain upon the sale of the shares of the capital stock of RJCG with respect to which they claimed the capital gains deduction provided for in subsection 110.6(2.1) of the ITA.

[8] However, these deductions were rejected by the Minister of National Revenue (the Minister) on the ground that, throughout the entire 24-month period preceding the sale, RJCG was not a "Canadian-controlled private corporation" within the meaning of subsection 125(7) of the ITA (Appeal Book, vol. 2, p. 308).

[9] Six different corporations are directly or indirectly involved in the transactions underlying these appeals (Reasons, paras. 7, 8, 27 and 29):

> a) Dale Parizeau L. M. Inc. (Dale Parizeau), an insurance brokerage company carrying on business in Quebec.
>
> b) Gestion Lagarde Massicote Inc. (Gestion Lagarde), a company that holds all of the common and preferred shares in Dale Parizeau.
>
> c) Gestion RJCG, a corporation, which before April 28, 2006, held all the common shares in Gestion Lagarde.

> d) Aviva Canada Inc. (Aviva), formerly CGU Group Canada Ltd. (CGU), a company incorporated under the laws of Ontario, which holds all the preferred shares in Gestion Lagarde.
>
> e) Aviva International Holdings Limited (Aviva International), a non-resident corporation, which is Aviva's parent company.
>
> f) 1695711 Ontario Inc. (1695711 Ontario) of which Aviva holds 20% of the capital stock and to whom the shares of the capital stock of RJCG were sold on April 28, 2006.

[10] A unanimous shareholder agreement (Shareholders' Agreement) signed by RJCG, Aviva, Gestion Lagarde and Dale Parizeau on April 12, 2002, is at the centre of this case (Appeal Book, vol. 7, pp. 1071–1104).

[11] In addition to Article 18.2 of the Shareholders' Agreement, according to which that agreement is governed by the laws of Quebec, two articles are of particular importance in the context of this litigation. In Article 6 of the Shareholders' Agreement, the parties recognized that Aviva – formerly CGU – had been granted an option to acquire 66.305% of Gestion Lagarde Class "A" common shares. It also provided that Gestion Lagarde would issue a sufficient number of shares to allow Aviva to acquire this percentage (Reasons, para. 13):

> 6. CGU OPTION
>
> The parties recognize that CGU has been granted the option to subscribe to and purchase that number of Class "A" Shares (the "Optioned Shares"), which, when issued and added to the issued and outstanding Class "A" Shares, would result in the Optioned Shares representing 66.305% of the resulting issued and outstanding Class "A" Shares (which include the Optioned Shares), for a price of one dollar ($1.00) per Share, pursuant to a restated and amended option agreement entered into between CGU and the Corporation as of April 12, 2002 (the "CGU Option"). The Shareholders shall, and shall cause their respective nominees to the board of directors of the Corporation to, give effect to the CGU Option and cause the Corporation to issue the appropriate number of Shares to CGU upon the exercise of the CGU Option.

[12] The other provision of interest is Article 7.3 of the Shareholders' Agreement. It provided that starting on May 1, 2005, Aviva would be entitled to require RJCG to dispose in its favour the Class "A" shares it held in the capital stock of Gestion Lagarde (Reasons, para. 13):

> 7.3 Call on RJCG Shares by CGU
>
> CGU shall be entitled to require RJCG to sell on May 1, 2005, and any May 1 thereafter, all but not less than all of its Shares to CGU upon giving six (6) months' prior notice to RJCG, (which notice may be given six months prior to May 1, 2005), and CGU shall, in such event, purchase such Shares at their Fair Value increased by an amount equal to the following: […] and RJCG shall be obliged to sell such Shares at such purchase price.

[13] At some point before the exercise date, a sum of $400,000 was paid by Aviva in consideration for the right to make some amendments to the Shareholders' Agreement. This amount, which was to be paid to Gestion Lagarde, was ultimately paid to RJCG (Appeal Book, vol. 7, p. 1111).

[14] Several amendments were then made to Article 7.3 (Reasons, paras. 15-27), which gave rise to many questions during the proceedings, including whether, pursuant to a letter dated December 20, 2005, Aviva's option covered the shares of the capital stock of RJCG as the Crown argued, rather than the shares of Gestion Lagarde as the appellants argued (Reasons, para. 27). The TCC judge conducted his analysis on the assumption that the shares of the capital stock of Gestion Lagarde were the ones targeted, without however elucidating that question.

[15] At any rate, the shares of the capital stock of RJCG were the ones that were eventually sold. The record shows that on April 28, 2006 Aviva ceded its option to 1695711 Ontario, a corporation in which it held 20% of the capital stock, and on the same day, 1695711 Ontario

acquired the shares that the family trusts held in the capital stock of RJCG (Appeal Book, vol. 7, pp. 1200–1202 and 1209).

[16] In rejecting the claimed deduction, the Minister relied on the deeming provision provided for in paragraph 251(5)(*b*) of the ITA and made the assumption that the December 20, 2005 letter granted Aviva the right to acquire the shares of the capital stock of RJCG, thereby giving Aviva control over RJCG. Aviva was in turn controlled by Aviva International, a non-resident corporation. As a result, RJCG no longer met the requirement that it be a "Canadian-controlled private corporation" during the 24 months prior to the sale (see paragraph 110.6(1)(*c*) and subsection 125(7) of the ITA).

THE DECISION OF THE TAX COURT OF CANADA JUDGE

[17] The TCC judge first examined the argument according to which the Minister could not rely on the call option set out in the Shareholders' Agreement as a basis for rejecting the deduction claimed because this option was absolutely null and void (Reasons, para. 33). After having indicated that a ruling favourable to the appellants on this issue would bring an end to the matter, the TCC judge devoted the better part of his analysis to this issue (Reasons, paras. 35–69).

[18] According to the appellants, Article 6 of the Shareholders' Agreement, which gives Aviva an option to acquire the shares of Gestion Lagarde, and Article 7.3 of the Shareholders' Agreement, which gives Aviva the option to acquire the shares held by RJCG in Gestion Lagarde, are contrary to section 148 of the *Act respecting the distribution of financial products*

and services, CQLR, c. D-9.2 (ARDFPS) because they give Aviva more than 20% of the capital stock of Dale Parizeau (Reasons, para. 47).

[19] In support of this argument, the appellants rely on subparagraph 251(5)(*b*)(i) of the ITA, which provides that, for some purposes, call options for shares are deemed to have been exercised so that the holder of a call option for shares is treated as if it owned the subject shares. According to the appellants, section 148 of the ARDFPS, and in particular the words "directly or indirectly" in that section, mean that the holder of a call option must be treated in the same fashion for the purposes of this act.

[20] According to the appellants, it follows that the call option granted by the Shareholders' Agreement is contrary to the ARDFPS because it would allow Aviva, as a financial institution, to hold more than 20% of the capital stock of Dale Parizeau, which meets the definition of a damage insurance company. Given that this is a requirement of public order, Articles 6 and 7.3 of the Shareholders' Agreement would be null and void as they allow this threshold to be exceeded. Articles 1413 and 1418 of the *Civil Code of Québec*, C.Q.L.R. c. CCQ-1991 (C.C.Q.) are cited in support of this proposition.

[21] The TCC judge accepted from the onset that it is the Superior Court that has the jurisdiction to declare null and void the call option (Reasons, para. 45). Nevertheless, the Tax Court of Canada (TCC), in exercising its jurisdiction to rule on an appeal from an assessment, "must consider the *bona fides* of contracts, including the validity of a contract and any of its

provisions" (Reasons, para. 46). The TCC judge therefore proceeded on the basis that he could entertain the argument based the alleged nullity of the option.

[22] However, the TCC judge rejected the appellants' argument, holding that a deeming provision under the ITA cannot be used in the application of another act (Reasons, paras. 51–52). The fact that Aviva is, under paragraph 251(5)(*b*), deemed to be the owner of the shares of Gestion Lagarde for the purposes of subsection 110.6(1) of the ITA does not mean that this fiction can be transposed and applied for the purposes of section 148 of the ARDFPS (*Ibidem*).

[23] The TCC judge also underlined the fact that as long as the option had not been exercised, Aviva remained able to ensure that the acquisition which was envisaged would be completed in compliance with the 20% threshold provided for in section 148 of the ARDFPS. This is in fact what happened since Aviva, by transferring its option to 1695711 Ontario and allowing it, rather than Aviva, to acquire the shares of the capital stock of RJCG, complied with this threshold (Reasons, para. 50).

[24] The TCC judge added that even if the fiction created by paragraph 251(5)(*b*) of the ITA applied to the ARDFPS, Articles 6 and 7.3 would not be null and void. Not only does Article 18.6 of the Shareholders' Agreement provide for the severability of illegal portions (Reasons, para. 53), but the framework provided by the ARDFPS already contemplates remedies other than a declaration of nullity for corporations that contravene its provisions (Reasons, para. 65).

[25] The TCC judge then considered the effect of Articles 6 and 7.3 of the Shareholders' Agreement on the deduction claimed by the appellants. He conducted his analysis without adopting the Minister's position that pursuant to the letter dated December 20, 2005, the option was modified to cover the shares of the capital stock of RJCG rather than those in the capital stock of Gestion Lagarde, thus disqualifying RJCG as a "Canadian-controlled private corporation."

[26] Indeed, he took the initiative of raising the hypothesis that the appeals were doomed to fail on the basis of the assets and activities criterion set out in subsection 110.6(1) of the ITA (Reasons, para. 71).

[27] After having invited the parties to be heard on this new issue and having considered their written submissions, the TCC judge explained that none of the exceptions to the application of the deeming provision applied in this case (*i.e.*: see paragraph 110.6(14)(*b*)), and that paragraph 251(5)(*b*) had therefore to be applied with all attendant consequences (Reasons, para. 76). One of these consequences was that the RJCG shares did not meet the requirements of paragraph 110.6(1)(*c*).

[28] According to this provision, in the 24 months preceding the sale, the shares had to be those of a corporation, the fair market value of the assets of which was attributable to assets used principally in an active business carried on primarily in Canada; or the corporation related to it had to be a "Canadian-controlled private corporation" whose shares met the asset test (Reasons, paras. 81–83).

[29] The TCC judge had previously concluded, in view of the evidence, that RJCG and Gestion Lagarde were only management corporations; RJCG's assets were composed only of the shares of the capital stock of Gestion Lagarde; Gestion Lagarde's assets were composed only of the shares of the capital stock of Dale Parizeau and that given the deeming provision, Dale Parizeau had ceased to be a "Canadian-controlled private corporation" starting in 2002, when the call option was initially granted (Reasons, paras. 73–74, 78–79 and 83).

THE PARTIES' POSITIONS

[30] At the beginning of the hearing, counsel for the appellants informed us that only the argument based on the nullity of the call option would be invoked in support of the appeals. He recognized that if he did not succeed on this point, the appeals had to be dismissed. The summary of the arguments is therefore limited to those pertaining to the alleged nullity of the option.

[31] Counsel for the appellants first argued that the TCC judge had the jurisdiction to analyze the Shareholders' Agreement and rule on the nullity of the option granted to Aviva, because it was an issue related to the notices of assessment (Appellants' factum, paras. 25–26).

[32] He added that the TCC judge had to give the ARDFPS a broad and liberal interpretation, something which he had omitted from doing (Appellants' factum, paras. 41–42). He cites the decision of the Quebec Court of Appeal in *Souscripteurs du Lloyds c. Alimentation Denis & Mario Guillemette*, 2012 QCCA 1376 [*Souscripteurs Lloyds*], where certain contractual provisions were declared inoperative because they contravened the ARDFPS. In reaching this

conclusion, the Court of Appeal emphasized the fact that the ARDFPS is an act of public order designed to protect the consumer (*Souscripteurs Lloyds*, para. 82).

[33] Counsel for the appellants also cited the decision of the Superior Court in *Formule Pontiac Buick GMC Inc. c. Bureau des Services financiers*, 2004 CanLII 7239 [*Formule Pontiac*], where the word "remuneration", as it appears in section 431 of the ARDFPS, was interpreted as including the concept of dividends (*Formule Pontiac*, paras. 68–69):

> [TRANSLATION][68] The Tribunal understands the argument made by counsel for the applicant, stating that it was not remuneration but a dividend or some other way of being paid. If we adopt a literal interpretation, counsel for the applicant may be right. But that is not the interpretation that the Tribunal must follow to ascertain compliance or non-compliance with the act. If there is no ambiguity, the Tribunal must ascertain the purpose of the act. The language is clear, the legislature seeks to protect the consumer and wants the consumer to be informed of the cost of its product when it is sold by a person who is not accredited.
>
> [69] The applicant attempts to circumvent the law by adopting a literal interpretation and using a distinct corporate structure. The Tribunal cannot follow the applicant on this argument.

[34] The Superior Court gave effect to the legislative intent in these terms (*Formule Pontiac*, paras. 75–76):

> [TRANSLATION][75] Indeed, the act seeks to prevent someone from receiving more than 30% remuneration without disclosing it to the consumer. By the applicant's own admission in paragraph 94, the applicant organized its affairs in order not to receive more than 30%, using a literal interpretation of the section as previously stated. The Tribunal concludes that the legislation must be interpreted in such a way as to achieve its purpose. And this purpose of the act is not respected by the financial structure developed by the applicant.
>
> [76] In conclusion, the applicant is not entitled to act as it does. It does not comply with section 431 of [the ARDFPS]. The amount of money that it receives as remuneration or a dividend or otherwise, is greater than the 30% permitted under section 431. This section must be interpreted so that it can achieve the full purpose that the legislator intended to give it, i.e. consumer protection.

[35] Counsel for the appellants argues that section 148 of the ARDFPS must be construed in the same fashion. According to him, the words “held directly or indirectly” must be given a broad and liberal interpretation in order to include “options acquired by taxpayers who have a lot of money and can pay considerable sums to change those options at the appropriate time [...]” (Appellants’ factum, para. 50).

[36] He adds that, contrary to what the TCC judge states, while failure to meet the requirements of section 148 of the ARDFPS can be sanctioned by penalties, this does not prevent a court from ruling on issues of public order (Appellants’ factum, para. 52 citing *Formule Pontiac* and *Souscripteurs Lloyds*), and in this case, from ruling that Articles 6 and 7.3 are absolutely null and void.

[37] Although the Crown supports the TCC judge’s decision rejecting the appellants’ argument based on nullity, it submits that only the Superior Court was entitled to declare the call option null and void (Factum of the Crown, para. 41, note 38). The Crown adds that in the absence of such a declaration, the appellants could not base their case on the nullity of Articles 6 and 7.3 of the Shareholders’ Agreement (*Ibidem*).

[38] Be that as it may, the Crown submits that the option was not null and void. It points out that section 148 of the ARDFPS governs the holding of shares beyond the stipulated threshold, whereas the call option merely confers a right to purchase (Factum of the Crown, paras. 42–43). This distinction becomes crucial when regard is had to the fact that Aviva did not exercise its right to purchase in violation of section 148 of the ARDFPS (Factum of the Crown, para. 46).

[39] At any rate, according to the Crown, the TCC judge correctly concluded that a violation of section 148 of the ARDFPS did not result in the absolute nullity of the option given the sanction provided for in section 485 of the ARDFPS (Factum of the Crown, paras. 45–47).

ANALYSIS

- *TCC's jurisdiction*

[40] The Crown is challenging the TCC's jurisdiction to declare null and void the call option. In pronouncing on the assessment, the TCC judge held that he could entertain the argument based on the nullity of the call option, the validity of which was relied upon by the Minister in issuing the assessment, even though no competent tribunal had ruled on the matter.

[41] It is not necessary to resolve this issue since, as will be seen, the TCC judge correctly rejected the argument that the option was null and void. However, I note that, as mentioned during the hearing, the Crown is distorting the controversy when it suggests that the TCC judge would have been required to "declare" the option null and void with all attendant consequences. As the TCC judge explains at paragraphs 45 and 46 of his reasons, he would have been required to pronounce on the nullity of the option for the sole purpose of determining the validity of the assessments under appeal.

[42] Thus, the role of the TCC, when addressing an argument based on nullity in an appeal under the ITA, cannot be assimilated to that of the Superior Court, which has the jurisdiction to "declare" null and void a contract for all legal purposes under articles 33, 35 and 142 the *Code of*

Civil Procedure, C.Q.L.R. c. C-25.01 (compare, see *Markou v. The Queen*, 2016 TCC 137, paras. 7–21 where the TCC had to deal with a similar problem in a case arising in a common law province).

[43] That being said, I do not dismiss the position of the Crown counsel who takes exception to the approach of the appellants who, in her view, rely on the legal validity of the option granted to Aviva when it suits them, but argue that it would be contrary to the public order when they find it useful to depart from it. It is far from clear that the public order can be invoked in this manner, but the TCC judge having correctly refused to give effect to the argument based on nullity, it is not necessary to expand upon this subject.

- *Nullity of the call option*

[44] The cornerstone of the appellants' argument in support of the alleged nullity of the call option under articles 1413 and 1418 of the C.C.Q. is that for the purposes of section 148 of the ARDFPS, the holding of a call option on shares of an insurance company must be treated as if the option had been exercised.

[45] In making this argument, counsel for the appellants recognizes that no provision equivalent to paragraph 251(5)(*b*) of the ITA is found in the ARDFPS. However, he submits that the words "held, directly or indirectly" in section 148 of the ARDFPS, when given a broad and liberal interpretation, cover not only the holding of shares, but also the option to hold shares. The TCC judge refused to accept that interpretation, insisting on the fact that the deemed provision

provided for in paragraph 251(5)(*b*) of the ITA finds no equivalent in the ARDFPS (Reasons, paras. 51–52).

[46] The question raised is one of statutory interpretation, which is subject to the standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33, para. 8).

[47] Before addressing this issue, it must be recalled that the words of section 148 of the ARDFPS are to be read in the light of their entire context and according to their grammatical and ordinary sense harmoniously with the scheme of the ARDFPS, its object and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21).

[48] I begin the analysis by emphasizing the particular nature of a deeming provision. As the Supreme Court noted in *R. v. Verrette*, [1978] 2 S.C.R. 838, at page 845, "[a] deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is." For the particular purposes of the ITA, paragraph 251(5)(*b*) deems, among other things, that a corporation that has a right to acquire shares contingently and in the future has exercised this right, even if in reality this option has not been exercised. While the situation in 2002 was that the option had not been exercised, the fact does remain that, for the purposes of subsection 125(7) of the ITA, a legal fiction already prevailed. However, in areas unaffected by a legal fiction, the actual situation stands. For the purposes of the ARDFPS, the actual situation was and remained that Aviva had not exercised its option.

[49] This conclusion does not fully resolve the issue because counsel for the appellants asks us to interpret section 148 of the ARDFPS so as to include not only the holding of shares above the prohibited threshold, but also the holding of an option, which, if exercised, would allow this threshold to be exceeded (Appellants' factum, para. 50).

[50] I accept that the words "held, directly or indirectly" give section 148 of the ARDFPS a large scope, but I do not believe that these words go so far as to allow for the appellants' reading of this provision. As stated, the reality is that holding a right to acquire shares in the future does not equate with holding the shares covered by that right.

[51] The purpose of section 148 of the ARDFPS, when read in context, is to prevent a financial institution from holding an interest of more than 20% in an insurance company or exercising on it the influence associated with an interest that would exceed this threshold. Therefore, at first glance, holding shares indirectly rather than directly covers the holding of shares by proxy. This reading is faithful to the ordinary meaning of the words and gives section 148 of the ARDFPS an effect consistent with the legislative intent because a person who holds shares by proxy is able to exercise all the rights arising from them. Conversely, holding the right to exercise a call option on these shares does not confer any of these rights.

[52] Applying this reasoning to the facts at issue, Aviva did not directly or indirectly hold the shares of Dale Parizeau. Aviva had a choice to acquire the shares covered by the option. The mere fact that this choice was available does not make Aviva the owner of the shares covered by the option. Only a legal fiction comparable to the one created under the ITA could alter the

situation and cause Aviva to be deemed the owner of the shares that it was entitled to purchase. In this regard, it would be incongruous to say the least to declare Aviva in violation of section 148 of the ARDFPS during the period preceding the exercise of the option based on the evidence which shows that this option was exercised without contravening the requirements of the ARDFPS.

[53] The cases cited by the counsel for the appellants do not support their argument. In *Souscripteurs Lloyds*, the Court of Appeal held that a provision excluding indemnification for gross negligence contravened the regulations applicable to insurance policies enacted under the ARDFPS, as well as section 196 thereof. Aside from establishing that a contractual provision can be declared inoperative because it is contrary to the ARDFPS, that case does not assist the appellants.

[54] Similarly, *Formule Pontiac*, where the Superior Court construed the word "remuneration", is of no assistance to the appellants. In that case, the Court found that a dividend had been paid to disguise remuneration exceeding the threshold set out in section 431 of the ARDFPS. It was in that context that the Superior Court held that a broad and liberal construction of the word "remuneration" could include the payment of a dividend. If a parallel is drawn with this case, not only must it be repeated that holding a call option for shares does not equate with holding the shares covered by the option, but nothing in this case suggests that the call option granted by the Shareholders' Agreement was intended to defeat section 148 of the ARDFPS. The opposite is rather obvious when one considers how the option was exercised.

[55] I therefore conclude that section 148 of the ARDFPS cannot be construed so as to treat a person who holds a call option the same way as a person who holds the shares covered by the option. It follows that the appellants' argument based on nullity must be dismissed.

[56] That is sufficient to dispose of these appeals.

CONCLUSION

[57] I would dismiss the appeals with costs in the main case only.

"Marc Noël"
Chief Justice

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

Certified true translation
François Brunet, Revisor

APPENDIX I

***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.)**
Definitions	**Définitions**
110.6 (1) For the purposes of this section,	**110.6 (1)** Les définitions qui suivent s'appliquent au présent article.
qualified small business corporation share of an individual (other than a trust that is not a personal trust) at any time (in this definition referred to as the "determination time") means a share of the capital stock of a corporation that,	*action admissible de petite entreprise* S'agissant d'une action admissible de petite entreprise d'un particulier (à l'exception d'une fiducie qui n'est pas une fiducie personnelle) à un moment donné, action du capital-actions d'une société qui, à la fois :
(a) at the determination time, is a share of the capital stock of a small business corporation owned by the individual, the individual's spouse or common-law partner or a partnership related to the individual,	**a)** au moment donné, est une action du capital-actions d'une société exploitant une petite entreprise, action dont le particulier, son époux ou conjoint de fait ou une société de personnes liée au particulier est propriétaire;
(b) throughout the 24 months immediately preceding the determination time, was not owned by anyone other than the individual or a person or partnership related to the individual, and	**b)** tout au long de la période de 24 mois qui précède le moment donné, n'est la propriété de nul autre que le particulier ou une personne ou société de personnes qui lui est liée;
(c) throughout that part of the 24 months immediately preceding the determination time while it was owned by the individual or a person or partnership related to the individual, was a share of the capital stock of a Canadian-controlled private corporation more than 50% of the fair market value of the assets of which was attributable to	**c)** tout au long de la partie de la période de 24 mois qui précède le moment donné, où l'action est la propriété du particulier ou d'une personne ou société de personnes qui lui est liée, est une action du capital-actions d'une société privée sous contrôle canadien et dont plus de 50 % de la juste valeur marchande de l'actif est attribuable à des éléments visés aux sous-alinéas (i) ou (ii):
(i) assets used principally in an active business carried on primarily in	**(i)** des éléments utilisés principalement dans une entreprise

Canada by the corporation or by a corporation related to it,

que la société ou une société qui lui est liée exploite activement, principalement au Canada,

(ii) shares of the capital stock or indebtedness of one or more other corporations that were connected (within the meaning of subsection 186(4) on the assumption that each of the other corporations was a payer corporation within the meaning of that subsection) with the corporation where

(ii) des actions du capital-actions ou des dettes d'une ou plusieurs autres sociétés rattachées à la société — au sens du paragraphe 186(4), selon l'hypothèse que chacune de ces autres sociétés est une société payante au sens du même paragraphe — dans le cas où, à la fois :

(A) throughout that part of the 24 months immediately preceding the determination time that ends at the time the corporation acquired such a share or indebtedness, the share or indebtedness was not owned by anyone other than the corporation, a person or partnership related to the corporation or a person or partnership related to such a person or partnership, and

(A) tout au long de la partie de la période de 24 mois qui précède le moment donné se terminant au moment où la société a acquis ces actions ou ces dettes, nul autre que la société, qu'une personne ou société de personnes qui lui est liée ou qu'une personne ou société de personnes liée à une telle personne ou société de personnes n'en est propriétaire,

(B) throughout that part of the 24 months immediately preceding the determination time while such a share or indebtedness was owned by the corporation, a person or partnership related to the corporation or a person or partnership related to such a person or partnership, it was a share or indebtedness of a Canadian-controlled private corporation more than 50% of the fair market value of the assets of which was attributable to assets described in subparagraph (iii), or

(B) tout au long de la partie de la période de 24 mois qui précède le moment donné, où ces actions ou ces dettes sont la propriété de la société, d'une personne ou société de personnes qui lui est liée ou d'une personne ou société de personnes liée à une telle personne ou société de personnes, il s'agit d'actions ou de dettes de sociétés privées sous contrôle canadien et dont plus de 50 % de la juste valeur marchande de l'actif est attribuable à des éléments visés au sous-alinéa (i) ou au présent sous-alinéa.

(iii) assets described in either of subparagraph (i) or (ii)

[…]

Except that

Toutefois :

(d) where, for any particular period of time in the 24-month period ending at the determination time, all or substantially all of the fair market value of the assets of a particular corporation that is the corporation or another corporation that was connected with the corporation cannot be attributed to assets described in subparagraph (i), shares or indebtedness of corporations described in clause (B), or any combination thereof, the reference in clause (B) to "more than 50%" shall, for the particular period of time, be read as a reference to "all or substantially all" in respect of each other corporation that was connected with the particular corporation and, for the purpose of this paragraph, a corporation is connected with another corporation only where

d) dans le cas où, pour une période donnée comprise dans la période de 24 mois se terminant au moment donné, la totalité, ou presque, de la juste valeur marchande de l'actif d'une société donnée qui est la société ou une autre société rattachée à celle-ci n'est attribuable ni à des éléments visés au sous-alinéa c)(i), ni à des actions ou dettes de sociétés visées à la division c)(ii)(B), ni à une combinaison de tels éléments, actions ou dettes, le passage « plus de 50 % », à cette division, est remplacé, pour cette période donnée, par le passage « la totalité, ou presque, » quant à chacune des autres sociétés rattachées à la société donnée; pour l'application du présent alinéa, une corporation n'est rattachée à une autre que si, à la fois :

(i) the corporation is connected (within the meaning of subsection 186(4) on the assumption that the corporation was a payer corporation within the meaning of that subsection) with the other corporation, and

(i) elle y est rattachée, au sens du paragraphe 186(4), selon l'hypothèse qu'elle est une société payante au sens du même paragraphe,

(ii) the other corporation owns shares of the capital stock of the corporation and, for the purpose of this subparagraph, the other corporation shall be deemed to own the shares of the capital stock of any corporation that are owned by a corporation any shares of the capital stock of which are owned or are deemed by this subparagraph to be owned by the other corporation,

(ii) l'autre société est propriétaire d'actions du capital-actions de la société et est réputée, pour l'application du présent sous-alinéa, propriétaire des actions du capital-actions d'une société quelconque qui sont la propriété d'une société dont les actions du capital-actions sont la propriété de l'autre société ou sont réputées l'être en application du présent sous-alinéa;

Definitions

125(7) In this section,

Définitions

125(7) Les définitions qui suivent s'appliquent au présent article.

Canadian-controlled private corporation means a private corporation that is a Canadian corporation other than

(a) a corporation controlled, directly or indirectly in any manner whatever, by one or more non-resident persons, by one or more public corporations (other than a prescribed venture capital corporation), by one or more corporations described in paragraph (c), or by any combination of them,

(b) a corporation that would, if each share of the capital stock of a corporation that is owned by a non-resident person, by a public corporation (other than a prescribed venture capital corporation), or by a corporation described in paragraph (c) were owned by a particular person, be controlled by the particular person,

(c) a corporation a class of the shares of the capital stock of which is listed on a designated stock exchange, or

(d) in applying subsection (1), paragraphs 87(2)(vv) and (ww) (including, for greater certainty, in applying those paragraphs as provided under paragraph 88(1)(e.2)), the definitions excessive eligible dividend designation, general rate income pool and low rate income pool in subsection 89(1) and subsections 89(4) to (6), (8) to (10) and 249(3.1), a corporation that has made an election under subsection 89(11) and that has not revoked the election under subsection 89(12); (*société privée sous contrôle canadien*)

société privée sous contrôle canadien Société privée qui est une société canadienne, à l'exception des sociétés suivantes :

a) la société contrôlée, directement ou indirectement, de quelque manière que ce soit, par une ou plusieurs personnes non-résidentes, par une ou plusieurs sociétés publiques (sauf une société à capital de risque visée par règlement), par une ou plusieurs sociétés visées à l'alinéa c) ou par une combinaison de ces personnes ou sociétés;

b) si chaque action du capital-actions d'une société appartenant à une personne non-résidente, à une société publique (sauf une société à capital de risque visée par règlement) ou à une société visée à l'alinéa c) appartenait à une personne donnée, la société qui serait contrôlée par cette dernière;

c) la société dont une catégorie d'actions du capital-actions est cotée à une bourse de valeurs désignée;

d) pour l'application du paragraphe (1), des alinéas 87(2)vv) et ww) (compte tenu des modifications apportées à ces alinéas par l'effet de l'alinéa 88(1)e.2)), des définitions de compte de revenu à taux général, compte de revenu à taux réduit et désignation excessive de dividende déterminé au paragraphe 89(1) et des paragraphes 89(4) à (6) et (8) à (10) et 249(3.1), la société qui a fait le choix prévu au paragraphe 89(11) et qui ne l'a pas révoqué selon le paragraphe 89(12). (*Canadian-controlled private corporation*)

Arm's length

Lien de dépendance

251 (1) For the purposes of this Act,

…

Control by related groups, options, etc.

(5) For the purposes of subsection 251(2) and the definition *Canadian-controlled private corporation* in subsection 125(7),

(a) where a related group is in a position to control a corporation, it shall be deemed to be a related group that controls the corporation whether or not it is part of a larger group by which the corporation is in fact controlled;

(b) where at any time a person has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently,

(i) to, or to acquire, shares of the capital stock of a corporation or to control the voting rights of such shares, the person shall, except where the right is not exercisable at that time because the exercise thereof is contingent on the death, bankruptcy or permanent disability of an individual, be deemed to have the same position in relation to the control of the corporation as if the person owned the shares at that time,

(ii) to cause a corporation to redeem, acquire or cancel any shares of its capital stock owned by other shareholders of the corporation, the person shall, except where the right is not exercisable at that time because the exercise thereof is contingent on

251 (1) Pour l'application de la présente loi :

[…]

Groupe lié, droit d'achat ou de rachat et personne liée à elle-même

(5) Pour l'application du paragraphe (2) et de la définition de *société privée sous contrôle canadien* au paragraphe 125(7) :

a) le groupe lié qui est en mesure de contrôler une société est réputé être un groupe lié qui contrôle la société, qu'il fasse ou non partie d'un groupe plus nombreux qui contrôle en fait la société;

b) la personne qui, à un moment donné, en vertu d'un contrat, en equity ou autrement, a un droit, immédiat ou futur, conditionnel ou non :

(i) à des actions du capital-actions d'une société ou de les acquérir ou d'en contrôler les droits de vote, est réputée occuper la même position relativement au contrôle de la société que si elle était propriétaire des actions à ce moment, sauf si le droit ne peut être exercé à ce moment du fait que son exercice est conditionnel au décès, à la faillite ou à l'invalidité permanente d'un particulier,

(ii) d'obliger une société à racheter, acquérir ou annuler des actions de son capital-actions dont d'autres actionnaires de la société sont propriétaires, est réputée occuper la même position relativement au contrôle de la société que si celle-ci

the death, bankruptcy or permanent disability of an individual, be deemed to have the same position in relation to the control of the corporation as if the shares were so redeemed, acquired or cancelled by the corporation at that time;

(iii) to, or to acquire or control, voting rights in respect of shares of the capital stock of a corporation, the person is, except where the right is not exercisable at that time because its exercise is contingent on the death, bankruptcy or permanent disability of an individual, deemed to have the same position in relation to the control of the corporation as if the person could exercise the voting rights at that time, or

(iv) to cause the reduction of voting rights in respect of shares, owned by other shareholders, of the capital stock of a corporation, the person is, except where the right is not exercisable at that time because its exercise is contingent on the death, bankruptcy or permanent disability of an individual, deemed to have the same position in relation to the control of the corporation as if the voting rights were so reduced at that time; and

(c) where a person owns shares in two or more corporations, the person shall as shareholder of one of the corporations be deemed to be related to himself, herself or itself as shareholder of each of the other corporations.

An Act Respecting the Distribution of Financial Products and Services, **C.Q.L. c. D-9.2**

rachetait, acquérait ou annulait les actions à ce moment, sauf si le droit ne peut être exercé à ce moment du fait que son exercice est conditionnel au décès, à la faillite ou à l'invalidité permanente d'un particulier,

(iii) aux droits de vote rattachés à des actions du capital-actions d'une société, ou de les acquérir ou les contrôler, est réputée occuper la même position relativement au contrôle de la société que si elle pouvait exercer les droits de vote à ce moment, sauf si le droit ne peut être exercé à ce moment du fait que son exercice est conditionnel au décès, à la faillite ou à l'invalidité permanente d'un particulier,

(iv) de faire réduire les droits de vote rattachés à des actions, appartenant à d'autres actionnaires, du capital-actions d'une société est réputée occuper la même position relativement au contrôle de la société que si les droits de vote étaient ainsi réduits à ce moment, sauf si le droit ne peut être exercé à ce moment du fait que son exercice est conditionnel au décès, à la faillite ou à l'invalidité permanente d'un particulier,

c) lorsqu'une personne est propriétaire d'actions de plusieurs sociétés, elle est réputée, à titre d'actionnaire d'une des sociétés, être liée à elle-même à titre d'actionnaire de chacune des autres sociétés.

Loi sur la distribution de produits et services, **L.R.Q. c. D-9.2**

147. For the purposes of this chapter,

"*financial institution*" means a financial institution other than an insurer engaging exclusively in the business of reinsurance;

"*firm*" means a firm registered for the damage insurance sector that acts through a damage insurance broker and does not engage exclusively in the business of reinsurance;

148. Not more than 20% of the shares of a firm or voting rights attached to its shares may be held directly or indirectly by financial institutions, financial groups or legal persons related thereto.

However, the first paragraph shall not operate to prevent a firm from allotting its shares or registering a transfer of its shares to give effect to a contract entered into before 21 December 1988.

***Civil Code of Québec*, C.Q.L. c. CCQ-1991**

1413. A contract whose object is prohibited by law or contrary to public order is null.

1417. A contract is absolutely null where the condition of formation sanctioned by its nullity is necessary for the protection of the general interest.

1418. The absolute nullity of a contract may be invoked by any person having a present and actual interest in doing so; it is invoked by

147. Pour l'application du présent chapitre, on entend par :

«*institution financière*» : une institution financière autre qu'un assureur qui pratique exclusivement la réassurance;

«*cabinet*» : un cabinet inscrit dans la discipline de l'assurance de dommages qui agit par l'entremise d'un courtier en assurance de dommages et qui ne transige pas uniquement des affaires de réassurance;

148. Les actions d'un cabinet ou les droits de vote qui y sont afférents ne peuvent être détenus, directement ou indirectement, à plus de 20%, par des institutions financières, des groupes financiers ou des personnes morales qui leur sont liés.

Toutefois, le premier alinéa n'a pas pour effet d'empêcher un cabinet d'attribuer ses actions ou d'enregistrer leur transfert pour donner suite à un contrat conclu avant le 21 décembre 1988.

***Code civil du Québec*, L.R.Q. c. CCQ-1991**

1413. Est nul le contrat dont l'objet est prohibé par la loi ou contraire à l'ordre public.

1417. La nullité d'un contrat est absolue lorsque la condition de formation qu'elle sanctionne s'impose pour la protection de l'intérêt général.

1418. La nullité absolue d'un contrat peut être invoquée par toute personne qui y a un intérêt né et actuel; le

the court of its own motion.

A contract that is absolutely null may not be confirmed.

1422. A contract that is null is deemed never to have existed.

In such a case, each party is bound to restore to the other the prestations he has received.

***Code of Civil Procedure*, C.Q.L. c. C-25.01**

JURISDICTION OF SUPERIOR COURT

33. The Superior Court is the court of original general jurisdiction. It has jurisdiction in first instance to hear and determine any application not formally and exclusively assigned by law to another court or to an adjudicative body.

It has exclusive jurisdiction to hear and determine class actions and applications for an injunction.

JURISDICTION OF COURT OF QUÉBEC

35. The Court of Québec has exclusive jurisdiction to hear and determine applications in which the value of the subject matter of the dispute or the amount claimed, including in lease resiliation matters, is less than $85,000, exclusive of interest; it also hears and determines applications ancillary to such an application, including those for the specific performance of a contractual obligation. However, it does not have such jurisdiction in cases where jurisdiction is formally and exclusively assigned to another court

tribunal la soulève d'office.

Le contrat frappé de nullité absolue n'est pas susceptible de confirmation.

1422. Le contrat frappé de nullité est réputé n'avoir jamais existé.

Chacune des parties est, dans ce cas, tenue de restituer à l'autre les prestations qu'elle a reçues.

***Code de procédure civile*, L.R.Q. c. C-25.01**

LA COMPÉTENCE DE LA COUR SUPÉRIEURE

33. La Cour supérieure est le tribunal de droit commun. Elle a compétence en première instance pour entendre toute demande que la loi n'attribue pas formellement et exclusivement à une autre juridiction ou à un organisme juridictionnel.

Elle est seule compétente pour entendre les actions collectives et les demandes d'injonction.

LA COMPÉTENCE DE LA COUR DU QUÉBEC

35. La Cour du Québec a compétence exclusive pour entendre les demandes dans lesquelles soit la valeur de l'objet du litige, soit la somme réclamée, y compris en matière de résiliation de bail, est inférieure à 85 000 $, sans égard aux intérêts; elle entend également les demandes qui leur sont accessoires portant notamment sur l'exécution en nature d'une obligation contractuelle. Néanmoins, elle n'exerce pas cette compétence dans les cas où la loi l'attribue formellement et exclusivement à une autre juridiction ou à un organisme

or adjudicative body, or in family matters other than adoption.

juridictionnel, non plus que dans les matières familiales autres que l'adoption.

An application brought before the Court of Québec is no longer within the jurisdiction of that Court if a cross-application is made for an amount or value equal to or exceeding $85,000, or if an amendment to the application increases the amount claimed or the value of the subject matter of the dispute to $85,000 or more. Conversely, the Court of Québec alone becomes competent to hear and determine an application brought before the Superior Court if the amount claimed or the value of the subject matter of the dispute falls below that amount. In either case, the record is transferred to the competent court if all parties agree or if the court so orders on its own initiative or on a party's request.

La demande introduite à la Cour du Québec cesse d'être de la compétence de la cour si, en raison d'une demande reconventionnelle prise isolément ou d'une modification à la demande, la somme réclamée ou la valeur de l'objet du litige atteint ou excède 85 000 $. Inversement, la Cour du Québec devient seule compétente pour entendre la demande portée devant la Cour supérieure lorsque la somme réclamée ou la valeur de l'objet du litige devient inférieure à ce montant. Dans l'un et l'autre cas, le dossier est transmis à la juridiction compétente si toutes les parties y consentent ou si le tribunal l'ordonne, d'office ou sur demande d'une partie.

If two or more plaintiffs join together or are represented by the same person in the same judicial application, the Court of Québec has jurisdiction if it would be competent to hear and determine each plaintiff's application.

Lorsque plusieurs demandeurs se joignent ou sont représentés par une même personne dans une même demande en justice, la cour est compétente si elle peut connaître des demandes de chacun.

142. Even in the absence of a dispute, a judicial application may be instituted to seek, in order to resolve a genuine problem, a declaratory judgment determining the status of the plaintiff, or a right, power or obligation conferred on the plaintiff by a juridical act.

142. La demande en justice peut avoir pour objet d'obtenir, même en l'absence de litige, un jugement déclaratoire déterminant, pour solutionner une difficulté réelle, l'état du demandeur ou un droit, un pouvoir ou une obligation lui résultant d'un acte juridique.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKETS:	A-372, A-370-16, A-371-16, A-373-16, A-374-16, A-375-16, A-376-16, A-377-16, A-378-16, A-379-16, A-380-16, A-381-16, A-382-16, A-383-16, A-384-16, A-385-16.

APPEAL OF 16 JUDGMENTS OF THE TAX COURT OF CANADA RENDERED BY MR. JUSTICE GERALD J. RIP ON FEBRUARY 19, 2015, FILE NUMBERS (2011-1393(IT)G), (2011-1274(IT)G), (2011-1358(IT)G), (2011-1365(IT)G), (2011-1352(IT)G), (2011-1272(IT)G), (2011-1357(IT)G), (2011-1360(IT)G), (2011-1284(IT)G), (2011-1314(IT)G), (2011-1349(IT)G), (2011-1356(IT)G), (2011-1305(IT)G), (2011-1351(IT)G), (2011-1363(IT)G), (2011-1350(IT)G).

STYLE OF CAUSE:	LINE DUROCHER (2011-1393(IT)G) XAVIER VALLERAND (2011-1274(IT)G) MARIE-PIER BLONDEAU (2011-1358(IT)G) OLIVIER RINGUET (2011-1365(IT)G) GENEVIÈVE LAGARDE (2011-1352(IT)G) LOIK VALLERAND (2011-1272(IT)G) MARISOL RINGUET (2011-1357(IT)G) FRANCINE BUSSIÈRES (2011-1360(IT)G) G.MARIUS BÉRUBÉ (2011-1284(IT)G) CATHERINE SANSOUCY (2011-1314(IT)G) CLAUDINE LAGARDE (2011-1349(IT)G) NATHALIE MONETTE (2011-1356(IT)G) AISHA BLONDEAU (2011-1305(IT)G) FRANCIS S. LABONTÉ (2011-1351(IT)G) VINCENT LAGARDE (2011-

	1363(IT)G) ÉLISE LAGARDE (2011-1350(IT)G)
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	OCTOBER 27, 2016
REASONS FOR JUDGMENT:	NOËL C.J.
CONCURRED IN BY:	TRUDEL J.A. SCOTT J.A.
DATED:	NOVEMBER 25, 2016

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