Date: 20081229

Docket: A-35-08

Citation: 2008 FCA 419

CORAM: **DÉCARY J.A.**
LÉTOURNEAU J.A.
NOËL J.A.

BETWEEN:

RCI ENVIRONNEMENT INC.
(CENTRES DE TRANSBORDEMENT
ET DE VALORISATION NORD-SUD INC.)

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on December 1, 2008.

Judgment delivered at Ottawa, Ontario, on December 29, 2008.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: DÉCARY J.A.
LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision by Justice Archambault of the Tax Court of Canada (TCC) (the TCC judge), who confirmed in part the assessments issued for RCI Environnement Inc. (RCI) and Centre de Transbordement et de Valorisation Nord-Sud Inc. (CTVNS) regarding their 1999 tax year. In doing so, the TCC judge also confirmed in part the assessments issued for RCI and CTVNS's 2000 tax year, which included an adjustment as a result of the adjustment made for 1999.

[2] Separate appeals were filed before the TCC by RCI and CTVNS, but the appellants merged during the proceedings, to form the company RCI Environnement Inc. The TCC judge took the merger into account by rendering a single judgment to decide what were originally two appeals. Accordingly, the matter before this Court is a single appeal filed by the company resulting from the merger, which should be referred to as RCI Environnement Inc. (2006) (RCI (2006)).

[3] At issue here is the tax treatment of $12,000,000 received by RCI and CTVNS in equal shares following the settlement of a dispute concerning the violation of some non-competition agreements. The TCC judge concluded that this was an eligible capital amount pursuant to section 14 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp) (the Act), three-quarters of which should be included in computing the companies' income. According to counsel for RCI (2006), the amount is a windfall gain that is exempt from taxation.

FACTS

[4] The facts underlying the appeal are described in a chronological summary prepared by the Respondent's counsel, which the judge reproduced in its entirety in his reasons, having made certain changes suggested by counsel for RCI (2006). Two witnesses were also heard during the proceedings before the TCC. For the purposes of this appeal, we can simply rely on the following summary.

[5] RCI and CTVNS are sister companies that were established in 1997 by Lucien Rémillard (Reasons, paragraph 3, 3.). At the time, Mr. Rémillard was the majority shareholder of Placements St-Mathieu Inc. (PSM), which, in turn, owned Société en commandite St-Mathieu (SEC) (Appeal Book, Vol. III, pages 514 and 515). The four entities, namely RCI, CTVNS, SEC and PSM (collectively referred to as "Groupe RCI"), wanted to acquire a solid waste management company operated in Quebec by Waste Management of Canada Inc. (WMI).

[6] On July 30, 1997, RCI acquired some assets from WMI (Reasons, paragraph 3, 5.). At the same time, CTVNS acquired WMI, the shares it held in WMI Québec Inc., and a lot and building (transfer station) (*ibidem*). On the same day, SEC acquired rights in the contracts for the provision of services to WMI's customers in Quebec (Reasons, paragraph 3, 6.). Lastly, Groupe RCI also acquired the accounts receivable of WMI and WMI Québec Inc. (Reasons, paragraph 3, 7.).

[7] The total price of all of the transactions on July 30, 1997, was about $17,250,000, plus $1,361,053 for the accounts receivable (Reasons, paragraph 3, 8.). The transactions were conditional on WMI signing non-competition agreements with RCI, CTVNS and SEC, which is what it did (Reasons, paragraph 3, 9.).

[8] No share of the purchase price paid by RCI and CTVNS was allocated to the non-competition agreements (Reasons, paragraph 3, 10.). The agreements had five-year terms and concerned solid waste management operations in the Greater Montréal area (Reasons, paragraph 3, 12.).

[9] At the time the non-competition agreements were signed, a company called Intersan Inc. was operating a solid waste management business in Quebec, specifically in the Greater Montréal area (*ibidem*). In the year following the acquisition by Groupe RCI, WMI's parent company (WMI USA) merged with USA Waste Services Inc. (USA Services) (Reasons, paragraph 3, 15.). The new merged entity was Waste Management Inc. (WM 1998) (*ibidem*). At the time of the merger, Intersan Inc. was owned by Canadian Waste Services Inc. (CWS), a subsidiary of USA Services (*ibidem*).

[10] Because Intersan Inc. was part of the WM 1998 group and operating in the Greater Montréal area (*ibidem*), the merger resulted in WM 1998 and its subsidiaries (collectively referred to as "Groupe WM 1998") being bound by the non-competition agreements (*ibidem*). As a result, the agreements were violated.

[11] Between March 25, 1998, and August 18, 1998, Groupe RCI sent a series of formal demands (Reasons, paragraph 3, 17. to 24.). The last formal demand was sent on August 18, 1998, to all members of Groupe WM 1998, reminding them of the terms of the non-competition agreements signed by WMI and asking that these terms be respected from then on (Reasons, paragraph 3, 24.). The president of CWS, David Sutherland-Yoest was instructed to resolve the dispute between Groupe RCI and Groupe WM 1998 (Reasons, paragraph 3, 26.).

[12] Negotiations between David Sutherland-Yoest and Lucien Rémillard ensued. In November 1998, they agreed to settle the dispute against a payment of $12 million (Reasons, paragraph 3, 32.).

[13] On December 16, 1998, an out-of-court settlement agreement (entitled "Release, Settlement and Termination Agreement") was signed. According to the agreement, a $12 million payment had to be made to terminate the non-competition agreements signed for the benefit of RCI, CTVNS and SEC and any claim related to the last formal demand (Reasons, paragraph 3, 33.).

[14] The $12 million cheque was drawn on the bank account of CWS (Reasons, paragraph 3, 35.). The TCC judge concluded that CWS was the real payer of this amount and not the other members of Groupe WM 1998 (Reasons, paragraphs 83 and 84).

[15] SEC waived its share of the $12 million despite it having obtained the most important asset in the July 30, 1997, transaction with WMI, namely the contracts for the provision of services (Appeal Book, Vol. VI, page 1010). The TCC judge wrote the following in that respect (Reasons, paragraph 79, note 32):

> The fact that [SEC] waived receipt of its share could raise a question of a benefit conferred if, as I believe, the limited partnership was not dealing at arm's length with CTVNS and RCI. Because the parties agreed not to raise this question or any other question arising out of the waiver, the matter has been dealt with as if RCI and CTVNS were the only parties entitled to receive their share of the $12 million.

[16] The amount received was divided equally between RCI and CTVNS (Reasons, paragraph 3, 38.). A note was made in their financial statements for the fiscal year ending July 31, 1999, explaining that the amount was a non-taxable extraordinary amount (Reasons, paragraph 3, 39.). In accordance with that note, no share of the amount received appeared in their tax returns for the 1999 tax year.

[17] The Minister of National Revenue (the Minister), through reassessments issued with respect to their 1999 taxation year, added $6 million each to RCI's and CTVNS's income, as income from a business. The consequence of these assessments was to change a loss carry-forward claimed by RCI and CTVNS for the previous year.

[18] Appeals were lodged before the TCC and, in his amended replies to the notices of appeal, the Minister indicated that, if the $12 million were not income from a business, three-quarters of that amount was still taxable, because it was either an eligible capital amount within the meaning of section 14 or a capital gain within the meaning of sections 39 and 40 of the Act.

[19] The TCC judge concluded that the $12 million were an eligible capital amount. He therefore referred the assessments back to the Minister for reassessments to be made accordingly. That decision is under appeal.

STATUTORY PROVISIONS

[20] The TCC judge cited the following provisions in support of his reasons. The emphasis is his:

14(1) Inclusion in income from business – Where, at the end of a taxation year, the total of all amounts each of which is an amount determined, in respect of a business of a taxpayer, for E in the definition "cumulative eligible capital" in subsection (5) (in this section referred to as an "eligible capital amount" [note omitted] or for F in that definition exceeds the total of all amounts determined for A to D in that definition in respect of the business (which excess is in this subsection referred to as "the excess"), ... (*b*) in any other case, the amount, if any, by which the excess exceeds ½ of the amount determined for Q in the definition "cumulative eligible capital" in subsection (5) in respect of the business shall be included in computing the taxpayer's income from that business for that year.	**14(1) Montant à inclure dans le calcul du revenu tiré d'une entreprise** -- Lorsque, à la fin d'une année d'imposition, le total des montants dont chacun est un montant représenté par l'élément E de la formule applicable figurant à la définition de « montant cumulatif des immobilisations admissibles » au paragraphe (5) . appelé « montant en immobilisations admissible » [référence omise] au présent article ou un montant représenté par l'élément F de cette formule excède le total des montants représentés par les éléments A à D de cette formule, au titre d'une entreprise d'un contribuable, les règles suivantes s'appliquent : [...] *b*) dans les autres cas, l'excédent éventuel de cet excédent sur la moitié du montant représenté par cet élément Q relativement à l'entreprise est à inclure dans le calcul du revenu du contribuable tiré de cette entreprise pour l'année.
14(5) In this section, "**eligible capital expenditure**" of a taxpayer in respect of a business means the portion of any outlay or expense made or incurred by the taxpayer, as a result of a transaction occurring after	**14(5)** Les définitions qui suivent s'appliquent au présent article. **« dépense en capital admissible »** S'agissant d'une dépense en capital admissible d'un contribuable au titre d'une entreprise, la partie de toute

1971, on account of capital for the purpose of gaining or producing income from the business, other than any such outlay or expense
(*a*) ...
(*b*) ...

(*c*) that is the cost of, or any part of the cost of,

(i) tangible property of the taxpayer,
(i) intangible property that is depreciable property of the taxpayer,
(ii) property in respect of which any deduction (otherwise than under paragraph 20(1)(*b*)) is permitted in computing the taxpayer's income from the business or would be so permitted if the taxpayer's income from the business were sufficient for the purpose, or (iv) an interest in, or right to acquire, any property described in any of subparagraphs (i) to (iii)

but, for greater certainty and without restricting the generality of the foregoing, does not include any portion of
...
"**cumulative eligible capital**" of a taxpayer at any time in respect of a business of the taxpayer means the amount determined by the formula

(A + B + C + D + D.1) - (E + F)

where

A is 3/4 of the total of all eligible capital expenditures in respect of the

dépense de capital engagée ou effectuée par lui, par suite d'une opération réalisée après 1971, en vue de tirer un revenu de l'entreprise, à l'exception d'une dépense de cette nature :
a) [...]
b) [...]
c) soit représentant tout ou partie du coût, selon le cas :

(i) des biens corporels acquis par le contribuable,
(ii) des biens incorporels qui constituent des biens amortissables pour le contribuable,
(iii) des biens relativement auxquels une déduction (sauf celle prévue à l'alinéa 20(1)*b*)) est permise dans le calcul du revenu qu'il a tiré de l'entreprise ou serait permise si le revenu qu'il a tiré de l'entreprise était suffisant à cet effet,
(iv) d'un droit sur un bien visé à l'un des sous-alinéas (i) à (iii) ou d'un droit d'acquérir ce bien;

il est entendu toutefois, sans que soit limitée la portée générale de ce qui précède, que la présente définition ne vise aucune partie :
[...]

« montant cumulatif des immobilisations admissibles » En ce qui concerne l'entreprise d'un contribuable, à un moment donné, s'entend du montant calculé selon la formule suivante :

(A + B + C + D + D.1) - (E + F)

où :

business made or incurred by the taxpayer before that time and after the taxpayer's adjustment time, [note omitted]

...

E is the total of all amounts each of which is ¾ of the amount, if any, by Which

(*a*) an amount which, as a result of a disposition [note omitted] occurring after the taxpayer's adjustment time and before that time, the taxpayer has or may become entitled to receive, in respect of the business carried on or formerly carried on by the taxpayer where the consideration given by the taxpayer therefore was such that, if any payment had been made by the taxpayer after 1971 for that consideration, the payment would have been an eligible capital expenditure of the taxpayer in respect of the business exceeds
(*b*) all outlays and expenses to the extent that they were not otherwise deductible in computing the taxpayer's income and were made or incurred by the taxpayer for the purpose of giving that consideration,

…

38. Taxable Capital Gains and Allowable Capital Losses

For the purposes of this Act,

(*a*) subject to paragraphs (*a.1*) and (*a.2*), a taxpayer's taxable capital gain for a taxation year from the

A représente les 3/4 du total des dépenses en capital admissibles, au titre de l'entreprise, engagées ou effectuées par le contribuable avant ce moment donné et après le moment du rajustement qui lui est applicable;
[...]

E le total des sommes dont chacune représente les 3/4 de l'excédent éventuel du montant visé à l'alinéa *a*) sur le total visé à l'alinéa *b*) :

a) le montant que, par suite d'une disposition [référence omise] effectuée après le moment du rajustement applicable au contribuable et avant le moment donné, le contribuable est devenu ou peut devenir en droit de recevoir, au titre de l'entreprise qu'il exploite ou qu'il a [référence omise] exploitée, si la contrepartie qu'il en donne est telle que, s'il avait fait, pour cette contrepartie, un paiement après 1971, ce paiement aurait été pour lui une dépense en capital admissible au titre de l'entreprise;
b) le total des dépenses engagées ou effectuées par le contribuable en vue de donner cette contrepartie et qui ne sont pas déductibles par ailleurs dans le calcul de son revenu;

[...]

38. Sens de gain en capital imposable et de perte en capital déductible.

Pour l'application de la présente loi :

a) sous réserve de l'alinéa *a*.1), le gain en capital imposable d'un contribuable

disposition of any property is 1/2 of the taxpayer's capital gain for the year from the disposition of the property;
...

pour une année d'imposition, tiré de la disposition d'un bien, est égal aux ¾ du gain en capital qu'il a réalisé pour l'année à la disposition du bien
[...]

39(1) Taxable Capital Gains and Allowable Capital Losses -- For the purposes of this Act,

(*a*) a taxpayer's capital gain for a taxation year from the disposition of any property is the taxpayer's gain for the year determined under this subdivision (to the extent of the amount thereof that would not, if section 3 were read without reference to the expression "other than a taxable capital gain from the disposition of a property" in paragraph 3(*a*) and without reference to paragraph 3(*b*), be included in computing the taxpayer's income for the year or any other taxation year) from the disposition of any property of the taxpayer other than

(i) eligible capital property,

...

39(1) Sens de gain en capital et de perte en capital -- Pour l'application de la présente loi :

a) un gain en capital d'un contribuable, tiré, pour une année d'imposition, de la disposition d'un bien quelconque, est le gain, déterminé conformément à la présente sous-section (jusqu'à concurrence du montant de ce gain qui ne serait pas, compte non tenu du passage « autre qu'un gain en capital imposable résultant de la disposition d'un bien », à l'alinéa 3*a*), et de l'alinéa 3*b*), inclus dans le calcul de son revenu pour l'année ou pour toute autre année d'imposition), que ce contribuable a tiré, pour l'année, de la disposition d'un bien lui appartenant, à l'exception :

(i) d'une immobilisation admissible,

[...]

40(1) General rules -- Except as otherwise expressly provided in this Part

(*a*) a taxpayer's gain for a taxation year from the disposition of any property is the amount, if any, by which

(iii) if the property was disposed of in the year, the amount, if

40(1) Règles générales -- Sauf indication contraire expresse de la présente partie :

a) le gain d'un contribuable tiré, pour une année d'imposition, de la disposition d'un bien est l'excédent éventuel :

any, by which the taxpayer's proceeds of disposition exceed the total of the adjusted cost base to the taxpayer of the property immediately before the disposition and any outlays and expenses to the extent that they were made or incurred by the taxpayer for the purpose of making the disposition, ...

(i) en cas de disposition du bien au cours de l'année, de l'excédent éventuel du produit de disposition sur le total du prix de base rajusté du bien, pour le contribuable, calculé immédiatement avant la disposition, et des dépenses dans la mesure où celles-ci ont été engagées ou effectuées par lui en vue de réaliser la disposition,

54 In this subdivision,

"**eligible capital property**" of a taxpayer means any property, a part of the consideration for the disposition of which would, if the taxpayer disposed of the property, be an eligible capital amount in respect of a business; [note omitted]

54 Les définitions qui suivent s'appliquent à la présente sous-section.

« immobilisation admissible » Bien dont la disposition aurait pour contrepartie partielle un montant en immobilisations admissibles au titre d'une entreprise. [référence omise]

TCC DECISION

[21] The TCC judge concluded that the payment in question was an eligible capital amount. He dismissed the argument that the amount was a "windfall gain" as being "entirely without basis" (Reasons, paragraph 32). According to the TCC judge, it had not been shown that the payment was "unexpected, unforeseen and exceptional", as well-established case law requires (Reasons, paragraphs 32 to 34).

[22] As categorically, the TCC judge dismissed the Minister's first position that the amount was income from a business within the meaning of section 9 of the Act (Reasons, paragraphs 35 to 48). That conclusion is not at issue in this appeal.

[23] Counsel for RCI (2006) asked the TCC judge not to address the alternative issue, namely whether the payment was an eligible capital amount or a capital gain. He argued that these were new grounds for assessment that could not be argued because the time allowed had expired.

[24] The TCC judge relied on this Court's decision in *Walsh v. Canada*, 2007 FCA 222, [2007] F.C.J. No. 813 (QL) (paragraph 38) to conclude that these were alternative arguments that the Minister was authorized to make pursuant to subsection 152(9) of the Act (Reasons, paragraph 51):

152(9) The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act	**152(9)** Le ministre peut avancer un nouvel argument à l'appui d'une cotisation après l'expiration de la période normale de nouvelle cotisation, sauf si, sur appel interjeté en vertu de la présente loi:
(*a*) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and	*a*) d'une part, il existe des éléments de preuve que le contribuable n'est plus en mesure de produire sans l'autorisation du tribunal;
(*b*) it is not appropriate in the circumstances for the court to order that the evidence be adduced.	*b*) d'autre part, il ne convient pas que le tribunal ordonne la production des éléments de preuve dans les circonstances.
…	[…]

[25] Before dealing with the substantive issue, the TCC judge considered the argument of counsel for RCI (2006), according to which sections 14, 39 and 40 could not apply because no "property" had been involved in this case, and, moreover, there had been no "disposition" of property (Reasons, paragraph 54). The TCC judge cited the broad definition of "property" in subsection 248(1) of the Act to conclude that it was not necessary to refer to civil law, as suggested by RCI and CTVNS, to resolve the issue. According to the TCC judge, non-competition agreements give rights, and such rights are "property" within the meaning of the definition provided in subsection 248(1) of the Act (Reasons, paragraphs 55 to 67).

[26] The TCC judge then dealt with the concept of "disposition". He first stated that when the settlement was made (December 17, 1998), the term "disposition" was defined only for the rules relating to taxable capital gains. However, relying on the usual meaning of disposition, he concluded that the cancellation of the non-competition agreements was a disposition for the purposes of section 14 (Reasons, paragraphs 68 to 72). He adopted the reasoning of the Supreme Court in *Her Majesty the Queen v. Compagnie Immobilière BCN Limitée*, [1979] 1 S.C.R. 865 in that respect.

[27] After noting section 39, which stipulates that a capital gain may be from the disposition of any property "other than eligible capital property", the TCC judge considered whether the amount received was an "eligible capital amount" within the meaning of section 14 (Reasons, paragraphs 73 to 87).

[28] The TCC judge stated that in order to answer that question, the Court had to refer to item E, which appears in subsection 14(5) of the Act where "cumulative eligible capital" is defined. The TCC judge specifically discussed the third requirement provided there (the other two not having been challenged in the case before him):

> [W]here the consideration given by the taxpayer therefor was such that, if any payment had been made by the taxpayer after 1971 for that consideration, the payment would have been an eligible capital expenditure . . .

[29] The TCC judge concluded that the question had to be decided from the perspective of the two taxpayers in question, namely RCI and CTVNS. The question is therefore the following: if RCI and CTVNS had paid $12 million themselves to obtain the rights they held under the non-competition agreements, what would the nature of that expenditure be? According to the TCC judge, it was an eligible capital expenditure (Reasons, paragraph 77).

[30] In the event that he had misstated the question, the TCC judge continued his analysis by posing it from the perspective of the payer. The TCC rejected the RCI and CTVNS's argument that each Groupe WM 1998 member company should be considered to have paid $12 million. In his opinion, only CWS should be considered to be the payer. The TCC judge concluded that, from the perspective of CWS, the amount also had to be considered to be an eligible capital expenditure (Reasons, paragraphs 82 to 85). He continued by saying that he would have drawn the same conclusion if WMI were considered to have paid the $12 million (Reasons, paragraph 86).

[31] Lastly, in the event that the rights held by RCI and CTVNS under the non-competition agreements were not eligible capital property, the TCC judge concluded that they were capital property and that RCI's and CTVNS's waiver of these rights in exchange for the $12 million payment was a disposition (Reasons, paragraphs 87 to 89). As the adjusted base price of the rights was nil, the inclusion in income was the same, that is, three quarters of the amount received.

[32] The TCC judge therefore referred the assessments back to the Minister for reassessment, on the basis that three quarters of the amount received by RCI and CTVNS should be included in the calculation of their income pursuant to subsection 14(1) of the Act and that the loss carry-forward for the year 2000 should be adjusted accordingly.

ANALYSIS AND DECISION

[33] In support of the appeal, counsel for RCI (2006) reiterates the series of arguments he submitted before the TCC. In order, he argues that the Minister could not rely alternatively on subsection 14(1) and section 38 (Memorandum, paragraph 26); that, in any event, there was a [TRANSLATION] "complete lack of evidence" for this alternative reasoning (Memorandum, paragraph 27); that there was no "property" within the meaning of the Act by virtue of the *Civil Code of Québec*, let alone a "disposition" (Memorandum, paragraphs 28 and 29); that if there

was “property”, the TCC has misapplied section 14 by not considering our Court’s decision in *The Queen v. Toronto Refiners and Smelters Ltd.*, 2002 FCA 476 (paragraphs 15 to 23); and that the TCC judge erred in concluding alternatively that the payment in question gave rise to a capital gain (Memorandum, paragraph 31).

[34] Counsel for RCI (2006) did not mention the standard of review in raising these issues again. It should be noted that questions of law are subject to the correctness standard, while questions of fact and mixed questions cannot be reviewed unless there is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[35] In my humble opinion, the TCC judge gave a complete response to the arguments raised by counsel for RCI (2006). As to the first argument, subsection 152(9) of the Act stipulates that the Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period. In this case, the Minister’s alternative position was to invoke additional provisions of the Act to determine the tax treatment of the amount received by RCI and CTVNS. As explained by the TCC judge, these arguments relate to the very transaction being assessed and do not result in additional tax (in fact, there is a decrease). The arguments in question were announced well before the trial began, and no prejudice was argued by counsel for RCI (2006) regarding the availability of evidence to refute these arguments. In my opinion, the TCC judge correctly allowed the Minister to submit these arguments pursuant to subsection 152(9).

[36] Counsel for RCI (2006) argues that, in any event, there is a [TRANSLATION] "complete lack" of evidence for the alternative arguments. In particular, nothing in the evidence allowed the TCC judge to conclude that the non-competition agreements provided RCI and CTVNS with an advantage of an enduring nature and that the cancellation of the agreements resulted in decreased goodwill. Yet the TCC judge relied on the evidence to draw his conclusions. During his testimony, Mr. Sutherland-Yoest stated that Mr. Rémillard himself had argued that, from CWS's perspective, the non-competition agreements were worth at least $12 million as they made it possible to protect a $200 million investment (Appeal Book, Vol. II, page 257). According to the TCC judge, the fact that RCI's and CTVNS's competitor agreed to pay $12 million to cancel the agreements and that the amount represented over 55% of the value of the assets acquired by Groupe CCI in 1997 clearly demonstrated the importance of those rights (Reasons, paragraph 30).

[37] At the hearing, counsel for RCI (2006) criticized the TCC judge for not having considered in his calculation the fact that Groupe CGI included SEC, which had also been a main participant in the acquisition of the assets. This, however, merely increased the relative size of the amount received by RCI and CTVNS for the cancellation of the agreements. In any event, the TCC judge was well aware of this dichotomy (Reasons, paragraph 27). He indicated, however that the dispute was presented on the basis that RCI and CTVNS were the only parties entitled to receive the $12 million and that the parties had undertaken not to raise any question arising from the fact that SEC had waived the amount (Reasons, paragraph 79, note 32).

[38] The non-competition agreements were introduced in evidence, and even though they were only in effect for five years, they clearly resulted in preserving the goodwill acquired from WMI during that time (Reasons, paragraphs 27 and 28). Considering the importance of the territory that was the subject of the agreements and the amount paid to motivate RCI and CTVNS to waive their rights, one cannot seriously claim that the cancellation of the agreements was immaterial or did not have a negative impact on the goodwill acquired from WMI a few months earlier.

[39] As to the notion of "property" under the Act, it has been recognized for a long time that the concept of "property" under the Act is a large one that can extend to contractual rights (*Canada v. Golden*, [1986] 1 S.C.R. 209, at page 214). A number of decisions rendered since have applied the concept of property to contractual and even personal rights (see, for example, *Valley Equipment Ltd. v. The Queen*, 2008 FCA 65, paragraph 26; *Nadeau v. The Queen*, 2003 FCA 400, paragraph 28; *Kieboom v. M.R.N.*, [1992] 3 F.C. 488 (F.C.A.), pages 499 and 500; *Sani Sport Inc. c. La Reine*, [1990] 2 C.T.C. 15 (C.A.F.), page 23; *La Capitale, Cie D'assurance générale v. The Queen*, 98 DTC 6215 (F.C.A.), page 6221; *Rapistan Canada Ltd. v. M.R.N.*, [1974] 1 F.C. 739 (F.C.A.), page 742; *Pe Ben Industries Co. v. The Queen*, 88 DTC 6347 (F.C.T.D.), page 6351, 3rd paragraph before the end).

[40] Moreover, as explained by the TCC judge, this Court's decision in *Manrell v. The Queen*, 2003 FCA 128, [2003] 3 F.C. 727, does not help counsel for RCI (2006) at all (Reasons, paragraphs 61 to 63). The principle arising from that decision is that only a right that makes it

possible to make a claim against someone else is “property”. The right given to RCI and CTVNS under the non-competition agreements was clearly of that nature.

[41] As to the concept of “disposition”, the TCC judge did not err in referring to that word’s usual meaning for the application of section 14. That is what the Supreme Court did in *Compagnie Immobilière BCN,* cited above, where it decided that the word “disposition” in English (“aliéné” in French) was sufficiently broad to include the extinguishment of a right granted by a lease (*ibidem*, pages 878 to 879).

[42] The TCC judge was correct from the outset to conclude that, for the purposes of the provisions relating to capital gain, there had been a “disposition” according to the definition provided in paragraph 54(*a*), according to which this word includes “any . . . event entitling a taxpayer to proceeds of disposition of property”. I would add that, in terms of tax policy and principles, there is no reason to treat the concept of “disposition” differently depending on whether the property in question falls under section 38 or section 14.

[43] In his memorandum (paragraph 65), counsel for RCI (2006) relied on the Supreme Court’s decision in *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, without referring to any passage in particular, to argue that [TRANSLATION] “only the cancellation of a monetary debt” can result in a “disposition”. The case in question involved deciding whether statutory penalties incurred in the normal course of business could be deducted from income. With respect, this decision does

not in any way deal with the concept of disposition or say anything of the kind. In principle, any right that is convertible into cash is likely to result in a disposition when it is converted.

[44] Counsel for RCI (2006) also argued at the hearing that the TCC judge's conclusion was contrary to this Court's decision in *Robert McNeill v. The Queen*, 2000 DTC 6211. That case involved determining whether an amount paid for damages for breach of contract could be deducted from the payer's income. The Court of Appeal relied on the Supreme Court's decision in *65302 British Columbia,* cited above, to conclude that the amount could be considered as a penalty incurred in the normal course of business (*McNeill,* cited above, paragraph 14). Counsel for RCI (2006) relies on the fact that the breakdown of the amount paid—as appears in the trial decision (99 DTC 280)—indicates that goodwill was included as an item in the calculation of the damages. He seems to conclude from that that the sale of goodwill is not subject to section 14. Once again, section 14 was not at issue in this case, and the fact that goodwill was included as an item in the calculation of the amount does not affect the nature of the amount in question, in this case, damages that could be considered as penalties incurred in the normal course of business (*McNeill*, cited above, paragraph 16).

[45] Counsel for RCI (2006) also criticizes the TCC judge for improperly applying the third requirement of item E of the formula set out in subsection 14(5) of the Act. He relies on this Court's decision in *The Queen v. Toronto Refiners And Smelters Limited*, 2002 FCA 476, to say that the analysis should be made from the perspective of the payer.

[46] Contrary to the arguments of counsel for RCI (2006), I do not believe that that decision means that the analysis should be made from the perspective of the payer in all instances. In that case, the Court was dealing with an exceptional situation, the payment in question having been made by a public authority under an enactment, in a non-business context. In order to consider the actual context of the payment, the Court had to keep in mind that the payment was issued by a public authority, namely, the City of Toronto, exercising a power of expropriation (*Toronto Refiners,* cited above (paragraph 18)). For all intents and purposes, this made the question underlying item E inapplicable, because no one would pay money to acquire the right to be expropriated.

[47] The decision rendered by this Court 16 years earlier in *The Queen v. Goodwin Johnson (1960) Ltd.*, [1986] 1 C.T.C. 448, however, seems to contradict the position adopted by the TCC judge. In that case, the Court had to decide whether a payment of $830,000 received by the respondent was an eligible capital amount pursuant to subsection 14(1). This provision, which is essentially the same as the one at issue here, reads as follows:

14(1) Where, as a result of a transaction occurring after 1971, an amount has become payable to a taxpayer in a taxation year in respect of a business carried on or formerly carried on by him and the consideration given by the taxpayer therefore was such that, if any payment had been made by the taxpayer after 1971 for that consideration, the payment would have been an eligible capital expenditure of	14(1) Lorsque par suite d'une opération effectuée après 1971, une somme est devenue payable à un contribuable au cours d'une année d'imposition à l'égard d'une entreprise qu'il exploite ou qu'il a exploitée et que la contrepartie donnée par ce contribuable pour cette somme était telle que, si le contribuable avait effectué un paiement après 1971 pour cette contrepartie, ce paiement aurait

the taxpayer in respect of the business, there shall be included in computing the taxpayer's income for the year from the business the amount, if any, by which 1/2 of the amount so payable (which 1/2 is hereafter in this section referred to as an "eligible capital amount" in respect of the business) exceeds the taxpayer's cumulative eligible capital in respect of the business immediately before the amount so payable became payable to the taxpayer.	constitué pour le contribuable une dépense en immobilisations admissible à l'égard de l'entreprise. Il faut inclure dans le calcul du revenu tiré dans l'année par le contribuable de l'exploitation de l'entreprise, la fraction, si fraction il y a, de la moitié de la somme ainsi payable (moitié appelée ci-après dans le présent article un « montant en immobilisations admissible » à l'égard de l'entreprise) qui est en sus du montant admissible des immobilisations cumulatives à l'égard de l'entreprise, existant immédiatement avant que la somme ainsi payable soit devenue payable au contribuable.

[Emphasis added.]

[48] The majority (Heald and Urie J.J.A.) concluded that the nature of the payment in the hands of the payer determined the nature of the payment in the hands of the respondent (*Goodwin Johnson,* cited above, page 455):

> . . . [subsection 14(1)] employs the curious technique of determining whether or not a payment is an eligible capital expenditure by notionally considering the recipient of the payment as the payor for the consideration which was given in return for the payment. In my opinion, that notional change of roles cannot be effected in a vaccum. By that I mean, the circumstances in which the actual payment was made, for the actual consideration given, do not change and cannot be ignored. They are vital in making the determination required to ascertain whether or not the payment is an eligible capital expenditure. As I have concluded that the payment by Naden of $830,000 as the actual payor, was in settlement of an action for damages for breach of contract so too then is the payment of that sum by the notional payor, the respondent. . . .
>
> [Emphasis added.]

After having analysed the payment from the perspective of the payer, the majority concluded that the expenditure was a revenue expenditure and therefore not an eligible capital expenditure (*ibidem*, page 456).

[49] Justice Pratte (dissenting) drew the opposite conclusion. He first explained the following (*ibidem*):

> . . . In this case, it is common ground that the notional payment that must be assumed to have been made by the respondent is an eligible capital expenditure if it is an expenditure made on account of capital. The narrow issue to be resolved, therefore, is simply whether that notional payment was on account of capital or not.

In his opinion, the wording of subsection 14(1) was inescapable and meant that the hypothetical question had to be analysed from the perspective of the "taxpayer", in that case the respondent (*ibidem*, page 457):

> . . . under subsection 14(1), the question is not whether the payment made by [the payor] to the respondent was a capital out-lay. It probably was not. <u>The real and only question is whether the notional payment that must be assumed to have been made by the respondent was on account of capital. That question, as I have already said, must be answered in the affirmative</u>.
>
> [Emphasis added.]

[50] The TCC judge, without discussing this decision, but aware of its existence, as he refers to it (Reasons, paragraph 85), implicitly accepts Justice Pratte's reasoning. It goes without saying that he was bound by the majority decision and that he could not as a judge of the TCC decide to follow the minority opinion (see the TCC judge's comment in that regard, paragraph 76, note

29). He was nonetheless free to express his opinion on the matter so that it could be considered in the event of an appeal. Accordingly, the TCC judge wrote as follows:

> [77] In my opinion, the text is clear and unequivocal in this case. In the context of item E of the definition of cumulative eligible capital, the consideration in question is what the "taxpayer" gave in order to receive the payment to which item E refers. In this case, what RCI and CTVNS (and also SEC), the "taxpayers", gave as consideration for the $12 million were the rights they held under the non-competition agreements. Now, if the taxpayer (and not the parties that paid the "amount") had made a "payment" "for that consideration", would "the payment" have been an eligible capital expenditure "of the taxpayer"? That is, if RCI and CTVNS had paid $12 million for that consideration, the "rights" created by the non-competition agreements, would that expenditure have been an eligible capital expenditure of RCI and CTVNS? Clearly the question must be decided from the perspective of the taxpayer, and not of the payer of the amount. If these two companies had acquired the rights created by the non-competition agreements after 1971, this would, in my opinion, have been an eligible capital expenditure. The amounts would not have been deductible as current expenses in computing their income, having regard to the prohibition in paragraph 18(1)(*b*) of the Act regarding capital expenditures. It would have been an eligible capital expenditure because obtaining the non-competition agreements would have procured an enduring advantage for their business; the expense would have been incurred in order to earn income from their business and none of the exceptions provided in the definition of "eligible capital expenditure" in subsection 14(5) of the Act would have applied.
>
> [78] Even though it is not necessary to examine Parliament's objectives when it enacted the text of the third requirement set out in item E of the definition of cumulative eligible capital, I cannot help observing that the result described above seems to me to be consistent with Parliament’s objectives. When section 14 and paragraph 20(1)(*b*) were added to the Act in the 1972 tax reform, the purpose was to allow businesses to deduct a portion of their capital expenditures on incorporeal property over a period of several years; these included the cost of goodwill, which would not have been an eligible expenditure before 1972. In addition to recognizing that this type of expenditure was eligible, rules were also made to include in income, when the proceeds of disposition exceeded the unamortized portion of those expenditures, the amounts deducted under paragraph 20(1)(*b*) as a result of the disposition of eligible capital property and to tax the capital gain realized in the disposition. It is possible to own goodwill without having purchased it. For example, an entrepreneur who creates a new business and operates it successfully for several years develops a skilled workforce and builds a reputation and customer base; the entrepreneur has then created goodwill, that is, has created an ability

> to make a profit. If the entrepreneur sells the business, he or she is often able to convert that ability into cash, even if the asset does not appear on the balance sheet as a separate item. An indicator that there is goodwill is the fact that a business is sold for more than the fair market value of all of the business's corporeal property. Accordingly, in order to determine whether the property was part of inventory, capital property or eligible capital property, there had to be a way of ensuring that section 14 applied only to eligible capital property.
>
> [79] . . . How would the nature of an expenditure for a third party be relevant in determining whether the money received for waiving the rights created by the non-competition agreements was an eligible capital amount for RCI and CTVNS? There is no point in determining the status or nature of the expenditure in the hands of [the payer], because it is the nature of the rights waived by RCI and CTVNS that must determine the tax treatment of those rights. . . . [Footnotes omitted.]

[51] In my opinion, the opinion expressed by the TCC judge is convincing. Beyond the statutory language, which is plain and clear on the specific point we are concerned with, no logic can justify that the tax treatment of a taxpayer should be determined according to the circumstances relating to another taxpayer. In my view, the question is sufficiently clear to allow us to say that the majority opinion expressed by this Court in *Goodwin Johnson*, cited above, according to which the quality of the amount should be analyzed on the basis of the payer, is no longer good law (see *Miller v. Canada (A.G.)*, 2002 FCA 370, paragraphs 8 to 10).

[52] I therefore conclude that the hypothetical question should be analysed from the perspective of the two taxpayers in question, namely RCI and CTVNS. As, from the perspective of RCI and CTVNS, the hypothetical amount paid to acquire the rights created by the non-competition agreements would be an eligible capital expenditure, the TCC judge correctly

concluded that the $12 million should be included in the calculation of the income of RCI and CTVNS under subsection 14(1) of the Act.

[53] Having reached that conclusion, it is not necessary to consider that aspect of the judgment that analyses the hypothetical question from the perspective of the payer (Reasons, paragraph 86) or the reasons underlying the alternative conclusion that the disposition of the rights granted by the non-competition agreements resulted in a capital gain (Reasons, paragraphs 87 to 89). I believe it useful, however, to say that counsel for RCI (2006) failed to demonstrate a gap in the TCC judge's reasoning on either of these questions.

[54] I would therefore dismiss the appeal with costs.

"Marc Noël"

J.A.

"I agree.
Robert Décary J.A."

"I agree.
Gilles Létourneau J.A."

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-35-08

(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE ARCHAMBAULT OF THE TAX COURT OF CANADA DATED DECEMBER 20, 2007, DOCKET NOS. 2005-3860(IT)G AND 2005-3861(IT)G.)

CITATION:	RCI Environnement Inc. and (Centres de Transbordement et de Valorisation Nord-Sud Inc.) and Her Majesty the Queen
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	December 1, 2008
REASONS FOR JUDGMENT BY:	Noël J.A.
CONCURRED IN BY:	Décary J.A. Létourneau J.A.
DATED:	December 29, 2008

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