[OFFICIAL ENGLISH TRANSLATION]

2000-3125(IT)G

BETWEEN:

CAROLINE PELLETIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
***Claude Pelletier* (2000-3126(IT)G), *René Pelletier* (2000-3127(IT)G), *Nathalie Pelletier* (2000-3128(IT)G)**, ***Lyne Crevier* (2000-3129(IT)G)** and ***Johanne Pelletier* (2000-3130(IT)G)** on October 29, 2002, at Québec, Quebec by the Honourable Judge P. R. Dussault

Appearances

Counsel for the Appellant:	Jacques Côté
Counsel for the Respondent:	Nathalie Labbé

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1995 taxation year is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the benefit in the amount of $50,000 included in the appellant's income must be deducted, the whole in accordance with the attached Reasons for Judgment.

The appellant is entitled to her costs. However, since the six appeals were heard on common evidence, the total amount of costs for the services of counsel, beginning with the preparation for the hearing, is limited to the amount of costs that would be applicable in the case of a single appeal.

Signed at Ottawa, Canada, this 13th day of November 2002.

"P. R. Dussault"

J.T.C.C.

Translation certified true
on this 16th of May 2003.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

2000-3126(IT)G

BETWEEN:

CLAUDE PELLETIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
***Caroline Pelletier* (2000-3125(IT)G), *René Pelletier* (2000-3127(IT)G), *Nathalie Pelletier* (2000-3128(IT)G)**, ***Lyne Crevier* (2000-3129(IT)G)** and ***Johanne Pelletier* (2000-3130(IT)G)** on October 29, 2002, at Québec, Quebec by the Honourable Judge P. R. Dussault

Appearances

Counsel for the Appellant:	Jacques Côté
Counsel for the Respondent:	Nathalie Labbé

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1995 taxation year is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the benefit in the amount of $50,000 included in the appellant's income must be deducted, the whole in accordance with the attached Reasons for Judgment.

The appellant is entitled to his costs. However, since the six appeals were heard on common evidence, the total amount of costs for the services of counsel, beginning with the preparation for the hearing, is limited to the amount of costs that would be applicable in the case of a single appeal.

Signed at Ottawa, Canada, this 13th day of November 2002.

"P. R. Dussault"

J.T.C.C.

Translation certified true
on this 16th of May 2003.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

2000-3127(IT)G

BETWEEN:

RENÉ PELLETIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of ***Caroline Pelletier*** **(2000-3125(IT)G),** ***Claude Pelletier*** **(2000-3126(IT)G),** ***Nathalie Pelletier*** **(2000-3128(IT)G)**, ***Lyne Crevier*** **(2000-3129(IT)G)** and ***Johanne Pelletier*** **(2000-3130(IT)G)** on October 29, 2002, at Québec, Quebec by the Honourable Judge P. R. Dussault

Appearances

Counsel for the Appellant:	Jacques Côté
Counsel for the Respondent:	Nathalie Labbé

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1995 taxation year is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the benefit in the amount of $50,000 included in the appellant's income must be deducted, the whole in accordance with the attached Reasons for Judgment.

The appellant is entitled to his costs. However, since the six appeals were heard on common evidence, the total amount of costs for the services of counsel, beginning with the preparation for the hearing, is limited to the amount of costs that would be applicable in the case of a single appeal.

Signed at Ottawa, Canada, this 13th day of November 2002.

"P. R. Dussault"

J.T.C.C.

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on this 16th of May 2003.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

2000-3128(IT)G

BETWEEN:

NATHALIE PELLETIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
***Caroline Pelletier* (2000-3125(IT)G), *Claude Pelletier* (2000-3126(IT)G), *René Pelletier* (2000-3127(IT)G)**, ***Lyne Crevier* (2000-3129(IT)G)** and ***Johanne Pelletier* (2000-3130(IT)G)** on October 29, 2002, at Québec, Quebec by the Honourable Judge P. R. Dussault

Appearances

Counsel for the Appellant:	Jacques Côté
Counsel for the Respondent:	Nathalie Labbé

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1995 taxation year is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the benefit in the amount of $50,000 included in the appellant's income must be deducted, the whole in accordance with the attached Reasons for Judgment.

The appellant is entitled to her costs. However, since the six appeals were heard on common evidence, the total amount of costs for the services of counsel, beginning with the preparation for the hearing, is limited to the amount of costs that would be applicable in the case of a single appeal.

Signed at Ottawa, Canada, this 13th day of November 2002.

"P. R. Dussault"

J.T.C.C.

Translation certified true
on this 16th of May 2003.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

2000-3129(IT)G

BETWEEN:

LYNE CREVIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of ***Caroline Pelletier*** **(2000-3125(IT)G),** ***Claude Pelletier*** **(2000-3126(IT)G),** ***René Pelletier*** **(2000-3127(IT)G)**, ***Nathalie Pelletier*** **(2000-3128(IT)G)** and ***Johanne Pelletier*** **(2000-3130(IT)G)** on October 29, 2002, at Québec, Quebec by the Honourable Judge P. R. Dussault

Appearances

Counsel for the Appellant:	Jacques Côté
Counsel for the Respondent:	Nathalie Labbé

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1995 taxation year is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the benefit in the amount of $50,000 included in the appellant's income must be deducted, the whole in accordance with the attached Reasons for Judgment.

The appellant is entitled to her costs. However, since the six appeals were heard on common evidence, the total amount of costs for the services of counsel, beginning with the preparation for the hearing, is limited to the amount of costs that would be applicable in the case of a single appeal.

Signed at Ottawa, Canada, this 13th day of November 2002.

"P. R. Dussault"

J.T.C.C.

Translation certified true
on this 16th of May 2003.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

2000-3130(IT)G

BETWEEN:

JOHANNE PELLETIER,

Appellant,

and

HER MAJESTY THE QUEEN

Respondent.

Appeal heard on common evidence with the appeals of ***Caroline Pelletier*** **(2000-3125(IT)G),** ***Claude Pelletier*** **(2000-3126(IT)G),** ***René Pelletier*** **(2000-3127(IT)G)**, ***Nathalie Pelletier*** **(2000-3128(IT)G)** and ***Lyne Crevier*** **(2000-3129(IT)G)** on October 29, 2002, at Québec, Quebec by the Honourable Judge P. R. Dussault

Appearances

Counsel for the Appellant:	Jacques Côté
Counsel for the Respondent:	Nathalie Labbé

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1995 taxation year is allowed, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the benefit in the amount of $50,000 included in the appellant's income must be deducted, the whole in accordance with the attached Reasons for Judgment.

The appellant is entitled to her costs. However, since the six appeals were heard on common evidence, the total amount of costs for the services of counsel, beginning with the preparation for the hearing, is limited to the amount of costs that would be applicable in the case of a single appeal.

Signed at Ottawa, Canada, this 13th day of November 2002.

"P. R. Dussault"

J.T.C.C.

Translation certified true
on this 16th of May 2003.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

Date: 20021113
Dockets: 2000-3125(IT)G, 2000-3126(IT)G, 2000-3127(IT)G
2000-3128(IT)G, 2000-3129(IT)G, 2000-3130(IT)G

BETWEEN:

CAROLINE PELLETIER, CLAUDE PELLETIER,
RENÉ PELLETIER, NATHALIE PELLETIER,
LYNE CREVIER, JOHANNE PELLETIER,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

P.R. Dussault, J.T.C.C.

[1] These appeals, heard on common evidence, are from reassessments for the 1995 taxation year. By those assessments, the Minister of National Revenue ("the Minister") included in the income declared by each of the appellants ("the appellants") an amount of $50,000 as a benefit conferred by "Bois de sciage Lafontaine Inc." ("the corporation"), in accordance with subsections 15(1) and 246(1) of the *Income Tax Act* ("the *Act*").

[2] In making the assessments at issue, the Minister relied *inter alia* on the assumptions of fact set out in subparagraphs 11(a) to (v) of the Amended Reply to the Notice of Appeal by Caroline Pelletier (Docket 2000-3125(IT)G) ("the Amended Reply"), which, by consent, apply to all the other appeals. These subparagraphs read as follows:

[TRANSLATION]

(a) On September 16, 1993, an agreement was signed among the shareholders in Bois de sciage Lafontaine Inc. ("the corporation").

(b) When the shareholder agreement ("the agreement") was signed, the shareholders in the corporation were: Clermont Pelletier, Marc Pelletier, Richard Kéroack, René Pelletier, Lyne Pelletier-Crevier, Johanne Pelletier, Claude Pelletier, Nathalie Pelletier and Caroline Pelletier.

(c) The shareholders holding class "A" shares are: Clermont Pelletier, holding 60 shares; Richard Kéroack, holding 20 shares; and Marc Pelletier, holding 20 shares.

(d) The shareholders holding class "H" shares are Marc Pelletier and Richard Kéroack, each holding 10 shares.

(e) Clauses 8, 9 and 10 of the agreement set out restrictions on the transfer of shares in the corporation.

(f) More specifically, clause 8.1.2 of the agreement stipulates that, during the lifetime of Clermont Pelletier, the holders of class "A" shares may dispose of those shares solely to the corporation or to the other holder of class "A" shares. If neither the corporation nor the other holder of class "A" shares wishes to acquire the shares, the person wishing to dispose of the shares must keep them.

(g) On October 14, 1994, Mr. Kéroack received a notice of dismissal from the corporation, effective October 28, 1994.

(h) On December 9, 1994, the corporation made an offer to Mr. Kéroack to purchase the class "A" and the class "H" shares he held in the corporation.

(i) On December 22, 1994, Mr. Kéroack refused the offer made by the corporation to purchase his shares because the price offered was too low. At the same time, he asked the corporation to share the costs of valuing the shares.

(j) On November 10, 1995, the 100 class "A" shares in the corporation were subdivided into 600 class "A" shares. Mr. Kéroack therefore owned 120 class "A" shares in the corporation.

(k) On November 10, 1995, Richard Kéroack, Caroline Pelletier, Claude Pelletier, Johanne Pelletier, Lyne Pelletier-Crevier, Nathalie Pelletier, René Pelletier, Clermont Pelletier, Marc Pelletier and the corporation engaged in a transaction (the "transaction").

(l) This transaction provided that the application of the September 16, 1993, agreement be suspended.

(m) Under the terms of the November 10, 1995, transaction, which does not reflect reality, Richard Kéroack sold the 120 shares he held in the corporation to Caroline Pelletier, Claude Pelletier, Johanne Pelletier, Lyne Pelletier-Crevier, Nathalie Pelletier and René Pelletier ("the benefiting members").

(n) The benefiting members are the children of Clermont Pelletier. They each received 20 class "A" shares in the corporation.

(o) It was agreed that the shares would be sold for a total price of $10,000.

(p) This price was negotiated between Mr. Kéroack and the corporation.

(q) The persons acquiring the shares, that is, the benefiting members of the Pelletier family, paid Mr. Kéroack nothing in consideration of the shares sold.

(r) The corporation paid Mr. Kéroack the amount of $10,000 in consideration of the shares sold.

(s) The benefiting members who received the shares never reimbursed the corporation.

(t) The facts have shown that the corporation acquired Mr. Kéroack's shares and then transferred them to the benefiting members of the Pelletier family for no consideration.

(u) On November 10, 1995, the date of the transfer, the fair market value of the 120 class "A" shares was $300,000.

(v) In transferring 20 shares to the appellant for no consideration, the corporation conferred on the appelant a benefit in the amount of $50,000.

[3] Paragraph 12 of the Amended Reply sets out the basis for the assessment, as follows:

> [TRANSLATION]
>
> 12. The assessment at issue is made on the following basis: if the corporation had directly transferred 20 class "A" shares to the appellant, it would have conferred on the appellant a taxable benefit in the amount of $50,000 under subsection 15(1) of the *Income Tax Act*. In this case, since the benefit is indirect, it is taxable under subsection 246(1) of the *Income Tax Act*.

[4] As well, in paragraphs 15 to 18 of the Amended Reply, the Deputy Attorney General of Canada made the following arguments:

> [TRANSLATION]
>
> 15. The Deputy Attorney General of Canada argues that the corporation acquired 120 shares from Mr. Kéroack and then transferred them to the six benefiting members of the Pelletier family. The fair market value of these shares was $300,000.
>
> 16. The appellant received 20 shares in the corporation, with a fair market value of $50,000. The appellant paid no consideration to the corporation when the 20 shares were transferred.
>
> 17. The Deputy Attorney General of Canada argues that, under subsection 246(1) of the *Act*, the corporation conferred on the appellant a benefit in the amount of $50,000, either directly or indirectly, by any means whatever. Moreover, under subsection 15(1) of the *Act*, if the corporation had transferred 20 shares to the appellant directly, an amount of $50,000 would be taxable in the appellant's hands as a benefit conferred by the corporation on a shareholder.
>
> 18. Even assuming that Mr. Kéroack had transferred the shares directly to the benefiting members, the Deputy Attorney General of Canada argues that this transfer was made with the consent or on the instructions of the corporation. The corporation agreed to suspending the shareholders agreement and to selling the shares to the benefiting members of the Pelletier family; in so doing, it conferred on these members shares with a fair market value of $300,000. Furthermore, the price the corporation paid Mr. Kéroack for the shares was $10,000. By means of all these operations, the

> corporation conferred on the appellant a total benefit in the amount of $50,000, in accordance with subsections 15(1) and 246(1) of the *Act*.

[5] The assumption of fact set out in subparagraph 11(m) of the Amended Reply that, under the terms of the November 10, 1995, transaction, the sale by Mr. Kéroack of 120 class "A" shares of the corporation's capital stock to the six appellants (who received 20 shares each) did "not reflect reality" and was in fact a smokescreen, was set aside at the hearing. Indeed, after the evidence was adduced, counsel for the respondent acknowledged that the corporation had never bought back the shares held by Mr. Kéroack and subsequently transfer them to the appellants for no consideration. She admitted that there had been only one transaction by which Mr. Kéroack sold the class "A" shares of the corporation's capital stock he held directly to the appellants. This admission subsequently resulted in the new, alternative argument based on subsection 152(9) of the *Act*; this new argument is set out in paragraph 18 of the Amended Reply and is the only argument on which the respondent now relies.

[6] Pierre-Denis Jacques, a chartered accountant and tax expert who was the main witness for the appellants, explained in detail the events that gave rise to the present appeals.

[7] In 1993, Clermont Pelletier, for all practical purposes, the sole shareholder in the corporation, had decided to find someone to take over after he retired. He did this by making Mr. Kéroack, a forestry engineer whom he had contacted for this purpose, a partner in the business operated by the corporation, that is, a fully integrated sawmill. At that time the corporation was worth approximately $6 million, but Mr. Kéroack had no money to invest. It was therefore agreed, as part of financial planning and an estate freeze, that Clermont Pelletier would hold 60 participating and voting shares (class "A" shares) of the corporation's capital stock and that Marc Pelletier, one of Clermont Pelletier's sons who was involved in the business, and Mr. Kéroack would each hold 20 class "A" shares. This arrangement, planned by Mr. Jacques himself in co-operation with Claude-André Gendreau, the lawyer for Clermont Pelletier and for the corporation, provided for Clermont Pelletier's retirement by means of a short-term buyback by the corporation of the 60 class "A" shares, as well as the other class shares of the corporation's capital stock held by Clermont Pelletier. Since it had been agreed that Marc Pelletier's participation was not to exceed 20 per cent, Mr. Kéroack could, in the near future, hold the equivalent of 50 per cent of the shares of the corporation

after buying back the class "A" shares held by Clermont Pelletier, and, as was also planned, he could then hold the equivalent of 100 per cent of the shares of the corporation after buying back the shares held by Marc Pelletier. The purpose of the buyback by the corporation of the corporation's capital stock shares held by Clermont Pelletier was to provide him with the $6 million that the corporation was then worth.

[8] Certain terms and conditions of this plan, particularly concerning Mr. Kéroack's integration as a partner and certain related guarantees, are reflected in the September 16, 1993, shareholder agreement ("the agreement") (Exhibit A-1, Tab 1) referred to in the Amended Reply. For example, clause 11.2 of the agreement stipulates as follows:

> [TRANSLATION]
>
> 11.2 Holders of class "A" shares other than Clermont Pelletier
>
> Under this agreement, each holder of class "A" shares, other than Clermont Pelletier, shall make an irrevocable offer to the company to sell to it all of his or her class "A" and class "B" shares and any other shares that he or she may hold in the company, except for the class "G" shares of the company's capital stock now held by Marc Pelletier, which are the subject of clause 11.3 of this agreement, for the price established in accordance with clause 16 of this agreement and in accordance with the terms and conditions set out below, if either of the following events occurs, which makes this offer suspensive:
>
> (a) withdrawal from the business; or
>
> (b) death of the person making the offer.
>
> This offer shall apply to all the shares held by the person making the offer on the date the above-mentioned suspension occurs, except for the class "G" shares of the company's capital stock now held by Marc Pelletier, which are the subject of clause 11.3 of this agreement.

[9] As well, clause 12 stipulates that [TRANSLATION] "the terms and conditions of the offer and its acceptance shall be the same as those set out in clause 8 above". Clause 12 also sets out various situations considered equivalent to withdrawal from

the business by a shareholder, in particular termination of a shareholder's employment contract for any reason whatsoever.

[10] Clause 8.1.2 sets out the following terms and conditions for offering class "A" shares:

> [TRANSLATION]
>
> 8.1.2 Holders of class "A" shares other than Clermont Pelletier
>
> (a) During Clermont Pelletier's lifetime, if a holder of class "A" shares wishes, for any reason whatsoever, to sell or otherwise to dispose of or to transfer all or part of his or her class "A" or class "H" shares and any other shares of the company's capital stock that he or she may hold, except for the class "G" shares of the company's capital stock now held by Marc Pelletier, which are the subject of clause 8.1.3 of this agreement, to the company by written notice at the price referred to in clause 16 below or at any lower price chosen by the person making the offer;
>
> (b) the company shall have a period of 60 days following the date it receives the notice to accept the offer in whole or in part;
>
> (c) if the company does not accept the offer in whole or in part within the 60-day period, the balance of the shares offered shall accrue to the other holder of class "A" shares, excluding Clermont Pelletier. This other holder of class "A" shares shall then have a further period of 30 days to accept this offer at the price offered;
>
> (d) on the expiry of the periods provided for above, if the company and the other holder of class "A" shares, excluding Clermont Pelletier, have declined to acquire all or part of the shares held by the person making the offer, that person shall keep the shares or the balance thereof, and shall not offer them to any other person.

[11] Clause 16(b) deals with the value of the participating shares and reads as follows:

> [TRANSLATION]

> (b) For the purposes of clauses 8, 11 and 14 above, the value of the participating shares shall be the most recent value established by the shareholders in a written document attached to this agreement as Appendix "A".

[12] Appendix "A", signed by all the shareholders and Clermont Pelletier for the corporation, stipulates as follows:

> [TRANSLATION]
>
> For the purposes of clause 16, starting on this date the established value of the class "A" shares in the company shall be $1 per share.

[13] Although clause 16 makes provision for subsequent valuation within 90 days following the production of the financial statements of the preceding fiscal year, the shareholders made no subsequent valuation prior to the November 10, 1995, transaction.

[14] Making Mr. Kéroack a partner in the corporation did not produce the desired results and led to a dispute with Clermont Pelletier, who demanded that Mr. Kéroack resign as early as June 1994. Mr. Kéroack refused and was dismissed in October 1994.

[15] On December 9, 1994, Marc Pelletier, secretary of the corporation, sent Mr. Kéroack a letter stating that the corporation agreed to acquire the 20 class "A" and the 10 class "H" shares of the corporation's capital stock held by Mr. Kéroack for $1 per share, in accordance with the automatic offer of sale of these shares provided for in clauses 11, 12 and 8 of the agreement. In his testimony, Mr. Jacques, the accountant and tax expert, stated that he himself had decided on the terms of this letter.

[16] On December 22, 1994, Jean Blouin, Mr. Kéroack's lawyer, replied to the letter sent to his client. While acknowledging that the agreement was applicable, Mr. Blouin stated that he completely disagreed with the valuation of the shares at $1 per share, emphasizing that no new valuation had been made within 90 days following the production of the corporation's financial statements for the fiscal year ended on August 31, 1993, that is, by November 3, 1993. Since the corporation had no new value to propose, Mr. Blouin suggested that the fair market value be used

and, in this regard, offered to pay half the cost of the services of a business valuation expert in order to establish this value. He added that, otherwise, he relied on clause 36 of the agreement, which provided for recourse to compulsory arbitration, to the exclusion of the courts, in resolving any disagreement or dispute concerning the application of the agreement.

[17] In his testimony, Mr. Jacques stated that he and Mr. Gendreau were very concerned about the situation following Mr. Kéroack's dismissal, a situation that threatened the survival of the business and could have significant financial repercussions, to say the least. Together, they estimated the financial repercussions of a lawsuit by Mr. Kéroack at not less than $1 million.

[18] According to Mr. Jacques, Mr. Gendreau wanted to have sole say with respect to the dispute between the corporation and Clermont Pelletier on the one hand and Mr. Kéroack on the other. In the ensuing months, however, delays dragged out and there was little communication between the parties' lawyers.

[19] Mr. Jacques stated that in September 1995, Mr. Gendreau telephoned him to tell him about an unhoped-for offer to settle that he had just received from Mr. Blouin. Mr. Blouin was asking for immediate payment of $10,000 for the shares held by Mr. Kéroack, with no tax incidence for Mr. Kéroack. Mr. Blouin was also asking for payment of his own fees in the amount of $1,500. According to Mr. Jacques, this offer to settle was presented as being non-negotiable. Although Mr. Jacques testified that the corporation and Clermont Pelletier had made only one offer to Mr. Kéroack, that is, the December 9, 1994, offer at $1 per share, Mr. Kéroack testified that apparently the offer to settle originated, not with his own lawyer, Mr. Blouin, but with Mr. Gendreau.

[20] In any case, although the offer to settle was not what he expected, Mr. Kéroack clearly let it be understood that he was anxious to settle the matter and be done with it. In his view, the money no longer mattered at that point: he would have accepted $5,000 just as readily as $50,000 in order to end the dispute.

[21] An agreement was therefore reached to sell the shares held by Mr. Kéroack for $10,000 directly to Clermont Pelletier's children, except for Marc Pelletier, in accordance with the terms and conditions set out by Mr. Jacques, to which Mr. Kéroack had no objection. Nonetheless, such a sale involved suspending the agreement.

[22] On September 14, 1995, the corporation issued two cheques signed by Clermont Pelletier: one to Mr. Blouin in trust for $10,000, in payment of the shares; the other to Mr. Blouin for $1,500, in payment of his fees. Mr. Jacques explained that it was difficult to contact Clermont Pelletier's children on short notice since most of them did not live in the area; however, it appears that the children never reimbursed the corporation for the shares it had paid, and that the corporation claimed the amount it had paid as an expense.

[23] Mr. Jacques stated that he himself had decided, on the spot and without consulting anyone, to accept the offer communicated to him by Mr. Gendreau and apparently made by Mr. Blouin. He added that he immediately contacted either Mr. Guérette, the corporation's in-house accountant, or Marc Pelletier, telling them to find the required amount of money by all means and as soon as possible.

[24] Mr. Jacques stated that he himself had decided on the terms of the transaction to be effected. Since the transaction was to have no tax incidence for Mr. Kéroack, there was no question of having the corporation buy back the shares held by Mr. Kéroack in the corporation because that buyback would have generated a deemed dividend. A buyback would also have had the effect of increasing the percentage of participating shares of the corporation's capital stock held by Clermont Pelletier and Marc Pelletier, when it had been agreed that at no time was Marc Pelletier's percentage of shares to exceed 20 per cent. As for Clermont Pelletier, he had just implemented an estate freeze, and there was no question of increasing the percentage of participating shares beyond the 60 per cent he already held.

[25] Accordingly, selling the shares held by Mr. Kéroack to Clermont Pelletier's children, except to Marc Pelletier, appeared to be the solution that would meet the requirement of the agreement between the parties and also maintain the percentages of participating shares held by Clermont Pelletier and Marc Pelletier. For Mr. Kéroack, the sale would give rise to a capital gain, which would nevertheless be fully tax exempt since the corporation qualified as a small business corporation under section 110.6 of the *Act*.

[26] Since at the time Mr. Kéroack held 20 class "A" shares and there were six purchasers, a simple change to the by-laws and a subdivision of the shares using a multiple of six were carried out. In this way, under the terms of the November 10, 1995, transaction (Exhibit A-1, Tab 4), the 20 class "A" shares held

by Mr. Kéroack thus became 120 class "A" shares, which were sold to Clermont Pelletier's children, the six appellants in the present case.

[27] Clause 8 of the transaction stipulates exactly what its title indicates: that it constitutes a transaction within the meaning of articles 2631 *et seq*. of the *Civil Code of Québec*, by which the seller, the purchasers, and the intervenors, that is, Clermont Pelletier, Marc Pelletier and the corporation, confer on each other full and final discharge of all claims of any nature whatsoever. For the purposes of this transaction, in which Mr. Kéroack sells 120 class "A" shares of the corporation's capital stock that he holds for a total price of $10,000, clause 1 provides for suspension of the agreement signed on September 16, 1993.

[28] According to the respondent's alternative argument stated in paragraph 18 of the Amended Reply, it was in consenting to the suspension of the agreement that the corporation conferred on the appellants shares having a fair market value of $300,000; as well, the corporation itself paid the $10,000 price of the shares to Mr. Kéroack. By means of all these transactions, therefore, the corporation apparently conferred a benefit in the amount of $50,000 on each of the appellants in accordance with subsections 15(1) and 246(1) of the *Act*.

[29] For his part, counsel for the appellants stated that the terms of the transaction were determined by Mr. Jacques primarily in order to achieve a business objective by ensuring that there was no tax incidence for Mr. Kéroack. He argued that the corporation did not confer the transferred shares on the appellants because it did not hold those shares: it could therefore not confer or transfer shares it did not own. According to counsel for the appellants, the corporation intervened in the November 10, 1995, transaction as a party to the agreement merely to agree to the suspension of the agreement, an action that cannot be considered as a transfer of assets.

[30] In short, counsel for the appellants argued that if a benefit was conferred on the appellants, that benefit was conferred by Mr. Kéroack, who agreed to be paid a mere $10,000 for his shares. Since the transaction was therefore entered into by persons dealing at arm's length, in light of subsection 246(2) of the *Act*, there would be no tax incidence for the appellants.

[31] Counsel for the appellants also argued that, by agreeing to the suspension, the corporation may have waived a right, and this may have resulted in conferring

a benefit on the appellants; however, he noted that the respondent adduced no evidence of the value of that benefit other than the value of the shares themselves.

Analysis

[32] It is important to bear in mind from the outset that the appellants, like Richard Kéroack, Clermont Pelletier and Marc Pelletier, were already shareholders and parties to the agreement. The corporation was also a party to the agreement.

[33] Under the terms of the November 10, 1995, transaction, all the shareholders without exception, including Richard Kéroack and the corporation, had agreed to the suspension of the agreement in order to carry out the transaction. Failing suspension of the agreement, clause 8.1.2 of the agreement provided that a holder of class "A" shares wishing to sell or otherwise to dispose of his or her shares was obliged to offer them first to the corporation, which had a period of 60 days to accept the offer; however, if the corporation decided not to accept the offer, the other holder of class "A" shares, with the exception of Clermont Pelletier, could then accept the offer. Clause 11.2 provided that an irrevocable suspensive offer had to be made by a holder of class "A" shares, other than Clermont Pelletier, if the holder of those shares withdrew from the business; in particular, such a withdrawal was deemed to occur on termination of the shareholder's employment contract. In that case, it was provided that the terms and conditions of the offer and its acceptance were the same as those set out in clause 8. Thus, failing suspension of the agreement, the corporation and, if it declined, then Marc Pelletier alone had the right to acquire the shares that Mr. Kéroack had to dispose of following his dismissal. The purchase by the corporation of the shares held by Mr. Kéroack would have had no incidence for the corporation since, under corporate law, the corporation would have been obliged to cancel those shares (see Quebec's *Companies Act*, R.S.Q., c. C-38, section 123.42; and the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, subsection 39(6)).

[34] That cancellation would have been of no benefit to the corporation itself, but would have benefited Clermont Pelletier and Marc Pelletier, whose holdings of class "A" shares would have increased from 60 per cent to 75 per cent and from 20 per cent to 25 per cent respectively. If the corporation had declined the offer, under clause 8.1.2 of the agreement, Marc Pelletier alone could have acquired the shares, and the percentage of class "A" shares held by Marc Pelletier would have increased from 20 per cent to 40 per cent. Thus it can be seen that the application of the agreement and the purchase of the shares of the corporation's capital stock

held by Mr. Kéroack, either by the corporation itself or by Marc Pelletier, would have benefited only Clermont Pelletier and Marc Pelletier in the first instance and only Marc Pelletier in the second instance. We should recall that the primary objective of a shareholder agreement is to govern the relationship among the shareholders, in accordance with each of their rights as a shareholder. The consent given by Clermont Pelletier and Marc Pelletier, more than the consent given by the corporation itself, to suspending the agreement in order to make it possible to sell the shares held by Mr. Kéroack to the six appellants in the present case, can definitely be considered an indirect means of transferring to the appellants the benefit they could have obtained had the agreement not been suspended. However, that point was not the basis of the assessment or of the respondent's argument.

[35] Furthermore, the fact that the appellants were able to acquire shares worth $300,000 for $10,000 is essentially the result of Mr. Kéroack's decision to accept this much lower amount in order to settle the dispute between himself and Clermont Pelletier once and for all. The shares sold to the appellants belonged to Mr. Kéroack, and he alone could decide to dispose of them at that price. The Court agrees that the appellants obtained a benefit. However, the Court considers that the benefit was conferred on the appellants directly by Mr. Kéroack and indirectly by Clermont Pelletier and Marc Pelletier since, had the agreement not been suspended, these two persons were the only ones who would have benefited from the $10,000 offer to settle with Mr. Kéroack. The Court therefore finds that subsection 246(1) of the *Act* does not apply to this case since the corporation did not directly or indirectly give shares to the appellants. In light of subsection 246(2) of the *Act*, the Court considers that the benefit conferred on the appellants by Mr. Kéroack by means of the November 10, 1995, transaction has no tax incidence.

[36] It might be pointed out that the corporation had at least conferred a benefit on the appellants in the amount of $10,000 by paying the price of the shares itself and not requiring reimbursement. Although that point is valid, the assessments as regards the appellants were not made on that basis and that point was never argued by counsel for the parties.

[37] Having regard to the foregoing, the appeals are allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the benefit in the amount of $50,000 included in each appellant's income must be deducted.

[38] The appellants are entitled to their costs. However, since the six appeals were heard on common evidence, the total amount of costs for the services of counsel, beginning with the preparation for the hearing, is limited to the amount of costs that would be applicable in the case of a single appeal.

Signed at Ottawa, Canada, this 13th day of November 2002.

"P. R. Dussault"

J.T.C.C.

Translation certified true
on this 16th of May 2003.

Sophie Debbané, Revisor