Federal Court of Appeal | Cour d'appel fédérale

Date: 20180727

Docket: A-199-17

Citation: 2018 FCA 144

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
BOIVIN J.A.
DE MONTIGNY J.A.

BETWEEN:

MARC ST-PIERRE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Quebec, Quebec, on June 21, 2018.

Judgment delivered at Ottawa, Ontario, on July 27, 2018.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: GAUTHIER J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] Marc St-Pierre (the appellant) is appealing before this Court a decision by Justice Favreau of the Tax Court of Canada (the TCC judge) rendered on June 1, 2017 (2017 TCC 69). The TCC judge dismissed the appellant's appeal from a reassessment issued by the Minister of National Revenue (the Minister) on April 30, 2013, in respect of his 2009 taxation year.

[2] The assessment dated April 30, 2013, concerned amounts that 2869-6474 Québec Inc. (the Corporation) paid to the appellant in 2008 and 2009 as capital dividends, the appellant being the sole director and sole shareholder of the Corporation. An error in the calculation of the balance of the Corporation's capital dividend account (CDA) had previously resulted in the Corporation declaring a capital dividend that exceeded that to which it was entitled.

[3] The appellant subsequently requested the retroactive annulment of the erroneously declared capital dividend. When issuing the reassessment dated April 30, 2013, the Minister included in the appellant's income for his 2009 taxation year the amount he had received from the Corporation in 2009, as well as interest at the legal rate on the amount received by the appellant in 2008 and not repaid in 2009. To do so, the Minister relied on subsection 15(2) and section 80.4 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the ITA). The provisions are reproduced in the annex to these reasons.

[4] For the following reasons, I am of the opinion that the reassessment issued by the Minister on April 30, 2013, is unfounded and that the appeal should therefore be allowed.

I. The facts

[5] On February 1, 2008, the Corporation disposed of its business assets, including eligible capital property, valued at $900,000. The amount received by the Corporation represented a gain under section 14 of the ITA (repealed in 2016). Only half of the amount was required to be added to its taxable income; the other half was non-taxable and could be added to its CDA balance.

[6] Before the disposition of the assets on February 1, 2008, the balance of the Corporation's CDA was $146,881. The Corporation and the appellant were informed by their accounting advisors that the balance of the CDA was $596,881 after the above-mentioned disposition. The $450,000 increase corresponded to half of the proceeds of disposition of the eligible capital property.

[7] The information concerning the balance of the CDA was, however, erroneous because the true balance of the CDA, the day after the disposition of the assets, remained unchanged at $146,881. Proceeds of disposition of eligible capital property are calculated in accordance with paragraph 14(1)(*b*) of the ITA and, pursuant to that paragraph, the amount thereof cannot be known before "the end of a taxation year". Thus, the $450,000 could only be added to the CDA as of the first day of the following taxation year, in this case January 1, 2009.

[8] Being unaware of this error, the appellant signed, as the Corporation's sole director, a resolution dated February 2, 2008, declaring the payment of a capital dividend of $596,881 to its sole shareholder, in other words, to himself. As a result, the Corporation declared a dividend of $450,000 that exceeded the limit to which it was entitled. It must be noted that the Corporation would have been entitled to pay its shareholder a capital dividend of $596,881 as of January 1, 2009. However, it did so prematurely.

[9] Other errors were made in connection with the declaration of the capital dividend on February 2, 2008. To declare such a dividend, the Corporation had to make an "election" within the meaning of subsection 83(2) of the ITA and file form T-2054 with the Canada Revenue

Agency (CRA). This had to be done on the earlier of the following dates: the date on which the dividend was declared; the date on which the dividend (or the first payment thereof) became payable; or the date on which the dividend (or the first payment thereof) was paid. In this case, the Corporation did not make this election until October 22, 2008, while the dividend was declared on February 2, 2008.

[10] The form also contained errors. It indicated that the dividend would become payable on November 30, 2008, and that the first payment would be made on the same day, whereas the resolution did not specify the date on which the dividend would become payable, and the first payment was made on December 31, 2008.

[11] The Corporation made a total of three payments to the appellant: $86,567 on December 31, 2008; $381,260 on December 31, 2009; and $40,000 on December 31, 2010. The total of these three payments is $507,827. The record contains nothing to explain the discrepancy between the declared amount of $596,881 and the total of the three payments ($507,827), but this discrepancy is not relevant for the purposes of this appeal.

[12] The tax consequence of the above-mentioned errors is as follows. Under Part III of the ITA and, more precisely, under subsection 184(2), the Corporation became subject to a tax equal to three fifths of the excess portion of the dividend declared on the actual balance of its CDA on the date of the declaration. Because the excess was $450,000, the Part III tax could be as much as $270,000, even if the amounts declared were not paid.

[13] The Minister did not find the error until November 2011. In a letter dated November 9, 2011, he informed the Corporation that the balance of its CDA as at February 2, 2008, was not $596,881 but rather $146,881, and that the Corporation was therefore subject to tax under Part III of the ITA.

[14] Following discussions, the parties agreed that the appellant would file a motion for a declaratory judgment with the Quebec Superior Court to request the rectification of the February 2, 2008, resolution declaring the payment of a capital dividend of $596,881 to the appellant. The CRA agreed to not issue any assessment against the Corporation under Part III of the ITA pending the declaratory judgment.

[15] The appellant filed his motion before the Superior Court in January 2013. In it, he claimed that the capital dividend had been declared and paid in error, and he requested the retroactive annulment, and not the rectification, of the resolution dated February 2, 2008.

[16] In February 2013, pending the hearing of the motion before the Superior Court, the CRA informed the appellant that it intended to assess him personally under Part I of the ITA. The proposed assessment for 2009 would be pursuant to subsection 15(2) and section 80.4 of the ITA, as previously described. According to the CRA, if the resolution in question were annulled by the Superior Court, the amounts of $86,567 and $381,260 paid to the appellant on December 31, 2008 and 2009, would have to be considered as having been received unjustly, such that the appellant would be indebted to the Corporation for those amounts.

[17] Because the assessment proposed by the CRA was for the 2009 taxation year, the CRA had to issue it no later than May 20, 2013, that is, the end of the appellant's normal reassessment period for that taxation year, to be within the prescribed limitation period (see subsection 152(3.1) of the ITA). The CRA asked the appellant to waive the normal reassessment period, but he refused to do so. Therefore, on April 30, 2013, the CRA issued the notice of reassessment for the 2009 taxation year.

[18] A few months later, on January 6, 2014, the Superior Court allowed the appellant's motion for a declaratory judgment. It declared the resolution dated February 2, 2008, null and deemed it never to have existed. It also ordered the restitution of the payments made pursuant to the resolution, namely the reimbursement by the appellant to the Corporation of the amounts that he had received from the Corporation, with interest. The restitution occurred in October 2015, when the appellant reimbursed the Corporation $539,157. The parties do not call into question that the amounts that the appellant owed the Corporation were reimbursed, with interest, within the prescribed time frame.

II. The decision of the TCC judge

[19] Before the TCC judge, the appellant argued that when the notice of reassessment was issued in April 2013, he was not indebted to the Corporation and that therefore neither subsection 15(2) nor section 80.4 of the ITA could apply to him. It was not until January 2014, when the Superior Court's judgment was rendered, that a restitution obligation arose.

[20] The respondent maintained before the TCC judge that the resolution dated February 2, 2008, was annulled *ab initio* as a result of the Superior Court's declaratory judgment. Since the juristic reason behind the payments no longer existed, the appellant received the amounts without being entitled to them. He was therefore unjustly enriched at the expense of the Corporation, justifying the addition of the amounts received to his income under subsection 15(2) and section 80.4 of the ITA.

[21] The TCC judge accepted the respondent's argument to the effect that the appellant was enriched at the expense of the Corporation to the extent of the amounts received as a capital dividend, a dividend that was later annulled by judicial declaration (reasons, paragraph 59). In reaching that conclusion, the TCC judge referred to *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 [*Garland*], as well as to article 1493 of the *Civil Code of Québec*, C.Q.L.R. c. CCQ-1991 (C.C.Q.).

[22] The TCC judge also considered whether such enrichment could give rise to a debt within the meaning of subsection 15(2) of the ITA (reasons, paragraph 57). He responded to the question in the affirmative, relying on this Court's decision in *Lust v. Canada*, 2007 FCA 62, 360 N.R. 306 [*Lust*].

[23] In doing so, the TCC judge confirmed the merit of the reassessment and dismissed the appellant's appeal.

[24] The appellant is challenging that judgment on appeal to this Court.

III. Issue

[25] The issue is as follows: Did the TCC judge err in determining that the reassessment was well-founded pursuant to subsection 15(2) and section 80.4 of the ITA, namely, in determining that the appellant was indebted to the Corporation on the basis of unjust enrichment for the amounts he received from the Corporation?

IV. Analysis

A. *Positions of the parties*

[26] The appellant challenges, on several fronts, the TCC judge's conclusion that he was enriched at the expense of the Corporation when he received the amounts at issue. First, he argues that the alleged enrichment no longer exists because restitution was made when he reimbursed the $539,157 in October 2015 in accordance with the Superior Court's decision. Second, he submits that he received the amounts at issue pursuant to an existing, valid juristic reason, namely the Corporation's resolution declaring a capital dividend. Third, the appellant argues that the TCC judge should not have relied on *Lust* given that the facts therein are specific to that case and can be distinguished from those in the present case. Fourth, he argues that the TCC judge interpreted subsection 15(2) of the ITA, which concerns the debt of a shareholder of a corporation, too broadly. Finally, he submits that even if a debt did exist, it would not have arisen until the Superior Court's judgment was rendered. According to the appellant, it follows that the assessment dated April 30, 2013, was unfounded at the time that it was issued.

[27] The respondent, on the other hand, alleges that the meaning of the word "debt" in subsection 15(2) of the ITA must be broadly interpreted. Moreover, the appellant purportedly

admitted in his notice of objection to the reassessment that the retroactive cancellation of the resolution dated February 2, 2008, resulted in his indebtedness to the Corporation. Because, as a result of the Superior Court judgment rendered on January 6, 2014, the capital dividend was deemed never to have existed, the appellant can no longer claim that there is a juristic reason for him having received the amounts at issue.

B. *Standard of review*

[28] The applicable standards of review in this appeal are those set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]. According to *Housen*, questions of law are reviewable on a standard of correctness and questions of fact and mixed fact and law are reviewable on a standard of palpable and overriding error.

C. *The unjust enrichment issue*

[29] The issue at the heart of this dispute is raised by the respondent's submission that the appellant was enriched at the expense of the Corporation—an unjust enrichment—and that this unjust enrichment constitutes a "debt" within the meaning of subsection 15(2) of the ITA. Unless the unjust enrichment of the appellant has been demonstrated, the notice of reassessment dated April 30, 2013, issued by the respondent will have no legal basis and cannot be confirmed by this Court. This Court must therefore examine the notion of unjust enrichment as it exists in Quebec civil law.

[30] The notion of unjust enrichment is governed by articles 1493 to 1496 of the C.C.Q. More specifically, article 1493 stipulates the following:

1493. A person who is enriched at the expense of another shall, to the extent of his enrichment, indemnify the other for the latter's correlative impoverishment, if there is no justification for the enrichment or the impoverishment.	**1493.** Celui qui s'enrichit aux dépens d'autrui doit, jusqu'à concurrence de son enrichissement, indemniser ce dernier de son appauvrissement corrélatif s'il n'existe aucune justification à l'enrichissement ou à l'appauvrissement.

[31] For the purposes of this case, it must be noted that the purpose of this provision of the C.C.Q. is, *inter alia*, to create a "*de in rem verso*" remedy for indemnifying the impoverished party. This remedy is alternative in nature and cannot be used if there is a juristic reason for the enrichment. One of the essential conditions giving rise to a remedy for unjust enrichment is thus the absence of justification (article 1493 of the C.C.Q.; Vincent Karim, *Les Obligations*, Vol. 1, 4th ed., Montreal: Wilson & Lafleur, 2015, paragraphs 3616, 3629 and 3659; Jean-Louis Baudouin, Pierre-Gabriel Jobin and Nathalie Vézina, *Les Obligations*, 7th ed., Cowansville: Éditions Yvon Blais, 2013, paragraphs 544, 547 and 548).

[32] I also note that *Garland*, which the TCC judge referenced, is a common law matter and not a civil law matter. However, *Garland* is relevant in the present context in that it reiterates the three elements underlying unjust enrichment: an enrichment of the defendant, a corresponding deprivation of the plaintiff, and an absence of juristic reason for the enrichment (*Garland*, paragraph 30).

[33] What is the situation in this case?

[34] The amounts that the appellant received on December 31, 2008 and 2009, were paid by the Corporation pursuant to the resolution dated February 2, 2008, which declared a capital

dividend. Those payments were thus justified within the meaning of article 1493 of the C.C.Q. and remained so until the cancellation by way of a judicial declaration by the Superior Court on January 6, 2014. The TCC judge seemed to recognize this when he specified at paragraph 53 of his reasons that the appellant's obligation to repay the amounts received arose only on January 6, 2014:

> Marc St-Pierre's obligation to repay the amounts he received as capital dividends arose only when the judgment was rendered and became enforceable in the 30 days following the date of the judgment with no retroactive effect. The restitution was naturally not possible before the date of the judgment [of the Superior Court].

[35] Having first found that the appellant could not repay the amounts at issue before the Superior Court had rendered its decision, the TCC judge nevertheless found later, at paragraph 59 of his reasons, that "the appellant was indebted to [the Corporation] through an unjustified or unjust enrichment corresponding to the amounts he received from [the Corporation]".

[36] The TCC judge's two findings are, with all due respect, incompatible if not contradictory. In fact, if restitution was not possible before the date of the Superior Court's declaratory judgment, it necessarily follows that there was no debt, in this case no unjust enrichment, before that date. The appellant could not be both indebted to the Corporation and legally incapable of repaying the debt to the Corporation. In fact, by cancelling the resolution dated February 2, 2008, the Superior Court's decision places the parties in the position they were in before the resolution was adopted, that is, before the payment of the amounts at issue.

[37] Even on the assumption that there was unjust enrichment in this case from the date of the Superior Court's decision, January 6, 2014, the fact remains that the Minister established the assessment prior to that date, that is, on April 30, 2013. The TCC judge rejected the appellant's claim that the assessment was one of protection and was instead of the opinion that the assessment was "based on the [Superior] Court's determination of the motion in favour of the appellant by applying the effects of the conclusions sought" (reasons, paragraph 60). However, on reading the record, it seems instead that the Minister actually made the assessment in anticipation of a Superior Court decision that would be favourable to him, notwithstanding the fact that on April 30, 2013, the legal basis for the assessment issued did not exist. In other words, on April 30, 2013, the Minister applied a tax measure to a factual and legal situation that did not arise until January 6, 2014. Moreover, if the Superior Court's judgment established an unjust enrichment as of January 6, 2014, the fact remains that there was no longer any enrichment when the restitution of the amounts by the appellant occurred in October 2015. In reality, the respondent seeks to have an amount of money taxed even though the appellant returned that amount to the Corporation in accordance with the Superior Court's judgment. Once restitution has been made, the notions of impoverishment and enrichment become moot, rendering article 1493 of the C.C.Q. inapplicable.

[38] Consequently, the notice of reassessment dated April 30, 2013, is unfounded. This conclusion alone is sufficient to allow the appeal, but under the circumstances a few observations should be made.

[39] It is agreed that the Corporation would eventually have had the right to pay its shareholder $596,881 tax-free as a capital dividend. In this case, it simply declared this dividend too soon. The TCC judge also noted that the Corporation never paid an amount that exceeded the actual balance of its CDA (reasons, paragraph 46). It follows that the appellant never received a tax-free amount before it was correctly included in the Corporation's CDA. This is not a case where the transactions resulted in a loss of tax for the government or where there was some attempt by the appellant to avoid taxes. In essence, it is simply a case of an unfortunate date error.

[40] It is also important to note that in a situation like this, the Minister is not without means and resources. In fact, the rules in the ITA concerning a corporation's CDA are strict and the penalties are assessed accordingly. The Minister could have assessed the Corporation under Part III of the ITA even recognizing that the errors committed were errors made in good faith. In this case, the Minister showed some flexibility, and he cannot be faulted for that, by agreeing to not assess the Corporation under Part III of the ITA if the appellant, in his capacity as the Corporation's director, filed a motion for rectification (letter dated November 28, 2012, Appeal Book, Tab 2). As for the appellant, he chose to file a motion to quash rather than a motion to rectify the 2008 resolution. With respect to these issues, the appellant and the respondent each, in turn, claimed that the other could have acted differently in this case: the respondent could have assessed the Corporation under Part III of the ITA and the appellant could have sought the rectification rather than the cancellation of the 2008 resolution. The respondent also mentioned at the hearing that she could have assessed the appellant under subsection 15(1) rather than subsection 15(2), which would have prevented the appellant from deducting from his

income in subsequent years the sums he repaid. The justification for each party's choice is of little importance since the only issue is whether the assessment issued is well-founded.

[41] Finally, the appellant asked this Court to overturn the TCC judge's findings of fact concerning Ms. Brigitte Mailloux, a tax professional, whom the appellant consulted for the disposition of his business assets. According to the appellant, the TCC judge committed a palpable and overriding error when he found at paragraph 7 of his reasons that Ms. Mailloux's use of the Taxprep 2008 software led to the error in the calculation of the Corporation's CDA, thereby implying a responsibility on the part of Ms. Mailloux in that regard.

[42] At the hearing, this Court required that the parties provide short supplementary written submissions on this issue, and they were duly submitted. The appellant refers this Court to a few passages from the transcript of the hearing before the TCC judge and seeks this Court's intervention (letters from the appellant to the Court dated June 28 and July 5, 2018). The respondent, in reply, acknowledges that [TRANSLATION] "a reading of these passages could lead to the conclusion that the TCC judge committed a palpable error", but maintains that the intervention of this Court is unwarranted because the error, if there is one, is not overriding (letter from the respondent to the Court dated July 3, 2018).

[43] I note that the standard of review for findings of fact requires that there be an error that is both palpable and overriding to justify the intervention of a court of appeal (*Housen; Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286). Because the finding of fact challenged by the appellant has no impact on the result of the case, the respondent is correct to

point out that this cannot be an overriding error that warrants our intervention. Consequently, and while a reading of the passages of the transcripts submitted by the appellant combined with the TCC judge's finding at paragraph 7 of his reasons may make one wonder, this Court cannot intervene on this point by reason of the standard of review.

V. Disposition

[44] For these reasons, I would allow the appeal, I would set aside the TCC judgment and, rendering the judgment that the TCC should have rendered, I would allow the appeal of the notice of reassessment dated April 30, 2013, with costs, and I would set aside the notice. Under the circumstances, there is no need to refer the notice of reassessment back to the respondent for reconsideration. Since the parties agreed at the hearing to bear their own costs, I would not award any in this Court.

"Richard Boivin"

J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
Yves de Montigny J.A."

Annex
Relevant Statutory Provisions

Shareholder debt

15 (2) Where a person (other than a corporation resident in Canada) or a partnership (other than a partnership each member of which is a corporation resident in Canada) is

> (*a*) a shareholder of a particular corporation,
>
> (*b*) connected with a shareholder of a particular corporation, or
>
> (*c*) a member of a partnership, or a beneficiary of a trust, that is a shareholder of a particular corporation

and the person or partnership has in a taxation year received a loan from or has become indebted to the particular corporation, any other corporation related to the particular corporation or a partnership of which the particular corporation or a corporation related to the particular corporation is a member, the amount of the loan or indebtedness is included in computing the income for the year of the person or partnership.

Dette d'un actionnaire

15 (2) La personne ou la société de personnes — actionnaire d'une société donnée, personne ou société de personnes rattachée à un tel actionnaire ou associé d'une société de personnes, ou bénéficiaire d'une fiducie, qui est un tel actionnaire — qui, au cours d'une année d'imposition, obtient un prêt ou contracte une dette auprès de la société donnée, d'une autre société liée à celle-ci ou d'une société de personnes dont la société donnée ou une société liée à celle-ci est un associé est tenue d'inclure le montant du prêt ou de la dette dans le calcul de son revenu pour l'année. […]

Loans

[…]

80.4 (2) Where a person (other than a corporation resident in Canada) or a partnership (other than a partnership each member of which is a corporation resident in Canada) was

Prêts

[…]

80.4 (2) Lorsqu'une personne (autre qu'une société résidant au Canada) ou une société de personnes (autre qu'une société de personnes dont chacun des associés est une société résidant au Canada) était :

(*a*) a shareholder of a corporation,

(*b*) connected with a shareholder of a corporation, or

(*c*) a member of a partnership, or a beneficiary of a trust, that was a shareholder of a corporation,

and by virtue of that shareholding that person or partnership received a loan from, or otherwise incurred a debt to, that corporation, any other corporation related thereto or a partnership of which that corporation or any corporation related thereto was a member, the person or partnership shall be deemed to have received a benefit in a taxation year equal to the amount, if any, by which

(*d*) all interest on all such loans and debts computed at the prescribed rate on each such loan and debt for the period in the year during which it was outstanding

exceeds

(*e*) the total of

(i) the amount of interest for the year paid on all such loans and debts (other than loans deemed to have been made under subsection 15(2.17)) not later than 30 days

a) soit un actionnaire d'une société;

b) soit rattachée à un actionnaire d'une société;

c) soit un associé d'une société de personnes, ou un bénéficiaire d'une fiducie, qui était actionnaire d'une société,

et que, à ce titre, la personne ou la société de personnes a reçu un prêt de la société, de toute autre société qui lui est liée ou d'une société de personnes dont la société ou toute autre société qui lui est liée est un associé, ou a par ailleurs contracté une dette en faveur de l'une d'elles, la personne ou la société de personnes est réputée avoir reçu, au cours d'une année d'imposition, un avantage égal à l'excédent éventuel du total visé à l'alinéa *d*) sur le montant visé à l'alinéa *e*):

d) le total des intérêts sur tous ces prêts et sur toutes ces dettes, calculés au taux prescrit sur chacun de ces prêts et chacune de ces dettes pour la période de l'année où le prêt ou la dette était impayé;

e) le total des sommes suivantes :

(i) le montant des intérêts pour l'année versés sur tous ces prêts ou toutes ces dettes (sauf les prêts qui sont réputés par le paragraphe 15(2.17) avoir été consentis) au

after the end of the year, and

(ii) the specified interest amounts, for the year, in respect of all such loans that are deemed to have been made under subsection 15(2.17).

plus tard 30 jours après la fin de l’année,

(ii) les montants d’intérêts déterminés, pour l’année, relativement à tous ces prêts qui sont réputés par le paragraphe 15(2.17) avoir été consentis.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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APPEARANCES:

Pierre Hémond	FOR THE APPELLANT
Alain Gareau	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MTA LLP Sainte-Foy, Quebec	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT