Docket: 2002-1228(IT)G

BETWEEN:

ALAIN BROUILLETTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 16 and November 17, 2004, at Montréal, Quebec

Before: The Honourable Justice Louise Lamarre Proulx

Appearances:

Counsel for the Appellant:	Jacques Matte
Counsel for the Respondent:	Pierre Cossette Anick Provencher

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1995 taxation year is allowed, with costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 23rd day of March 2005.

Louise Lamarre Proulx

Lamarre Proulx J.

Translation certified true
on this 30th day of June 2005.

Sophie Debbané, revisor

Citation: 2005TCC203
Date: 20050323
Docket: 2002-1228(IT)G

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ALAIN BROUILLETTE,

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Respondent.

REASONS FOR JUDGMENT

[OFFICIAL ENGLISH TRANSLATION]

Lamarre Proulx J.

[1] This appeal involves the 1995 taxation year.

[2] The issue is whether the appellant and the corporation that acquired the appellant's shares in another corporation were dealing with each other at arm's length. If they were not dealing with each other at arm's length, section 84.1 of the *Income Tax Act* ("the Act") would apply, and the disposition price of the shares would be a deemed dividend received by the appellant rather than a capital payment.

[3] If I find that the dealings were at arm's length and that consequently section 84.1 of the Act does not apply, the Minister of National Revenue ("the Minister") makes the alternative submission that the General anti-avoidance rule (GAAR) set out in section 245 of the Act applies.

[4] The appellant, Mr. Brouillette, testified that he and Rolland Ferland each held 50% of the shares of Brouillette Automobiles Inc. In late 1994, Mr. Ferland wanted to get out of the business and sell his shares for $500,000. Mr. Brouillette

tried to get financing to purchase these shares. The bank apparently refused to grant a loan to Brouillette Automobiles Inc. Following this refusal, the appellant's accountant suggested that he team up with a partner. The accountant introduced him to Richard Chagnon, another of the accountant's clients.

[5] Richard Chagnon and Pierre Brunet operated a Mazda dealership in Drummondville as partners. They used the same accounting firm as the appellant's business: Samson Bélair.

[6] In his testimony, Mr. Chagnon clearly stated that he and his partner wanted to buy Brouillette Automobiles Inc. They knew that Rolland Ferland wanted to leave immediately and were aware that Mr. Brouillette might want to stay on a bit longer. However, when the shares were purchased, provisions were made for Mr. Brouillette's ultimate departure in five years and for the possibility of ending the relationship earlier.

[7] Mr. Chagnon explained that it did not bother him that Mr. Brouillette might want to stay on a bit longer: since the dealership in question was a Chrysler dealership and theirs was a Mazda dealership, Mr. Brouillette's services would be useful in keeping the Chrysler dealership. Mr. Chagnon also stated that the business relationship subsequently fluctuated. Mr. Chagnon and Mr. Brunet did not have the same work culture as Mr. Brouillette. Consequently, Mr. Chagnon and Mr. Brunet used the clause entitling them to terminate their business relationship with Mr. Brouillette at an earlier date.

[8] The appellant testified that none of his children were interested in continuing the family business. Consequently, he wanted to get as much as possible for his shares while continuing to work for the business for a while.

[9] Jean Martineau, a tax specialist with Samson Bélair, prepared the various phases of the sale in issue.

[10] On February 21, 1995, 9016-4476 Québec Inc. ("9016") was incorporated. At April 21, 1995, Mr. Brouillette held 500 Class "A" shares and 20 Class "C" shares in that company. The company 9017-4481 Québec Inc. ("9017"), of which Mr. Chagnon and Mr. Brunet were the two equal shareholders, held 500 Class "A" shares and, for $100,000, subscribed for the 100,000 Class "G" shares. Alain Brouillette was the president of 9016 and Richard Chagnon was its secretary.

[11] The parties admit that the appellant controlled 51% of the voting shares of 9016.

[12] On April 24, 1995, the National Bank of Canada made $490,000 in term financing available to Brouillette Automobiles Inc. The full amount was to be disbursed by June 30, 1995. The offer was addressed to the appellant and to Richard Gagnon. The collateral clause reads as follows:

> [TRANSLATION]
>
> **Collateral**
>
> - The surety of Alain Brouillette, Richard Chagnon and Pierre Brunet, solidarily, for the sum of $300,000.
>
> - A first security for the sum of $490,000 on the Borrower's immovables, located at 2750 Lafontaine Street in Saint-Hyacinthe, based on the standard forms in use at the Bank and including the standard clauses to protect the Lender.

[13] The offer was accepted. The borrowed amount was used to lend $400,000 to 9016 and to pay Rolland Ferland a $75,000 retirement allowance. Company 9016 signed a note in favour of Brouillette Automobiles Inc.

[14] On June 13, 1995, 9016 purchased the shares held by Rolland Ferland. The price was $500,000 (Exhibit I-1, tab 20).

[15] On the same date, by means of a rollover, the appellant converted his Brouillette Automobiles Inc. shares into 500,000 non-participating, non-voting Class "E" shares in 9016 with a paid-up capital of $7,500. As a result, 9016 became the sole shareholder of Brouillette Automobiles Inc.

[16] On September 30, 1995, Brouillette Automobiles Inc. declared a $400,000 dividend payable to 9016.

[17] On October 6, 1995, the parties entered into a new agreement. A two-page document at tab 18 of Exhibit I-1 succinctly explains the agreements that followed. I will quote from the paragraph entitled [TRANSLATION] "Sale of Preferred Shares" and the first part of the agreement entitled [TRANSLATION] "Shareholders' Agreement".

[TRANSLATION]

Sale of Preferred Shares

In October 1995, Alain Brouillette sells his 500,000 Class E preferred shares in 9016-4476 Québec Inc. to 9017-4481 Québec Inc. The selling price is $500,000, payable by the issuance of a non-interest-bearing demand note. 9017-4481 Québec Inc. agrees to pay the note as follows: a minimum of $50,000 per year provided Brouillette Automobile Inc. has the necessary cash flow. Balance to be paid in full on October 1, 2000.

. . .

Shareholders' Agreement

- The parties shall sign a Shareholders' Agreement. In addition to the standard clauses, the Shareholders' Agreement shall include the following clauses:
  - A restriction on the powers of the shareholder having 51% of the votes.
  - . . .

[18] On November 17, 1995, the appellant sold 500,000 preferred shares in 9016 to 9017 for $500,000, payable by a non-interest-bearing demand note (tab 24).

[19] An agreement between the appellant and 9017 dated November 17, 1995, states that the debtor acknowledges owing the creditor $500,000, payable in annual instalments of not less than $50,000. The balance of the note is payable in full on October 1, 2000 (tab 27).

[20] On November 17, 1995, the shareholders of 9016, that is, the appellant and 9017, signed a unanimous shareholders' agreement (tab 25, pages 22-23). Among other things, the agreement stipulates that 9017 shall not receive any amount as dividends from 9016 until the $500,000 note has been paid in full and that any amount 9017 receives from 9016 must serve to pay down the note.

[21] This clause was read at the request of counsel for the respondent. In other respects, the real purpose of the agreement of the shareholders of 9016, the corporation that holds the shares in Brouillette Automobiles Inc., is to restrict the

decision-making powers of the shareholder who had 51% of the votes, that is, Mr. Brouillette.

[22] On June 30, 1997, 9017 used its power to terminate its relationship with shareholders at an earlier date and paid the appellant $300,000 in final settlement of the $500,000 demand note (tab 31).

[23] Jacques Jubainville, CA, a partner with the accounting firm of Samson Bélair in Ste-Hyacinthe, testified at the hearing. He explained that his firm was the auditor of Brouillette Automobiles Inc. His dealings with the appellant began when one of his partners left the firm. At the time, Mr. Ferland had commenced negotiations regarding the sale of his shares. The $500,000 amount was determined on the basis of book value.

[24] Mr. Jubainville testified that Mr. Brouillette initially tried to purchase the shares himself from Mr. Ferland. The book value of the business was about $900,000 - $1,000,000 at the time, but the business was turning a meagre profit of roughly $40,000 per year. The bank was hesitant. It apparently suggested finding a partner who would invest money in the business. Since Mr. Brouillette did not quite know what to do, Mr. Jubainville suggested the name of Richard Chagnon, one of his clients. He told him that Messrs. Chagnon and Brunet had taken over a car dealership that was on the verge of bankruptcy and had turned it around in two years, making a great deal of profit.

[25] Mr. Jubainville testified that as of 1995, Mr. Chagnon made Brouillette Automobiles Inc. into another success after he got involved in the business. In two years, he doubled its sales from $11 million to $24 million.

[26] Jean Martineau, a tax specialist with the same accounting firm, testified that he suggested Mr. Brouillette buy out Mr. Ferland using a company as an intermediary and using a technique called a “leveraged buyout”. Mr. Martineau testified that this technique is not disadvantageous to the seller and is less costly for the buyer. To pay the seller, the operating company can declare intercorporate dividends because that company often finances a part of the purchase. The dividends can be used to pay the seller. If Mr. Brouillette had purchased the shares personally, he would have needed a $700,000 dividend from his company after it had obtained its $500,000 loan. However, by using a company and by paying intercorporate dividends, which are not subject to tax, he need only give the buying company a $500,000 dividend.

[27] Mr. Martineau explained that his plan took into account the separate interests of the parties he needed to protect. This explains why Mr. Brouillette initially had 51% of the shares in 9016. It also explains why, upon the sale of his shares, the shareholders' agreement restricted his decision-making powers (in that all decisions required unanimity) but it also provided that priority would be given to paying Mr. Brouillette's shares.

Arguments

[28] Counsel for the appellant referred to paragraph 251(1)(*c*) of the Act, which reads as follows:

> 251(1) **Arm's length** — For the purposes of this Act,
>
> . . .
>
> (*c*) where paragraph (*b*) does not apply, it is a question of fact whether persons not related to each other are at a particular time dealing with each other at arm's length.

[29] He submitted that, based on the evidence as a whole, the appellant and Messrs. Chagnon and Brunet had separate economic interests and that they entered into the agreement in issue based on those separate economic interests.

[30] In his opinion, this was essentially a purchase and sale of shares between parties with separate economic interests. There is no doubt that the parties negotiated because they managed to find common ground. None of the parties had a detailed understanding of the way in which the transaction was structured; nonetheless they all had a very good understanding of the desired purpose or outcome: the sale of shares by one party and the purchase of those shares by another. The parties relied on professionals to ensure that the transactions would be lawful and that they would pay as little tax as possible.

[31] Counsel for the appellant submitted that Mr. Brouillette was not the shareholder of the corporation that acquired its shares, and he had neither *de jure* nor *de facto* control of that corporation. The shareholders' agreement concerned 9016, which held 100% of the shares of Brouillette Automobiles Inc. In order to establish non-arm's length dealings, one would have to claim that Mr. Brouillette

controlled 9017. In fact, the contrary is true: 9017 actually controlled 9016 because it could exercise the option.

[32] In counsel's submission, the fact that the transaction was negotiated to minimize the tax consequences between the parties does not amount to acting in concert.

[33] As for the potential application of section 245, counsel for the appellant referred to subsection 245(3) of the Act:

> 245(3) **Avoidance transaction** — An avoidance transaction means any transaction
>
> (*a*) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit; or
>
> (*b*) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.

[34] Counsel submitted that the business transaction in issue was undertaken primarily for *bona fide* purposes, specifically the purchase and sale of a business, and that the tax aspect was an ancillary albeit integral part of the transaction.

[35] The Minister submitted that the appellant and 9017 acted in concert in their transaction for the reasons set out in the Reply to the Notice of Appeal:

> [TRANSLATION]
>
> aa. in 1995 and during the period referred to in the preceding paragraph, the appellant and 9017 acted in concert in their transactions for the following reasons, *inter alia*:
>
> - a single entity was responsible for negotiating the transactions involving the appellant, *Brouillette Automobile*, *9016*, *9017*, Richard Chagnon and/or Pierre Brunet;

- the parties were economically dependent on each other and acted without separate interests;

- following the transaction of November 17, 1995, the appellant had full control over the income 9017 received from 9016, and indirectly over the use of the operating surpluses generated by *Brouillette Automobile*;

- the transaction of November 17, 1995, that is, the sale and purchase of 500,000 non-voting shares, had no commercial legitimacy other than a transfer of $500,000 in surpluses of *Brouillette Automobile* to the appellant without tax consequences;

- a non-interest-bearing note was presented to create an artificial situation;

- the appellant had *de facto* control of all the transactions.

[36] Counsel for the respondent explained that the important point in the instant case is whether the appellant and 9017 were dealing at arm's length.

[37] Counsel for the respondent referred to the decision of the Exchequer Court in *M.N.R. v. Estate of Thomas Rodman Merritt*, 69 DTC 5159, and, in particular, to an excerpt from pp. 5165-66:

> In my view, the basic premise on which this analysis is based is that, where the "mind" by which the bargaining is directed on behalf of one party to a contract is the same "mind" that directs the bargaining on behalf of the other party, it cannot be said that the parties are dealing at arm's length. In other words where the evidence reveals that the same person was "dictating" the "terms of the bargain" on behalf of both parties, it cannot be said that the parties were dealing at arm's length.

[38] Counsel also referred to the decision of the Supreme Court of Canada in *Swiss Bank Corp. v. Canada (Minister of National Revenue – M.N.R.)*, [1974] S.C.R. 1144, and, in particular, to the comments of Laskin J. at page 1152:

> . . . A sound reason for this that the enactment itself suggests is the assurance that the interest rate will reflect ordinary commercial dealing between parties acting in their separate interests. A lender-borrower relationship which does not offer this

> assurance because there are, in effect, no separate interests must be held to be outside of the exception that exempts a non-resident from taxation on Canadian interest payments. . . .

[39] According to counsel, the appellant dictated the terms of the agreement to the other party, or both parties acted in concert when they accepted the terms proposed by accounting consultants who acted for both parties, or the appellant had *de facto* control over 9017.

[40] Counsel also referred to the decision of the Federal Court of Appeal in *Petro-Canada v. Canada*, [2004] F.C.J. No. 734 (QL), at paragraphs 54, 55 and 56:

> 54 There is a large body of jurisprudence dealing with the determination of whether a transaction is between two parties dealing at arm's length. Broadly speaking, the courts have identified three questions that may be used as a framework for analysis; see, for example, Peter Cundill & Associates Ltd v. Minister of National Revenue, [1991] 2 C.T.C. 221, 91 D.T.C. 5543 (F.C.A.). First, is there a common mind directing the bargaining for both parties to the transaction? Second, did the parties to the transaction act in concert without separate interests? Third, did one party to the transaction exercise de facto control over the other?
>
> 55 The Judge addressed these questions implicitly rather than expressly, and concluded that the joint exploration corporations did not deal with each other at arm's length when entering into the agreement for the purchase and sale of the seismic data. In my view, the evidence justifies that conclusion. The terms of the transactions did not reflect ordinary commercial dealings between vendors and purchasers acting in their own interests. The joint exploration corporations, for example, did not attempt to negotiate a volume discount, as the evidence indicated would be normal for such large acquisitions of seismic data. Neither joint exploration corporation acted independently and in its own interest in entering into the transactions. The terms of the transaction were in fact dictated jointly by Petro-Canada and Phillips (in the case of the Phillips JEC) and jointly by Petro-Canada and CanEagle (in the case of the CanEagle JEC). The joint exploration corporations, for all practical purposes, were indifferent as to the purchase price of the seismic data because, whatever it turned out to be, the shareholders would ensure that the purchase price was funded. Any tax relief relating to the cost of the seismic data would be transferred to Petro-Canada by means of a renunciation.
>
> 56 In my view, this case cannot be distinguished from Swiss Bank Corporation v. Minister of National Revenue, [1974] S.C.R. 1144, [1972] C.T.C. 614, 72 D.T.C. 6470. The question in Swiss Bank was whether interest payments made by a Canadian corporation on loans made by investors in Switzerland were paid at arm's length. The investors were not related to each other. They became involved in the transaction as the result of the promotional activities of Swiss Bank Corporation and Swiss Credit Bank. The two Swiss banks each owned

> 40% of the shares of another Swiss corporation, referred to as S.I.P., which acted as a trustee or agent for the investors. S.I.P. was the sole shareholder of the Canadian corporation to which the investors' funds were lent. Thus, the Canadian borrower was completely captive to the common interests of the lenders, who effectively acted in concert (through S.I.P) in dictating the terms of the loans. Similarly, in this case, the joint exploration corporations were captive to the common interests of their respective shareholders, who acted jointly in dictating the terms upon which the seismic data would be purchased. In my view, the Judge was correct to conclude that the joint exploration corporations did not deal at arm's length with the vendors of the seismic data.

[41] Counsel for the respondent submitted that section 245 applies because there were avoidance transactions that had no *bona fide* business purpose.

Analysis and Conclusion

[42] Section 84.1 of the Act applies to dispositions of the shares of one corporation to another corporation with which the seller is not dealing at arm's length within the meaning of section 251 of the Act. That meaning is broadened by paragraphs 84.1(2)(*b*) and (*c*), although that broadened meaning was not referred to by the respondent.

[43] It is interesting to read the papers about section 84.1 of the Act by the various authors who attended the 2000 and 2002 conferences of the Association de planification fiscale et financière (APFF). One excerpt that I find interesting, because I believe it explains the purpose of section 84.1, is from page 38:36 of an article by Louis Tassé entitled "L'article 84.1 et le lien de dépendance de fait" (2000 APFF conference):

> [TRANSLATION]
>
> Historically, it was the CCRA's position that section 84.1 of the ITA did not apply when the taxpayer parted with all of his shares in the corporation in issue. This position dates back to the 1970s, when a Revenue Canada official stated as follows at a conference:
>
> > It was our view that the shareholder was entitled to realise his equity in the form of a tax-free gain if he parted with ownership, but that rearranging his affairs so that he did not really part with ownership but merely held indirectly what he formerly held

> directly resulted in an improper avoidance of tax on the distribution of retained earnings.

[44] In my view, the following excerpt from pp. 31:15-16 of a paper by notary Denis Lacroix entitled "Mise à jour sur l'article 84.1" (2002 APFF conference) where he comments on this Court's decision in *Nadeau v. The Queen*, [1999] 3 C.T.C. 2235, is also of interest:

> [TRANSLATION]
>
> . . . According to the main argument made by the son, who was representing his mother in court, the series of transactions could not be considered an abuse of the provisions of the *Income Tax Act* because a sale of the shares to a corporation controlled by a third party would have been acceptable. This argument did not succeed before the judge. As pathetic as the argument may appear to some, it brings out the completely perverse nature of section 84.1. It has been demonstrated beyond a doubt that we live in a climate where intergenerational transfers of small businesses are fraught with great peril. It is therefore unfortunate that, under our tax system, transfers of businesses to family members are subject to conditions far more onerous than transfers of businesses to strangers.

[45] H. Heward Stikeman and Robert Couzin write as follows in "Surplus Stripping" (1995) 43 Can. Tax J., No. 5, at page 1853:

> . . . By 1975, a continuum had been established. At one end was the "classic" strip, a sale of shares of an operating company to a new company controlled by the seller. At the other was the innocent arm's-length disposition. In between, the department turned thumbs down on cases where the economic interest in the purchasing corporation was held for the benefit of the seller or his or her family, but might accept situations where the purchasing company was owned by adult relatives who participated in the business. . . .

[46] Parliament has decided that there will be a deemed dividend in this type of transaction only when the buying corporation is not dealing with the seller at arm's length. Parliament could have provided that any disposition of shares to a corporation would result in a deemed dividend equal to the amount by which the paid-up capital was exceeded. However, Parliament did not do so. It must therefore be assumed that Parliament intended to sanction transactions made with one's self, that is to say, complex transactions in which the shareholder ultimately retains substantially the same property. When the buyer corporation and the seller have separate economic interests, and they carry out the transaction in accordance with those separate interests, section 84.1 of the Act does not apply.

[47] In *McNichol v. Canada*, [1997] T.C.J. No. 5 (QL), Bonner J. of this Court made an exhaustive analysis of a *de facto* non-arm's length relationship in a situation where subsection 84(2) and section 84.1 of the Act applied:

> 16 Three criteria or tests are commonly used to determine whether the parties to a transaction are dealing at arm's length. They are:
>
> (a) the existence of a common mind which directs the bargaining for both parties to the transaction,
>
> (b) parties to a transaction acting in concert without separate interests, and
>
> (c) "de facto" control.
>
> The common mind test emerges from two cases. The Supreme Court of Canada dealt first with the matter in M.N.R. v. Sheldon's Engineering Ltd. ([1955] C.T.C. 174, 55 DTC 1110). At pages 1113-14 Locke J., speaking for the Court, said the following:
>
> > Where corporations are controlled directly or indirectly by the same person, whether that person be an individual or a corporation, they are not by virtue of that section deemed to be dealing with each other at arm's length. Apart altogether from the provisions of that section, it could not, in my opinion, be fairly contended that, where depreciable assets were sold by a taxpayer to an entity wholly controlled by him or by a corporation controlled by the taxpayer to another corporation controlled by him, the taxpayer as the controlling shareholder dictating the terms of the bargain, the parties were dealing with each other at arm's length and that s. 20(2) was inapplicable.
>
> The decision of Cattanach, J. in M.N.R. v. T R Merritt Estate ([1969] C.T.C. 207, 69 DTC 5159) is also helpful. At pages 5165-66 he said:

> In my view, the basic premise on which this analysis is based is that, where the "mind" by which the bargaining is directed on behalf of one party to a contract is the same "mind" that directs the bargaining on behalf of the other party, it cannot be said that the parties were dealing at arm's length. In other words where the evidence reveals that the same person was "dictating" the "terms of the bargain" on behalf of both parties, it cannot be said that the parties were dealing at arm's length.

The acting in concert test illustrates the importance of bargaining between separate parties, each seeking to protect his own independent interest. It is described in the decision of the Exchequer Court in Swiss Bank Corporation v. M.N.R. ([1971] C.T.C. 427, 71 DTC 5236; aff'd [1972] C.T.C. 614, 72 DTC 6470). At page 5241 Thurlow J. (as he then was) said:

> To this I would add that where several parties -- whether natural persons or corporations or a combination of the two -- act in concert, and in the same interest, to direct or dictate the conduct of another, in my opinion the "mind" that directs may be that of the combination as a whole acting in concert or that of any of them in carrying out particular parts or functions of what the common object involves. Moreover as I see it no distinction is to be made for this purpose between persons who act for themselves in exercising control over another and those who, however numerous, act through a representative. On the other hand if one of several parties involved in a transaction acts in or represents a different interest from the others the fact that the common purpose may be to so direct the acts of another as to achieve a particular result will not by itself serve to disqualify the transaction as one between parties dealing at arm's length. The Sheldon's Engineering case [supra], as I see it, is an instance of this.

Finally, it may be noted that the existence of an arm's length relationship is excluded when one of the parties to the transaction under review has de facto control of the other. In this regard reference may be made to the decision of the Federal Court of Appeal in Robson Leather Company Ltd. v. M.N.R., 77 DTC 5106.

[48] In analysing the separate interests of the sellers and buyers, he concluded that a buyer and a seller are not acting in concert simply because they are seeking to enter into an agreement that is beneficial to both parties:

> 17 The evidence in the present case shows that arm's length bargaining was present in the sale of the Bec shares. The interests of vendors and purchaser were divergent with regard to the purchase price. The appellants were clearly price sensitive for they terminated discussions with regard to the sale of the shares to a

> prospective purchaser, Malcolm Dunfield, upon learning that Forestell would pay a higher price. Conduct of overriding importance in establishing that the purchaser dealt with the appellants at arm's length, is Mr. Forestell's action in consulting Mr. Haylock, his own accounting and tax adviser, before committing Beformac to the transaction. At Mr. Forestell's request Mr. Haylock reviewed the situation and gave his opinion on the transaction from the point of view of Mr. Forestell. The actions of the appellants and Mr. Forestell in negotiating the share sale transaction were clearly governed by their respective perceptions of their own self-interest and nothing else. The fact that the tax savings potentially accruing to the appellants as a consequence of sale formed not only the reason for the sale but also the boundaries within which sale price might be negotiated does not suggest that the appellants and Forestell acted in concert. Buyer and seller do not act in concert simply because the agreement which they seek to achieve can be expected to benefit both. Section 84.1 is therefore not applicable.

[49] In the case at bar, there was no evidence that there were retained earnings or that the corporation had significant liquidity. There is reason to doubt that the corporation had liquidity because when Brouillette Automobiles Inc. wanted to borrow money, the bank suggested finding a strong financial partner. In addition, unlike *Petro-Canada*, *supra*, there was no evidence of ordinary or normal commercial relations between sellers and buyers, different from those that took place.

[50] In my opinion, the evidence established without a doubt that the interests of Messrs. Chagnon and Brunet were totally separate from those of Mr. Brouillette. Mr. Brouillette tried to sell at the best price he could get. Mr. Chagnon and Mr. Brunet tried to get the lowest price for the shares of a business that they were seeking to purchase and operate.

[51] Financial advisors are not the directing minds of the corporations that they advise. They advise. They do not make the decisions. It cannot be determined that parties have acted in concert simply because they have used the same financial advisors. The interests of each party to an agreement must be analysed to determine whether they have acted in concert.

[52] From Mr. Chagnon and Mr. Brunet's point of view, what was involved was the purchase of a new business without the old shareholders. This was understood from the outset of the negotiations. Mr. Ferland was leaving immediately and the appellant would be leaving in five years. Ultimately, he left in two years.

[53] The appellant had no control over 9017 when the agreement was entered into or at any other time. First, 9017 had to pay the disposition price of the shares

before benefiting, by way of dividends, from the profits of Brouillette Automobiles Inc. This was a disposition intended to protect the seller. It was not a disposition aimed at controlling 9017. Company 9017 was entitled to exercise a total purchase option at any time. In fact, it exercised this option early in 1997. In addition, based on the shareholders' agreement between the shareholders of 9016, he did not control that corporation either.

[54] Since section 84.1 of the Act applies only to non-arm's length dealings, it does not apply here.

[55] Can section 245 of the Act apply to the case at bar? The respondent did not refer to any basis of taxation other than to section 84.1 of the Act. In my view, when the evidence shows that the parties were dealing at arm's length, the legal debate is closed. To hold that section 245 of the Act applies would be to legislate. The respondent stated that the purpose of the Act was to avoid corporate surplus stripping. If so, the respondent would have needed to point to an applicable section of the Act other than section 84.1.

[56] In *McNichol, supra*, it was possible to apply subsection 84(2) of the Act. Bonner J. applied section 245 based on the application of subsection 84(2), not of section 84.1, which had also been invoked as a basis for the assessment.

[57] Ultimately, even if section 245 could be applied to the case at bar, it is my opinion that the transactions were entered into fundamentally for a business or commercial purpose. That was the only true purpose of the transaction. The financial advisors helped the parties carry out these transactions for the least amount of tax. However, the purpose of one of the two parties was to purchase the business and the purpose of the other was to sell his shares for the best possible price. As a result of this finding regarding the purpose, the General anti-avoidance rule is not applicable under subsection 245(3) of the Act.

[58] The appeal is accordingly allowed, with costs.

Signed at Ottawa, Canada, this 23rd day of March 2005.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 30th day of June 2005.

Sophie Debbané, revisor