Docket: 2004-2792(IT)G

BETWEEN:

MARCEL LÉTOURNEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of *Yvonnette Côté-Létourneau* (2004-2693(IT)G), on October 23, 2006, at Québec, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: André Lareau

Counsel for the Respondent: Janie Payette and **Marielle Thériault**

AMENDED JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1998 taxation year is dismissed, with costs to the Respondent for one matter only, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 4th day of **June** 2007.

"Alain Tardif"

Tardif J.

Translation certified true
on this 30th day of March 2010.

François Brunet, Revisor

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Counsel for the Respondent:	Janie Payette and **Marielle Thériault**

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Citation: 2007TCC91
Date: 20070504
Dockets: 2004-2693(IT)G
2004-2792(IT)G

BETWEEN:

YVONNETTE CÔTÉ-LÉTOURNEAU,
MARCEL LÉTOURNEAU,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENTS

Tardif J.

[1] These appeals pertain to the 1998 taxation year.

[2] The issues to be determined are as follows:

> Did the Minister of National Revenue ("the Minister") correctly add $593,065 to the Appellant Marcel Létourneau's income and $600,539 to the Appelant Yvonnette Côté-Létourneau's income as grossed-up dividends in accordance with sections 84.1 and 82 of the *Income Tax Act* ("the Act") for the 1998 taxation year, and did the Minister correctly grant the Appellant Marcel Létourneau a $79,056 dividend tax credit and the Appellant Yvonnette Côté-Létourneau a $80,052 dividend tax credit for that year?

[3] Since the instant appeal is related to the appeal of Yvonnette Côté-Létourneau in Docket 2004-2693(IT)G, the parties agreed that the evidence submitted in the appeal of Marcel Létourneau (2004-2792(IT)G) would avail for both appeals.

[4] The facts set out in paragraphs 1 to 6, 9, 16 to 18, 21 and 22 of the Notice of Appeal and admitted to by the Respondent provide a fairly good summary of the important facts on which the assessment under appeal is based. They read:

> [TRANSLATION]
>
> 1. Centre d'Hébergement St-Joseph ("the Centre") incorporated on November 28, 1983, under Part 1A of the *Companies Act*.
>
> 2. Until early 1994, the only outstanding shares of that corporation consisted of 1,000 Class "A" common shares, held by the Appellant and his spouse Ms. Côté-Létourneau in equal amounts.
>
> 3. During the years 1994 and 1995, a crystallization of Mr. Létourneau's shares in the Centre was effected within the framework of section 110.6 of the *Income Tax Act* ("the Act" or "the ITA"), on the basis of the advice of his then legal counsel.
>
> 4. Specifically, in the course of the year 1994, the Appellant sold, to the Centre, 250 Class "A" shares of the Centre, having a paid-up capital of $250, an adjusted cost base of $250, and a fair market value of $250,000. The consideration received by the Appellant consisted of 250 Class "B" shares of the Centre.
>
> 5. In the course of the year 1995, the Appellant sold, to the Centre, 250 Class "A" shares of the Centre having a paid-up capital of $250, an adjusted cost base of $250, and a fair market value of $250,000. The consideration received by the Appellant consisted of 250 Class "B" shares of the Centre.
>
> 6. The Class "B" shares issued by the Centre were preferred, non-voting and non-participating shares.
>
> . . .
>
> 9. It appears, from the documents prepared by Mr. Létourneau's then legal counsel that, in particular, this plan resulted concretely, as of March 18, 1998, in the incorporation of a new corporation called 9061-3175 Québec inc. ("9061").
>
> . . .

16. Under the [TRANSLATION] "Létourneau Family Trust" instrument drafted by Mr. Létourneau's then legal counsel and, in particular, section 7 of the instrument, which pertains to the powers of trustees, the trustees must exercise their powers unanimously in relation to all acts and decisions to be made under section 7.

17. Specifically, section 7.1.7 provides that the voting rights and all rights connected to the ownership of shares can only be exercised with the unanimous consent of all trustees.

18. The trustee Bertrand Wall is a chartered accountant with Dagenais Cadieux LLP, whose office is located at 511 Place D'Armes, Suite 500, Montréal, Quebec H2Y 2W7.

. . .

21. On July 14, 2003, the Minister of Revenue sent the Appellant Mr. Létourneau a notice of assessment claiming the sum of $121,531.42 from him.

22. According to this notice of assessment, the sale of Class "B" shares to 9061 generated a dividend for the Appellant under section 84.1 of the Act.

[5] The Appellant also submitted the following in paragraph 19 of his Notice of Appeal:

[TRANSLATION]

19. Bertrand Wall is at arm's length from Mr. Létourneau [and] his spouse Yvonnette Côté-Létourneau

[6] The Respondent denied this allegation; both parties agree that this constitutes the heart of the controversy.

[7] As for the Respondent, she made and confirmed the assessment on the basis of the following very detailed assumptions of fact:

[TRANSLATION]

(a) Centre d'Hébergement St-Joseph Inc. ("the Centre") operates a home and health care centre for seniors, and incorporated on November 28, 1983, under Part 1A of the *Companies Act* (Quebec).

(b) Until early 1994, the Appellant and his spouse Yvonnette Côté-Létourneau each held 500 Class "A" voting shares of the Centre.

(c) The Appellant and Yvonnette Côté-Létourneau are Canadian residents.

(d) The Centre's directors are the Appellant and Yvonnette Côté-Létourneau.

<u>The acquisition of the Class "B" shares of the Centre by the Appellant and Yvonnette Côté-Létourneau</u>

(e) In the course of the years 1994 and 1995, the Appellant and Yvonnette Côté-Létourneau proceeded with the "crystallization" of the capital gains deduction in respect of their Class "A" share holdings in the Centre.

(f) Thus, the Appellant and Yvonnette Côté-Létourneau each disposed of their Class "A" share holdings in the Centre, and the Centre received those holdings. In consideration of this disposition, the Appellant and Ms. Côté-Létourneau each received 500 newly issued non-voting Class "B" shares of the share capital of the Centre, and availed themselves of subsection 85(1) of the *Income Tax Act*, in the following manner:

	Shares disposed of	Consideration received
February 22, 1994	• 250 Class "A" shares • FMV: $250,000 • ACB: $250 • Paid-up capital $250 • Agreed amount: $250,000	• 250 Class "B" shares • FMV: $250,000
January 5, 1995	• 250 Class "A" • FMV: $250,000 • ACB: $250 • Paid-up capital: $250 • Agreed amount : $250,000	• 250 Class "B" shares • FMV: $250,000

(g) The 500 Class "B" shares issued by the Centre and purchased by the Appellant are preferred, redeemable, non-voting and non-participating.

(h) At the time of acquiring the Class "B" shares, the Appellant was not at arm's length from the Centre.

(i) In his income tax returns for the taxation years 1994 and 1995, the Appellant reported the following taxable capital gains and claimed the following capital gains deduction in relation to the disposition of the Class "A" shares:

	1994	1995	TOTAL
Taxable gains:	$187,312.50	$187,312.50	$374,625
Capital gains deduction under section 110.6 :	$187,313	$168,526	$355,839

(j) On January 5, 1995, the Centre issued 500 new Class "A" voting shares to the Appellant and another 500 to Yvonnette Côté-Létourneau.

The 1998 tax planning

(k) In early 1998, Serge M. Racine, a lawyer, prepared a tax plan for the Appellant and Ms. Côté-Létourneau. This plan resulted in the withdrawal, by the couple, of $500,000 each from the Centre, for a total withdrawal of $1,000,000, without tax consequences.

(l) This tax plan is discussed in a document signed by Serge M. Racine, and dated April 9, 1998.

(m) Under the plan, *inter alia*,

- a corporation would be created to acquire some of the Centre's participating shares;

- a trust would be created, having the Appellant, Ms. Côté-Létourneau, and an unrelated third party as trustees, and the new corporation as beneficiary;

- the trust would hold the shares of the newly created corporation;

- a part of the fair market value of the Centre would be transferred to a new corporation by means of the disposition, by the Appellant and Ms. Côté-Létourneau, of shares held by them in the share capital of the Centre, in such a manner that the corporation receiving these shares would not be related to the Appellant or Ms. Côté-Létourneau (but ultimately, it was); and

- the newly created corporation would pay the Appellant and Ms. Côté- Létourneau for these shares by issuing a promissory note payable in the form of dividends, or by means of a repurchase, by the Centre, of the acquired shares.

The creation of 9061-3175 Québec Inc.

(n) On March 18, 1998, 9061-3175 Québec Inc. ("9061") was incorporated under Part 1A of the *Companies Act* (Quebec).

(o) The Appellant was the sole director of 9061 throughout the relevant period.

(p) According to 9061's T2 tax returns for the years ended March 31, 1999, to March 31, 2002, Yvonnette Côté-Létourneau was the president of 9061.

The creation of the Létourneau Family Trust on March 30, 1998

(q) On March 30, 1998, the Létourneau Family Trust was created by the lawyer Serge M. Racine and had the following trustees and beneficiaries:

Trustees	Beneficiary or beneficiaries
• Appellant	• 9061
• Yvonnette Côté-Létourneau	• Upon the liquidation of 9061, the last shareholders to be listed in 9061's registers
• Bertrand Wall	

(r) The trustees of the Létourneau Family Trust were to hold and administer the trust property and were to exercise unanimously the powers set out in section 7.1 of the trust instrument of March 30, 1998, notably with respect to the voting of the Trust's shares.

(s) Bertrand Wall is a chartered accountant with the firm of Dagenais Cadieux LLP. The firm reviewed the financial statements of 9061 and the Centre, and prepared the financial statements of those corporations and of the Appellant and Ms. Côté-Létourneau for the 1998, 1999, 2000, 2001 and 2002 taxation years, among others.

(t) Section 10.3 of the trust instrument of March 30, 1998, stipulates that the trustees can renounce their charge after accepting it, and do not need a court's authorization to do so.

(u) According to section 10.6 of the trust instrument, the trustees may effect a general delegation of their powers to those of their co-trustees who are neither the settlor nor a beneficiary.

(v) The accountant Bertrand Wall either delegated his powers and obligations to the Appellant and Yvonnette Côté-Létourneau as contemplated in section 10.6 of the trust instrument, or renounced his charge as contemplated in section 10.3 thereof, and therefore, at all times, only the Appellant and Yvonnette Côté-Létourneau controlled the Trust.

(w) Bertrand Wall told the following facts to Marie-Claude Poitras of the tax avoidance section of the Québec Tax Services Office during a telephone conversation on October 2, 2002:

- he knows the Appellant and Yvonnette Côté-Létourneau because they are his clients;

- he agreed to be a trustee of the Létourneau Family Trust because [TRANSLATION] "there was a need for trustees";

- he has no role, rights or powers in or over the Létourneau Family Trust;

- the Appellant and Yvonnette Côté-Létourneau are the only decision-makers and administrators in respect of the Létourneau Family Trust;

- At the time that the Létourneau Family Trust was created, Mr. Wall signed a document in which he delegated all his rights and powers as a trustee to the Appellant and Yvonnette Létourneau, but he does not have this document in his possession;

- Mr. Wall was not involved in any meetings of the Létourneau Family Trust and had no contacts regarding the management of the Trust's affairs; and

- Mr. Wall never made any decisions with the Appellant and Ms. Côté-Létourneau concerning the Létourneau Family Trust or Serge Racine's tax planning.

The issuance of shares by 9061 on March 30, 1998

(x) On March 30, 1998, 9061 issued shares in the following manner:

Class "E" non-voting shares

- 10 Class "E" preferred shares were issued to Serge M. Racine for $10

- Mr. Racine transferred these shares to the Létourneau Family Trust

- 9061 repurchased these shares

- 9061 issued 10 Class "E" shares to the Appellant Mr. Létourneau

Class "F" non-voting shares

- 9061 issued 10 Class "F" preferred shares to Yvonnette Côté-Létourneau

Class "A" voting shares, Class "B" non-voting shares and Class "C" voting shares

- 100 Class "A" voting shares were issued to the Létourneau Family Trust for $100

- 100,000 Class "B" non-voting preferred shares and two Class "C" preferred shares (100 votes per share) were issued to the Centre in consideration of the assignment of a $100,000 claim initially payable by the Appellant and Ms. Côté-Létourneau to the Centre

The disposition by the Appellant and Yvonnette Côté-Létourneau, to the Centre, of their holdings of Class "B" shares of the share capital of the Centre on March 30 and April 10, 1998

(y) On March 30, 1998, the Appellant and Ms. Côté-Létourneau each disposed of 50 of their 500 Class "B" shares in the share capital of the Centre, and, in consideration, each received a $50,000 promissory note.

(z) On March 30, 1998, 9061 redeemed and cancelled the 100,000 Class "B" shares of its share capital held by the Centre in consideration of the redemption and cancellation, by the Centre, of the 100 Class "B" shares of its share capital held by 9061.

(aa) On March 30, 1998, the Appellant, Ms. Côté-Létourneau, and 9061 effected a set-off and cancelled the $100,000 debt that the Appellant owed 9061 as well as the $100,000 debt that 9061 owed them (which debts are referred to in subparagraphs 15(x) (last paragraph) and 15(y).

(bb) On April 10, 1998, the Appellant and Ms. Côté-Létourneau each disposed of their remaining 450 Class "B" shares in the share capital of the Centre, 9061 acquired these shares, and, in consideration, the Appellant and Ms. Côté-Létourneau each received a $450,000 promissory note.

Other transactions

(cc) On March 30, 1998, the Centre issued 120 Class "G" voting shares to 9061.

(dd) On April 10, 1998, the Centre issued 125 Class "E" voting and non-participating shares to 9061 for $125.

(ee) On April 10, 1998, 9061 redeemed the two Class "C" shares held by the Centre for $2.

(ff) On April 11, 1998, the 900 Class "B" shares of the share capital of the Centre, held by 9061, were split into 900,000 Class "B" shares.

Redemption of Class "B" shares and repayment on promissory notes

(gg) During its fiscal year ended March 31, 1999, the Centre redeemed 571,000 Class "B" shares, held by 9061, for $571,000.

(hh) During its fiscal year ended March 31, 2000, the Centre redeemed 225,000 Class "B" shares, held by 9061, for $225,000.

(ii) According to the financial statements of 9061 as at March 31, 2001 and March 31, 2002, 9061 still held 104,000 Class "B" shares of the Centre.

(jj) Over the course of the fiscal years ended March 31, 1999, 2000, 2001, and 2002, and in the manner set out below, 9061 gradually repaid the Appellant on the debts totalling $500,000 ($50,000 + $450,000) and gradually repaid Ms. Côté-Létourneau on the debts totalling the same amount:

Repayment of debts by 9061 according to its financials:	Yvonnette Côté-Létourneau	Appellant
As at March 31, 1999	$254,208	$250,209
As at March 31, 2000	$152,500	$152,499
As at March 31, 2001	$74,216	$70,537
As at March 31, 2002	$19,076	$26,755
TOTAL REPAID:	$500,000	$500,000

Non-arm's length relationship upon the dispositions of the Class "B" shares on March 30 and April 10, 1998:

(kk) The March and April 1998 transactions involving the Centre, 9061 and the Létourneau Family Trust were part of the tax plan that Serge M. Racine prepared for the Appellant and Yvonnette Côté-Létourneau, and did not require any negotiations in order to proceed.

(ll) When the dispositions were made on March 30 and April 10, 1998,

- the Appellant and Yvonnette Côté-Létourneau were trustees of the Létourneau Family Trust;
- the Appellant and Yvonnette Côté-Létourneau were the sole directors of the Centre, whose Class "B" shares, having a value of $1,000,000, were held by 9061;

- the Appellant was the director of 9061 and Ms. Côté-Létourneau was its president;
- 9061 was the sole beneficiary of the Létourneau Family Trust;
- the shares of 9061 were the only assets of the Létourneau Family Trust; and
- the Appellant and Ms. Côté-Létourneau had *de jure* and *de facto* control over the Létourneau Family Trust, 9061 and the Centre.

(mm) The Appellant and Ms. Côté-Létourneau made all the decisions for the Centre, 9061 and the Létourneau Family Trust.

Connected corporations

(nn) Immediately after the Appellant's disposition of the 50 Class "B" shares in the share capital of the Centre and the receipt of those shares by 9061 on March 30, 1998, 9061 held "more than 10% of the issued share capital (having full voting rights under all circumstances)" of the Centre, and "more than 10% of the fair market value of all of the issued shares of the capital stock" of the Centre.

(oo) Immediately after the Appellant's disposition of the 450 Class "B" shares of the capital stock of the Centre and the receipt of those shares by 9061 on April 10, 1998, 9061 held "more than 10% of the issued share capital (having full voting rights under all circumstances)" of the Centre and "more than 10% of the fair market value of all of the issued shares of the capital stock" of the Centre.

Calculation of the deemed dividend

(pp) The Minister calculated the ACB of the Class "B" shares, the grossed-up dividend and the tax credit in the following manner:

Calculation of the ACB of the Class "B" shares according to paragraph 84.1(2)(*a.1*) of the ITA

ACB less		$500,000
Deduction claimed under s. 110.6 of the ITA prior to applying the 75% rate:	$355,839 x 4/3 =	$474,452
ACB of Class "B" shares for the purposes of section 84.1 of the ITA		**$25,548**

Calculation of the deemed dividend under paragraph 84.1(1)(*b*) of the ITA

FMV of consideration other than shares received	$500,000
ACB under section 84.1(2)(*a.1*) of the ITA	$25,548
Amount of deemed dividend	$474,452
Dividend gross-up: 125% x $480,431	**$593,065**

Calculation of dividend tax credit: section 121 of the ITA:

Dividend tax credit:	13.33% x $593,065	**$79,056**

Waiver

(qq) On April 11, 2002, the Appellant signed a waiver of the normal reassessment period, thereby enabling the Minister to make the reassessment of July 14, 2003 for the 1998 taxation year, in relation to the 1994 and 1995 "crystallization" and the 1998 tax planning.

[8] The facts referred to in subparagraphs (a) through (j), (l), (n) through (p), (r) through (u), (x) through (z), (aa), (cc) through (jj) and (nn) through (qq) were admitted to. As for the facts referred to in subparagraphs (k), (m), (q), (v), (w), (bb), (kk), (ll) and (mm), they were denied.

[9] At the beginning of the hearing, the Appellants abandoned their argument concerning the limitation period. The issue is essentially about the sale, in two successive stages, of the 500 Class "B" shares of the Centre to 9061; about whether this transaction triggers section 84.1 of the *Income Tax Act* ("the Act"); and lastly, about the imposition of a deemed dividend justifying the notices of assessment under appeal.

[10] Over the years, the Appellants developed a very trusting relationship with Bertrand Wall, a chartered accountant by training. The firm in which Mr. Wall was a partner had a great deal of expertise concerning the management of nursing homes for people with decreasing autonomy and the accounting services that such homes require; he was also an excellent advisor to the Appellants.

[11] The Appellant said that he met with Mr. Wall regularly and spoke with him on the phone often. For Mr. Wall, the Appellant's file was anything but one among many; it was quite clearly an important file that he knew well.

[12] At one point, Mr. Wall advised the Appellants to consult with someone in order to develop a tax plan that would save them taxes.

[13] On Mr. Wall's suggestion, the Appellants met with lawyer Serge Racine. They mandated him to prepare a tax plan, which they approved after obtaining answers to some of their concerns.

[14] The plan that Mr. Racine submitted to the Appellants provided for the creation of a family trust. Thus, a trust was created, and Mr. Wall, the accountant, was appointed as one of the three trustees, the other two being the Appellants.

[15] The assessment made by the Minister of National Revenue ("the Minister") relied, in part, on the facts obtained during the telephone conversation between the auditor Marie-Claude Poitras and Mr. Wall.

[16] The tenor of the conversation, discussed in detail at the hearing, was, in fact, reproduced as follows at paragraph (w) of the Reply to the Notice of Appeal:

> [TRANSLATION]
>
> - he knows the Appellant and Yvonnette Côté-Létourneau because they are his clients;
> - he agreed to be the trustee of the Létourneau Family Trust because [TRANSLATION] "there was a need for trustees";
> - he has no role, rights or powers in or over the Létourneau Family Trust;
> - the Appellant and Yvonnette Côté-Létourneau are the only decision-makers and administrators in respect of the Létourneau Family Trust;
> - At the time that the Létourneau Family Trust was created, Mr. Wall signed a document in which he delegated all his rights and powers as trustee to the Appellant and Yvonnette Létourneau, but he does not have this document in his possession;

- Mr. Wall was not involved in any meetings of the Létourneau Family Trust and had no contacts in respect of the management of the Trust's affairs; and

- Mr. Wall never made any decisions with the Appellant and Ms. Côté-Létourneau concerning the Létourneau Family Trust or Serge Racine's tax planning.

[17] Naturally, the Appellant Mr. Létourneau denied this account of the contents of this telephone conversation, although he was neither a party to it nor present when it took place.

[18] Upon being asked to provide his version of the facts set out in the Reply, Mr. Wall discussed the background and what he considered to be the very special circumstances. Among other things, he said that he was hard of hearing and that this sometimes made it difficult for him to understand things properly.

[19] He also said that he was at his private home and that it was very early in the morning; thus, he might have made statements that were confused, inappropriate, or even at odds with reality.

[20] Nonetheless, he did acknowledge that he was a trustee of convenience; and in the light of the following excerpt from his testimony, there is no doubt about this.

> October 23, 2006 – Transcript, at pages 140-142
>
> [TRANSLATION]
>
> Q. Tell me, Mr. Wall, you also told Ms. Poitras that you signed a document in which you delegated your rights and powers as a trustee to Mr. and Mrs. Létourneau, is that correct?
>
> A. Yes. But I never signed that document. I had signed such a document in another trust, and I got mixed up at one point.
>
> Q. And why would you delegate your powers?
>
> A. In other trust?
>
> Q. Well, actually, why did you tell Ms. Poitras that you delegated your powers?

A. Well, it's because she was bombarding me with questions. At one point...

Q. She was bombarding you?

A. Well, I mean...

Q. You couldn't call her back?

A. Call her back? I wasn't thinking that I would have to call her back later.

Q. You told her that you agreed to be a trustee of the Létourneau Family Trust because there was a need for trustees. Is that correct?

A. Well, it's because...

Q. Is that correct?

A. Yes, there was indeed a need for trustees.

Q. You told her that you had no role, rights or powers in or over that trust, right?

A. Oh yes, I might have said that.

Q. That Mr. and Mrs. Létourneau were the Trust's only decision-makers and administrators. You told her that?

A. Yes.

Q. That you were not involved in any meetings. None. That you had no contracts for the purpose of discussing the affairs of the Trust. We're still talking about the same period, now.

A. We had no face-to-face meetings, but in terms of ... we talk over the telephone.

Q. But no contacts for discussion purposes?

A. Well, there were no formal meetings.

Q. Yes, but, isn't contact over the phone still contact?

A. Well, I assumed that contact was...

Q. That contact meant physical contact?

A. Yes.

Q. O.K. And that you never made any decisions with Mr. and Mrs. Létourneau with respect to the trust or the tax planning?

A. None with respect to the tax planning.

Q. What about the trust? You said not the trust, either.

A. Well, I'm not the one who formed the trust.

Q. You're not the one who formed it, but that was not the nature of the statement that you made to her. You told her that you made no decisions with respect to the trust.

A. Well, there are no decisions...

Q. To make?

A. No direct ones, because we had no formal meetings for the trust, but, indirectly, since I am on the file, and I am always asked...

Q. When you say that you are on the file...

A. Well, in the sense that 9061 and either the St-Joseph Trust ... for those things, I am the one who does the accounting.

. . .

October 23, 2006 – Transcript, at page 145

A. What were you expecting? What kinds of decisions?

Q. Yes.

A. I had no decisions *per se* to make in 9061. I am 9061's accountant.

Q. Very well. And if I understand correctly, in 9061, you had — and tell me whether I am using the right term — you caused an issuance examination report concerning the financial statements to be produced?

A. Yes.

Q. And you produced an audit report concerning the Centre's financial statements?

A. Yes.

Q. O.K. And as far as you're concerned, there is no conflict involved in being a trustee and issuing reports concerning 9061's financial statements?

A. No.

Q. And why is that?

A. Well, because, in ... I was a trustee, it's the trust, not the actual trustee, that was the shareholder. It wasn't me personally.

[21] Ms. Poitras was called to testify about Mr. Wall's role in the trust, as defined by the famous telephone conversation. She was very clear on the subject; her answers were completely unambiguous.

[22] Ms. Poitras also stated that the questions addressed to Mr. Wall had been prepared in advance as part of the preparation of the telephone conversation; thus, this was not an interpretation that became hesitant by virtue of the passage of time.

[23] She also testified that, contrary to what Mr. Wall has stated, he was the one who initiated the conversation. She had first tried to reach Mr. Wall by phone, but was unsuccessful. She left a message with the phone number at which she could be reached. And the conversation took place on Mr. Wall's initiative, contrary to what he said.

[24] The excerpts from the telephone conversation reveal a lot about Mr. Wall's true role, especially since, in the first part of his testimony, he answered in a very questionable manner, frequently referring to mistakes, forgetfulness, and the fact that the conversation took place very early in the morning, all of which is rather unusual language for an accountant who probably knows the file better than the Appellants themselves.

[25] Thus, he had the Appellant's file at his office or private residence and could refer to it as needed.

[26] Faced with these contradictory explanations, I unhesitatingly accept the version provided by Ms. Poitras and reject that of Mr. Wall. I do so for the following reasons:

- Her testimony was precise, she testified with assurance, and she had written notes concerning the contents of the telephone conversation.

- Mr. Wall was hesitant and uncomfortable and was clearly trying to avoid certain questions; on several occasions, he tried to discredit the answers that had been given to Ms. Poitras, on the pretext that he was somewhat confused because of the context, his hearing problem and the early hour at which the conversation took place.

- Apart from these elements, which obviously favour the auditor's version, the overall context shows that the auditor's version is much more credible than that of the accountant, who clearly tried, throughout his testimony, to provide precise answers to some questions and very confused answers to others. I found it truly astonishing that an accountant with Mr. Wall's experience could have very precise recollections of certain facts and a completely deficient memory with respect to others, especially those which have major consequences on the outcome of the appeal.

- The fact that there was a business relationship between the Appellant and Mr. Wall, that they had known each other for nearly 20 years and that they had numerous and regular communications, warrants the raising of the following question:

  (A) <u>At the time that the Appellants transferred their shares to the 9061 management company, did they deal with 9061 on a non-arm's-length basis, in which case the tax consequences provided for in section 84.1 of the Act apply?</u>

[27] In order to answer this question, we must begin by considering the conditions under which the statutory provision in issue, namely subsection 84.1(1) of the Act, applies:

> **SECTION 84.1: Non-arm's length sale of shares**
>
> (1) **Where** after May 22, 1985, a **taxpayer** resident in Canada (other than a corporation) **disposes of shares** that are **capital property of the taxpayer** (in this section referred to as the "subject shares") of **any class of the share capital of a corporation resident in Canada** (in this section referred to as the "subject corporation") **to another corporation** (in this section referred to as the "purchaser corporation") **with which the taxpayer does not deal at arm's length** and, **immediately after the disposition, the subject corporation would be connected** (within the meaning assigned by subsection 186(4) if the references therein to "payer corporation" and to "particular corporation" were read as "subject corporation" and "purchaser corporation" respectively) **with the purchaser corporation**,
>
> . . .
>
> [Emphasis added.]

[28] The conditions under which the consequences of this subsection apply are therefore as follows:

a. A taxpayer (other than a corporation) resident in Canada disposes of shares;

b. The shares are capital property of the taxpayer;

c. The shares are a class of the share capital of a corporation resident in Canada (hereinafter the "subject corporation");

d. The shares are disposed of to another corporation (hereinafter the "purchaser corporation");

e. The taxpayer does not deal with the purchaser corporation at arm's length;

f. Immediately after the disposition, the subject corporation is connected with the purchaser corporation. (See D. Lacroix, "Mise à jour sur l'article 84.1 L.I.R." in *Congrès 2002* (Montréal: Association de planification fiscale et financière, 2002), 31:1, at page 31:3).

[29] In the case at bar,

a. The Appellants are taxpayers resident in Canada;

b. The Appellants disposed of shares, specifically, Class "B" shares of the Centre, which are shares of a corporation that is also a resident of Canada, and that corporation became the "subject corporation".

c. Those shares were disposed of to another corporation, namely 9061, the "purchaser corporation" in this situation.

d. Immediately after the disposition, Centre and 9061 were connected corporations, because 9061 owned more than 10% of the Class "B" common shares of the Centre. In particular, they were related under subsection 186(4) of the Act, which provides:

> **SECTION 186: Tax on assessable dividends**
>
> **(4) Corporations connected with a particular corporation.** For the purposes of this Part, a payer corporation [i.e. subject corporation] is connected with a particular corporation [i.e. purchaser corporation] at any time in a taxation year (in this subsection referred to as the "particular year") of the particular corporation if
>
> (*a*) the payer corporation [subject corporation] is controlled (otherwise than by virtue of a right referred to in paragraph 251(5)(*b*)) by the particular corporation at that time;
>
> (*b*) the particular corporation [purchaser corporation] owned, at that time,
>
> (i) **more than 10% of the issued share capital** (having full voting rights under all circumstances) **of the payer corporation**, and
>
> (ii) shares of the share capital of the payer corporation **having a fair market value of more than 10% of the fair market value of all of the issued shares of the share capital of the payer corporation.**
>
> [Emphasis added.]

[30] The only condition in issue here is whether 9061, the purchaser corporation, dealt with the Appellants on a non-arm's length basis when the transactions of March 30 and April 10, 1998, took place.

[31] In deciding this issue, one must first examine the "arm's length" concept contemplated in section 251 of the Act.

[32] Let us begin with subsection 251(1), as it read in 1998:

> **SECTION 251: Arm's length**
>
> **(1)** For the purposes of this Act,
>
> (*a*) **related persons shall be deemed not to deal with each other at arm's length**;
>
> (*b*) **it is a question of fact** whether persons not related to each other were at a particular time dealing with each other at arm's length.
>
> [Emphasis added.]

[33] Thus, in order to determine whether persons are not dealing with each other at arm's length, we must determine what "related persons" are. And the definition of "related persons" is set out in subsection 251(2) of the Act. It is only if persons *are not related* under subsection 251(2) that we must consider the concept of *de facto* non-arm's length relationship contemplated in paragraph 251(1)(*b*) of the Act.

i - "Related persons" who are not at arm's length from each other: paragraph 251(1)(*a*) of the Act

[34] Subsection 251(2) of the Act lists all situations in which persons are related:

> **SECTION 251: Arm's length**
>
> **(2) Definition of "related persons"** For the purpose of this Act, related persons", or persons related to each other, are
>
> (*a*) **individuals connected** by blood relationship, **marriage** or adoption;
>
> (*b*) a **corporation** and
>
> (i) a person who controls the corporation, if the corporation is controlled by one person,
>
> (ii) **a person who is a member of a related group that controls the corporation**,
>
> (iii) any person related to a person described in subparagraph (i) or (ii);
>
> (*c*) any two corporations

(i) if they are controlled by the same person or group of persons,

(ii) if each of the corporations is controlled by one person and the person who controls one of the corporations is related to the person who controls the other corporation,

(iii) if one of the corporations is controlled by one person and that person is related to any member of a related group that controls the other corporation,

(iv) if one of the corporations is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation,

(v) if any member of a related group that controls one of the corporations is related to each member of an unrelated group that controls the other corporation, or

(vi) if each member of an unrelated group that controls one of the corporations is related to at least one member of an unrelated group that controls the other corporation.

[Emphasis added.]

[35] Subparagraph 251(2)(*b*)(ii) of the Act, a provision the application of which will be analysed below, provides that a corporation is related to a person who is a *member of a related group* that controls the corporation.

[36] "Related group" is defined in subsection 251(4) of the Act:

SECTION 251: Arm's length

(4) Definitions concerning groups. In this Act, "related group" means a group of persons **each member of which is related to every other member of the group;**

[Emphasis added.]

[37] Since Mr. and Mrs. Létourneau are spouses, they are related under paragraph 251(2)(*a*) of the Act because they are connected by marriage. And, being related, they form a related group.

[38] Consequently, the next thing to be determined is whether the related group consisting of the Appellants controls 9061. If so, the group is related to 9061 and is not at arm's length from it.

[39] It should also be noted that subsection 251(5) provides clarifications about related groups, contemplated in subsection 251(2), that control a corporation. It provides as follows:

> **SECTION 251: Arm's length**
>
> (5) For the purposes of subsection (2) and the definition of "Canadian-controlled private corporation" in subsection 125(7):
>
> (*a*) where a related group **<u>is in a position to control a corporation, it shall be deemed to be a related group that controls the corporation whether or not it is part of a larger group by which the corporation is in fact controlled</u>**.
>
> . . .
>
> [Emphasis added.]

[40] Thus, under this provision, even if the Appellants are part of a larger group (consisting of the Appellants and Bertrand Wall) which controls the corporation, the Appellants, assuming they are in a position to control the corporation alone, will be considered a related group that controls 9061.

[41] In order to determine whether the Appellants control the corporation, we must now turn to the concept of control.

[42] It must be noted that "control" for the purposes of this provision is *de jure* control, that is to say, legal control, as discussed by the justices of the Federal Court of Appeal in *SMX Shopping Centre Ltd. v. Canada*, 2003 FCA 479:

> 20 Subsection 251(2) of the *Income Tax Act* specifies the relationships that must exist between persons if they are to be considered related to each other for income tax purposes. Paragraph 251(2)(*a*) provides that persons who are connected by blood, marriage or adoption are related to each other. Thus, Amir Malekyazdi, his wife Mahin-Touss Malekyazdi, and their four children are related to one another. A corporation is related to each member of a related group that controls the corporation (subparagraph 251(2)(*b*)(ii)), and is also related to any person who is related to any member of that related group (subparagraph 251(2)(*b*)(iii)). A related group is defined in subsection 251(4) as a group of persons each member of which is related to every other member. **<u>"Control" in this context is *de jure* control</u>**. In the case of SMX, *de jure* control is in the hands of a related group consisting either of Amir Malekyazdi and his wife, Mahin-Touss Malekyazdi, who are the legal owners of the SMX shares, or their four children, who are the beneficial owners. In either case, SMX is related to Amir Malekyazdi.

[Emphasis added.]

[43] The *Income Tax Act* does not define the concept of *de jure* control. Rather, the case law has defined the tests that are used to determine whether a person is in a position to control a corporation. In *Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795, the Supreme Court of Canada summarized the other decisions on the subject. The following is the relevant excerpt from the Court's decision:

> (3) Summary of principles and conclusion as to control
>
> **85** It may be useful at this stage to summarize the principles of corporate and taxation law considered in this appeal, in light of their importance. They are as follows:
>
> > (1) Section 111(5) of the *Income Tax Act* contemplates *de jure*, not *de facto*, control.
> >
> > (2) The general test for ***de jure* control** is that enunciated in *Buckerfield's*, *supra*: whether the majority shareholder enjoys **"effective control"** over the "affairs and fortunes" of the corporation, as manifested in "**ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the board of directors**".
> >
> > (3) To determine whether such "effective control" exists, **one must consider**
> >
> > > (a) the corporation's governing statute;
> > >
> > > (b) the share register of the corporation; and
> > >
> > > (c) **any** specific or unique **limitation** on either the majority shareholder's power to control the election of the board or the board's power to manage the business and affairs of the company, as manifested in either:
> > >
> > > > (i) the constating documents of the corporation; or
> > > >
> > > > (ii) any unanimous shareholder agreement.
> >
> > (4) Documents other than the share register, the constating documents, and any unanimous shareholder agreement are not generally to be considered for this purpose.

> (5) If there exists any such limitation as contemplated by item 3(c), the majority shareholder may nonetheless possess *de jure* control, unless there remains no other way for that shareholder to exercise "effective control" over the affairs and fortunes of the corporation in a manner analogous or equivalent to the *Buckerfield's* test.
>
> [Emphasis added.]

[44] In the case at bar, the Létourneau Family Trust has the power to elect 9061's board of directors because it holds 100% of the common voting shares of 9061. Consequently, it has *de jure* control over 9061. Given these circumstances, we must determine who controls the trust, or, in other words, who makes the decisions about the trust, in order to determine who controls 9061.

[45] Before we consider the attributes of a trust in order to determine who controls the trust, it is important to discuss the decision in *Canada v. Consolidated Holding Co*., [1974] S.C.R. 419, where Judson J. stated the following, at pages 422-424, with respect to the determination of the control of a company where the shareholders are the trustees of a trust that controls that company:

> **In determining whether a group of persons controls a company, it is not sufficient in the case of trustees who are registered as shareholders to stop the inquiry at the register of shareholders and the Articles of Association. It is necessary to look to the trust instrument** to ascertain whether one or more of the trustees have been put in a position where they can at law direct their co-trustees as to the manner in which the voting rights attaching to the shares are to be exercised.
>
> **From the point of view of the company,** apart from protective provisions, **trustee shareholders must vote as a unit. If they are not unanimous, the shares cannot be voted.** In this event, **the control would be in "Consolidated", the two shareholders of which are the two Gavin trustees. Merely to look at the share register is not enough when the question is one of control.**
>
> [Emphasis added.]
>
> The problem here is not solved by a decision that a company is not bound to see to the execution of trusts to which its shares are subject or that it may take the vote of the first named trustee on its share register. These are merely protective provisions in favour of the company and do not touch the question of control. Here, if one looks at the facts as a whole, one finds that the two Gavins, by combining, can control the vote of the estate shares. They already control the voting of "Consolidated". In this case, therefore, both corporations are controlled by the same group of persons, namely the two Gavins. They are, in the words of Abbott J. in *Vina Rug (Canada) Ltd.* v. *Minister of National Revenue*,

> in a position to control at least a majority of votes to be cast at a general meeting of shareholders.

> I do not think that the decision in *I.R.C.* v. *J. Bibby & Sons Ltd*. establishes anything more than this proposition--that a person who is the registered owner of 50 per cent of the shares with voting rights controls the company and that it is immaterial whether or not his exercise of that voting power can be controlled either by co-trustees or through appropriate proceedings by order of the Court. It does not establish the proposition that in a case such as this, where two trustees have the power to subject a third trustee in the exercise of the voting rights of the shares, one must disregard that power.

[46] A trust is a patrimony by appropriation codified by the civil law applicable to the case at bar. Articles 1260 and 1278 of the *Civil Code of Québec*, S.Q. 1991, c. 64 (C.C.Q.) discuss the powers of trustees:

> **1260.** A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a **trustee undertakes** [*s'oblige*], by his acceptance, to hold and **administer.**

> **1278.** A trustee has the control and the **exclusive administration of the trust patrimony,** and the **titles relating to the property of which it is composed are drawn up in his name**; he has **the exercise of all the rights pertaining to the patrimony** and may take any proper measure to secure its appropriation.

> A trustee acts as the administrator of the property of others charged with full administration.

> [Emphasis added.]

[47] The trustees are the decision-makers, and therefore exercise the voting rights attached to the shares held by the trust. As far as the Létourneau Family Trust is concerned, we must examine the provisions of the trust that will be set out below in order to determine who the trustees are and how they exercise their voting rights.

[48] The trust instrument, which can be found at tab 10 of Exhibit I-1, provided, *inter alia*:

> [TRANSLATION]
>
> ARTICLE VII – TRUSTEES' POWERS
>
> 7.1 In addition to all other powers conferred on the Trustees by the provisions of the *Civil Code of Québec*, the Trustees, by virtue of this Trust, have the power, at their complete discretion, to administer the Trust Property at any time and in any manner whatsoever and exercise all the powers that an owner can generally exercise over his property. In addition, and without limiting the scope of the foregoing, the **Trustees exercise the following powers on a unanimous basis**:
>
> . . .
>
> ARTICLE X – APPOINTMENT AND RESIGNATION OF TRUSTEES
>
> 10.1 **I appoint Marcel Létourneau, Yvonnette Côté and Bertrand Wall as Trustees.**
>
> 10.2 In the event of the death or the refusal or incapacity to act of one of the Trustees, or upon notice in writing given by Marcel Létourneau or Yvonnette Côté, or in the event of their death or incapacity, upon written notice given by their liquidator, a replacement shall be appointed. If any other vacancy occurs and a replacement is not appointed, any interested person may apply to a judge of the Superior Court to have one appointed.
>
> 10.3 The Trustees may, without the permission of a court, renounce their charge after having accepted it.
>
> 10.4 A Trustee who becomes incapable, bankrupt or insolvent shall be removed *ipso facto* from his or her position as trustee.
>
> 10.5 Any Trustee who ceases to reside in Canada shall be removed from his or her position as trustee.
>
> 10.6 The Trustees may delegate their powers to third persons for specific purposes only; they do not have the power to effect a general delegation, except to one or more Trustees who are neither a Settlor nor a Beneficiary.
>
> [Emphasis added.]

[49] Since it is the trustees who exercise the powers related to the shares held by the Trust, we must examine their rights, and the powers provided for, in order to assess the control over 9061, since the trust itself holds 100% of the voting shares of 9061.

[50] As the Supreme Court held in *Consolidated Holding, supra*, in determining the issue of control through a trust, one must examine the trust instrument. The Appellants submit that since the decisions had to be unanimous at all times, they were unable to control the trust alone.

[51] I agree with this submission. Our task is not to infer *de facto* control, but, rather, to examine all factors relevant to the *de jure* control of the corporation. Who was in a position to elect 9061's board of directors? The three trustees were in such a position, and they had to do so unanimously.

[52] Thus, since it cannot be held that the group consisting of Mr. and Mrs. Létourneau had *de jure* control over 9061, the conditions established by the foregoing provisions are not met.

ii *De facto* non-arm's length relationship: paragraph 251(1)(*b*) of the Act

[53] We must now consider the question of the *de facto* arm's length relationship. In order to determine whether the Appellants were, on the facts, in a non-arm's length relationship with 9061, it is important for us to consider the remarks made by Bowman J. (now Chief Justice of this Court) in *RMM Canadian Enterprises Inc. v. Canada*, No. 94-1732(IT)G, April 10, 1997:

> It is true that a determination whether persons are at arm's length requires that the court make findings of fact, **but whether, on the facts, there is in law an arm's-length relationship is necessarily a question of law**. Even Parliament which, subject to constitutional limitations, is supreme and has the power to deem cows to be chickens, cannot turn a question of law into a question of fact. All that paragraph 251(1)(*b*) means is that in determining whether, as a matter of law, unrelated persons are at arm's length, **the factual underpinning of their relationship must be ascertained.** The meaning of "arm's length" within the *Income Tax Act* is obviously a question of law.

[Emphasis added.]

[54] In addition, Bonner J., in *McNichol v. Canada*, No. 94-1577(IT)G, January 17, 1997, went over the factors to be considered in deciding whether or not parties are, *de facto*, dealing with each other at arm's length:

> **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.* 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* 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. 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 D.T.C. 5106.

[Emphasis added.]

[55] Thus, we must analyse the relationship between Bertrand Wall and the Appellants in order to determine whether they truly were not at arm's length from 9061.

[56] Before analysing the three conditions that must be met in order to hold that a *de facto* non-arm's length relationship exists, it is important to go over what the evidence as a whole has revealed.

[57] The Appellant Mr. Létourneau and his spouse have known Mr. Wall for several years. Over those years, a special relationship was developed and a very strong bond of trust was forged. This bond clearly gave rise to a relationship between the parties that was characterized by forthrightness and in which it was neither abnormal nor significant for the accountant, in the course of his dealings with Mr. Létourneau and his wife, to express his disagreement or reservations about certain plans or ideas.

[58] The evidence also shows that Mr. Létourneau was an informed and prudent individual who asked the necessary questions in order to be able to take on the responsibility to make final decisions. In this regard, the fact that he paid fees to

the accountant Mr. Wall undeniably conferred on him the authority to make any decision having actual or potential consequences on his assets.

[59] It can also be seen that the few isolated examples or situations that were described in an attempt to show that the accountant was genuinely independent are not very persuasive, though I have no doubt that the accountant could have expressed an unfavourable opinion about certain ideas or decisions made by the Appellant Ms. Côté-Létourneau. The only relevant question is this: Who made the decision at the very end of a situation that called for a conclusion?

[60] With respect to the transactions involving the purchase and sale of the Appellants' Class "B" shares by 9061, I am satisfied, in view of the evidence, that Mr. Wall would never have voted against his clients' wishes. As for the two transactions of March 30 and April 10, 1998, I am more than satisfied that Mr. Wall did not have any input as his role was essentially passive.

[61] The truth is that Bertrand Wall did not exercise his powers as a trustee at all; there was no true decision-making power associated with his involvement in the trust. Indeed, the content of his telephone conversation with the auditor showed this very clearly.

[62] The evidence has brought to light enough facts to answer three questions about the transactions of March 30 and April 10, 1998:

1. Did a common mind direct the bargaining for both parties?

2. Did the parties to the transactions act in concert without separate interests?

3. Did one of the parties exercise *de facto* control over the other?

[63] Did a common mind direct the bargaining? The issue is who actually made the decisions for 9061. In view of the evidence, Mr. Wall was not involved in the decision-making at all; while the trust instrument provided that the decisions had to be made unanimously, I find that Mr. and Mrs. Létourneau were the only ones who decided that 9061 would purchase their shares. Mr. Wall might have had and expressed reservations or hesitations, but, ultimately, he would never have dared to vote against Mr. and Mrs. Létourneau, who would not have acquiesced in such conduct by the accountant to whom they were paying fees.

[64] Since they were "sellers" to the same extent as they were "purchasers", I find that the same minds directed the bargaining on these transactions. Lastly, nothing could have prevented the transaction between the Appellants and 9061 either on March 30, 1998, or on April 10, 1998, because, in my opinion, they directed the bargaining for both parties.

[65] The next question is whether the parties to the two sale transactions were acting in concert without separate interests. The comments made above apply here as well. Since both parties to the transactions were the same people, they were obviously acting in concert without separate interests.

[66] Lastly, did the Appellants in fact control 9061? If so, they are deemed not to have been dealing with each other at arm's length. The evidence has shown, on a balance of probabilities, that Mr. Wall's role was a role of convenience. Mr. and Mrs. Létourneau did in fact control 9061.

[67] Consequently, I find that there was indeed a non-arm's length relationship.

(B) Can it be claimed, in the alternative, that section 84.1 of the Act does not apply because the Appellants never acquired the shares of the Centre?

[68] It is important to refer to the provision on the basis of which the Appellants submit that the shares had to be acquired by them in order for a dividend to be deemed as part of the calculation of the adjusted cost base of the shares sold:

> **SECTION 84.1: Non-arm's length sale of shares**
>
> (1) Where after May 22, 1985 a taxpayer resident in Canada (other than a corporation) disposes of shares that are capital property of the taxpayer (in this section referred to as the "subject shares") of any class of the capital stock of a corporation resident in Canada (in this section referred to as the "subject corporation") to another corporation (in this section referred to as the "purchaser corporation") with which the taxpayer does not deal at arm's length and, immediately after the disposition, the subject corporation would be connected (within the meaning assigned by subsection 186(4) if the references therein to "payer corporation" and to "particular corporation" were read as "subject corporation" and "purchaser corporation" respectively) with the purchaser corporation
>
> . . .
>
> (2) For the purposes of this section,
>
> (*a*) . . .

> (*a.1*) where a share disposed of by a taxpayer was **acquired by the taxpayer after 1971** from a person with whom the taxpayer was not dealing at arm's length, was a share substituted for such a share or was a share substituted for a share owned by the taxpayer at the end of 1971, the adjusted cost base to the taxpayer of the share at any time shall be deemed to be the amount, if any, by which its adjusted cost base to the taxpayer, otherwise determined, exceeds the total of
>
> . . .
>
> [Emphasis added.]

[69] The Appellants submit that the shares referred to in paragraph 84.1(2)(*a*.1) of the Act were never *acquired* by them. The Appellants owned the shares of the Centre because they *subscribed* to the shares upon their issuance, not because they acquired the shares. Their position is based on the following argument: in order for shares to be *acquired*, there must be a corresponding *disposition*, but the Centre never disposed of these shares, and merely issued them.

[70] I do not agree with this analysis. It is sufficient to consider the definition of the word "acquisition" in order to dispose of this question.

[71] First of all, it should be noted that the word "acquisition" is not defined in the *Income Tax Act*. Consequently, one can refer to Hubert Reid, *Dictionnaire de droit québécois et canadien*, 3d ed. (Cowansville, QC: Wilson & Lafleur, 2004), at page 12, which states as follows:

> **[TRANSLATION]**
>
> **Acquisition**
>
> - 1. The fact of becoming an owner of property or a holder of a right.
> - 2. A transaction by which a person becomes the owner of property or holder of a right.

[72] Similarly, Paul Robert, *Le grand Robert de la langue française, Dictionnaire alphabétique et analogique de la langue française*, 2d ed., vol. 1 (Paris: Dictionnaires Le Robert, 1985) defines "*acquisition*" as follows at page 92 and "*acquérir*" [acquire] as follows at page 91:

Acquisition, n.

- 1. Act of acquiring

Acquire, v.tr.

- 1. To become the owner of property or a right.

[73] The Appellants did indeed *acquire* the shares of the Centre in 1983 because they became the owners of the shares upon subscribing for them.

[74] Since all the conditions set out in section 84.1 of the Act have been met, the Minister correctly revised the adjusted cost base of the shares that the Appellants sold to 9061 and correctly deemed a dividend.

CONCLUSION

[75] The appeal is dismissed, with costs to the Respondent in only one matter.

Signed at Ottawa, Canada, this 4th day of May 2007.

"Alain Tardif"

Tardif J.

Translation certified true
on this 30th day of March 2010.

François Brunet, Revisor

CITATION:	2007TCC91
COURT FILE NOS.:	2004-2693(IT)G and 2004-2792(IT)G
STYLES OF CAUSE:	Yvonnette Côté-Létourneau v. The Queen Marcel Létourneau v. The Queen
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	October 23, 2006
REASONS FOR JUDGMENTS BY:	The Honourable Justice Alain Tardif
DATE OF JUDGMENTS:	**June** 4, 2007

APPEARANCES:

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Counsel for the Respondent:	Janie Payette and **Marielle Thériault**

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