Dockets: 2005-3860(IT)G
2005-3861(IT)G

BETWEEN:

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

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on July 9, 11, 12, 13 and 27, 2007,
at Montréal, Quebec.
Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the Appellant:	Maurice Trudeau Geneviève Émond
Counsel for the Respondent:	Nathalie Lessard

JUDGMENT

The appeals from the assessments under the *Income Tax Act* (**Act**) for the 1999 and 2000 taxation years are allowed and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the $6 million figure must be included for both companies in computing income from a business for the 1999 taxation year, in accordance with the attached Reasons for Judgment.

The Respondent is entitled to three quarters of her costs.

Signed at Ottawa, Canada, this 20th day of December 2007.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 26th day of March 2008.

Brian McCordick, Translator

Citation: 2007TCC647
Date: 20071220
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REASONS FOR JUDGMENT

Archambault J.

[1] RCI Environnement Inc. (**RCI**) and Centres de Transbordement et de Valorisation Nord-Sud Inc. (**CTVNS**) are appealing from the assessments made by the Minister of National Revenue (**Minister**) for the 1999 and 2000 taxation years. The issue is essentially the same for both companies; they each received $6,000,000 under a settlement (**Settlement**) between RCI, Société en commandite Saint-Mathieu (**SEC**) and CTVNS, on the one side, and WMI Waste Management of Canada Inc. (**WMI**), on the other, signed on December 16 and 17, 1998. Under the Settlement, Canadian Waste Services Inc. (**CWS**), a corporation related to WMI, paid $12,000,000 to Placement St-Mathieu Inc.[1] (**PSM**) on December 16, 1998, to terminate non-competition agreements and all rights and obligations under the agreements and to release WMI and its related corporations from all obligations, claims and undertakings resulting from the non-competition

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[1] For the purposes of these appeals, I assume that PSM was acting as mandatary of RCI and CTVNS. Under an agreement dated December 16, 1998, RCI and CTVNS lent that sum to PSM. (Exhibit I-3, tabs 11 et 12)

agreements and a formal notice dated August 18, 1998. In their financial statements, RCI and CTVNS included half of that figure, $6,000,000, as an extraordinary item that they considered to be non-taxable for the purposes of the *Income Tax Act* (**Act**).

[2] Under subsection 9(1) of the Act, the Minister included the $6,000,000 in the income of RCI and CTVNS for their fiscal year ended July 31, 1999, as income from a business, and the consequence was to change the non-capital loss carried forward to the 2000 taxation year. The outcome of the appeal for 2000 depends entirely on the tax treatment of the $6,000,000 for 1999. Alternatively, the Respondent argues that a fraction of that amount is taxable income under section 14 (eligible capital property) or section 38 (taxable capital gain). By certificate dated February 1, 2006, CTVNS merged with RCI and the corporation resulting from the merger is RCI Environnement Inc. (**RCI 2006**). That corporation still argues that the funds that RCI and CTVNS received are non-taxable windfall gains.

Facts

[3] In argument, counsel for the Respondent produced the chronological summary of facts reproduced below. I have made a few changes, indicated in square brackets, in many cases to reflect suggestions made by counsel for RCI 2006:

> [TRANSLATION]
>
> CHRONOLOGICAL SUMMARY OF FACTS:
>
> 1. In the 1980s, Lucien Rémillard[1] owned Intersan Inc. [Intersan operated and still operates a waste management business in the greater Montréal region and has a dump site in St-Nicéphore, near Drummondville.]
>
> 2. Mr. Rémillard sold Intersan Inc. to "Philip Environmental Inc." [**Philip**] (a roughly 70% share in 1991 and the rest in 1995) [for about $100,000,000].
>
> [2.1 In 1996 and 1997, CWS, a subsidiary of USA Waste Services Inc. (**USA Services**), acquired companies operating solid waste management businesses or assets used in companies of that nature. First came the acquisition of Philip, then Laidlaw, and in early 1997, assets owned by WMI, except for assets in Quebec. Philip's assets still included Intersan. According to Exhibit I-2 and the testimony of Mr. Sutherland-Yoest, the president of CWS at that time.)]

3. In 1997, Mr. Rémillard created the appellant corporations[2] to acquire assets [all located in Quebec] owned by … WMI …, including all the shares of WMI Québec Inc., which were held by WMI ("the acquisition").

4. On or about June 27, 1997, … PSM paid ... CWS $3,000,000 so that CWS could have Philip ... release PSM and Lucien Rémillard from a non-competition clause signed on July 31, 1995, at the time of the sale of Intersan (I-1, tab 2). David Sutherland-Yoest was the person who encouraged that transaction and introduced L. Rémillard to WMI. …

5. On July 30, 1997, the following acquisitions were made: RCI [acquired] assets for the sum of $3,608,600,[3] CTVNS [acquired] the shares of WMI Québec Inc. for the sum of $1,200,000[4] (or $1,202,899, based on the exchange rate used for the assets), and also a lot and building (transfer station) for the sum of $3,000,000[5] (or $3,007,199, based on the exchange rate used for the assets).

6. In addition, ... SEC acquired rights in the contracts [for the provision of services to WMI's customers in Quebec] for $9,350,000 [and, according to the admission by counsel for RCI 2006, the services were performed by RCI under a subcontract given by SEC. According to the notes to RCI's financial statements, RCI received $9.1 million for those services in 1998 (note 10), $5.6 million in 1999 (note 12) and $3,2 million in 2000 (note 12), while for the same years it paid "referral fees" of $99,928 in 1998, $375,868 in 1999 and $565,241 in 2000. (See Exhibit A-2, tabs 1 to 3).][6]

7. PSM [PSM, SEC, RCI and CTVNS (**Groupe RCI**)] also acquired the accounts [receivable] of WMI and WMI Québec Inc. for the sum of $1,361,053.[7]

8. The total price of all of the transactions on July 30, 1997, was therefore about $17,250,000[8] [$12,500,000 US], plus $1,361,053 for the accounts [receivable] (those figures do not take into account the $3 million paid [by PSM] to CWS to settle the non-competition agreement with Philip).

9. As a condition of the transactions on July 30, 1997, WMI had to sign non-competition agreements with RCI and CTVNS [and a non-solicitation agreement with SEC (the three agreements are referred to as "**non-competition agreements**")].

10. No monetary consideration was paid by [Groupe RCI] for the non-competition agreements (no portion of the sale price was allocated to that clause in particular). See Exhibit I-1, tab 2 (schedule 2.3) and notice of appeal, 2005-3861(IT)G, para. [7] and notice of appeal 2005-3860, para. [7] and Exhibit I-7, pp. [32] and [53], [excerpts from the discovery

testimony of Jacques Plante, who was the director of finance at RCI at the time].

11. The term of those agreements was 60 months (5 years). They contained undertakings on a number of matters, and in particular, WMI had to [make reasonable business efforts to refer customers to RCI] for certain [accounts], referred to as "National Accounts" [where possible].[9]

12. At the time the non-competition agreements were signed (July 30, 1997), Intersan Inc. was operating in Quebec, and specifically in the Greater Montréal area.

13. The territory where RCI and CTVNS carried on business was Greater Montreal, and the biggest competitor was Intersan .... [Other competitors, including Browning Ferris Industries (**BFI**), were also active. BFI also had a dump site there.] CTVNS operates transfer centres [in] Laval and [in] St-Rémi. [Intersan operates a transfer centre in Longueuil.]

14. In addition, a contract entitled "General Agreement" was signed on July 30, 1997. One provision of the contract was that any compensation payable in relation to the various acquisition contracts, or related contracts, was limited to $12.5 million US. However, Davi[d] Sutherland-Yoest said that he had not been made aware of that clause.

15. In the year following the acquisition by [Groupe RCI], WMI merged with [USA Services]. [It is more accurate to say that WMI's parent company, Waste Management Inc. (**WMI USA**) merged with USA Services.] Intersan was then owned by CWS, a subsidiary of [USA Services] (see I-2). The new merged entity became Waste Management Inc. (WM [1998]). [Because of the merger, WMI and CWS (including its subsidiary Intersan) became subsidiaries of WM 1998. (See paragraph 13 of RCI's notice of appeal.) As a result of the merger, the non-competition undertaking given to RCI by WMI became binding on its parent company, WM 1998, and CWS's new subsidiaries (including Intersan). (See paragraph 14 of the notice of appeal, admitted by the Respondent.) Total sales volume for WM 1998 was $12 billion.]

16. The merger agreement was announced in a news release on March 11, 1998 [and the merger was completed on July 17, 1998] (I-3, tabs 1 and 9 and testimony of David Sutherland-Yoest).

17. On March 25, 1998 (barely eight months after the acquisition), RCI and others [represented by Maurice Trudeau] sent Intersan a formal notice ..., citing the news release of March 11, 1998, and reminding Intersan of the obligations assumed by WMI in the non-competition clauses. The

Appellants alleged that no effort whatsoever was made to have WMI's "National Accounts" contracts transferred to them. They further alleged that Intersan ... was engaging in a price war to acquire those National Accounts, and more specifically the Winners store accounts (I-3, tab 1, p. 2).

18. By letter dated March 25, 1998, RCI and others demanded the immediate cessation of those activities **and** the payment of "compensation representing damages now estimated at $250,000.00" (I-3, tab 1, p. 2).

19. On March 27, 1998, Dick Van Wyck replied for Intersan ..., in a brief letter, to the formal notice of March 25 (I-3, tab 2) [among other things, asking Mr. Trudeau to provide him with the non-competition agreements].

20. On April 16, 1998, RCI and others [represented by Mr. Trudeau] sent a fresh formal notice to Intersan ... and its General Manager (I-3, tab 3). [In the letter, the recipients were alleged to have violated their contractual and legal obligations, in particular regarding the transfer of the "national accounts", and to have engaged in unfair competition.]

21. It noted that nothing had been done in response to the first formal notice. It also alleged acts by which Intersan ... had given Mr. Rémillard and the Appellant a bad reputation. It stated: "Intersan's monopoly position in Quebec ... resulting from its numerous acquisitions and the merger of [USA Services] with [WMI USA] cannot put Intersan ... above the laws of Quebec and Canada." The next paragraph of the letter asked for immediate action to be taken to "limit the prejudice suffered by RCI to date", [and it then alluded to] the possibility of an administrative remedy being sought from the Competition Bureau of Canada. [However, no reference was made to the quantum of damages in the letter.]

22. On July 29, 1998, an American law firm delivered a legal opinion which, according to I-6, dealt with the possibility of compelling specific performance of the non-competition agreements under the laws of Delaware in the United States (I-3, tab 4). [The substance of the opinion was not placed in evidence.]

23. On August 3, 1998, the sole director (Lucien Rémillard) of RCI and CTVNS passed resolutions. They stated, among other things, that RCI and CTVNS believe it to be important that SEC be a party to any proceedings that might be brought against WMI, that SEC was prepared to agree to that if it did not incur any expense[s], and that it waived any benefit it might obtain as a result of the decision of a court of competent jurisdiction or an out-of-court settlement. [No other evidence was introduced in relation to the agreement with SEC.] The resolutions conclude by saying that because the parties wish to establish the terms on which proceedings would be

instituted, it is therefore resolved that RCI and CTVNS be part[ies] to an agreement to be signed on that date between RCI, CTVNS and SEC, … (I-3, tab 5). [No proceedings were instituted after those resolutions were passed.]

24. On August 18, 1998, a fresh formal notice was delivered by RCI and others. This time, the law firm Langlois, Gaudreau was retained, and the formal notice was delivered to all of the corporations involved in Groupe [WM 1998] (I-3, tab 7). [In the letter, Groupe WM 1998 was reminded that WMI was bound by certain agreements as of July 30, 1997 — non-competition agreements, non-solicitation agreements and an agreement not to interfere in the conduct of the business of the corporations for whose benefit the agreements were entered into — that had been made with Groupe RCI. Under the non-competition agreements, WMI, on behalf of itself and its related corporations, agreed not to engage in competition with Groupe RCI, directly or indirectly, for a period of 60 months. The letter stated that because of the merger of WMI USA and USA Services, Groupe WM 1998, including its subsidiary Intersan, was bound by the non-competition agreements. In general, the formal notice letter was a reminder of the various obligations under the non-competition agreements. It referred to certain violations, including the fact that WMI had violated its obligation to make its best efforts to transfer the national accounts to Groupe RCI, the fact that WMI was also in breach of its obligation not to solicit the national customers actively, directly or through Intersan, the fact that Intersan was then operating a solid waste management business within a 150-kilometre radius of WMI's former establishment in Quebec, and the fact that WM 1998 held financial interests in a firm carrying on a solid waste management business, in particular through Intersan, within a 150-kilometre radius of WMI's former establishment. In addition, WMI and Intersan were in breach of their obligation not to solicit customers belonging to Groupe RCI, not to interfere in the activities of Groupe RCI and not to attempt to persuade customers or suppliers to change their relationship with Groupe RCI. However, no quantum of damages was mentioned or claimed in the letter.]

25. On August 31, 1998, RCI received its first statement of account from Langlois Gaudreau (I-3, tab 8).

26. On receipt of that letter, David Sutherland-Yoest was informed of the "problem". He was instructed to resolve it and he reported to John Drury, President of [WM 1998], on the steps he took.

27. On September 4, 1998, Dick Van Wyck replied to that letter on behalf of Groupe [WM 1998, that is, WM 1998, WMI, CWS and Intersan], denying that Intersan ... was bound by the non-competition agreements, in particular because it was already carrying on business within Greater

Montréal in 1997 (at the time of the acquisition). As well, the allegations against Intersan ... were denied and an invitation to hold a meeting "to clear the air" was issued (I-3, tab 9). ...

28. On October 16, 1998, and November 12, 1998, two more statements of account were issued by Langlois Gaudreau to RCI, in connection with the non-competition clauses (I-3, tab 9).

29. Between September and November 1998, David Sutherland-Yoest came to Montréal to meet with L. Rémillard ... . He first proposed the solution of entering into business agreements to "combine" the operations of the appellant and Intersan, a profitable solution for both parties.

30. L. Rémillard refused to negotiate agreements of that kind as long as the "problem" relating to the non-competition agreements was not resolved.

31. David Sutherland-Yoest proposed a $3 million payment to settle the "problem". L. Rémillard requested $20 million. They negotiated. Mr. Rémillard having told David Sutherland-Yoest what CWS considered to be its investments in Quebec [that is, about $200,000,000 in assets]. ... Mr. Sutherland-Yoest did not identify a specific argument he could have relied on to reduce Lucien Rémillard's claims. He apparently just said that he would not pay the amount sought, while making a counter-offer, and so on.

32. In November 1998, an agreement for $12 million was finally reached, orally, between Mr. Sutherland-Yoest and Lucien Rémillard (with the approval of John [Drury] to whom Mr. Sutherland-Yoest reported, because Mr. Sutherland-Yoest did not have the authority to commit that amount). [According to Mr. Sutherland-Yoest, the approval did not require authorization by the WM 1998 board of directors because it was not a large enough amount, for a corporation with annual sales of $12 billion.] Mr. Rémillard [then] asked Roch Provencher, C.A. and external auditor for Mr. Rémillard's companies, whether the agreed amount was "reasonable". That question was never put to Mr. Provencher in relation to the tax impact of that figure.

33. On December 16, 1998, the out-of-court settlement agreement (entitled "Release, Settlement and Termination Agreement") was signed [by Lucien Rémillard on behalf of RCI, CTVNS and SEC] and provided for payment of $12 million in consideration for the cancellation [as of that date] of the non-competition agreements signed for the benefit of RCI, [SEC] and CTVNS and termination of any past or future proceedings in connection with the non-competition agreements [concerning the corporations in Groupe WN 1998 and their officers, directors, employees and agents] and any claim contained in the letter of August 18, 1998,

[without reference to the formal notices previously given by Mr. Trudeau]. The agreement was signed by Mr. Sutherland-Yoest for WMI [on December 17, 1998] (I-3, tab 10).

34. The $12 million was not broken down among the various items [for which that figure] was intended to "compensate".

35. The $12 million cheque was drawn on the bank account of CWS (I-3, tab 12) [although, according to the lawyer for RCI 2006, the payer, under the Settlement, was Groupe WM 1998]. It is possible that either CWS or Intersan recorded the outlay, for accounting purposes. ...

36. Mr. Sutherland-Yoest told us that it is very probable that Intersan (like the other CWS subsidiaries) paid management fees to CWS. For one thing, CWS holds the rights in the national contracts. Accordingly, the subsidiaries have to pay the parent company for the use of those contracts. The parent company is also the one that has the administrative personnel to negotiate those contracts, among others. ... Mr. D'Addario [manager of WMI Québec before the acquisition and manager of RCI thereafter] told us that the relationship was identical for RCI [(both before and after the acquisition) in relation to the national contracts], which [billed] WMI [for its services], because WMI had not "transferred" the national contracts to it, as provided for in the non-competition agreements. [In fact, those agreements provide that WMI must refer customers or prospective customers of the national accounts program to RCI. However, article 4.3 of the contract for the purchase of certain WMI assets by RCI refers to "transfer" of the national accounts. According to Mr. D'Addario, those contracts were subcontracted to RCI, and RCI was paid for its services by WMI. Accordingly, notwithstanding the sale of its Canadian assets to CWS, it seems that WMI continued to operate a business.]

37. A series of transactions took place <u>on the same date</u> [December 17, 1998], including [a lease], an agreement for services to be performed by RCI for [CWS and] Intersan, "assignments of customer contracts", [an agreement relating to the unloading of waste at the CTVNS transfer station in St-Rémi and a consultation agreement] (I-3, tabs 13 to 20). These contracts were to "combine" the operations of the two [groups of] corporations and were profitable for both. [Under this series of transactions, RCI also paid $7 million to CWS and Intersan, of which $5 million was part payment for dumping rights and $2 million was for the acquisition of equipment (Exhibit I-3, tabs 15 and 20). CWS and] Intersan [were to] acquire [RCI and CTVNS under article 13 of the agreement for services], but that did not take place.

38. RCI and CTVNS divided the [$12 million] received equally between them.

39. They reported [their share of that money] in a note to their financial statements [as an "extraordinary item" received "to avoid potential litigation arising out of the merger in the United States of USA Waste Services Inc. and Waste Management Inc. (U.S.)"] and treated [it] as [a non-taxable amount]. [In their notice of appeal, RCI and CTVNS described the "extraordinary items" as] windfall gains. RCI, however, deducted the professional fees [totalling $24,076.82 before taxes (see Exhibit I-3, tabs 4 and 8)] incurred for the formal notices and other services performed to obtain the $12 million in its business [current] expenses. [Surprisingly, PSM also included the $3,000,000 outlay made under the June 27, 1997, services agreement to release PSM and Mr. Rémillard from the non-competition agreement with Philip in 1997 as current expenses (Exhibit I-1, tab 2 and testimony of Mr. Provencher).]

40. Lucien Rémillard did not testify. He did not explain how he determined the "reasonable" amount he was prepared to accept to resolve the "problem". Nor do we know the substance of the opinions he received from his legal advisers, because the Appellant chose not to waive professional privilege.

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[1] Lucien Rémillard is the [president and] sole director of the Appellant (CTVNS and RCI, at the time). [CTVNS and RCI were held by a trustee for other unidentified persons. However, it is clear that they were sister companies.]

[2] CTVNS was created on June 20, 1997, and RCI was created on May 1, 1997.

[3] See I-1, tab 4 (schedule 2.3) for the breakdown of the sale price among the assets.

[4] This is the amount shown in the schedule to the "letter of intent", I-1, tab 3. The price on the contract is US $869,587). [Curiously, it seems that WMI Québec was acting only as mandatary of WMI after January 1, 1993, and it was WMI that reported all of the income of WMI Québec with its own. See p. 2 of the contract for the sale of accounts receivable by WMI to PSM on July 30, 1997, Exhibit I-1, tab 10.]

[5] This is the amount shown in the schedule to the "letter of intent", I-1, tab 3. The price on the contract is US $2,173,932).

[6] This is the price stated in a schedule to the "letter of intent" dated June 20, 1997, between WMI and [PSM], I-1, tab 3.

[7] Exhibit I-1, tab 10, p. 4. [All of the corporations in Groupe RCI are described in the contracts relating to the sale of WMI’s assets as having their head office at 85 rue St-Paul Ouest, Montréal, and their president, who represented them, was Lucien Rémillard (Exhibit I-1, tabs 4 to 12)].

[8] I-1, tab 2 (schedule to the letter of intent).

[9] These are contracts relating to customers seeking services in Quebec and other provinces of Canada. Examples would be chains of businesses such as the Winners stores. [See article 5.5 of the non-competition agreement, Exhibit I-1, tab 8]

[4] The impression Mr. Sutherland-Yoest [2] had of Mr. Rémillard's intentions at the time the cancellation of the non-competition agreements was negotiated was that Mr. Rémillard wanted to get back his former company, Intersan. In addition to wanting to buy back the company, Mr. Rémillard wanted WM 1998 to abandon the Greater Montréal market. Mr. Sutherland-Yoest also thought that Mr. Rémillard's argument to justify increasing the initial $3,000,000 offer[3] made by Groupe WM 1998 was about as follows: "his [Mr. Rémillard's] argument was by [his] selling the non competition undertakings, we [WM 1998] would be protecting our assets in the Quebec market, on which we spent so much as $200,000,000."

[5] Given the importance of the non-competition agreements dated July 30, 1997, it is worth reproducing here the main clauses describing the obligations of WMI (referred to as the party of the "First Part"):[4]

ARTICLE III
CONFIDENTIALITY

3.1 The FIRST PART hereby agrees that it shall not, divulge, diffuse, sell, transfer, give, circulate or otherwise distribute to any Person whatsoever or whomsoever, or otherwise make public, any Confidential Information for a period of sixty (60) months from the date of this Agreement.

3.2 Except when authorized in accordance herewith, under no circumstance shall the FIRST PART reproduce any Confidential Information without the SECOND PART [*sic*] prior written consent. All reproductions of Confidential Information shall be governed by this Agreement and shall be treated as Confidential Information hereunder.

3.3 Any document or work composed, assembled or produced by the FIRST PART and containing Confidential Information shall be deemed to be

[2] At the time Mr. Sutherland-Yoest testified, he and Mr. Rémillard were associated in certain businesses, including as shareholders in a corporation acquired by Mr. Sutherland-Yoest in September 2001. Mr. Rémillard also sat on that company's board of directors.

[3] That is, the same amount as was paid to CWS by PSM to have Philip release it and Mr. Rémillard from their non-competition agreements so that they could acquire WMI's Quebec assets in 1997, through RCI, SEC and CTVNS.

[4] See Exhibit I-1, tabs 7 and 8 respectively, for the agreement between WMI and RCI and the agreement between WMI and CTVNS.

Confidential Information within the meaning of this Agreement and shall be treated as such.

3.4 Notwithstanding any provision hereof, nothing in this Agreement shall prevent the disclosure of Confidential Information if such disclosure must be made in response to the formal request of a governmental body or is otherwise required under any applicable law; it being understood, however, that the FIRST PART, save for any filling [*sic*] and reporting to governmental or regulatory body in the normal course of business, shall inform the SECOND PART of such a request for disclosure in order that the latter may, at the appropriate time, decide whether or not to contest the said disclosure.

ARTICLE IV
NON-COMPETITION

4.1 The FIRST PART shall not, for a period of sixty (60) months after the date of this Agreement, on his own behalf or on behalf of any Person, whether directly or indirectly, in any capacity whatsoever including, without limitation, as an employer, employee, mandator, mandatory, principal, agent, joint venturer, partner, shareholder, independent contractor, franchisor, franchisee, distributor, consultant, trustee or through any Person, carry on or be engaged in or have any financial interest in or be otherwise commercially involved in the Activity in all or part of the Territory.

4.2 Without limiting the generality of the foregoing and for greater certainty, the restrictions in this Section 4.1 above shall not prevent the FIRST PART:

(i) from owning 20% or less of the shares or interest in any company or other entity that carries on or is engaged in or has any financial or other interest in or is otherwise commercially involved in any activity in all or part of the Territory which is the same as, substantially similar to or in competition with the Activity;

(ii) from owning the shares of Gestion des Rebuts D.M.P. Inc., which owns an expropriation claim for the St-Etienne landfill;

(iii) from being involved in or owning an incinerator, the Ste-Gertrude landfill and/or to repossess eventually the St-Etienne landfill or to own and/or operate any landfill outside the Territory and to receive Solid Waste from within the Territory provided such Solid Waste was not solicited by the FIRST PART;

(iv) from performing environmental engineering or counseling;

(v) from rendering services of consultant on waste management primarily on non solid waste;

(vi) from carrying [on] an industrial process waste services business;

(vii) from marketing, processing, transporting and selling recyclables, save for collecting of recyclables;

(viii) from carrying on the business of industrial cleaning.

ARTICLE V
OBLIGATION OF NON-SOLICITATION OF CUSTOMERS

5.1 The FIRST PART shall not, with respect to the Territory only, for a period of sixty (60) months from the date of this Agreement, on his own behalf or on behalf of any other Person, whether directly or indirectly, in any capacity whatsoever, including, without limitation, as an employer, employee, mandator, mandatory, principal, agent, joint venturer, partner, shareholder, independent contractor, franchisor, franchisee, distributor, consultant, trustee, or through any Person:

(a) canvass or solicit any Customer [5] or procure or assist the canvassing or soliciting of any Customer for purposes similar to or of the same nature as the Activity;

(b) canvass or solicit any Prospective Customer[6] or procure or assist the canvassing or soliciting of any Prospective Customer for purposes similar to or of the same nature as the Activity.

5.2 The FIRST PART shall not, with respect to the Territory only, for a period of sixty (60) months after the date of this Agreement, on his own behalf or on behalf of any other Person, directly or indirectly, in any capacity whatsoever, including, without limitation, as an employer, employee, mandator, mandatory, principal, agent, joint venturer, partner, shareholder, independent contractor, franchisor, franchisee, distributor, consultant, trustee, or through any Person:

(a) accept, or procure or assist the acceptance of, any business from any Customer for purposes similar to or of the same nature as the Activity;

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5 This term is defined in schedule A to this agreement (Exhibit I-1, tab 7) as follows:

> "Customer" shall mean any Person having purchased, retained or utilized the FIRST PART's goods or services in the course of the Business at any time during the twelve (12) month period preceding the date of this Agreement.

6 This expression is defined in schedule A to this agreement (Exhibit I-1, tab 7) as follows:

> "Prospective Customer" shall mean any Person solicited by the FIRST PART at any time during the twelve (12) months [*sic*] period preceding the date of this Agreement for any purpose relating to the Business.

(b) accept, or procure or assist the acceptance of, any business from any Prospective Customer for purposes similar to or of the same nature as the Activity.

5.3 Sections 5.1 and 5.2 shall not prevent the FIRST PART:

(i) from owning 20% or less of the shares or interest in any company or other entity that carries on or is engaged in or has any financial or other interest in or is otherwise commercially involved in any activity in all or part of the Territory which is the same as, substantially similar to or in competition with the Activity as presently carried on by the FIRST PART;

(ii) from owing the shares of Gestion des Rebuts D.M.P. Inc., which owns an expropriation claim for the St-Etienne landfill;

(iii) from being involved in or owning an incinerator, the Ste-Gertrude landfill and/or to repossess eventually the St-Etienne landfill or to own and/or operate any landfill outside the Territory and to receive Solid Waste from within the Territory provided such Solid Waste was not solicited by the FIRST PART;

(iv) from performing environmental engineering or counseling;

(v) from rendering services of consultant on waste management primarily on non solid waste;

(vi) from carrying an industrial process waste services business;

(vii) from marketing, processing, transporting and selling recyclables, save for collecting of recyclables;

(viii) from carrying on the business of industrial cleaning.

5.4 Sections 4.1, 5.1 and 5.2 shall not prevent the solicitation and servicing through sub-contracts of Customers or Prospective Customers of the FIRST PART's present or future "National Accounts Programs", save for accounts of customers of such program assigned to the SECOND PART by the FIRST PART and save for solicitation of Customers within the Territory whose headquarters are based within the Territory.

5.5 The FIRST PART shall make its best effort to direct to the SECOND PART the Customers or Prospective Customers of the FIRST PART's present or future "National Accounts[7] Program", if permitted under such Accounts Program.

ARTICLE VI
NON-INTERFERENCE

6.1 The FIRST PART shall not, for a period of sixty (60) months after the date of this Agreement, on his own behalf or on behalf of any other Person, whether directly or indirectly, in any capacity whatsoever, including, without limitation, as an employer, employee, mandator, mandatory, principal, agent, joint venturer, partner, shareholder, consultant, supplier, trustee, or through any Person, interfere or attempt to interfere with the Activity carried on by the SECOND PART in the Territory or persuade or attempt to persuade any Customer, Prospective Customer or supplier of the SECOND PART to discontinue or alter such Person's relationship with the SECOND PART.

[6] It is also useful to reproduce the Settlement agreement:

RELEASE, SETTLEMENT and TERMINATION AGREEMENT

1.[8] **Whereas** WMI Waste Management of Canada Inc. entered into two non-competition agreements, one each with RCI Environnement Inc. and Centre [*sic*] de Transbordement et de Valorisation Nord-Sud Inc., and a non-solicitation agreement with Société en Commandite St-Mathieu (Contrat), being a limited partnership, all three agreements being dated July 30th, 1997 and hereinafter collectively called the "Non-Competition Agreements";

2. **And whereas** RCI Environnement Inc., Centre [*sic*] de Transbordement et de Valorisation Nord-Sud Inc. and the Société en Commandite St-Mathieu (Contrat), hereinafter collectively called "RCI", have made a claim by virtue of a letter dated August 18th, 1998 to the effect that, among other things, Waste Management, Inc., WMI Waste Management of Canada Inc., Canadian Waste Services Inc. and Intersan Inc. (collectively called "WMI Canada") are in breach of the obligations under the Non-Competition Agreements;

3. **And whereas** the parties wish to terminate the Non-Competition Agreements and settle and release all rights, claims and obligations arising under the Non-Competition Agreements as well as the claims set out in the said letter;

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7 That expression is defined in schedule A to this agreement (Exhibit I-1, tab 7) as follows:
"National Accounts" for the purpose of this Agreement means a customer account that is not only serviced within the Province of Quebec for the Activity.

8 I have added the paragraph numbering for ease of reference.

4. **Now therefore**, in consideration of the payment by WMI Canada of the sum of $12,000,000 to RCI, which payment is to be made on or before December 17th, 1998 (the "Effective Date"), the undersigned parties hereby:

(1) agree that the Non-Competition Agreements and all rights and obligations arising thereunder are hereby terminated as of the Effective Date; and

(2) unconditionally forever release and discharge Waste Management, Inc., WMI Waste Management of Canada Inc., Canadian Waste Services Inc. and Intersan Inc., and their affiliated companies and their respective officers, directors, employees, representatives and agents, as of the Effective Date, from any and all obligations, claims, undertakings and covenants, whether past, present or future, known or unknown, contingent or otherwise, arising under or related in any manner to: (i) the Non-Competition Agreements; and (ii) the claims, allegations and facts set out in that certain letter dated August 18th, 1998 issued by Langlois, Gaudreau on behalf of RCI Environnement Inc. and its affiliated companies.

5. **Provided always**, that in the event of default of payment of the foregoing consideration on the Effective Date, then this Release, Settlement and Termination Agreement shall be of no force or effect and in such event shall be annulled and cancelled.

6. The undersigned parties hereby direct and authorize WMI Canada to pay the aforemention[ed] consideration of $12,000,000 to "Placements St-Mathieu Inc.".

7. **This Release, Settlement and Termination Agreement** shall be governed by the laws in force in the Province of Quebec. It is the specific request of all parties that this Release, Settlement and Termination Agreement be drafted in English. Les parties à la présente ont exigé que la présente convention soit rédigée en langue anglaise.

...

[Emphasis added.]

[7] To justify his assessment, the auditor wrote the following conclusions in his report:

[TRANSLATION] The taxpayer considers this amount to be a "windfall". We take the contrary position because the work done by its lawyer resulted in receipt of that amount. It cannot be concluded that it is an unforeseen gain; the competition was harming the normal business of GROUPE RCI and thus contributing to a reduction in its income. It can be assumed that if there had been no satisfactory agreement between the parties, the matter would not have rested there and legal proceedings might have been instituted. Under the

> non-competition agreement, RCI, like CTVNS, was entitled to demand compensation regardless of the nature and amount of the compensation.
>
> [Emphasis added.]

[8] In his testimony, Mr. D'Addario said that business was not going well for WMI in Quebec at the time of the acquisition. It was operating with outdated equipment and having labour relations problems with its unions. After the acquisition by RCI, new investments were made for the acquisition of new equipment, specifically trucks and containers; the labour relations problems were resolved and the number of sales representatives at RCI was increased, and in Mr. D'Addario's view this resulted in a 30% increase in sales in 1998 over 1997. Income continued to rise after that. According to Mr. D'Addario, the price list used by RCI was essentially the same as WMI's. The prices could be increased only based on the inflation rate, the cost of disposing of solid waste, the price of fuel and wages. He said that RCI had expanded during 1997 and 1998 at the expense of Intersan and BFI.

[9] In his testimony, Mr. Provencher said that sales attributable to the WMI assets acquired by Groupe RCI were $13,500,000 at the time of the acquisition in July 1997, $18,000,000 a year later, a 35% increase (actually 33.33%), and $21,000,000 in fiscal 1999, a 60% increase (actually 55.5%) over the figure at the time of the acquisition, and a 25% increase (actually 17%) over July 31, 1998, which was a few days after the merger of WMI USA and USA Services took effect. According to Mr. Sutherland-Yoest, CWS (and, in all likelihood, Intersan) was losing market share to RCI and BFI at the time of the merger of WMI USA and USA Services in 1998, and that situation continued after the merger. The apparent goal of counsel for RCI 2006 in calling these witnesses was to show that RCI and CTVNS had not suffered any damages as a result of the violation of the non-competition agreements, contrary to what he himself alleged in his formal notice of March 25, 1998, addressed to Groupe RCI.

Positions of the Parties

RCI 2006

[10] Counsel for RCI 2006 submits that the Minister assumed the following premises in adding $6,000,000 to the income of RCI and CTVNS as income from a business under subsection 9(1) of the Act: the competition had harmed RCI's business, income had declined and RCI was entitled to demand compensation, regardless of the nature or amount of compensation. In counsel’s submission, the evidence introduced by RCI 2006 clearly showed that RCI and CTVNS had not

suffered any drop in income. On the contrary, their income had risen significantly: by 60% (actually 55.5%) from 1997 to 1999.

[11] In addition, the outcome of the action taken by RCI and CTVNS was very unpredictable, given that Intersan was already operating a business in the Montréal region at the time when WMI signed the non-competition agreements, and at that time Intersan was not affiliated with WMI. Essentially, counsel for RCI 2006 took the same position as counsel for WMI took on September 4, 1998, in reply to the formal notice letters from Groupe RCI, that is, the position that CWS and Intersan were not bound by the non-competition agreement as a result of the merger of WMI USA and USA Services. He also pointed out that the formal notice letter from Langlois Gaudreau made no claim for compensation, but rather demanded compliance with the non-competition agreements. He also argued that the reason why WMI paid the $12,000,000 was that it wanted to settle the dispute once and for all, and to buy peace.

[12] The final submission by counsel for RCI 2006 was to cite the principles of civil law holding that in order to obtain damages, fault and injury must be proved, and a causal link between the fault and injury demonstrated. That link must be direct and certain. In counsel's submission, Groupe RCI did not succeed in proving this.

[13] On the Respondent's alternative arguments, primarily that receipt of the $12 million triggered the application of section 14 (eligible capital amount) or section 38 (taxable capital gain) of the Act, counsel for RCI 2006 submits that these are new grounds that cannot be advanced to justify a reassessment after the time allowed for that purpose has expired, as held by McLachlin J. in *Continental Bank of Canada v. Canada*, [1998] 2 S.C.R. 358, [1998] S.C.J. No. 62 (QL), at paragraph 18.

[14] In response to the Minister's alternative arguments, counsel for RCI 2006 also argued that the non-competition agreements were not property for the purposes of the Act, in particular because they are property that is not an object of commerce. In the alternative, he argues that even if they are property, there was no disposition for the purposes of the Act, and no proceeds of disposition. Moreover, if the $12 million was proceeds of disposition of property disposed of in December 1998, subsection 14(1) of the Act would not apply because of item E of the formula set out in the definition of "cumulative eligible capital" in subsection 14(5) of the Act and the rule of interpretation known as the "mirror image" rule. That rule holds that if RCI and CTVNS had paid the $12 million, it

could not have been considered to be an eligible capital expenditure because, if we look at things from the perspective of all the real payers of the money, they would not have incurred that expenditure in order to earn income from a business.[9] According to the interpretation of the Settlement agreement proposed by counsel for RCI 2006, the corporations that paid the $12 million, WM 1998, WMI, CWS and Intersan, are all Groupe WM corporations. Accordingly, the payment would have to be an eligible capital expenditure for each of those corporations. The evidence adduced by the Respondent is insufficient to allow for an assessment of the circumstances that existed in each of those four corporations.

[15] Counsel's final submission was that the $12 million was a windfall gain under the tests recognized by the courts, and in particular the tests set out in *Canada v. Cranswick*, [1982] F.C.J. No. 28 (QL) and [1982] 1 F.C. 813. The tests adopted by Le Dain J.A., then of the Federal Court of Appeal of Canada, were as follows:

> 13 Counsel for the respondent adopted the indicia which the Trial Judge had emphasized in commenting on the Federal Farms decision and submitted a more elaborate list which is set out in his memorandum as follows:
>
> (a) The Respondent had no enforceable claim to the payment;
> (b) There was no organized effort on the part of the Respondent to receive the payment;
> (c) The payment was not sought after or solicited by the Respondent in any manner;
> (d) The payment was not expected by the Respondent, either specifically or customarily;
> (e) The payment had no foreseeable element of recurrence;
> (f) The payor was not a customary source of income to the Respondent;
> (g) The payment was not in consideration for or in recognition of property, services or anything else provided or to be provided by the Respondent; it was not earned by the Respondent, either as a result of any activity or pursuit of gain carried on by the Respondent or otherwise.

[16] In the submission of counsel for RCI 2006, RCI and CTVNS had no cause of action in respect of the $12 million; they had made no organized effort to receive payment of that amount, and had merely sent a formal notice. The effort had actually been made by Mr. Sutherland-Yoest. In fact, it was Mr. Sutherland-Yoest who had made the initial $3 million offer. In counsel's

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[9] He relied on *The Queen v. Goodwin Johnson (1960) Ltd.*, FCA, A-1649-83, March 17, 1986, 86 DTC 6185, and *Canada v. Toronto Refiners & Smelters Ltd.*, 2002 FCA 476; [2003] 1 C.T.C. 365; 297 NR 392, para. 6.

submission, RCI and CTVNS had also not sought payment of the amount in question.

[17] Counsel also cited the decision in *Cartwright and Sons Limited v. M.N.R.*, 61 DTC 499. The issue in that case was whether a lump sum payment of $7,000 by The Carswell Company Limited to the appellant in an action in damages for copyright violation that was settled out of court constituted income. Mr. Fordham concluded that the money had none of the characteristics of income. He stated the relevant facts as follows (at pages 500 et 501):

> Before going further, one or two other uncontradicted facts should be mentioned. The appellant did not lay claim to any financial loss suffered through the publication of Carswell's directory. In fact, the appellant expressly disclaimed having experienced any loss of income by reason of Carswell's infringement of the appellant's copyright. This, in itself, is an unusual and important circumstance, as ordinarily some ascertainable degree of loss is suffered by anyone in the appellant's position. However, such was not the case here. On the contrary, sales of the appellant's law list increased noticeably. Furthermore, no discernible yardstick was used in arriving at the $7,000.00 ultimately agreed on as the amount that should be paid to the appellant. Mr. W. B. Cartwright, who gave evidence, testified that, at the meeting at which settlement was arranged, first the sum of $15,000.00 was mentioned, then $5,000.00 and then $7,000.00. These figures merely were taken from the air, so to speak; no particular basis of computation was utilized. He considered that a substantial sum should be obtained from Carswell's as punitive damages.

[18] Counsel for RCI 2006 sees a lot of similarities between the facts in *Cartwright* and the facts in these appeals.

Respondent

[19] At paragraph 22 of the amended reply to the notice of appeal, the Respondent sets out the following arguments in support of the conclusion that the $6,000,000 was not a windfall gain**:**

> [TRANSLATION]
> (q) The $6,000,000 received by the Appellant was not a windfall gain because:
>
> (i) the Appellant had an enforceable claim for payment of the $6,000,000;
>
> (ii) the Appellant made efforts to obtain payment of the $6,000,000;

(iii) the Appellant sought and solicited payment of the $6,000,000 through the negotiations that led to the agreement that terminated the non-competition agreement;

(iv) the $6,000,000 was paid as consideration for cancellation of the non-competition agreement and the obligations under that agreement; and

(v) this was not an unforeseeable gain.

[20] In the submission of counsel for the Respondent, the $6,000,000 each paid to RCI and CTVNS was meant to replace future income that RCI and CTVNS could have earned if there had been no breach of WMI's obligations.[10] She based her argument on the formal notice letter from Langlois Gaudreau, which demanded compliance with the non-competition agreements. In her submission, the effect of the potential competition from Groupe WM 1998 and its subsidiary Intersan in Quebec was to reduce the income that RCI could have earned. Counsel also relied on the formal notice sent on March 25, 1998, in which Mr. Trudeau claimed [TRANSLATION] "payment of compensation representing damages now estimated at $250,000". The formal notice stated that Intersan was bound by the obligations contracted by WMI pursuant to the merger of the parent corporation WMI USA with USA Services. The allegations regarding the breach were that no effort had been made to transfer WMI's national customers to RCI and that Intersan was unfairly engaging in a price war in order to acquire RCI's customers (Exhibit I-3, tab 1).

[21] In the submission of counsel for the Respondent, the reason that RCI's profits rose after the acquisition was that the corporation had made new investments in new equipment and hired new sales representatives. She believes that RCI and CTVNS wanted to protect their profits by sending multiple formal notices to Groupe WM 1998. She pointed out that RCI and Mr. Rémillard wanted Groupe WM 1998 to leave the Montréal market, the impact of which, in her submission, would have been to increase Groupe RCI's profits.

[22] She also cited the decision of the Supreme Court of Canada in *Tsiaprailis v. Canada*, 2005 CSC 8, 2005 DTC 5126 (Fr.), [2005] 2 C.T.C. 1, and [2005] 1 S.C.R. 113. That decision refers to the *surrogatum* principle, which Charron J.

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[10] In fact, at paragraph 22(r) of her amended reply to the notice of appeal, it states that the Minister had assumed that the purpose of the $6,000,000 paid to RCI by WMI and the payment made to CTVNS was to compensate for loss of future profits.

described at paragraph 7 by summarizing the position taken by her colleague Abella J., as follows:

> ... As she explains, in assessing whether the monies will be taxable, we must look to the nature and purpose of the payment to determine what it is intended to replace. The inquiry is a factual one. The tax consequences of the damage or settlement payment is then determined according to this characterization. In other words, the tax treatment of the item will depend on what the amount is intended to replace. This approach is known as the *surrogatum* principle. As noted by Abella J., it was defined in *London and Thames Haven Oil Wharves, Ltd. v. Attwooll*, [1967] 2 All E.R. 124 (C.A.), and subsequently adopted in a number of Canadian cases: see P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (4th ed. 2002), at pp. 91-93; and V. Krishna, *The Fundamentals of Canadian Income Tax* (8th ed. 2004), at pp. 413-15.
>
> [Emphasis added.]

[23] In the alternative, counsel for the Respondent submits that a fraction of the amount in issue is income under section 14 or 38 of the Act. I will use some of her arguments in my analysis, which follows.

Analysis

[24] To the knowledge of both counsel for the parties and the Court, there has been no decision in which the tax consequences of a payment to have non-competition agreements cancelled have been addressed. In my opinion, selecting the appropriate tax treatment in this case requires an appropriate characterization of the transactions that took place in 1997 and 1998. It is also essential to determine the precise nature of the contractual rights that are central to the debate, in order to determine the true nature of the $12 million paid in the settlement.

[25] In order to determine this, we will review the most significant facts in relation to those transactions. In 1997, Groupe RCI acquired all or almost all of the assets owned by WMI in Quebec for the operation of its solid waste disposal business, a business that involves the collection, transportation, transfer and dumping of that waste. For reasons that were not explained, the Quebec corporation WMI was not transferred in its entirety to a single purchaser; rather, the assets of the corporation were dispersed, at the same time, among various corporations in Groupe RCI that each has its head office on rue St-Paul in Montréal and each has the same president, Lucien Rémillard. The assets of the corporation that were transferred included the permits, licences and operating

rights associated with the corporation (and in particular transfer and dumping permits), immovables, rolling stock, equipment, office furniture, contracts with customers of the corporation and the telephone numbers used by WMI's Quebec operation. With WMI's Quebec operation came all its personnel except for four individuals. On the other hand, Groupe RCI reserved the right not to hire certain members of the administrative staff. The assets described in the agreement between CTVNS and WMI (Exhibit A-3, tab 9) included the WMI Québec goodwill. It should be added that WMI Québec was acting as mandatary for WMI.[11] Some of the assets were excluded from the sale to Groupe RCI, in particular the names under which WMI operated in Quebec, computer software, patents and trade secrets, and the goodwill associated with such intellectual property. Article 3.1.2 of the agreement between RCI and WMI dated July 30, 1997 (Exhibit A-2, tab 9), provides as follows:

> 3.1.2 all computer software and software licenses, proprietary information, intellectual property, trade secrets, patents, patent applications, patent licenses, trademarks and trade names, applications for trademarks and trade names, industrial designs and applications for registration of industrial designs, copyrights, applications for copyrights, licenses of intellectual property, goodwill associated with such intellectual property, all future income and proceeds from the foregoing intellectual property, and all material and processing specifications and designs owned or used by the SELLER, including without limitation all rights to the names "Waste Management", "WMI", "WMI Waste Management of Canada Inc.", "WMI Québec Inc." and "Port-O-Let" and any other business name used by the SELLER or WMI QUEBEC INC., including the software used by the SELLER in their portables [*sic*] computers (Palm tops/pricing for profit); and certain computer hardware used to communicate with corporate main frames and servers that are not located in Anjou, Laval or St-Rémi, Province of Quebec.

[26] It should also be noted that the parties to the agreement waived the provisions of articles 1767 to 1778 of the *Civil Code of Québec* (**C.C.Q.**) relating to the sale of an enterprise. Article 1767 C.C.Q provides that the sale of an enterprise is a sale which has as its object the whole or a substantial part of an enterprise and which is made outside the ordinary course of business of the seller. The parties also relied on section 167 of the *Excise Tax Act*, which allows the purchaser to avoid paying goods and services tax (GST) when there is a sale of all or substantially all of the property used in carrying on the business that is sold.

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[11] See footnote 4 in the chronological summary of the facts.

[27] A key factor in all these agreements was that the acquisition of all these assets was conditional on non-competition undertakings given by WMI to RCI, CTVNS and SEC.[12] It should be noted that it seems that SEC obtained the most important asset, the contracts to supply services to WMI's customers, for which it paid $9.3 million out of a total price of $18.56 million for WMI's entire Quebec operation.[13] As a result, I have no doubt that WMI transferred the goodwill of its Quebec operation, in very large part, to Groupe RCI in July 1997.

[28] Nor is there any doubt in my mind that the purpose of the non-competition agreements was to preserve the goodwill thus acquired by Groupe RCI. Although they were valid only for five years and about seven months had already passed at the time the Settlement was agreed to, the non-competition agreements provided the beneficiaries of those agreements, the corporations in Groupe RCI, with an advantage of an enduring nature. In *Associated Newspapers Ltd. v. F.C. of T.*; *Sun Newspapers Ltd. v. F.C. of T.*, (1938) 5 A.T.D. 87, 61 C.L.R. 337 and *Associated Portland Cement Manufacturers, Ltd. v. C.I.R.*, [1946] 1 All E.R. 68, 27 T.C. 103, 118, 120, cited in *No. 481 v. M.N.R.*, 58 DTC 41, 44, it was recognized that agreements of this nature confer an advantage of an enduring nature and are an addition to a capital asset:

> . . .
>
> [Two British cases]
>
> I was unable to find a case in Canada on the actual non-compete question. But in Great Britain this very question was dealt with in a few cases. I am of the opinion that the principles, which were applied in the consideration of those cases can be justified in the present appeal. The test of those principles can be found in two cases. The first one is *Associated Portland Cement Manufacturers, Ltd. v. C.I.R.*, (1946) 1 All E.R. 68, 27 T.C. 103, 118, 120. In brief, here are the facts. Two of the directors of company, who were both sixty years of age, in consideration of the payment to them of sums totalling £30,000, entered into world-wide covenants with the company not to compete with it for the rest of their working lives after their retirement. It was held by the Court of Appeal that the company had gained by these payments "an advantage of an enduring nature" in that the value of its goodwill had been enhanced by "dangerous potential competitors" having been bought off; the deduction claimed was therefore inadmissible as being of a capital nature. At page 399 of *The Principles of Income Taxation* by

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[12] The non-competition agreement between WMI and RCI provides as follows:

> WHEREAS the Purchase Agreement was expressly subject to WMI Waste Management of Canada Inc. entering into a non competition agreement with RCI Environnement Inc.

There is a similar provision in the non-competition agreement between WMI and CTVNS.

[13] See paragraphs 6 and 8 of the chronological summary of facts, *supra*.

Hannan and Farnsworth, Lord Greene, M.R., said, with regard to the above-cited case:

> In my opinion in the present case the language of Lord Cave (in Atherton's Case — A.F.) is satisfied by the facts. This was an expenditure once and for all with a view to bringing into existence "an advantage for the enduring benefit of the trade". There was nothing temporary about this advantage. It was to last during the lives of the two directors in question. That that advantage was a solid one, I have already endeavoured to point out. That it was "for the benefit of the trade" in a very true sense is again quite clear, because when analysed its effect was unquestionably to add to the value of the goodwill . . . these benefits acquired by the company were solid; they were permanent and they were world-wide. They protected the company against certain risks, and the value to be set out on that protection was shown by the company itself in deciding to pay these amounts.

The other case to which I wish to refer is the case of *Associated Newspapers Ltd. v. F.C. of T.; Sun Newspapers Ltd. v. F.C. of T.*, (1938) 5 A.T.D. 87, 61 C.L.R. 337. The facts: The companies were engaged in the publication of the newspaper "The Sun" which was published in the evening and sold at 1 1/2d per copy. "The World" was a competitive evening newspaper also sold at 1 1/2d a copy. It became known that proposals were on foot for publishing in place of "The World" an evening newspaper to be known as "The Star", at the price of 1d. The persons interested in the proposed newspaper were approached by a representative of the appellant companies and he agreed to pay them £86,500 (by instalments) as the purchase price of their interest in "The World" and, further, in consideration of their withdrawal of the arrangements to start a new paper and binding themselves for three years not to produce a morning or evening daily paper or a Sunday newspaper in or within three hundred miles from Sydney. Latham, C.J., of the High Court of Australia, held that the expenditure in question was an outgoing of capital. He says at page 89, (1938) 5 A.T.D.):

> The evidence shows that the disappearance of "The World" and the prevention of the threatened competition was advantageous to the appellant companies. They were saved from the risk of losing circulation and of being forced to reduce the price of "The Sun" and their advertising rates . . .
>
> It is true that the payments did not result in obtaining a new capital asset of a material nature, but they did obtain a very real benefit or advantage for the companies, namely, the exclusion of what might have been serious competition. When the words "permanent" or "enduring" are used in this connection it is not meant that the advantage which will be obtained will last forever. The distinction

> which is drawn is that between more or less recurrent expenses involved in running a business and an expenditure for the benefit of the business as a whole . . . The effect of the payment was to enlarge the good-will of the enterprise, which was one of its most valuable assets.
>
> In substance it amounted to the addition of a capital asset, immaterial in character but substantial in value and significance, to the general equipment of the business enterprise of the appellant companies.
>
> [Emphasis added.]

[29] It is immediately apparent that the goodwill acquired with the other assets of a business is eligible capital property, and that the cost of acquisition of that property cannot be considered to be a current expense; rather, it is a capital expense. Acquiring a customer list, as SEC did, in a way, by purchasing WMI's commercial accounts, is also a capital expense. (See, in particular, *Canada v. Farquhar Bethune Insurance Limited*, [1982] F.C.J. No. 6012 (QL), 82 DTC 6239.) Note must also be made of the decisions in *Aliments CA-MO Foods Inc. v. The Queen*, 80 DTC 6043 (F.C.T.D.), *Cumberland Investments Ltd. v. Canada*, [1975] F.C.J. No. 511 (QL), 75 DTC 5309, [1975] C.T.C. 439 and *Gifford v. Canada*, 2004 DTC 6128 (SCC), which confirmed that acquisition of a customer list, together with a non-competition agreement, is an advantage of an enduring nature, and is thus a capital expense.

[30] A very strong indication of the value of the enduring advantage in this case—to which we will return later—is that CWS paid $12 million to buy out the non-competition agreements, representing over 55% of the value of the assets that Groupe RCI had purchased from WMI at the time it acquired the claims.

Windfall Gain

[31] In paragraph 39 of his amended reply to the amended reply to the notice of appeal, counsel for RCI 2006 submits that receipt of the $12 million was unexpected, unforeseen and exceptional and not the result of any effort by RCI to obtain it, and that RCI was in fact not entitled to any pecuniary compensation whatsoever. Accordingly, that sum was a windfall gain.

[32] In my opinion, that assertion is entirely without basis. The $12,000,000 was not paid, as was the case in *Cranswick*, unexpectedly, unforeseeably and without any effort by Groupe RCI to obtain it. Here, the evidence shows that counsel for

RCI 2006 himself sent two formal notice letters, the first of which, on March 25, 1998, claimed [TRANSLATION] "compensation representing damages now estimated at $250,000.00", which was to be paid within 10 days of the date of the notice. The second formal notice was sent on April 16, 1998. In addition, an American law firm was asked for a legal opinion and a third formal notice letter was then sent by Langlois Gaudreau on August 18, 1998. The legal fees and other costs for that work were at least $24,076. At the meetings initiated by Mr. Sutherland-Yoest, held during October and November 1998, there were negotiations that led to a settlement of the dispute arising out of the merger of the American parent corporations of WMI and CWS, that is, the dispute regarding the technical violation of the non-competition agreements signed by WMI for the benefit of RCI, CTVNS and SEC. Mr. Sutherland-Yoest offered $3,000,000 to buy out the agreements, while Mr. Rémillard apparently demanded $20,000,000. As a result of the negotiations, the amount was set at $12,000,000. In the circumstances, it is difficult to argue that Groupe RCI made no effort to obtain the $12,000,000 and did not solicit that payment in any way. Under the non-competition agreements, Groupe RCI had legal remedies that it could have exercised against WMI, and perhaps against Intersan, to enforce the undertakings set out in the non-competition agreements.[14]

[33] In addition, given that Mr. Rémillard hoped that Intersan and Groupe WM 1998 would leave the Montréal market and that he could buy back his old company, Intersan, it is not surprising that his efforts led to payment of an amount as large as $12,000,000. The final point, and we will come back to it later, is that the $12,000,000 was paid entirely for cancellation of the non-competition agreements. Accordingly, the test set out at paragraph 13(g) of *Cranswick* has not been met. In fact, the only test that might have been met here is the test at paragraph 13(f), that the payment did not come from a customary source of income.

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[14] See the Quebec decisions regarding enforcement of non-competition agreements, and in particular: *Personnel Marie-Andrée Laforce (2000) inc. v. Laforce*, [2004] J.Q. No. 8419 (QL), *Le journal La Seigneurie Inc. v. Desmarteau*, decision of the Superior Court of Quebec, District of Montréal, No. 500-05-6387-870, decision of Yves Mayrand J., *Lebeuf v. Groupe SNC-Lavallin,* [1999] R.J.Q. 385 (CA). See also: *Uni-Sélect inc. v. Acktion Corp* (*anciennement désignée Acklands Ltd.*), [2002] R.J.Q. 3005 CA and [1999] J.Q. No. 4607 (S.C.) (QL), *P.A. Boutin (1986) inc. v. Julien*, [1990] J.Q. No. 1098 (QL), *9100-6288 Québec inc. v. 9140-8484 Québec Inc.*, [2006] J.Q. No. 7111 (QL), 2006 QCCQ 6911. Those decisions held that an interlocutory injunction may be granted to enforce non-competition agreements and, if necessary, damages may be awarded where the breach of the non-competition agreements caused injury to the beneficiary of those agreements. If a penal clause was included with the non-competition clause, it is not necessary to prove the injury suffered, as set out in article 1623 C.C.Q.

[34] *Prima facie*, therefore, the $12,000,000 could not have been considered to be a windfall gain under the tests set out in the case law. I say "*prima facie*" because there is nothing to prevent the $12,000,000 from being considered a non-taxable amount if there is nothing in the Act to justify including all or part of that sum in the income of RCI and CTVNS. We can determine whether the amount is in fact taxable only after analyzing the other arguments submitted by the Respondent.

Income from a business under section 9 of the Act

[35] In support of her position that the $12 million was income from a business, because the formal notice of March 25, 1998, contained a demand for payment of compensation in the amount of $250,000 and a very large portion of the $12 million was to replace future income that RCI and CTVNS could have earned, counsel for the Respondent cited, in addition to *Tsiaprailis*, a number of decisions including *Transocean Offshore Ltd. v. Canada*, [2005] F.C,J. No. 496 (QL), 2005 DTC 5201, 2005 FCA 104,[15] and in particular paragraphs 49 and 50:

> 49 The Crown cites, in support of its interpretation, two cases in which an amount paid to a landlord as compensation for early termination of a lease was held to be taxable as income if the payment if found to be a replacement or substitute for future rent: *Grader v. Minister of National Revenue*, 62 D.T.C. 1070, [1962] C.T.C. 128 (E.C.), *Monart Corporation v. Minister of National Revenue*, 67 D.T.C. 5181, [1967] C.T.C. 263 (E.C.). A recent case illustrating the same principle is *R. Reusse Construction Co. v. Canada*, [1999] 2 C.T.C. 2928, 99 D.T.C. 823 (T.C.C.).
>
> 50 ... The concept of "profit" is very broad, but it is not broad enough to include capital receipts. Thus, the question addressed in these cases was whether a payment made to a landlord as damages or settlement of the termination of a lease is income or a capital receipt. For the purposes of Part I of the *Income Tax Act*, the answer to that question requires the application of a judge-made rule, sometimes called the "*surrogatum* principle", by which the tax treatment of a payment of damages or a settlement payment is considered to be the same as the tax treatment of whatever the payment is intended to replace. Thus, an amount paid as a settlement or as damages is income if it is paid as compensation for lost future rent (*Grader, Monart, Reusse Construction*, cited above). It is a capital receipt if it is compensation for a diminution of capital of the recipient: *Westfair Foods Ltd v. Minister of National Revenue*, [1991] 1 C.T.C. 146, 91 D.T.C. 5073 (F.C.T.D.), affirmed [1991] 2 C.T.C. 343, 91 D.T.C. 5625 (F.C.A.).
>
> [Emphasis added.]

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15 Leave to appeal to the Supreme Court denied: 347 N.R. 398.

[36] Counsel for the Respondent also cited *Canadian National Railway Co. v. Canada,* [1988] F.C.J. No. 524 (QL), 88 DTC 6340 (F.C.T.D.), in which Strayer J.A. had to decide whether $824,874 paid by Canadian Bechtel Limited on termination of a rail transportation contract had to be included in the income of the railway company. To answer that question, he set out the relevant legal principles at paragraphs 6 and 7:

> 6 There is much jurisprudence on the question of whether compensation paid on the occasion of the termination of some business arrangement is capital or income. To a large extent each case turns on its own facts. It appears to me that there are two aspects which a court must consider in examining such a situation retrospectively: was the purpose of the payment to replace capital or income; and, whether or not the purpose can be reliably determined, was the effect of the payment to replace capital or income? It appears to me to be a dual test because the purpose may not be discernable, or it may not be reliably discernable in the sense that parties to settlements should not, by misstating the real purpose, determine the tax consequences of the receipt of such compensation. It is therefore necessary to look at both purpose and effect.
>
> 7 With respect to purpose, the essential question is to determine what the compensation - whether paid pursuant to a contract, a court award of damages, or otherwise - is intended to replace[1]. In some cases the contract providing for compensation may be clear[2]. The measure employed for calculating compensation is not always determinative: potential lost income may be taken into account in calculating a capital sum to be paid[3]. Nor on the other hand does the fact that an amount is paid as damages for breach of a contract necessarily make it a capital sum and not income[4]. On the contrary it appears to me that whatever the source of the legal right to the compensation, be it the contract or the law of damages, the substantive issue is: what is this amount intended to replace?[5]

[1] See e.g., *London and Thames Haven Oil Wharves Ltd. v. Attwooll*, [1967] 2 All E.R. 124 (C.A.); followed in *The Queen v. Manley*, [1985] 1 C.T.C. 186, 85 D.T.C. 5150 (F.C.A.).
[2] See e.g. *C.I.R. v. Fleming & Co. (Machinery), Ltd.* (1951), 33 T.C. 57 (Ct. of Sess.)
[3] See e.g., *The Glenboig Union Fire Clay Co., Ltd. v. C.I.R.* (1922), 12 T.C. 427 (H. of L.) at 39-40; *Barr, Crombie & Co., Ltd. v. C.I.R.* (1945), 25 T.C. 406 (Ct. of Sess.) at 410.
[4] Cf. *The Queen v. Atkins*, [1976] C.T.C. 497, 76 D.T.C. 6258 where the Federal Court of Appeal held that damages paid in respect of breach of a contract of employment could not be regarded as salary income received by the taxpayer “from an office or employment”. While the Federal Court of Appeal has adhered to this position in *The Queen v. Pollock*, [1984] C.T.C. 353, 84 D.T.C. 6370 notwithstanding the doubt cast upon it by the Supreme Court of Canada in *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812 at 814 , the Court has in the *Manley* decision, *supra* note 1 confined the *Atkins* principle to the particular pleadings in that case.
[5] See cases cited *supra* note 1.

[37] In that case, Strayer J.A. applied the *surrogatum* principle, and concluded (at paragraph 18) "that the compensation received was no more than a *surrogatum* for the future profits surrendered. Therefore that payment should be treated as income."

[38] Was the $12,000,000 meant to replace income or capital? First, I believe that the starting point has to be the Settlement agreement itself; for convenience, I will again reproduce the key passage:

> **4. Now therefore**, <u>in consideration of the payment</u> by WMI Canada of the sum <u>of $12,000,000</u> to RCI, which payment is to be made on or before December 17th, 1998 (the "Effective Date"), <u>the undersigned parties</u> hereby:
>
> **(1)** <u>agree that the Non-Competition Agreements</u> and all rights and obligations arising thereunder <u>are hereby terminated</u> as of the Effective Date; and
>
> **(2)** unconditionally forever <u>release and discharge</u> Waste Management Inc., WMI Waste Management of Canada Inc., Canadian Waste Services Inc. and Intersan Inc., and their affiliated companies and their respective officers, directors, employees, representatives and agents, as of the Effective Date, <u>from</u> any and <u>all obligations, claims</u>, undertakings and covenants, whether past, present or future, known or unknown, contingent or otherwise, <u>arising under</u> or related in any manner to: (i) the <u>Non-Competition Agreements</u>; <u>and</u> (ii) the claims, allegations and facts set out in that certain <u>letter dated August 18th, 1998</u> issued by Langlois, Gaudreau on behalf of RCI Environnement Inc. and its affiliated companies.
>
> [Emphasis added.]

[39] Although paragraph 4(2) of the Settlement says that the companies in Groupe WM 1998 and their affiliated companies, officers, directors, representatives and agents are released from all claims for damages arising out of breaches of the obligations created by the non-competition agreements, I do not believe that enough evidence has been produced to establish that any injury was suffered by Groupe RCI. I believe that the position taken by counsel for RCI 2006 on this issue is correct.

[40] Although the formal notice of March 25, 1998, alleges injury in the amount of $250,000, there is nothing in the evidence produced in court that establishes, on a balance of probabilities, that Groupe RCI suffered any such injury. On the contrary, the evidence shows that Groupe RCI was able to supply its services to WMI's national customers and that its sales had risen significantly. On this point, we have the testimony of Mr. D'Addario and Mr. Provencher, in particular. It is

one thing to say in a formal notice that one has suffered injury, and it is another thing to prove this in court. The fact that the formal notice of August 18, 1998, did not reiterate the demand for compensation is a serious indication that no such injury was suffered. In my opinion, this was simply an initial position taken to put pressure on Groupe WM 1998 in response to the merger. In fact, as the extensive case law relating to interlocutory injunctions shows, when the creditor of a non-competition obligation wishes to obtain a court order to enforce the obligation, it is difficult to quantify the damages that may result from breach of the obligation.[16] Rather, I believe that the provision releasing Groupe WM 1998 and its employees from all actions was included in the Settlement only out of caution, to avoid any subsequent legal proceedings on that question. It is a stipulation that any good lawyer who wishes to protect his or her client properly will demand, even if there is no reason to believe that the client has caused any injury.

[41] In my opinion, we must not place any great probative weight on the testimony of Mr. Plante at discovery, which indicates that some of the facts alleged in the formal notices corresponded to the reality of the situation. For example, when counsel for the Respondent examined him on the second point listed in the letter of August 18, 1998, the assertion that WMI had breached its obligations as set out in the non-competition agreements because it had actively solicited Groupe RCI's national customers, she asked him (Exhibit I-7, page 78):

> [TRANSLATION]
> Q. [222] ... Am I to understand that they had solicited national contracts that you had already obtained as well?
>
> A. Yes.
>
> Q. [223] This is something that was actually done, that was to your knowledge?
>
> A. Yes.
>
> Q. [224] Was this more than one contract or ...
>
> A. I don't remember.
>
> Q. [225] ... do you have an example of a single one?

[16] See, in particular, the decisions cited in Paul-Arthur Gendreau, France Thibault, Denis Ferland, Bernard Cliche, Martine Gravel, *L'Injonction*, Les Éditions Yvon Blais, Cowansville, 1998, at pages 96 and 97.

A. I don't remember.

[Emphasis added.]

[42] Earlier, Mr. Plante had given the following answers to questions dealing with the first point set out in that same formal notice letter, that WMI was not fulfilling its obligations to make its best efforts to transfer the national customers. Because he had first said that this had not been done, counsel asked him (Exhibit I-7, page 77):

[TRANSLATION]
Q. [221] That was not done at all?

A. Pretty much not. Not at all.

[43] In my opinion, those two answers are contradictory, and the "not at all" is contradicted by the answer to question 222 reproduced above. And lastly, even if WMI had breached the agreements, that did not necessarily cause damage to Groupe RCI. At page 79, Mr. Plante states that WMI solicited Groupe RCI customers, and gave the following answers to these questions (Exhibit I-7, page 79):

[TRANSLATION]
A. Yes, there were representatives who regularly solicited our customers.

Q. [227] Including customers you had acquired from them?

A. Yes.

Q. [228] In the acquisitions of July 30?

A. That's right. Unsuccessfully, most of the time.

[Emphasis added.]

[44] As a final point, the comment made by Mr. Plante must be noted, in which he stated that the purpose of the formal demands [TRANSLATION] "was to stop their operations, to enforce the 'Non-Compete' ... We just wanted them to honour the agreements they had made with our companies." (Exhibit I-7, p. 67)

[45] It should also be noted that Intersan and CWS were operating their business and competing with RCI at the time the non-competition agreements were signed, when they and WMI were not affiliated. It was only when they joined Groupe WMI USA, in the merger, that any issue relating to enforcement of the

non-competition agreements arose. The problem arose out of WMI's agreement not to hold any financial interest, directly or indirectly, in a business competing with Groupe RCI. Groupe RCI's remedy was therefore to ask WM 1998 to divest itself of its interests in CWS and Intersan, in any event in relation to their assets in Quebec. The remedy was therefore by way of permanent injunction, which would have compelled WM 1998 to comply with the obligations that WMI had agreed to by contract.

[46] Mr. Sutherland-Yoest in fact acknowledged, in his testimony, that he had offered the $12 million "to get out of the non-competition issue" so that Groupe WM 1998 could continue to operate its waste management business freely in Montréal.[17] He wanted to protect the $200 million investment that Groupe WM 1998 had made in the Montréal region because Mr. Rémillard wanted that group to leave the province and to have Groupe RCI reacquire Intersan. That is why, in his own words, he brought the money to the table, to resolve the problem of the non-competition agreements. The $12 million paid by CWS was to have that obligation cancelled, and not to compensate Groupe RCI for loss of future income. The $12 million figure had nothing to do with profits that Groupe RCI could have earned. When Mr. Rémillard, on behalf of Groupe RCI, demanded $20 million and ultimately accepted the $12 million that Groupe WM 1998 offered him, it was not by way of quantifying the damages RCI might have suffered or quantifying the loss of future income, but rather to convert into cash the right that Groupe RCI had to prevent WM 1998 from holding $200 million interests in companies that were competing with Groupe RCI in Montréal. In my opinion, the $12 million has to be considered to have been paid wholly for cancellation of the non-competition agreements.

[47] It remains to be determined whether the $12 million paid to cancel the non-competition agreements is a capital receipt or replacement of income.

[48] It should be noted first that this was not the cancellation of a contract made in the ordinary course of the business of Groupe RCI. It was not the cancellation of a transportation contract as in *Canadian National Railway Co.* or of a lease as in *Grader*, *R. Reusse Construction Co*. and *Monart Corporation* (all cited *supra*). It was

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[17] We might wonder whether part of the $12 million was not paid to encourage Groupe RCI to come to an agreement on combining their operations, which agreement was made at the same time as the non-competition agreements. I find it impossible to conclude that this was the case, since Mr. Sutherland-Yoest said that Mr. Rémillard had refused to discuss combining operations before settling the non-competition agreements and the evidence as a whole is not sufficiently probative for any other conclusion to be reached.

the cancellation of the non-competition agreements made at the time of the acquisition by Groupe RCI of the Quebec assets of WMI's business, the purpose of those agreements being, as noted earlier, to protect the goodwill acquired with that business, and that was plainly a capital transaction. By agreeing to waive the non-competition agreements, Groupe RCI accepted "compensation for a diminution of capital", to use the words of Sharlow J.A. in *Transocean Offshore Ltd.* Because Groupe RCI could no longer benefit from the non-competition agreements, it is very likely that the market value of its goodwill was reduced. It is reasonable to believe that a potential purchaser would have been inclined to pay more on December 15, 1998, for the purchase of Groupe RCI than what it might have offered on December 18, 1998, once the non-competition agreements were cancelled and the $12 million was removed from the group's assets (for example, if it had been declared as a dividend). Accordingly, the purpose of the $12 million was not to replace the income that Groupe RCI could have earned if the contract had not been cancelled, and that money cannot be considered, for the purposes of subsection 9(1) of the Act, to be profit from a business; rather, it was meant to compensate for a reduction in capital.

Disposition of Capital Property or of Eligible Capital Property?

[49] Having found that the $12 million was paid as compensation for the reduction in the capital of Groupe RCI, we must ask whether that payment can give rise to a capital gain or an eligible capital amount.

[50] Before analyzing these two questions, we must first dispose of the preliminary argument made by RCI 2006, that the Minister could not argue a new ground to justify his assessment after the normal reassessment period. At the beginning of the hearing, I rejected that argument, relying on subsection 152(9) of the Act and the recent decision of the Federal Court of Appeal in *Walsh v. Canada*, [2007] F.C.J. No. 813 (QL), 2007 CarswellNat 1552. In that decision, Richard C.J. quoted Rothstein J.A. in *Anchor Pointe Energy Ltd v. Canada*, [2003] F.C.J. No. 1045 (QL), 308 N.R. 125, 2003 FCA 294, at paragraph 38: "*Anchor Pointe* tries to distinguish between a new basis of assessment and a new argument in support of its assessment. I do not find that semantical argument productive. ..."

[51] In *Walsh*, the Minister had assessed the taxpayers under subsection 2(1) and sections 5 and 7 of the Act in relation to benefits arising out of share purchase options that had been exercised. In their notice of appeal, the taxpayers argued that the assessments had to be vacated on the ground that they were non-residents of Canada. In his replies to the notices of appeal, the Minister had reiterated the

position taken when he made the assessment. A motion to amend the reply to the notice of appeal in each case was then made to the Tax Court of Canada, in which the Respondent argued, in support of the motion, that the benefit arising out of the purchase options could have been taxable under paragraph 115(1)(*a*) of the Act. The appellants argued that this was a new ground. In dismissing that argument, Richard C.J. stated the following rule and guidelines:

> 10 The right of the Crown to present an alternative argument in support of an assessment is now governed by subsection 152(9) of the Act, which applies to appeals disposed of after June 17, 1999. Subsection 152(9) of the Act states:

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

> …
>
> 18 The following conditions apply when the Minister seeks to rely on subsection 152(9) of the Act:
>
> 1) the Minister cannot include transactions which did not form the basis of the taxpayer's reassessment;
>
> 2) the right of the Minister to present an alternative argument in support of an assessment is subject to paragraphs 152(9)(*a*) and (*b*), which speak to the prejudice to the taxpayer; and
>
> 3) the Minister cannot use subsection 152(9) to reassess outside the time limitations in subsection 152(4) of the Act, or to collect tax exceeding the amount in the assessment under appeal.

[52] In my opinion, the Minister’s alternative arguments may be made under subsection 152(9) of the Act and the guidelines laid down in *Walsh*. The assessments in this case are not meant to tax a transaction different from the one for which CWS paid the $12 million. If the new arguments are accepted, the

amount of the assessment will not increase. On the contrary, a lower amount would then be set.

[53] In my opinion, the starting point for deciding whether the $12 million is relevant for the purposes of computing the income of RCI and CTVNS is an analysis of the relevant provisions of the Act on taxability:

> **38.** Taxable Capital Gains and Allowable Capital Losses —For the purposes of this Act,
>
> (*a*) subject to paragraphs (*a.1*) and (*a.2*), a taxpayer's taxable capital gain for a taxation year from the disposition of any property is 1/2 of the taxpayer's capital gain for the year from the disposition of the property;
>
> ...
>
> **39(1)** Taxable Capital Gains and Allowable Capital Losses -- For the purposes of this Act,
>
> (*a*) a taxpayer's capital gain for a taxation year from the disposition of any property is the taxpayer's gain for the year determined under this subdivision (to the extent of the amount thereof that would not, if section 3 were read without reference to the expression "other than a taxable capital gain from the disposition of a property" in paragraph 3(*a*) and without reference to paragraph 3(*b*), be included in computing the taxpayer's income for the year or any other taxation year) from the disposition of any property of the taxpayer other than (i) eligible capital property,
>
> ...
>
> **40(1)** **General rules** -- Except as otherwise expressly provided in this Part
>
> (*a*) a taxpayer's gain for a taxation year from the disposition of any property is the amount, if any, by which
> (i) if the property was disposed of in the year, the amount, if any, by which the taxpayer's proceeds of disposition exceed the total of the adjusted cost base to the taxpayer of the property immediately before the disposition and any outlays and expenses to the extent that they were made or incurred by the taxpayer for the purpose of making the disposition, ...
>
> **54** In this subdivision,
>
> "**eligible capital property**" of a taxpayer means any property, a part of the consideration for the disposition of which would, if the taxpayer disposed of the property, be an eligible capital amount in respect of a business;[18]

[18] Under subs. 248(1), this definition also applies to the Act as a whole.

14(1) Inclusion in income from business – Where, at the end of a taxation year, the total of all amounts each of which is an amount determined, in respect of a business of a taxpayer, for E in the definition "cumulative eligible capital" in subsection (5) (in this section referred to as an "eligible capital amount"[19] or for F in that definition exceeds the total of all amounts determined for A to D in that definition in respect of the business (which excess is in this subsection referred to as "the excess"),

...

(*b*) in any other case, the amount, if any, by which the excess exceeds ½ of the amount determined for Q in the definition "cumulative eligible capital" in subsection (5) in respect of the business shall be included in computing the taxpayer's income from that business for that year.

14(5) In this section,

"**eligible capital expenditure**" of a taxpayer in respect of a business means the portion of any outlay or expense made or incurred by the taxpayer, as a result of a transaction occurring after 1971, on account of capital for the purpose of gaining or producing income from the business, other than any such outlay or expense

(*a*) ...

(*b*) ...

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

(i) tangible property of the taxpayer,

(ii) intangible property that is depreciable property of the taxpayer,

(iii) property in respect of which any deduction (otherwise than under paragraph 20(1)(*b*)) is permitted in computing the taxpayer's income from the business or would be so permitted if the taxpayer's income from the business were sufficient for the purpose, or

(iv) an interest in, or right to acquire, any property described in any of subparagraphs (i) to (iii)

but, for greater certainty and without restricting the generality of the foregoing, does not include any portion of

...

"**cumulative eligible capital**" of a taxpayer at any time in respect of a business of the taxpayer means the amount determined by the formula

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

where

A is 3/4 of the total of all eligible capital expenditures in respect of the business made or incurred by the taxpayer before that time and after the taxpayer's adjustment time,

[19] *Ibid*.

...

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

(*a*) an amount which, as a result of a disposition[20] occurring after the taxpayer's adjustment time and before that time, the taxpayer has or may become entitled to receive, in respect of the business carried on or formerly carried on by the taxpayer where the consideration given by the taxpayer therefor was such that, if any payment had been made by the taxpayer after 1971 for that consideration, the payment would have been an eligible capital expenditure of the taxpayer in respect of the business

exceeds

(*b*) all outlays and expenses to the extent that they were not otherwise deductible in computing the taxpayer's income and were made or incurred by the taxpayer for the purpose of giving that consideration, …

...

[Emphasis added.]

The Concept of Property

[54] In argument, counsel for RCI 2006 submitted that sections 14, 39 and 40 of the Act were not applicable to the non-competition agreements because they were not "property", and even if they were, there was no "disposition" of property in this case. He said, for example, that the definition of "disposition" found today in subsection 248(1) of the Act came into force only on December 23, 1998, a few days after the date of the Settlement. In addition, the definition of "disposition" in section 54 of the Act before that date did not apply for the purposes of section 14. Although a careful reading of subsection 14(1) and item E in the definition of "cumulative eligible capital" in subsection 14(5) of the Act shows that it does not relate to "property",[21] but to disposition only, I believe it is possible to dispose of these two arguments without referring to the distinction between the wording of section 14 and the wording of section 40.

[55] In support of his argument that the agreements were not property, counsel for RCI 2006 relied on, *inter alia*, the provisions of the Civil Code and the civil law

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20 It is also worth noting that the concept of disposition was eliminated from item E in relation to amounts that became receivable on or after May 2, 2006. As of that date, it is not necessary that there be an actual disposition in order for there to be an eligible capital amount that must be included in income under subsection 14(1) of the Act.

21 Obviously, it could be argued that there can be a "disposition" only where there is a disposition of property. Given the conclusion I have reached, it is not necessary to dispose of this question.

commentators of Quebec. In my opinion, it is not necessary to refer to the civil law definitions in order to determine what constitutes property for the purposes of the Act, since the Act defines that concept in subsection 248(1), as follows:

"property" means property of any kind whatever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes	"biens" Biens de toute nature, meubles ou immeubles, corporels ou incorporels, y compris, sans préjudice de la portée générale de ce qui précède:
(*a*) a right of any kind whatever, a share or a chose in action,	*a*) les droits de quelque nature qu'ils soient, les actions ou parts;
(*b*) unless a contrary intention is evident, money,	*b*) à moins d'une intention contraire évidente, l'argent;
(*c*) a timber resource property, and	*c*) les avoirs forestiers;
(*d*) the work in progress of a business that is a profession.	*d*) les travaux en cours d'une entreprise qui est une profession libérale.

[Emphasis added.]

[56] Because the English version says "'property' means", this is clearly, in my opinion, an exhaustive definition. What it is important to take from the definition is the fact that the concept includes both corporeal and incorporeal property, including a right of any kind. It is not necessary here to determine the precise scope of the concept of "right", which is not defined in the Act. In the usual sense of the word, "*droit*" (right) includes, according to *Le Petit Robert*: "[TRANSLATION] … Something that is required or permitted under a precise, express rule (law, regulation)". A contract could have been included in that list of the sources of rights.

[57] To determine whether the non-competition agreements gave RCI and CTVNS "rights", it must be noted, first, that the non-competition agreements are governed by the laws of Quebec, as provided in article 2.8 of the agreements (see Exhibit I-1, tabs 7 and 8).[22] Book Five of the Civil Code deals with obligations. For the purposes of this appeal, it is useful to reproduce some of the general provisions in Chapter 1 of Title One of Book Five, and specifically articles 1371, 1372 and 1373:

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22 The non-solicitation agreement was not entered in evidence, but there is no reason to believe that it is not also governed by the laws of Quebec, since all of the agreements in connection with the sale of WMI's Quebec business to RCI and CTVNS are.

> **1371.** It is of the essence of an obligation that there be persons between whom it exists, a prestation which forms its object, and, in the case of an obligation arising out of a juridical act, a cause which justifies its existence.
>
> **1372.** An obligation arises from a contract or from any act or fact to which the effects of an obligation are attached by law.
>
> An obligation may be pure and simple or subject to modalities.
>
> **1373.** The object of an obligation is the prestation that the debtor is bound to render to the creditor and <u>which consists in doing or not doing something</u>.
>
> The debtor is bound to render a prestation that is possible and determinate or determinable and that is neither forbidden by law nor contrary to public order.
>
> [Emphasis added.]

[58] This last article is interesting in that it provides that the object of an obligation consists in doing or not doing something. In the former *Civil Code of Lower Canada*, article 1058 also provided that the object of an obligation was to give. In his commentary on the bill respecting the *Civil Code of Québec*, the Minister of Justice of Quebec said that it was decided not to mention the obligation to give because it was now included in the obligation to do. A prestation consisting in doing can include the idea of transferring property (for example, by a contract of sale) and also of performing a service (in particular, under the terms of a contract of employment). A prestation consisting in not doing can be found in non-competition agreements as it can in contracts dealing with immovable property where a servitude is created, for example when someone agrees not to build a wall of a certain height.

[59] We should also note article 1412 of the Civil Code, which deals with the object of a contract:

> **1412.** The object of a contract is the juridical operation envisaged by the parties at the time of its formation, as it emerges from all <u>the rights and obligations created by the contract</u>.

[60] If we analyze the non-competition agreements having regard to these Civil Code rules, we see that each of the obligations on the part of the debtor (WMI) gives a right to the creditor (Groupe RCI): the right to require that the debtor perform each of its obligations. The object of WMI's obligations consists (in very large part) in not doing something: article 3 of the agreements obliges WMI not to

disclose confidential information; article 4, not to compete with Groupe RCI by operating a solid waste management business within the territory covered by the agreement or by acquiring a financial interest in a business of that nature; article 5, not to solicit customers or prospective customers of WMI; and article 6, not to interfere in the operation of the business in the territory in question or persuade customers or suppliers to discontinue relations with Groupe RCI. In short, the non-competition agreements gave RCI and CTVNS the right to require that WMI not compete with them directly or indirectly, in any way whatsoever.

[61] In my opinion, counsel for RCI 2006 is mistaken in arguing that the object of the agreements is freedom to carry on business and that because the non-competition agreements are not objects of commerce they cannot be considered to be property for the purposes of the Act. One of the decisions he cited was *Manrell v. Canada*, [2003] F.C.J. No. 408 (QL), 2003 FCA 128, and in particular paragraphs 24 and 25, reproduced below:

> 24 Professor Ziff, in *Principles of Property Law*, 3rd ed (Scarborough: Carswell, 2000), says this about property (emphasis added) (at page 2):
>
> > Property is sometimes referred to as a bundle of rights. This simple metaphor provides one helpful way to explore the core concept. It reveals that property is not a thing, but a right, or better, a collection of rights (over things) enforceable against others. Explained another way, the term property signifies a set of relationships among people that concern claims to tangible and intangible items.
>
> 25 It is implicit in this notion of "property" that "property" must have or entail some exclusive right to make a claim against someone else. A general right to do something that anyone can do, or a right that belongs to everyone, is not the "property" of anyone. In this case, the only thing that Mr. Manrell had before he signed the non-competition agreement that he did not have afterward was the right he shares with everyone to carry on a business. Whatever it was that Mr. Manrell gave up when he signed that agreement, it was not "property" within the ordinary meaning of that word.
>
> [Emphasis added.]

[62] In my opinion, that passage hinders his case more than it helps: Sharlow J.A. was correct in concluding that a shareholder who sells shares in his or her company and does not give the purchaser a non-competition undertaking has not disposed of his or her freedom to carry on business. The only property the shareholder has disposed of is the shares of the company that were sold. By signing the non-competition agreements, the shareholder merely undertook not to do

something. If we adopt the civil law analysis, the object of the obligation is not "giving" something but "not doing" something. Where the object of the obligation is not doing, it seems obvious to me that no property is transferred under that obligation.

[63] Unlike the facts in *Manrell*, RCI and CTVNS in this case are not receiving money in consideration of an obligation not to compete. We are in the opposite situation. They are the ones who are the beneficiaries of WMI's undertakings, and the creditors of the obligation of not doing. RCI and CTVNS have a right under the non-competition agreements to demand that WMI honour its obligation of not doing. By terminating the non-competition agreements, that right was cancelled. It is clear that the rights created by the non-competition agreements were property for RCI and CTVNS within the meaning of subsection 248(1) of the Act. In Quebec law, those rights can be characterized as personal rights,[23] because they give the creditor a right to demand a prestation from another person, the debtor. Those rights, which can also be characterized as claims, can be the object of transfers and are recognized, in tax law, as property for the purposes of the Act. In *Manrell*, Sharlow J.A. cited several decisions to which she had been referred by counsel for Mr. Manrell, recognizing that rights of that kind are property:

> 52 Counsel for Mr. Manrell has provided what appears to be an exhaustive list of all the cases in which something has found to be “a right of any kind whatever”. I will not reproduce the whole list. But I will cite a few illustrative examples. The right represented by a term life insurance policy that has no cash surrender value but is convertible without evidence of insurability is a “right” for purposes of the definition of “property” in the *Estate Tax Act*, S.C. 1958, c. 29 (a definition very similar to the definition in the Income Tax Act): *Estate of Harry A. Miller* v. *Minister of National Revenue*, [1973] C.T.C. 793, 73 D.T.C. 5583(F.C.T.D.). An entitlement to receive payments from the pension plan of a deceased spouse is a “right” for purposes of the definition: *Driol* v. *Canada*, [1989] 1 C.T.C. 2175, 89 D.T.C. 122 (T.C.C.). An irrevocable promise in a marriage contract to pay a sum of money to the spouse during the marriage gives rise to a right in the hands of the recipient spouse as of the date of the promise, and that right is at that time a “right” for purposes of the definition: *Furfaro-Siconolfi* v. *Canada*, [1990] 2 F.C. 3, [1990] 1 C.T.C. 188, 90 D.T.C. 6237 (F.C.T.D.). An entitlement to maintenance or alimony is a “right” for purpose of the definition: *Canada* v. *Burgess*, [1982] 1 F.C. 849, [1981] C.T.C. 258, 81

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23 According to *Le Petit Robert*, in the definition of "*droit*": "[TRANSLATION] I• A right, rights ... 2• Real rights, which may be set up against everyone and enable the holder to exercise a power over property (ownership, usufruct, use, etc.). Claims (*droits de créance*) or personal rights, giving a person (creditor) the right to demand a prestation from another person (debtor)."

> D.T.C. 5192 (F.C.T.D.), see also *Nissim* v. *Canada*, [1999] 1 C.T.C. 2119, *Donald* v. *Canada*, [1999] 1 C.T.C. 2025 (T.C.C.).[24]

[64] As Létourneau J. acknowledged at page 6221 of *The Queen v. La Capitale, Compagnie D'Assurance Générale*, 98 DTC 6215, the term "property" in the Act includes practically any type of economic interest and practically any sort of interest a person can possess. Obviously, the rights that RCI, CTVNS and SEC possessed had considerable economic value, because CWS paid $12 million to terminate them. It is difficult to argue, as counsel for RCI 2006 did, that these are not objects of commerce because they cannot be sold. It must also be noted that the non-competition agreements expressly provide, in article 2.9, that the rights created by the agreements may be transferred. Article 2.9 states:

> 2.9 Assignment. All of the provisions of this Agreement shall be binding upon the FIRST PART and be enforceable by the SECOND PART, its successors, affiliated and subsidiary corporations and their respective assigns. For greater certainty, the parties acknowledge and agree that the sale of the SECOND PART or of all its operating assets to any other party shall not in any way limit, reduce or negate the obligations of the FIRST PART to the SECOND PART hereunder and in such event of sale, this Agreement will automatically benefit to the party purchasing the SECOND PART and/or all its operating assets.
>
> [Emphasis added.]

[65] The decisions cited above seem to be consistent with the interpretation adopted by the Supreme Court of Canada in *Canada v. Golden*, [1986] 1 S.C.R. 209, [1986] 1 C.T.C. 274, 86 DTC 6138. At paragraph 7, after quoting the definition of "property" in subsection 248(1) of the Act, Estey J. wrote:

> ... This extremely broad definition of property leaves very little in the "non-property" classification. It would appear to include a contract right and might

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[24] In addition to the decisions referred to earlier relating to support rights, the decision of the Federal Court of Appeal in *Nadeau v. R.*, 2003 FCA 400, 2003 D.T.C. 5736, [2004] 1 C.T.C. 293, and in particular paragraph 28, should be noted:

> 28 The income from support is a clear illustration of how two sources may be confused. Although the taxation of support payments as income is explicitly provided in subdivision d, which deals with "Other Sources", it still remains that the right to support is a "property" under the Act. If the right to support is a "property", it is hard to dissociate it from the income that results from the exercise of this right. That is why the courts, over the years, have ventured to allow the deduction of costs pertaining to support in the circumstances we have seen by invoking subdivision b and in particular paragraph 18(1)(*a*).
>
> [Emphasis added.]

> in some circumstances include a right to assert a covenant by a vendor to deliver "know-how". ...
>
> [Emphasis added.]

[66] The same approach was taken in *Pe Ben Industries Co. v. The Queen*, F.C.T.D., T-1583-82, June 8, 1988, 88 DTC 6347.[25] Strayer J. concluded that the rights in the transportation contract were property for the purposes of the Act. He wrote, at page 10 (6351 DTC):

> This leaves the question as to whether the amount in question was the proceeds of disposition of an asset thereby rendering it potentially subject to treatment as a capital gain. It may first be noted that both the plaintiff and the defendant contend as an alternative that the sum in question should be so treated. I am in agreement that it should in accordance with the various definitions in the Income Tax Act. Paragraph 39(1)(a) indicates that a capital gain arises "from the disposition of any property". Subsection 248(1) of the Act defines "property" as meaning "property of any kind whatever" including "(a) a right of any kind whatever, a share or a chose in action. . ." I believe that the plaintiff's rights under the contract with NAR which it gave up in return for a final payment would constitute such a right or a chose in action. ...
>
> [Emphasis added.]

[67] In conclusion, the rights that RCI and CTVNS had in the non-competition agreements are property for the purposes of the Act.

The Concept of Disposition

[68] The other question to be answered in determining whether section 14(1) or section 38 of the Act should be applied is whether there was a "disposition" within the meaning of item E of the definition of "cumulative eligible capital" in subsection 14(5) of the Act or a "disposition" within the meaning of sections 28, 39 and 40 of the Act. Counsel for RCI 2006 is correct in saying that on December 17, 1998, that is, the date when the Settlement was agreed to, the word "disposition"

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25 That case was heard at the same time as *Canadian National Railway Co.*, *supra*. In *Pe Ben*, Strayer J. of the Federal Court – Trial Division concluded that the cancellation of the transportation contract resulted in the "destruction of a distinct part of the business of the plaintiff" (p. 5 (6349 DTC)) and that the compensation paid was a capital payment and not income as the payment was in *Canadian National Railway Co.* After finding that the capital amount could not be considered to be an eligible capital amount by applying the mirror image rule, because from the payer's perspective the amount was considered to be a current expense, he concluded that there had been a capital gain.

was not defined in the Act for the purposes of section 14 of the Act. It was defined only for the rules relating to taxable capital gains.

[69] However, when an expression is not defined in legislation, we must look to the usual meaning. In *Canada v. Compagnie Immobilière BCN*, [1979] 1 S.C.R. 865, 79 DTC 5068,[26] the Supreme Court of Canada determined the meaning of the words "disposed of" in the English version, and the word "*aliené*" in the French version of subsection 1100(2) of the *Income Tax Regulations* (**Regulations**), which deals with the capital cost allowance deduction. At page 874 (page 5072 DTC), Pratte J. wrote:

> The expressions “disposed of” or “*aliénés*” used in Regulation 1100(2) are nowhere defined; it is apparent, however, that they must be ascribed the meaning which conforms with that of their companion defined expressions “disposition of property” and “proceeds of disposition”.

[70] After quoting various definitions from the *Oxford English Dictionary* and considering the writings of commentators in France and Quebec, Pratte J. stated the following conclusions, at pages 878 and 879 (page 5075 DTC):[27]

> As already indicated, the verb “to dispose of”, in its first meaning, encompasses the idea of destruction; one of the meanings of the verb “to destroy” is “to put an end to, to do away with” (Shorter Oxford English Dictionary, see Destroy). The extinction of a right through merger is but one method of “destroying” that right, that is of putting an end to its existence. In *Re Leven*, it was said that the word “disposition” taken by itself and used in its most extended meaning was “wide enough to include the act of extinguishment”.

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[26] The decision of the Supreme Court was rendered by Pigeon, Dickson, Beetz, Estey and Pratte JJ.; Pratte J. wrote the reasons. It must also be noted that both parties in that case were represented by eminent tax lawyers, one of whom, the late Alban Garon, became Chief Judge of the Tax Court of Canada.

[27] The argument made by counsel for RCI 2006 based on the decision of the Supreme Court of Canada in *R. v. Malloney's Studio Ltd*, [1979] 2 S.C.R. 326 (QL), 79 DTC 5124, that the decision in *Compagnie Immobilière BCN* is no longer applicable, cannot stand. The Supreme Court of Canada did not say in *Malloney's* that the principles laid down in *Compagnie Immobilière BCN* were no longer applicable law; rather, it said that the decision in *Compagnie Immobilière BCN* was not applicable in *Malloney’s* because the issues were different: "The nature of the transaction in that case was thus quite different from that in the appeal now before this Court" (para. 11 (p. 5128 DTC)). The issue in *Malloney’s* related to a question involving the application of section 68, while the issue in *Compagnie Immobilière BCN* involved the application of the rules set out in subsection 1110(2) of the Regulations.

> The acquisition by respondent of the lessor's rights under the first lease brought about the automatic termination of the leasehold interest; such interest was extinguished, it was destroyed.
>
> In my view, the rights of respondent under the first lease should be regarded as having been "disposed of" in January 1965.
>
> [Emphasis added, footnotes omitted.]

[71] If we apply that interpretation to the facts of this case, it is apparent that the cancellation of the non-competition agreements was a disposition for the purposes of section 14. In my opinion, there is no reason to adopt a definition of "disposition" for the purposes of the rules in section 14 that is different from the definition that applies for the purposes of the rules relating to the capital cost allowance deduction. There is also nothing in the text of section 14 to indicate a different meaning for the concept of disposition from the meaning adopted by the Supreme Court of Canada. Accordingly, cancellation of the rights created by the non-competition agreements constitutes a "disposition" of "property".

[72] Accordingly, the rights created by the non-competition agreements were, for the purposes of sections 38, 39 and 40 of the Act, property referred to in subsection 248(1) of the Act, and cancellation of those rights constitutes a disposition for the purposes of those sections and of section 14 of the Act.

Income from a Business under Section 14 (Eligible Capital Property)

[73] The remaining question is whether the cancellation of the non-competition agreements makes sections 14 and 38 applicable. As we saw earlier, section 39 provides that a capital gain may be "from the disposition of any property ... other than eligible capital property". Eligible capital property is property "a part of the consideration for the disposition of which would ... be an eligible capital amount" (section 54, *supra*). The question here is therefore whether the $12 million represents an amount of that nature. To answer it, we must refer to the content of item E in the definition of "cumulative eligible capital" and determine whether all of the requirements set out in that item are met in this case. For convenience, I will reproduce it again here:

> E is the total of all amounts each of which is ¾ of the amount, if any, by which
>
> (*a*) an amount which, as a result of a disposition occurring after the taxpayer's adjustment time and before that time, the taxpayer has or may become entitled to receive, in respect of the business carried on or formerly carried on by the taxpayer where the

> consideration given by the taxpayer therefor was such that, if any payment had been made by the taxpayer after 1971 for that consideration, the payment would have been an eligible capital expenditure of the taxpayer in respect of the business
>
> exceeds
>
> (*b*) all outlays and expenses to the extent that they were not otherwise deductible in computing the taxpayer's income and were made or incurred by the taxpayer for the purpose of giving that consideration, …
>
> ...
>
> [Emphasis added.]

As we saw earlier, there was a "disposition" here because of the cancellation of the rights created by the non-competition agreements. Accordingly, the first requirement has been met.

[74] The second requirement is that the amount must have been received in respect of the business that RCI and CTVNS were carrying on. During the 1999 taxation year, RCI and CTVNS carried on a solid waste management business in the Greater Montréal region, the business they had acquired from WMI in July 1997. Among the numerous agreements signed in relation to that acquisition were the three non-competition agreements. Those three non-competition agreements were the subject of the Settlement and were cancelled in consideration of the $12 million. As noted earlier, the purpose of those agreements was to protect the goodwill of CTVNS and RCI. By waiving the rights granted by the agreements, those two companies agreed to waive the enjoyment of those rights, which, in all likelihood, they could have exercised to prevent Intersan and any Groupe WM 1998 company or affiliate from carrying on business within a 150 km radius of the centre of Montréal. The $12 million received by RCI and CTVNS, in equal shares, was therefore received in respect of their business.

[75] In the submission of counsel for RCI 2006, the third requirement — "if any payment had been made by the taxpayer after 1971 for that consideration, the payment would have been an eligible capital expenditure of the taxpayer" — presents a problem.

[76] Before applying that requirement, it is important to consider the principle stated by the Supreme Court of Canada in *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, 99 DTC 5669. McLachlin J. (as she then was) wrote, for herself and

six of her colleagues,[28] that the duty of the courts is to apply the unambiguous provisions of the Act. At paragraph 40 of the decision, she wrote:

> 40 Second, it is well established in this Court's tax jurisprudence that a searching inquiry for either the "economic realities" of a particular transaction or the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the Act to a taxpayer's transaction. Where the provision at issue is clear and unambiguous, its terms must simply be applied: *Continental Bank*, *supra*, at para. 51, *per* Bastarache J.; *Tennant*, *supra*, at para. 16, *per* Iacobucci J.; *Canada v. Antosko*, [1994] 2 S.C.R. 312, at pp. 326-27 and 330, *per* Iacobucci J.; *Friesen v. Canada*, [1995] 3 S.C.R. 103, at para. 11, *per* Major J.; *Alberta (Treasury Branches) v. M.N.R.*, [1996] 1 S.C.R. 963, at para. 15, *per* Cory J.[29]

[77] In my opinion, the text is clear and unequivocal in this case. In the context of item E of the definition of cumulative eligible capital, the consideration in question is what the "taxpayer" gave in order to receive the payment to which item E refers. In this case, what RCI and CTVNS (and also SEC), the "taxpayers", gave as consideration for the $12 million were the rights they held under the non-competition agreements. Now, if the taxpayer (and not the parties that paid the "amount") had made a "payment" "for that consideration", would "the payment" have been an eligible capital expenditure "of the taxpayer"? That is, if RCI and CTVNS had paid $12 million for that consideration, the "rights" created by the non-competition agreements, would that expenditure have been an eligible capital expenditure of RCI and CTVNS? Clearly the question must be decided from the perspective of the taxpayer, and not of the payer of the amount. If these two companies had acquired the rights created by the non-competition agreements after 1971, this would, in my opinion, have been an eligible capital expenditure. The amounts would not have been deductible as current expenses in computing their income, having regard to the prohibition in paragraph 18(1)(*b*) of the Act regarding capital expenditures. It would have been an eligible capital expenditure because obtaining the non-competition agreements would have procured an enduring advantage for their business;[30] the expense would have been incurred in order to earn income from their business and none of the exceptions provided in the definition of "eligible capital expenditure" in subsection 14(5) of the Act would have applied.

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28 L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache and Binnie JJ.

29 I would add that if the text is clear and unequivocal it is not necessary to refer to decisions of the courts. In those circumstances, the text must prevail, even over decisions of the courts to the contrary.

30 See para. 28 *supra*.

[78] Even though it is not necessary to examine Parliament's objectives when it enacted the text of the third requirement set out in item E of the definition of cumulative eligible capital, I cannot help observing that the result described above seems to me to be consistent with Parliament's objectives. When section 14 and paragraph 20(1)(*b*) were added to the Act in the 1972 tax reform, the purpose was to allow businesses to deduct a portion of their capital expenditures on incorporeal property over a period of several years; these included the cost of goodwill, which would not have been an eligible expenditure before 1972. In addition to recognizing that this type of expenditure was eligible, rules were also made to include in income, when the proceeds of disposition exceeded the unamortized portion of those expenditures, the amounts deducted under paragraph 20(1)(*b*) as a result of the disposition of eligible capital property and to tax the capital gain realized in the disposition. It is possible to own goodwill without having purchased it. For example, an entrepreneur who creates a new business and operates it successfully for several years develops a skilled workforce and builds a reputation and customer base; the entrepreneur has then created goodwill, that is, has created an ability to make a profit. If the entrepreneur sells the business, he or she is often able to convert that ability into cash, even if the asset does not appear on the balance sheet as a separate item. An indicator that there is goodwill is the fact that a business is sold for more than the fair market value of all of the business's corporeal property. Accordingly, in order to determine whether the property was part of inventory, capital property or eligible capital property, there had to be a way of ensuring that section 14 applied only to eligible capital property.[31]

[79] Accordingly, applying item E of the definition of "cumulative eligible capital" as that definition is written avoids the problem raised in the position advanced by counsel for RCI 2006. It is not necessary to ask whether the payment by Groupe WM 1998 is an eligible capital expenditure for each of the companies in the group. How would the nature of an expenditure for a third party be relevant in determining whether the money received for waiving the rights created by the non-competition agreements was an eligible capital amount for RCI and CTVNS?[32] There is no point in determining the status or nature of the expenditure

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[31] As pointed out earlier, it is worth noting that this requirement is no longer included in section 14 of the Act, as of May 2, 2006, as a result of the amendment enacted by L.C. 2007, c. 2, subs. 3(6).

[32] It must be noted that the waiver was also given by SEC, and accordingly that it would have been reasonable for that limited partnership to receive its share of the $12 million. The fact that it waived receipt of its share could raise a question of a benefit conferred if, as I believe, the limited partnership was not dealing at arm's length with CTVNS and RCI. Because the

in the hands of Groupe WM 1998, because it is the nature of the rights waived by RCI and CTVNS that must determine the tax treatment of those rights. Applying the interpretation advanced by counsel for RCI 2006 could produce absurd results. If it is necessary to choose between an interpretation that produces absurd results and another interpretation that is consistent with the objectives of Parliament, the choice is obvious.

[80] Because all of the requirements for finding that the $12 million is an eligible capital amount have been met, that amount must be taken into account in applying subsection 14(1) of the Act.

[81] If I were mistaken as to the clear and unequivocal nature of subsection 14(1) and item E of the definition of cumulative eligible capital in subsection 14(5) of the Act, and it had to be determined whether, looking at it from the payer's perspective, the $12 million represented an eligible capital expenditure, I would come to the same conclusion, that the requirement has been met in this case.

[82] First, the argument advanced by counsel for RCI 2006 must be considered: that RCI and CTVNS have to be placed in the situation of each of the Groupe WM 1998 companies referred to in the Settlement. At first blush, I see nothing in the wording of item E that requires that the expenditure be an eligible capital expenditure for each of the parties that made the payment for cancellation of the rights created by the non-competition agreements.

[83] In any event, the interpretation advanced by counsel for RCI 2006, that all of the companies in Groupe WM 1998 are payers for the purposes of the agreement, is incorrect, in my opinion. I do not believe that the payer of the $12 million was each of the companies in Groupe WM 1998. Even though the second paragraph of the Settlement defines WMI as including WM 1998, WMI, CWS and Intersan, only WMI signed the Settlement. In addition, in paragraph 4 of the Settlement,[33] that definition was not applied; each of the companies that are released from their non-competition agreement is named individually. Accordingly, I find that,

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parties agreed not to raise this question or any other question arising out of the waiver, the matter has been dealt with as if RCI and CTVNS were the only parties entitled to receive their share of the $12 million.

[33] It is useful to reproduce the relevant passage here:

> ... in consideration of the payment by WMI ... of $12 000 000 to RCI ... the undersigned parties hereby ... 2. unconditionally forever release and discharge Waste Management Inc., WMI Waste Management of Canada Inc., Canadian Waste Services Inc. et Intersan Inc. ...

because of the context, the reference to WMI in paragraph 4 refers only to WMI itself and not to Groupe WM 1998.

[84] If we were to rely solely on the written Settlement agreement, we would have to conclude that there was only one payer: WMI. Contrary to what it says, however, it was not WMI that paid the $12 million, it was CWS (para. 35 of the chronological summary of facts). For the purposes of the mirror image rule, must we use the payer shown in the written Settlement agreement or the one that actually paid the money, in this case CWS? I believe it is the latter. The person who was the president of CWS on December 16, 1998, Mr. Sutherland-Yoest, said in his testimony that the $12 million paid by CWS was not only paid by that company, but also entered in its accounts. He doubted that it was entered in Intersan's accounts. In addition, CWS was a party to at least six of the seven agreements signed on December 16, 1998, giving effect to the agreement between Groupe WM 1998 and Groupe RCI to combine their operations in the Greater Montréal region (see Exhibit I-3, tabs 14 to 20). In the case of the "Service Agreement", which was a contract for services signed by CWS and Intersan with RCI (the first two companies were called Intersan for the purposes of that contract), the final "whereas" says: "Intersan wishes to use the services of RCI and to subcontract the business to RCI." In addition, clause 2.1.4 of the contract defines "business" as meaning "the C.W.S. and INTERSAN commercial, industrial and institutional customer contracts". It is therefore plain from those documents that CWS was operating a business in Quebec and that it was in its interests to pay the $12 million. Because there is no evidence that the $12 million was recovered from other Groupe WM 1998 companies, I conclude that the payer for the purposes of the mirror image rule was CWS.

[85] Because CWS was operating its business in Quebec and its business was solid waste management, the $12 million paid to have the non-competition agreements cancelled — which agreements concerned it, in all likelihood, since the merger of its parent corporation, USA Services, with WMI USA — was a capital expenditure because it gave CWS the right to continue operating its business in Quebec, which was a benefit of an enduring nature for it. The expenditure related to all of its operations in Quebec and was not made for the purpose of obtaining cancellation of a current expense, as was the case in *Goodwin Johnson*, *supra*, "by getting rid of an operational contractual expense".[34] In support of that conclusion, I would also recall the testimony of Mr. Sutherland-Yoest, who explained how CWS had come to pay the $12 million. He recounted the argument used by

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[34] Page 14 (6190 DTC).

Mr. Rémillard: "by selling the non-compete, they were protecting their 200 million dollar investment in Quebec".

[86] Even if we had to choose WMI, which had signed the non-competition agreements and was the only Groupe WM 1998 company that signed the Settlement, as the payer, it would have to be recalled that it was the owner of the property at 9501 boulevard Ray-Lawson in Anjou. That property had been excluded from the sale of the business by WMI to RCI in July 1997 and the non-competition clause defined the territory to which it applied as the area within a 150 km radius "from the actual premises located at 9501, Ray-Lawson boulevard, Anjou" (see Exhibit I-1, tab 7). As well, under the memorandum of agreement signed by PSM and WMI on June 20, 1997, that property, after the sale of the business, was to be leased to RCI by WMI for six months starting on the date the agreement was signed (Exhibit I-1, tab 3, page 3). When the two groups' operations were merged on December 16, 1998, a seven-year lease was signed for the property. In addition, according to Mr. D'Addario's testimony, RCI billed WMI for services to WMI's national customers (see paragraph 36 of the chronological summary of facts, *supra*). There is therefore every reason to believe that WMI was carrying on a business in Canada and the reasoning that applied to CWS could also be applied to WMI in terms of the treatment of the $12 million payment, for the purposes of the mirror image rule. Accordingly, the amount of $6 million must be taken into account by RCI and CTVNS in computing the eligible capital amount under subsection 14(1) of the Act.

Taxable Capital Gain: Section 38 of the Act

[87] If that conclusion were incorrect and the $12 million were not an eligible capital amount and, therefore, the rights created by the non-competition agreements were not eligible capital property, the taxable capital gains rules might apply.

[88] In my opinion, the cancellation of the non-competition agreements was a disposition of property, not only in the common law sense, as was held in *Compagnie Immobilière BCN*, *supra*, but also based on paragraph (*a*) of the definition of "disposition of property" as it appeared, at the time in question, in section 54 of the Act; under paragraph (*a*), a disposition included "any transaction or event entitling a taxpayer to proceeds of disposition of property",[35] In section 54,

[35] The fact that the Act defines the word "disposition" as including — in English, "includes" rather than "means" — means that the concept of disposition found in section 54 is not an

the expression "proceeds of disposition" includes "compensation for property destroyed", which encompasses the cancellation of contractual rights, as Strayer J.A. also acknowledged in *Pe Ben* (*supra*, pages 10 and 11 (6351 DTC)):

> ... Further, a "disposition" of property is defined by subparagraph 54(c)(i) as including "any transaction or event entitling a taxpayer to proceeds of disposition of property". This would cover the payment made by NAR to the plaintiff, whether one regards it as payment pursuant to the contract or for termination of the contract. This view is reinforced by the definition in subparagraph 54(h)(iii) of "proceeds of disposition" to include "compensation for property destroyed. . ." The money paid by NAR to the plaintiff was for termination of any claim which the plaintiff might have against NAR under the contract which claim was thus "destroyed".
>
> [Emphasis added.]

[89] We therefore have all of the necessary elements in this case to conclude that there was a taxable capital gain if the rights resulting from the non-competition agreements were not eligible capital property. Because the evidence is that RCI and CTVNS paid nothing to acquire those rights, the adjusted base price of the rights is nil. Accordingly, the whole of the $12 million would be a capital gain. It

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exhaustive definition. That is the interpretation the Supreme Court of Canada adopted in *Compagnie Immobilière BCN*, at paragraph 23:

> **23** Section 20 contains a number of substantive rules regarding the recapture of capital cost allowances and the effects on the operation of the system of a change in the use of depreciable property. It also contains an interpretative clause that is expressed to have effect for the purposes of s. 20 and also for the purposes of the 'regulations made under paragraph (a) of subsection (1) of section 11' which, of course, include Regulation 1100(2) aforesaid. In all but two of the definitions in s. 20(5), the words defined therein are declared to 'mean' so and so; these are true definitions and therefore restrictive. There are two exceptions where the words defined are declared to 'include' so and so; these exceptions are the following:
>
> Sec. 20(5)
> ...
> (b) 'disposition of property', includes any transaction or event entitling a taxpayer to proceeds of disposition of property;
> (c) 'proceeds of disposition' of property include
> (i) the sale price of property that has been sold,
> (ii) compensation for property damaged, destroyed, taken or injuriously affected. either lawfully or unlawfully, or under statutory authority or otherwise,
> ...
>
> [Emphasis added.]

should be noted that RCI and CTVNS have already expensed the legal fees they paid to obtain the Settlement. Counsel for the Respondent indicated that she was not seeking an adjustment in respect of the treatment of those expenses.

[90] For all these reasons, the appeal by RCI 2006 is allowed and the assessments in relation to computation of the income of RCI and CTVNS are referred back to the Minister for reconsideration and reassessment on the basis that the $6 million figure must be included for both companies in computing the income from a business for the 1999 taxation year under subsection 14(1) of the Act.[36] The Respondent is entitled to three quarters of her costs.

Signed at Ottawa, Canada, this 20th day of December 2007.

"Pierre Archambault"

Archambault J.

Translation certified true
on this 26th day of March 2008.

Brian McCordick, Translator

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[36] The new provisions set out in Bill C-33, one of which added section 56.4, relating to restrictive covenants, to the Act, had not yet received Royal Assent at the time this case was argued, and in my opinion they are not relevant for the purposes of this matter.

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PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	July 9, 11, 12, 13 and 27, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice Pierre Archambault
DATE OF JUDGMENT:	December 20, 2007

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