

Docket: 2017-2518(IT)G

BETWEEN:

MOULES INDUSTRIELS (C.H.F.G.) INC.,  
PLASTECH INC. AND 176104 CANADA INC.,

Taxpayers,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Reference under section 173 of the *Income Tax Act* heard on  
November 17, 2017, at Montreal, Quebec.

Before: The Honourable Associate Chief Justice Lucie Lamarre

Appearances:

Counsel for the appellant:	Simon Lemieux Olivier Fournier Aicha Nafii
Counsel for the respondent:	Nathalie Labbé

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**DECISION ON THE REFERENCE**

The questions of law submitted to the Court under the terms of this reference are as follows:

**Question 1**

[TRANSLATION]

Assuming that the conditions of application set out in clause 4.3 of the trust deeds for Fiducie CH and Fiducie de Gestion CH (the clause) have been

fulfilled, does this clause, which caps the maximum share of the income or capital that the trustees may pay the intended beneficiaries at 24.99%, as per the discretion conferred by the trust deeds, provide a basis for considering that these intended beneficiaries jointly own a maximum of 24.99% of the shares held by the trusts for the purposes of the rules of association set out in section 256 of the *Income Tax Act* (ITA) and in light of subparagraph 256(1.2)(f)(ii) of the Act, or does that subparagraph mean that the intended beneficiaries are deemed to hold 100% of the shares held by the trusts?

### **Answer to Question 1**

In response to this question, I conclude that the intended beneficiaries are deemed to hold 100% of the shares held by the trusts under subparagraph 256(1.2)(f)(ii) of the ITA.

### **Question 2**

[TRANSLATION]

Assuming that the conditions of application have been fulfilled, is each intended beneficiary of Fiducie CH presumed to hold all of the shares of the capital stock owned by Fiducie CH under subparagraph 256(1.2)(f)(ii) of the ITA, despite the clause?

### **Answer to Question 2**

The answer is affirmative.

### **Question 3**

[TRANSLATION]

Assuming that the conditions of application have been fulfilled, is each intended beneficiary of Fiducie de Gestion CH presumed to hold all of the shares of the capital stock owned by Fiducie de Gestion CH under subparagraph 256(1.2)(f)(ii) of the ITA, despite the clause?

### **Answer to Question 3**

The answer is affirmative.

Signed at Ottawa, Canada, this 3rd day of May 2018.

“Lucie Lamarre”  
\_\_\_\_\_  
Lamarre A.C.J.

Translation certified true  
on this 7th day of June 2018.

Janine Anderson, Revisor

Citation: 2018 TCC 85  
Date: 20180503  
Docket: 2017-2518(IT)G

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## **REASONS FOR THE DECISION ON THE REFERENCE**

Lamarre, A.C.J.

### **Introduction**

[1] This reference addresses questions regarding the proposed assessments, for which a draft assessment was issued on February 3, 2016 (Exhibit R-1).

[2] The taxpayers with an interest in this reference are the three corporations identified in the style of cause, namely, Moules Industriels (C.H.F.G) Inc. (Moules), Plastech Inc. (Plastech) and 176104 Canada Inc. (176104, and the three corporations collectively: the taxpayers).

[3] The draft assessment covers the taxation years ending on October 31, 2011, October 31, 2012, October 31, 2013, and October 31, 2014 (years in question), for the corporations with an interest in this reference.

[4] In the draft assessment, the Canada Revenue Agency (CRA) proposes considering the taxpayers as being associated within the meaning of section 256 of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Suppl.) (ITA) during the years in question, which would reduce the small business deduction claimed by the taxpayers for the years in question under subsections 125(1) and 125(3) of the ITA.

[5] The taxpayers' addresses and principal places of business are located in the province of Quebec. Moules and 176104 were incorporated on August 31, 1989, and December 5, 1990, respectively, under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (CBCA). Plastech was incorporated on January 5, 1998, under Part 1A of Quebec's *Companies Act*, CQLR, c. C-38, and is now governed by the *Business Corporations Act*, CQLR, c. S-31.1.

### **Statutory provisions**

[6] The relevant statutory provisions of the ITA referred to in these reasons are included in Appendix I to these reasons.

### **Material facts giving rise to the reference recounted jointly by the parties**

[7] The material facts giving rise to the reference are recounted jointly by the parties in paragraphs 8 to 26 of the document entitled [TRANSLATION] "In the matter of an agreement to refer the questions to the Court under section 173 of the ITA":

#### [TRANSLATION]

8. During the Years in Question, Claude Houle ("Mr. Houle") and Francine Guay ("Ms. Guay") were married. They have three children: Marie-Claude, Manon and Vincent Houle.
9. Mr. Houle directly or indirectly controls a group of corporations, including Plastech, as shown in the organization chart attached to this reference as Exhibit R-2.
10. Ms. Guay controls Moules, as shown in the organization chart attached to this reference as Exhibit R-2.
11. Fiducie CH and Fiducie de Gestion CH (jointly, the "Trusts") are trust patrimonies that were incorporated on December 20, 2007, as shown in a copy of the trust deed of Fiducie CH, attached in support of this reference as Exhibit R-3, as well as a copy of the trust deed of Fiducie de Gestion CH, attached to this reference as Exhibit R-4 (the trust deed of Fiducie CH and that of Fiducie de Gestion CH will hereinafter be referred to as the "Trust Deeds").
12. Fiducie CH and Fiducie de Gestion CH hold shares of the capital stock issued by the corporations in the group controlled by Mr. Houle. As of October 31, 2014, and throughout the Years in Question, Fiducie CH held

shares in Plastech, 6736025 Canada Inc. and 7793910 Canada Inc., while Fiducie de Gestion CH held shares in 6835449 Canada Inc. (the “Corporations”).

13. Mr. Houle directly or indirectly controls the Corporations and thus controlled them during the Years in Question.
14. Since the incorporation of the Trusts, Mr. Houle and Richard Duval (the “Trustees”) have been acting as trustees for each of the Trusts.
15. Mr. Houle’s descendants and their respective spouses (the “Intended Beneficiaries”) are named in the list of beneficiaries of the Trusts in section 3.1.1b) of the Trust Deeds.
16. As shown in clause 4.2 of the Trust Deeds, Exhibit R-3 and Exhibit R-4, as long as Mr. Houle is trustee of the Trusts, the Trustees have full discretion to determine the share of income or capital of the Trusts owed to each beneficiary, subject, however, to clauses 4.3 and 4.4 of the Trust Deeds.
17. The Trustees’ discretion is limited by clause 4.3 of the Trust Deeds (the “Clause”), [TRANSLATION] “notwithstanding any other provision of this deed”.
18. Therefore, the Clause takes precedence over, in particular, clause 4.2 of the Trust Deeds.
19. As appears in more detail in the Clause, the Clause applies if the following conditions (the “Conditions of Application”) are fulfilled:
  - a. At any time during a taxation year;
  - b. One of the conditions set out in paragraphs 4.3.1a), 4.3.1b) or 4.3.1c) of the Trust Deeds is fulfilled. These conditions relate to the ownership and control by one or more of the intended beneficiaries of the shares in the corporations; and
  - c. The condition set out in paragraph 4.3.1d) is fulfilled, i.e. the beneficial interest of one or more of the Intended Beneficiaries would result in any corporation that is directly or indirectly controlled in any manner whatsoever by Mr. Houle, or deemed to be controlled by Mr. Houle under the relevant provisions of the ITA, and in which the Trusts directly or indirectly hold shares, becoming associated with another private corporation, within the meaning of section 256 of the *Income Tax Act*.

20. When the Conditions of Application are fulfilled, all of the shares of all of the Intended Beneficiaries of any capital and income from each of the Trusts will therefore correspond, solely by virtue of that fact and with no need for amendment or modification of the Trust Deeds, to a maximum total of 24.99%, as indicated in the Clause.
21. The Clause begins to apply immediately before any of the conditions mentioned in paragraphs 4.3.1a), 4.3.1b) or 4.3.1c) and the condition set out in paragraph 4.3.1d) are fulfilled, as appears from paragraph 4.3.2b) of the Trust Deeds.
22. The Intended Beneficiaries are also beneficiaries of Fiducie FG and Fiducie de Gestion FG, holding respectively shares of the capital stock issued by Moules and 176104.
23. As appears from the draft assessment, Exhibit R-1, if each Intended Beneficiary is deemed to hold all of the shares in the Corporations owned by the Trusts during the Years in Question, then the Corporations were associated with Moules and 176104 during these same years, because:
  - a. Fiducie FG and Fiducie de Gestion FG are discretionary trusts;
  - b. Fiducie FG controls Moules;
  - c. 176104 is controlled by Francine Guay; and
  - d. Francine Guay is a beneficiary of Fiducie FG and Fiducie de Gestion FG.
24. According to the Taxpayers, the Conditions of Application were fulfilled during the Years in Question and therefore, the Intended Beneficiaries could not collectively be allocated more than 24.99% of the income or capital of the Trusts.
25. As appears from the draft assessment, Exhibit R-1, the CRA's position is that the Clause does not prevent each of the Intended Beneficiaries from being deemed to hold all of the Trusts' shares in the Corporations, by operation of subparagraph 256(1.2)(f)(ii) of the ITA.
26. The CRA's position was communicated in Technical Interpretation E2003-0052261E5, to the effect that even if a clause in the trust deed limits the percentage of income and capital that a beneficiary may receive from the trust, that beneficiary is presumed to hold all of the shares of the capital stock owned by the trust. A copy of this technical interpretation is attached to this reference as Exhibit R-5.

[8] The organization chart referred to by the taxpayers is attached as Appendix II to these reasons.

**The questions of law submitted to the Court under the terms of this reference**

[9] The questions of law submitted to the Court under this reference are stated as follows by the parties:

[TRANSLATION]

- (i) Assuming that the Conditions of Application have been fulfilled, does clause 4.3 of the Trust Deeds, which caps the maximum share of the income or capital that the Trustees may pay the Intended Beneficiaries at 24.99%, as per the discretion conferred by the Trust Deeds, provide a basis for considering that these Intended Beneficiaries jointly own a maximum of 24.99% of the shares held by the Trusts, for the purposes of the rules of association set out in section 256 of the ITA and in light of subparagraph 256(1.2)(f)(ii) of the Act, or does that subparagraph mean that the Intended Beneficiaries are deemed to hold 100% of the shares held by the Trusts?
- (ii) Assuming that the Conditions of Application are fulfilled, is each Intended Beneficiary of Fiducie CH presumed to hold all of the shares of the capital stock owned by Fiducie CH, under subparagraph 256(1.2)(f)(ii) of the ITA, despite the Clause?
- (iii) Assuming that the Conditions of Application are fulfilled, is each Intended Beneficiary of Fiducie de Gestion CH presumed to hold all of the shares of the capital stock owned by Fiducie de Gestion CH under subparagraph 256(1.2)(f)(ii) of the ITA, despite the Clause?

**Decisions sought**

[10] The decisions sought by the parties are as follows (see [TRANSLATION] In the matter of an agreement to refer the questions to the Court under section 173 of the ITA, at paragraphs 28 and 29):

[TRANSLATION]

- 28. The Taxpayers ask this Honourable Court to hold that a textual, contextual and purposive interpretation of the rules of association set out in section 256 of the ITA provides a basis for concluding that the Clause means that the Intended Beneficiaries do not jointly own more than



24.99% of the shares held by the Trusts during the Years in Question, and, therefore, to answer questions (ii) and (iii) in the negative.

29. Conversely, the Attorney General of Canada asks this Honourable Court to hold that nothing in the Trust Deeds prevents the Intended Beneficiaries from being considered to be the owners of all of the shares held by the Trusts, during the Years in Question, for the purposes of the rules of association set out in section 256 of the ITA, and, therefore, to answer questions (ii) and (iii) in the affirmative.

### **Taxpayers' arguments**

[11] The taxpayers are asking the Court to rule on the presumption of ownership of the shares in subparagraph 256(1.2)(f)(ii) of the ITA, when shares are held in a trust patrimony subject to the laws of the province of Quebec.

[12] They argue that the proportion of shares deemed to be owned by each of the intended beneficiaries is capped at 24.99% because these beneficiaries, during the relevant period, could not be allocated more than 24.99% of the accumulated income and capital with respect to the shares held in the trust patrimony.

[13] According to the taxpayers, the conclusion that can be drawn from the textual, contextual and purposive analysis of subparagraph 256(1.2)(f)(ii) of the ITA is that the presumption of ownership concerns only the portion of shares that can actually benefit the intended beneficiaries at any time, on the basis of the trustees' discretionary power, which is not limited by the trust deeds (the deeds). Therefore, if a given beneficiary can benefit only from a portion of the shares, at the trustees' discretion, the beneficiary is deemed to be the owner of this portion only.

[14] To justify this, the taxpayers submit that, upon reading the impugned provision, certain ambiguities arise regarding the meaning to be ascribed to the expression "owned . . . at any time by a trust" on the one hand, and the expression "discretionary power" on the other hand (I highlighted these two expressions, which appear in subparagraph 256(1.2)(f)(ii), as reproduced in Appendix I).

[15] First, the taxpayers argue that an initial ambiguity is found in the legislation with respect to the notion of ownership of property subject to a patrimony by appropriation under Quebec civil law.

[16] According to them, since the ITA does not define an ownership right, a trust or a beneficiary, reference must be made to private law, in this case, Quebec civil law, under sections 8.1 and 8.2 of the *Interpretation Act*, R.S.C. 1985, c. I-21. Indeed, if Parliament does not provide a definition for a term in a federal statute, reference must be made to the applicable suppletive private law, as long as Parliament does not expressly dissociate itself from it.<sup>1</sup>

[17] The taxpayers argue that under Quebec civil law, neither trusts, nor trustees, nor beneficiaries, nor settlors have any ownership rights in the property held in trust since none of them have any real right to that property. This property is part of a patrimony by appropriation, which is administered by the trustee in accordance with the terms of the trust deed. The trustee exercises all of the rights related to this patrimony, but is not its holder.<sup>2</sup>

[18] That is why the taxpayers state that the clause contained in section 4.3.1 of the deeds is a restriction that is inseparable from the appropriation of the trust. The trustees can exercise their discretion only up to 24.99% of the shares held by the trust patrimony with regard to the intended beneficiaries. In other words, these

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<sup>1</sup> See doctrine cited by the taxpayers at footnote 12, page 12 of their written submissions: Footnote 12: [TRANSLATION] “See Martin Lamoureux, ‘The Harmonization of Tax Legislation, Dissociation: A Mechanism of Exception - Part III’, (2002), 23:4, *Revue de planification fiscale et successorale*, Montreal, Association de planification fiscale et financière, pp. 735–748 [obtained from Taxnet Pro]; Benoit Mandeville, ‘The Harmonization of Tax Legislation: Asymmetry Versus Uniformity – Part I’, (2002), 23:2, *Revue de planification fiscale et successorale*, Montreal, APFF, pp. 393–405 [obtained from Taxnet Pro]; André Ouellette and Mathieu Legris, ‘The Place of Private Law in Federal Legislation: The *St-Hilaire* Case and Bijural Terminology Records’, (2002), 23:1, *Revue de planification fiscale et successorale*, Montreal, APFF, p. 197–216 [obtained from Taxnet Pro]; Sandra Hassan, ‘Bijuridisme et harmonisation : le pourquoi et le comment’, (2000–2001), 22:3, *Revue de planification fiscale et successorale*, Montreal, Association de planification fiscale et financière, pp. 703–711 [obtained from Taxnet Pro].”

<sup>2</sup> See Sandra Hassan, footnote 14, page 12 of the taxpayers’ written submissions; see also Julie Loranger, footnote 30, page 18 of the taxpayers’ written submissions: Footnote 14: [TRANSLATION] “Sandra Hassan with the collaboration of Chikwa Zahinda, ‘The Harmonization of Federal Tax Legislation: Comments on *Fiducie Sylvie Vallée v. Canada* and *Hewlett Packard Ltd. v. Canada*’ (2004), 25:2, *Revue de planification fiscale et successorale*, Montreal, Association de planification fiscale et financière, pp. 533–550 [obtained from Taxnet Pro].” Footnote 30: [TRANSLATION] “Julie Loranger, ‘Le fiduciaire : entre le tyran et le serviteur’, Barreau du Québec’s Service de la formation continue, *Développements récents en successions et fiducies*, Vol. 324, (Cowansville, Qc: Yvon Blais, 2010).”

intended beneficiaries have a potential indirect right to 24.99% of the shares, while the other beneficiaries have a potential indirect right to 100% of the shares.

[19] Second, the taxpayers argue that if subparagraph 256(1.2)(f)(ii) covered all of the shares held in trust, there would be a contradiction with the meaning of “discretionary power” because the trustees would have a power limited by the incorporation document over those shares, vis-à-vis a given beneficiary. In the context of a textual analysis of this legislative provision, they conclude that the characteristics of a beneficiary’s interests in the appropriation in question must be considered and only the proportion of the share of the accumulated income or capital that depends on the exercise of a discretionary power, which is not limited by the trust deed, should be affected.

[20] From a contextual point of view, the taxpayers stress that under section 256 of the ITA, association is determined “at any time”. However, according to them, at any time during the relevant period, the intended beneficiaries had only one certain right, which was to receive 24.99% of the accumulated income and capital, in accordance with the trustees’ discretion.

[21] The taxpayers refer us to paragraphs 256(1.2)(d) and 256(1.2)(e) and subparagraph 256(1.2)(f)(iii) of the ITA, concerning the look-through rules that apply to corporations, partnerships and non-discretionary trusts. They submit that, on a reading of these provisions, Parliament considers the scope of the rights of shareholders, partners and beneficiaries at any time. They thus conclude that it is not the status of the beneficiary that matters in this context, but rather, the characteristics of the beneficiary’s interests. The corollary is that, in this case, the trustees have a discretionary power of up to 24.99%.

[22] They add that this interpretation is consistent with subparagraph 256(1.2)(f)(iii). According to them, if the intended beneficiary had received a fixed and non-discretionary share of 24.99% in the appropriation of the trust, the beneficiary would have been deemed to hold 24.99% of the shares. They conclude that a similar result should be obtained when the trustees’ possibilities are capped at that ceiling.

[23] The taxpayers end with a purposive analysis of the legislative provision. It is the association of small family businesses for the purposes of the small business deduction that is at issue here. The rules for associated corporations concern corporations forming a single economic entity and provide a cross-ownership threshold of 25% in order to allow for a certain degree of reciprocal shareholding

between the groups of corporations. They argue that the interpretation proposed by the CRA is hard to reconcile with that objective and that the taxpayers' interpretation is more justifiable since it means that the intended beneficiaries are deemed to be the owners of the shares held in trust, but only to the extent of the possibilities actually available to the trustees to benefit them, at any time.

[24] The taxpayers rely upon a document issued by the Department of Finance<sup>3</sup> in which it is stated that paragraph 256(1.2)(f) constitutes a look-through rule. According to them, this rule means that, for the purposes of the rules of association, only the indirect rights that the beneficiaries retained in the shares of the corporation should be of interest, disregarding the trust.

### **Respondent's arguments**

[25] The CRA alleges that the limiting clause imposed on the intended beneficiaries by the deeds does not affect the presumption of ownership in subparagraph 256(1.2)(f)(ii) and that each intended beneficiary is nevertheless deemed to be the owner of all of the shares held by Fiducie CH and Fiducie de Gestion CH.

[26] The respondent is of the opinion that the wording of subparagraph 256(1.2)(f)(ii) is clear: the beneficiary of a discretionary trust is deemed to hold all of the shares of the capital stock of a corporation owned by the trust. This provision does not provide for the prorating of ownership rights on the basis of the ceiling to which the discretionary power could be subject.

[27] According to the respondent, the ceiling imposed on the designated beneficiaries in clause 4.3 of the deeds does not result in the elimination of the discretionary power provided for in clause 4.2 of the deeds. Rather, clause 4.3 is aimed at limiting the application of the discretionary power.

[28] The respondent specifies that since the text of this legislative provision is clear, there is no need to go beyond the words used by Parliament (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, para. 10, [2005] 2 S.C.R. 601). It is the statute that resolves the issue of establishing the percentage of shares deemed to be owned by the intended beneficiaries, not the terms of the deeds.

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<sup>3</sup> Explanatory Notes to Legislation Relating to Income Tax issued by the Minister of Finance in June 1988, at pages 496–499.

[29] According to the respondent, this textual interpretation is also consistent with the intention of Parliament because, if that was not its intention, it would have provided for the prorating of the ownership right on the basis of the ceiling to which the discretionary power could be subject.

[30] With respect to the contextual analysis, the respondent submits that she confirms her position. Subsection 256(1) contains the basic rules that specify in what circumstances corporations are associated. Associated corporations are considered to be a single economic entity and must share the small business deduction.

[31] Consequently, the ownership of shares is determinative for establishing whether corporations are associated. In this respect, subsection 256(1.2) contains rules for the indirect ownership of shares at paragraphs 256(1.2)(d), (e) and (f).

[32] Subparagraphs 256(1.2)(f)(ii) and (iii) set out the rules of deemed ownership for discretionary trusts and non-discretionary trusts. Subparagraph (ii) applies when the beneficiary's share of the income or capital from the trust depends on whether or not a person exercises a discretionary power. Subparagraph (iii) comes into play when subparagraph (ii) does not apply, i.e., when a beneficiary's share of the income or capital from the trust is not subject to the exercise of a discretionary power. In the latter case, the beneficiary is deemed to be the owner of the shares held by the trust prorated to the fair market value of the beneficiary's beneficial interest in the trust.<sup>4</sup>

[33] In this case, since the trustees have full discretion to determine the portion of the income or capital to be allocated to each intended beneficiary, it follows that subparagraph 256(1.2)(f)(ii) applies and that each intended beneficiary is deemed to hold all of the shares belonging to the trust. The respondent submits that the existence of a limiting clause in the trust's incorporation document has no impact.

[34] The respondent adds that subparagraph 256(1.2)(f)(ii) is a deeming provision. It is a statutory fiction and the validity of such a provision was enunciated in a judgment by the Supreme Court of Canada in a criminal matter, *R. v. Verrette*, [1978] 2 S.C.R. 838, at page 845. Doctrine in the area of taxation

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<sup>4</sup> Guy Laperrière and Yanick Houle, "Sociétés associées : Contrôle direct ou indirect" (2002) 2 RPF 239, at page 287.

recognizes the principle that more than one person can be deemed to be the owner of the same shares.<sup>5</sup>

[35] In response to the taxpayers' argument that under civil law the trust patrimony constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right, the respondent submits that, for the purposes of the ITA, Parliament chose to dissociate itself from provincial private law with regard to the treatment and the characterization of a trust, including in the context of the rules of association found in section 256.

[36] In subsection 104(2) of the ITA, Parliament stipulates that, for the purposes of the ITA, a trust shall be deemed to be in respect of the trust property an individual.

[37] Therefore, the ITA treats the trust as a distinct tax entity having ownership of the property transferred to it, including ownership of the shares of the capital stock of a corporation.

[38] The respondent argues that the rule of complementarity codified in sections 8.1 and 8.2 of the *Interpretation Act* does not apply to the treatment and characterization of trusts since Parliament dissociated itself from it by enacting subsection 104(2) of the ITA. This dissociation may be implicit.<sup>6</sup> It does not have to be expressly stated; it can simply be derived from the text and context.

[39] The respondent also concludes that a trust is covered in paragraph 256(1) of the ITA when reference is made to a person. Indeed, the term "individual" is defined in paragraph 248(1) as "a person other than a corporation". Therefore, a trust is not only an individual but also a "person", for all purposes of the ITA.<sup>7</sup>

[40] For the purposes of subsection 256(1) of the ITA, the trust, as a person, is considered to be the owner of the shares of the capital stock of a corporation held by the trust.

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<sup>5</sup> Marc D. Léger and Pearl E. Schusheim, "Family Trusts and the Association Rules" *Tax for the Owner-Manager*, January 2011, TaxFind.

<sup>6</sup> Martin Lamoureux, "The Harmonization of Federal Tax Legislation – The Harmonization of Tax Legislation, Dissociation: A Mechanism of Exception - Part III" (2002) 3 RPFS 735, section 3.2.4 - Implicit dissociation by Parliament.

<sup>7</sup> *Fundy Settlement v. Canada*, 2010 FCA 309, para. 5, [2012] 2 F.C.R. 374, aff'd *Fundy Settlement v. Canada*, 2012 SCC 14, [2012] 1 S.C.R. 520.

## **Taxpayers' reply**

[41] In reply, the taxpayers argue that Parliament's dissociation from provincial private law is a mechanism of exception. According to author Martin Lamoureux,<sup>8</sup> it is the analysis of the legislative text on the basis of its structure, tax context and underlying tax policies that must guide the courts in determining whether the presumption of the complementarity of civil law is to be rebutted such that an implicit dissociation must prevail.<sup>9</sup>

[42] The taxpayers affirm that the presumption found in paragraph 104(2) of the ITA that a trust is considered to be a distinct person is limited to the calculation of the trust's capital gains, income and taxes. Since an individual cannot have a beneficiary or trustee, the taxpayers conclude that there are limits to the statutory fiction imposed by subsection 104(2) of the ITA and, according to them, it is for this reason that the application of this legislative provision must be restricted to the calculation of a trust's income and taxes, and no more.

[43] According to the taxpayers, the rules of association at issue in this reference affect only corporations and apply when determining whether these corporations must share the small business deduction. The calculation of a trust's income and taxes is not at issue.<sup>10</sup>

## **Analysis**

[44] According to its draft assessment, the CRA is of the opinion that the taxpayers are associated within the meaning of the ITA, which reduces the small business deduction they can claim (under subsections 125(1) and 125(3) of the ITA).

[45] Indeed, the CRA believes that clause 4.3 of the deeds does not prevent each beneficiary from being deemed to hold all of the shares in the corporations held by the trust, by operation of subparagraph 256(1.2)(f)(ii) of the ITA. According to Technical Interpretation 2003-0052261E5 dated January 6, 2004 (Exhibit R-5), even if a clause in a trust deed limits the percentage of income and capital that a beneficiary may receive, the beneficiary is deemed to hold all of the shares of the

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<sup>8</sup> Martin Lamoureux, *supra* footnote 1.

<sup>9</sup> *Ibid.*, footnote 1, in section 3.2.4.

<sup>10</sup> Taxpayers' reply to the supplementary arguments of the Attorney General of Canada, paras. 17, 22, 23.

capital stock of a corporation owned by a trust. The taxpayers do not accept this interpretation.

[46] Before deciding this issue, it is appropriate to look at the context surrounding the application of subsection 256(1.2) of the ITA.

[47] The parties explained it well in their submissions. The rules of association are determinative in the calculation of the small business deduction. This deduction provides a reduced tax rate for the first bracket of income (initially \$200,000, but \$500,000 during the years in dispute) derived from a business actively operated by an eligible corporation. In order to avoid the duplication of tax benefits provided to more than one corporation within a group of controlled businesses, the rules for associated corporations require such a group of corporations to share the annual ceiling (of \$200,000 in 1988 and of \$500,000 since 2009) since they can be considered a single economic entity.

[48] Therefore, corporations controlled by the same person or the same group of persons are considered to form a single economic entity and are therefore associated within the meaning of the ITA. However, in the case of related corporations, Parliament provides a cross-ownership threshold of 25% for association (for example, two related corporations will be considered to be associated only if the person who so controlled one of the corporations was related to the person who so controlled the other corporation and also owns, in respect of each corporation, not less than 25% of the issued shares of any class of the capital stock thereof).<sup>11</sup>

[49] In this context, it seems clear to me that clause 4.3 of the deeds was provided for the purpose of avoiding the annual ceiling having to be shared by the corporations in question, and in so doing, avoiding the rules of association set out in section 256 and more specifically in paragraph 256(1.2)(f). Indeed, the intended beneficiaries to whom the limit of 24.99% apply are those who, at any time during a taxation year (referred to as the taxation year in question), satisfy the following conditions: (a) they directly or indirectly control a private corporation in which the trust holds no shares; (b) and (c) they own, either alone or together with related persons, not less than 25% of the issued shares of any class, other than a specified class, of the capital stock of a private corporation controlled by a person other than

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<sup>11</sup> Canada, Department of Finance, Budget Papers: Supplementary Information and Notices of Ways and Means Motions on the Budget (Ottawa, Department of Finance, February 10, 1988), at pages 5, 6 and 7).



trustee Claude Houle; and (d) the beneficial interest of the intended beneficiary would result in a corporation that is being directly or indirectly controlled by trustee Claude Houle and in which the trust holds shares becoming associated with another private corporation, within the meaning of section 256 of the ITA.

[50] In addition, clause 4.3.2 of the deeds stipulates that the application of the limit of 24.99% in regards to any intended beneficiary is deemed to begin immediately before the time when one or more of the conditions mentioned in paragraphs 4.3.1 a) to c) and the condition mentioned in paragraph d) are fulfilled and end the day after the last day of the last taxation year in question.

[51] The legislative provision that concerns us here is paragraph 256(1.2)(f) of the ITA. This paragraph is part of a group of other paragraphs that establish a look-through or attribution rule for when, for example, a corporation holds shares in another corporation (paragraph 256(1.2)(d)) or when the shares of a corporation belong to a partnership (paragraph 256(1.2)(e)). In both of these cases, a shareholder of a corporation (C1) or a member of a partnership (P1) who owns shares in a corporation (C2) is considered to be an owner of shares in C2 in proportion to the value of his or her assets in C1 or his or her income interest in P1.

[52] Paragraph 256(1.2)(f) establishes a similar rule when the shares of C2 are held by a non-discretionary trust (subparagraph 256(1.2)(f)(iii)). In the case of a discretionary trust (subparagraph 256(1.2)(f)(ii)), all of the beneficiaries subject to the discretionary power are deemed to be owners of shares of C2.

[53] The Explanatory Notes to Legislation Relating to Income Tax issued by the Minister of Finance in June 1988 state the following on pages 498 and 499:

New paragraph (1.2)(f) provides a similar “look-through” rule where shares are held by a trust. . . . In the case of a discretionary trust, all discretionary beneficiaries are deemed to own the shares. In any other case, each beneficiary is deemed to own a proportion of the shares based on the fair market value of his interest in the trust. . . . The result of the application of these provisions may be that more than one person can be deemed to own the same shares at the same time. . . .

[Emphasis added.]

[54] Further to a reading of subparagraphs 256(1.2)(f)(ii) and (iii) and the Explanatory Notes, it can be concluded that the deemed ownership of a beneficiary’s shares is a function of whether the beneficiary’s right to income or

capital depends on the exercise by any person of, or the failure by any person to exercise, any discretionary power. There is no indication that subparagraph 256(1.2)(f)(ii) cannot be applied if a beneficiary's discretionary share is limited by a trust deed, as claimed by the taxpayers.

[55] The terms of the ITA state that when the allocation to a beneficiary depends on the exercise of a discretionary power, subparagraph 256(1.2)(f)(ii) applies, and that when it does not, subparagraph 256(1.2)(f)(iii) applies.

[56] In this case, the beneficiaries' share depended on the trustees' discretionary power at any time, regardless of whether it was limited by clause 4.3 of the deeds. Indeed, if clause 4.3 was to be applied, the trustees still had full discretion to allocate a share of any capital and any income from the trust to the intended beneficiaries, a share that could vary between 0% and 24.99%. This clause does not result in the elimination of the discretionary power provided for in clause 4.2 of the deeds. This power, despite the fact that it could be subject to a ceiling of 24.99%, remains fundamentally discretionary.

[57] The taxpayers argue that if the intended beneficiaries had had a fixed share of 24.99%, they would have, under subparagraph 256(1.2)(f)(iii), been deemed to own a maximum of 24.99% of the shares held by the trust. According to them, a similar result should be obtained when the trustee's discretion is limited to a distribution that cannot exceed 24.99% of the income and capital of the trust.

[58] I respond to this by saying that the deeds do not in fact provide for the allocation of a fixed share to these beneficiaries. If that was the case, the beneficiaries' share would not have depended on the exercise of the trustee's discretion. Instead, they provide for a discretionary distribution of a share that can vary between 0% and 24.99% if the conditions in clause 4.3 are satisfied, or between 0% and 100% if those conditions are not satisfied, which can change from year to year.

[59] The interpretation that the taxpayers are trying to ascribe to subparagraph 256(1.2)(f)(ii) amounts to accepting an interpretation that requires the insertion of extra wording when there is another interpretation which does not require any additional wording. Indeed, the taxpayers are asking to have the share of the intended beneficiaries treated as if it was a fixed share that is not subject to a discretionary power. However, that is not what the deeds provide. No such stipulation is made. That interpretation is therefore not acceptable (*Markevich v. Canada*, [2003] 1 S.C.R. 94, 2003 SCC 9, at para. 15).

[60] Since I have concluded that the trust is discretionary in nature and offers the trustees a discretionary power when it comes to distributing shares to the intended beneficiaries, there is no need to deal with paragraph 256(1.2)(f)(iii) and render a decision whereby only a certain proportion of the shares would be deemed to be owned by the intended beneficiaries.

[61] In addition, I do not accept the taxpayers' argument that there is a latent ambiguity in the introductory text of subparagraph 256(1.2)(f). The passage in question refers to "shares of the capital stock of a corporation . . . owned . . . at any time by a trust". The taxpayers refer to Quebec civil law, where the notion of ownership does not exist in trust-related matters, and argue that this notion must instead be substituted by the notion of appropriation.

[62] More specifically, the taxpayers claim that the wording of paragraph 256(1.2)(f) of the ITA, which reads "where shares of the capital stock of a corporation are owned, or deemed . . . to be owned, at any time by a trust", should be read to mean the following for Quebec taxpayers: [TRANSLATION] "the shares of the capital stock of a corporation that may be allocated to a given beneficiary".

[63] Based on my understanding of this argument, this substitution would mean that the presumption of ownership of shares in subparagraph 256(1.2)(f)(ii) would concern only the percentage of the shares that can actually benefit the intended beneficiaries at any time on the basis of the trustees' discretionary power, which is not limited by the deeds.

[64] First of all, adopting such an interpretation would have the effect of giving the provision in question a completely different meaning than the meaning intended by Parliament.

[65] I also note that subsection 104(2) of the ITA establishes that for the purposes of the ITA, "a trust shall . . . be deemed to be in respect of the trust property an individual". In this respect, it is not disputed that a trust within the meaning of this paragraph includes a trust under Quebec law. Furthermore, within the meaning of the ITA, an individual is defined as "a person other than a corporation".<sup>12</sup>

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<sup>12</sup> Definition of "individual" in section 248 of the ITA.

[66] The taxpayers are of the opinion that subsection 104(2) of the ITA applies only to the calculation of the income or tax payable by a trust, but that it does not explain what a trust is.

[67] The taxpayers refer us to the judgment of the Supreme Court of Canada in *Settled Estates Limited v. Minister of National Revenue*, 60 DTC 1128, for the purpose of excluding the application of subsection 104(2) of the ITA from the analysis of subparagraph 256(1.2)(f)(ii). In that decision, the Court analyzed the definition of “personal corporation” in the former section 68 of the ITA, which defined such a corporation as being controlled by an individual or a member of his or her family resident in Canada. The Court immediately rejected the idea that the term “individual” (“*particulier*”) could refer to a trust. The context of that provision meant that any reference to the former subsection 63(2) (now 104(2)) was irrelevant.

[68] This is clearly not the case with the rules of association. On the contrary, Parliament specifically set out the applicable treatment for discretionary and non-discretionary trusts, just as it did for corporations and partnerships.

[69] Subsection 256(1) provides a broad outline for associating corporations under the ITA. In paragraphs 256(1)(c), (d) and (e), reference is made to a person who controls a corporation and is an owner of its shares. Subsection 256(1.2) expressly clarifies the notions of control and ownership of shares.

[70] A trust is considered to be a person within the meaning of the ITA, and therefore, on a contextual interpretation, it is reasonable to say that Parliament specifically provided that a trust could own shares of the capital stock of a corporation within the meaning of paragraph 256(1.2)(f). Indeed, this paragraph, which interprets subsection 256(1), acts as a bridge between certain stakeholders in a trust, in this case the beneficiaries, and the property owned by the trust.

[71] The taxpayers refer more specifically to article 1261 of the *Civil Code of Québec*<sup>13</sup> (CCQ) in order to convince me that a Quebec trust cannot own the property in its patrimony.

[72] Article 1261 of the CCQ reads as follows:

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<sup>13</sup> *Civil Code of Québec*, S.Q., 1991, c. 64.

1261. The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.

[73] However, subsection 104(1) of the ITA stipulates the following:

104(1) In this Act, a reference to a trust or estate (in this subdivision referred to as a “trust”) shall, unless the context otherwise requires, be read to include a reference to the trustee, executor, administrator, liquidator of a succession, heir or other legal representative having ownership or control of the trust property . . .

[Emphasis added.]

[74] Therefore, according to this last provision, contrary to what seems to be indicated in article 1261 CCQ, a trust can also mean a trustee having ownership or control of the trust property. In that sense, I believe that we can say that Parliament disassociated itself from Quebec private law with respect to the notion of ownership of the trust’s property.

[75] Furthermore, if I were to agree with the taxpayers, all of the provisions of the ITA (sections 107 and following) that allow for transfers without tax consequences during the distribution of trust property to beneficiaries in the province of Quebec would not apply. In my opinion, adopting such a proposition would go against the intention of Parliament. I do not think that it was the intention of Parliament to exclude Quebec trusts from this favourable treatment.

[76] As noted by the Supreme Court of Canada in *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55, [2016] 2 S.C.R. 670, in paras. 52 and 91, convergence of Quebec civil law and the common law of the other provinces is desirable from a tax policy perspective. The Court states the following in paragraph 52: “. . . Taxpayers in both Quebec and the common law provinces are subject to the same federal taxation system. They could expect to encounter similar results . . .”.

[77] I therefore conclude that for the purposes of the ITA, a trust is deemed to be an individual and is a person within the meaning of section 265 of the ITA. Therefore, the trusts in question may be considered to be the owners of the shares they hold in corporations.

[78] I would also add that at the very least, according to the purposive interpretation of paragraph 256(1.2)(f) of the ITA, trusts hold shares of the capital

stock of various corporations (which is accepted by the taxpayers in the statement of material facts giving rise to this reference). Indeed, the Explanatory Notes to Legislation Relating to Income Tax issued by the Minister of Finance, which I referred to earlier, expressly state that under this paragraph “where shares are held by a trust . . . [i]n the case of a discretionary trust, all discretionary beneficiaries are deemed to own the shares”<sup>14</sup>.

[79] Therefore, it can be inferred from these Explanatory Notes that Parliament’s intention concerned, at a minimum, the total number of shares held by the trust in its patrimony by appropriation. It certainly did not concern the percentage of shares that could ultimately be allocated to the intended beneficiaries.

[80] The taxpayers also argue that, from a contextual perspective, the presumption of ownership of shares cannot be applied beyond what can be allocated to the intended beneficiaries in accordance with the trustee’s discretionary power. On this subject, my response is that Parliament simply did not provide for the prorating of the ownership right in this sense, as it decided to do for corporations, partnerships and non-discretionary trusts.

[81] Finally, the taxpayers submit that it is not logical for the intended beneficiaries to be deemed to own 100% of the shares held by the trust if they are only entitled to a maximum of 24.99% of the capital and income of the trust. I agree with the arguments of the respondent that subparagraph 256(1.2)(f)(ii) is a provision that can be characterized as deeming.

[82] The Supreme Court of Canada defined a deeming provision and confirmed the validity of such a provision in *Verrette, supra*, at page 845, in the following terms:

. . . A deeming provision is a statutory fiction; as a rule it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is. . . .

[83] In *Durocher v. The Queen*, 2016 FCA 299, the Federal Court of Appeal reiterated the words of the Supreme Court of Canada in the context of an analysis of paragraph 251(5)(b) of the ITA.

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<sup>14</sup> Explanatory Notes to Legislation Relating to Income Tax issued by the Minister of Finance in June 1988, at pages 498–499.

[84] It is clear that the scope of a deeming provision is limited to what is clearly expressed (*La Survivance v. The Queen*, 2006 FCA 129, para. 55).

[85] Here, the statutory fiction found in subparagraph 256(1.2)(f)(ii) results in more than one owner being deemed to own all of the shares. This fiction is only applicable for the purposes of the rules of association set out in subsection 256(1) and is legally valid under the circumstances.

### **Decision**

[86] For these reasons, I reply as follows to the questions in this reference.

#### **Question 1**

[87] I confirm the position of the Minister of National Revenue that the intended beneficiaries are deemed to hold 100% of the shares held by the trusts under subparagraph 256(1.2)(f)(ii) of the ITA.

#### **Question 2**

[88] Each intended beneficiary of Fiducie CH is deemed to hold all of the shares of the capital stock owned by Fiducie CH, in accordance with subparagraph 256(1.2)(f)(ii) of the ITA.

#### **Question 3**

Each intended beneficiary of Fiducie de Gestion CH is deemed to hold all of the shares of the capital stock owned by Fiducie de Gestion CH, in accordance with subparagraph 256(1.2)(f)(ii) of the ITA.

WITHOUT COSTS.

Signed in Ottawa, Canada, this 3rd day of May 2018.

“Lucie Lamarre”

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Lamarre A.C.J.

on this 7th day of June 2018.

Janine Anderson, Revisor



**APPENDIX I**  
**LEGISLATIVE PROVISIONS**  
**INCOME TAX ACT**

**Reference to trust or estate**

104 (1) In this Act, a reference to a trust or estate (in this subdivision referred to as a “trust”) shall, unless the context otherwise requires, be read to include a reference to the trustee, executor, administrator, liquidator of a succession, heir or other legal representative having ownership or control of the trust property, but, except for the purposes of this subsection, subsection (1.1), subparagraph (b)(v) of the definition disposition in subsection 248(1) and paragraph (k) of that definition, a trust is deemed not to include an arrangement under which the trust can reasonably be considered to act as agent for all the beneficiaries under the trust with respect to all dealings with all of the trust’s property unless the trust is described in any of paragraphs (a) to (e.1) of the definition trust in subsection 108(1).

...

**Taxed as individual**

(2) A trust shall, for the purposes of this Act, and without affecting the liability of the trustee or legal representative for that person’s own income tax, be deemed to be in respect of the trust property an individual, but where there is more than one trust and

(a) substantially all of the property of the various trusts has been received from one person, and

(b) the various trusts are conditioned so that the income thereof accrues or will ultimately accrue to the same beneficiary, or group or class of beneficiaries,

...

**Fiducie ou succession**

104(1) Dans la présente loi, la mention d’une fiducie ou d’une succession (appelées « fiducie » à la présente sous-section) vaut également mention, sauf indication contraire du contexte, du fiduciaire, de l’exécuteur testamentaire, de l’administrateur successoral, du liquidateur de succession, de l’héritier ou d’un autre représentant légal ayant la propriété ou le contrôle des biens de la fiducie. Toutefois, sauf pour l’application du présent paragraphe, du paragraphe (1.1), du sous-alinéa b)(v) de la définition de disposition au paragraphe 248(1) et de l’alinéa k) de cette définition, l’arrangement dans le cadre duquel il est raisonnable de considérer qu’une fiducie agit en qualité de mandataire de l’ensemble de ses bénéficiaires pour ce qui est des opérations portant sur ses biens est réputé ne pas être une fiducie, sauf si la fiducie est visée à l’un des alinéas a) à e.1) de la définition de fiducie au paragraphe 108(1).

[...]

**Impôt à titre de particulier**

(2) Pour l’application de la présente loi, et sans que l’assujettissement du fiduciaire ou des représentants légaux à leur propre impôt sur le revenu en soit atteint, une fiducie est réputée être un particulier relativement aux biens de la fiducie; mais lorsqu’il existe plus d’une fiducie et que :

a) d’une part, dans l’ensemble, tous les biens des diverses fiducies proviennent d’une seule personne;

b) d’autre part, les diverses fiducies sont telles que le revenu en découlant revient ou reviendra finalement au même bénéficiaire ou groupe ou catégorie de bénéficiaires,

[...]

## Definitions

108 (1) In this subdivision,

**beneficiary** under a trust includes a person beneficially interested therein;

**income interest** of a taxpayer in a trust means a right (whether immediate or future and whether absolute or contingent) of the taxpayer as a beneficiary under a personal trust to, or to receive, all or any part of the income of the trust and, after 1999, includes a right (other than a right acquired before 2000 and disposed of before March 2000) to enforce payment of an amount by the trust that arises as a consequence of any such right;

## Small business deduction

125 (1) There may be deducted from the tax otherwise payable under this Part for a taxation year by a corporation that was, throughout the taxation year, a Canadian-controlled private corporation, an amount equal to the corporation's small business deduction rate for the taxation year multiplied by the least of

(a) the amount, if any, by which the total of

(i) the total of all amounts each of which is the amount of income of the corporation for the year from an active business carried on in Canada, other than an amount that is

(A) described in paragraph (a) of the description of A in the definition specified partnership income in subsection (7) for the year,

(B) described in subparagraph (a)(i) of the definition specified corporate income in subsection (7) for the year, or

(C) paid or payable to the corporation by another

## Définitions

108 (1) Les définitions qui suivent s'appliquent à la présente sous-section.

**bénéficiaire** Sont comprises dans les bénéficiaires d'une fiducie les personnes ayant un droit de bénéficiaire sur celle-ci.

**participation au revenu** S'agissant de la participation d'un contribuable au revenu d'une fiducie, le droit, immédiat ou futur, conditionnel ou non, du contribuable à titre de bénéficiaire d'une fiducie personnelle à tout ou partie du revenu de la fiducie, ou de recevoir tout ou partie de ce revenu, y compris, après 1999, le droit (sauf celui acquis avant 2000 et dont il est disposé avant mars 2000), découlant d'un tel droit, d'exiger de la fiducie le versement d'une somme.

## Déduction accordée aux petites entreprises

125 (1) La société qui est tout au long d'une année d'imposition une société privée sous contrôle canadien peut déduire de son impôt payable par ailleurs pour l'année en vertu de la présente partie une somme égale au produit de la multiplication du taux de la déduction pour petite entreprise qui lui est applicable pour l'année par la moins élevée des sommes suivantes :

a) l'excédent éventuel du total des montants suivants :

(i) le total des sommes dont chacune est le montant de revenu de la société pour l'année provenant d'une entreprise exploitée activement au Canada, sauf l'une des sommes suivantes :

(A) celle qui est visée à l'alinéa a) de l'élément A de la première formule figurant à la définition de revenu de société de personnes déterminé au paragraphe (7) pour l'année,

(B) celle qui est visée au sous-alinéa a)(i) de la définition de revenu de société déterminé au paragraphe (7) pour l'année,

(C) celle qui est payée ou payable à la société par

corporation with which it is associated, that is deemed by subsection 129(6) to be income for the year from an active business carried on by the corporation in circumstances where the associated corporation is not a Canadian-controlled private corporation or is a Canadian-controlled private corporation that has made an election under subsection 256(2) in respect of its taxation year in which the amount was paid or payable,

- (ii) the specified partnership income of the corporation for the year, and
- (ii.1) the specified corporate income of the corporation for the year

exceeds the total of

- (iii) the total of all amounts each of which is a loss of the corporation for the year from an active business carried on in Canada (other than a loss of the corporation for the year from a business carried on by it as a member of a partnership), and

- (iv) the specified partnership loss of the corporation for the year,

#### **Business limit**

(2) For the purpose of this section, a corporation's business limit for a taxation year is \$500,000 unless the corporation is associated in the taxation year with one or more other Canadian-controlled private corporations, in which case, except as otherwise provided in this section, its business limit is nil.

#### **Associated corporations**

(3) Notwithstanding subsection (2), if all the Canadian-controlled private corporations that are associated with each other in a taxation year file with the Minister in prescribed form an agreement that assigns for the purpose of this section a

une autre société à laquelle elle est associée et qui est réputée, par le paragraphe 129(6), constituer un revenu pour l'année provenant d'une entreprise exploitée activement par la société dans des circonstances où l'autre société n'est pas une société privée sous contrôle canadien ou est une telle société qui a fait le choix visé au paragraphe 256(2) pour son année d'imposition au cours de laquelle cette somme a été payée ou était payable,

- (ii) le revenu de société de personnes déterminé de la société pour l'année,

- (ii.1) le revenu de société déterminé de la société pour l'année,

sur le total des montants suivants :

- (iii) l'ensemble de toutes les sommes dont chacune est une perte de la société pour l'année provenant de l'exploitation d'une entreprise exploitée activement au Canada (autre qu'une perte de la société pour l'année provenant d'une entreprise qu'elle exploite comme associé d'une société de personnes),

- (iv) la perte de société de personnes déterminée de la société pour l'année;

#### **Définition de plafond des affaires**

(2) Pour l'application du présent article, le plafond des affaires d'une société pour une année d'imposition est de 500 000 \$, sauf si la société est associée, pendant l'année, à une ou plusieurs autres sociétés privées sous contrôle canadien, auquel cas son plafond des affaires pour l'année est nul, sauf disposition contraire du présent article.

#### **Sociétés associées**

(3) Malgré le paragraphe (2), si les sociétés privées sous contrôle canadien qui sont associées les unes aux autres pendant une année d'imposition présentent au ministre, selon le formulaire prescrit, une convention par laquelle est attribué,

percentage to one or more of them for the year, the business limit for the year of each of the corporations is

(a) if the total of the percentages assigned in the agreement does not exceed 100%, \$500,000 multiplied by the percentage assigned to that corporation in the agreement; and

(b) in any other case, nil.

#### **References to Tax Court of Canada**

173 (1) Where the Minister and a taxpayer agree in writing that a question of law, fact or mixed law and fact arising under this Act, in respect of any assessment, proposed assessment, determination or proposed determination, should be determined by the Tax Court of Canada, that question shall be determined by that Court.

(2) The time between the day on which proceedings are instituted in the Tax Court of Canada to have a question determined pursuant to subsection 173(1) and the day on which the question is finally determined shall not be counted in the computation of

(a) the periods determined under subsection 152(4),

(b) the time for service of a notice of objection to an assessment under section 165, or

(c) the time within which an appeal may be instituted under section 169,

for the purpose of making an assessment of the tax payable by the taxpayer who agreed in writing to the determination of the question, for the purpose of serving a notice of objection thereto or for the purpose of instituting an appeal therefrom, as the case may be.

#### **Interpretation - Definitions**

pour l'application du présent article, un pourcentage à une ou plusieurs d'entre elles pour l'année, le plafond des affaires, pour l'année, de chacune des sociétés correspond à ce qui suit :

a) si le total des pourcentages attribués selon la convention n'excède pas 100 %, le produit de 500 000 \$ par le pourcentage attribué à la société selon la convention;

b) dans les autres cas, zéro.

#### **Renvoi des questions de droit, etc. à la Cour canadienne de l'impôt**

173 (1) Lorsque le ministre et un contribuable conviennent, par écrit, de faire trancher par la Cour canadienne de l'impôt une question de droit, de fait ou de droit et de fait, portant sur une cotisation ou une détermination, réelles ou projetées, découlant de l'application de la présente loi, cette cour se prononce sur cette question.

(2) La période comprise entre la date à laquelle l'action est intentée auprès de la Cour canadienne de l'impôt en vue de faire statuer sur une question conformément au paragraphe (1) et la date à laquelle il est définitivement statué sur la question est exclue du calcul :

a) des périodes déterminées selon le paragraphe 152(4);

b) du délai de signification d'un avis d'opposition à une cotisation en vertu de l'article 165;

c) du délai d'appel en vertu de l'article 169,

pour ce qui est d'établir la cotisation concernant l'impôt payable par le contribuable qui a accepté, par écrit, que la question soit tranchée, de signifier un avis d'opposition à cette cotisation ou d'en appeler de celle-ci.

#### **Interprétation - Définitions**

248 (1) In this Act,

individual means a person other than a corporation;

### **Beneficially interested**

(25) For the purposes of this Act,

(a) a person or partnership beneficially interested in a particular trust includes any person or partnership that has any right (whether immediate or future, whether absolute or contingent or whether conditional on or subject to the exercise of any discretion by any person or partnership) as a beneficiary under a trust to receive any of the income or capital of the particular trust either directly from the particular trust or indirectly through one or more trusts or partnerships;

### **Associated corporations**

256 (1) For the purposes of this Act, one corporation is associated with another in a taxation year if, at any time in the year,

(a) one of the corporations controlled, directly or indirectly in any manner whatever, the other;

(b) both of the corporations were controlled, directly or indirectly in any manner whatever, by the same person or group of persons;

(c) each of the corporations was controlled, directly or indirectly in any manner whatever, by a person and the person who so controlled one of the corporations was related to the person who so controlled the other, and either of those persons owned, in respect of each corporation, not less than 25% of the issued shares of any class, other than a specified class, of the capital stock thereof;

(d) one of the corporations was controlled, directly or indirectly in any manner whatever, by a person and that person was related to each member of a

248 (1) Les définitions qui suivent s'appliquent à la présente loi.

particulier Personne autre qu'une société.

### **Droit de bénéficiaire**

(25) Les règles suivantes s'appliquent dans le cadre de la présente loi :

a) comptent parmi les personnes ou sociétés de personnes ayant un droit de bénéficiaire dans une fiducie donnée celles qui ont le droit — immédiat ou futur, conditionnel ou non, ou soumis ou non à l'exercice d'un pouvoir discrétionnaire par une personne ou une société de personnes — à titre de bénéficiaire d'une fiducie de recevoir tout ou partie du revenu ou du capital de la fiducie donnée, soit directement de celle-ci, soit indirectement par l'entremise d'une ou de plusieurs fiducies ou sociétés de personnes;

### **Sociétés associées**

256 (1) Pour l'application de la présente loi, deux sociétés sont associées l'une à l'autre au cours d'une année d'imposition si, à un moment donné de l'année :

a) l'une contrôle l'autre, directement ou indirectement, de quelque manière que ce soit;

b) la même personne ou le même groupe de personnes contrôle les deux sociétés, directement ou indirectement, de quelque manière que ce soit;

c) la personne qui contrôle l'une des deux sociétés, directement ou indirectement, de quelque manière que ce soit, est liée à la personne qui contrôle l'autre société, directement ou indirectement, de quelque manière que ce soit, et l'une de ces personnes est propriétaire d'au moins 25 % des actions émises d'une catégorie, non exclue, du capital-actions de chaque société;

d) la personne qui contrôle l'une des deux sociétés, directement ou indirectement, de quelque manière que ce soit, est liée à chaque

group of persons that so controlled the other corporation, and that person owned, in respect of the other corporation, not less than 25% of the issued shares of any class, other than a specified class, of the capital stock thereof; or

(e) each of the corporations was controlled, directly or indirectly in any manner whatever, by a related group and each of the members of one of the related groups was related to all of the members of the other related group, and one or more persons who were members of both related groups, either alone or together, owned, in respect of each corporation, not less than 25% of the issued shares of any class, other than a specified class, of the capital stock thereof.

#### **Definition of specified class**

(1.1) For the purposes of subsection 256(1), specified class means a class of shares of the capital stock of a corporation where, under the terms or conditions of the shares or any agreement in respect thereof,

(a) the shares are not convertible or exchangeable;

(b) the shares are non-voting;

(c) the amount of each dividend payable on the shares is calculated as a fixed amount or by reference to a fixed percentage of an amount equal to the fair market value of the consideration for which the shares were issued;

(d) the annual rate of the dividend on the shares, expressed as a percentage of an amount equal to the fair market value of the consideration for which the shares were issued, cannot in any event exceed,

(i) where the shares were issued before 1984, the rate of interest prescribed for the purposes of subsection 161(1) at the time the shares were issued, and

membre du groupe de personnes qui contrôle l'autre société, directement ou indirectement, de quelque manière que ce soit, et cette personne est propriétaire d'au moins 25 % des actions émises d'une catégorie, non exclue, du capital-actions de l'autre société;

e) chaque membre du groupe lié qui contrôle l'une des deux sociétés, directement ou indirectement, de quelque manière que ce soit, est lié à tous les membres du groupe lié qui contrôle l'autre société, directement ou indirectement, de quelque manière que ce soit, et une ou plusieurs des personnes membres des deux groupes liés sont propriétaires, seuls ou ensemble, d'au moins 25 % des actions émises d'une catégorie, non exclue, du capital-actions de chaque société.

#### **Sens de catégorie exclue**

(1.1) Une catégorie d'actions du capital-actions d'une société est exclue pour l'application du paragraphe (1) si, à la fois, selon les caractéristiques des actions de cette catégorie ou selon une convention y relative :

a) les actions ne sont ni convertibles ni échangeables;

b) les actions ne confèrent pas de droit de vote;

c) le montant de chaque dividende payable sur les actions est un montant fixe ou un montant déterminé en fonction d'un pourcentage fixe de la juste valeur marchande de la contrepartie de l'émission des actions;

d) le taux de dividende annuel sur les actions, exprimé en pourcentage de la juste valeur marchande de la contrepartie de l'émission des actions, ne peut en aucun cas excéder :

(i) dans le cas où les actions sont émises avant 1984, le taux d'intérêt prescrit pour l'application du paragraphe 161(1) au moment de l'émission des actions,

(ii) where the shares were issued after 1983, the prescribed rate of interest at the time the shares were issued; and

(e) the amount that any holder of the shares is entitled to receive on the redemption, cancellation or acquisition of the shares by the corporation or by any person with whom the corporation does not deal at arm's length cannot exceed the total of an amount equal to the fair market value of the consideration for which the shares were issued and the amount of any unpaid dividends thereon.

**Control, etc.**

(1.2) For the purposes of this subsection and subsections 256(1), 256(1.1) and 256(1.3) to 256(5),

(a) a group of persons in respect of a corporation means any two or more persons each of whom owns shares of the capital stock of the corporation;

(b) for greater certainty,

(i) a corporation that is controlled by one or more members of a particular group of persons in respect of that corporation shall be considered to be controlled by that group of persons, and

(ii) a corporation may be controlled by a person or a particular group of persons notwithstanding that the corporation is also controlled or deemed to be controlled by another person or group of persons;

(c) a corporation shall be deemed to be controlled by another corporation, a person or a group of persons at any time where

(i) shares of the capital stock of the corporation having a fair market value of more than 50% of the fair market value of all the issued and outstanding shares of the capital stock of the corporation, or

(ii) common shares of the capital stock of the

(ii) dans le cas où les actions sont émises après 1983, le taux d'intérêt prescrit au moment de l'émission des actions;

e) le montant que l'actionnaire a le droit de recevoir au rachat, à l'acquisition ou à l'annulation des actions par la société ou par une personne avec laquelle elle a un lien de dépendance ne peut dépasser le total de la juste valeur marchande de la contrepartie de l'émission des actions et du montant des dividendes impayés sur les actions.

**Précisions sur les notions de contrôle et de propriété des actions**

(1.2) Pour l'application du présent paragraphe et des paragraphes (1), (1.1) et (1.3) à (5):

a) un groupe de personnes s'entend de plusieurs personnes dont chacune est propriétaire d'actions du capital-actions de la même société;

b) il est entendu :

(i) d'une part, qu'une société qui est contrôlée par un ou plusieurs membres d'un groupe donné de personnes est réputée être contrôlée par ce groupe de personnes,

(ii) d'autre part, qu'une personne ou un groupe donné de personnes peut contrôler une société même si une autre personne ou un autre groupe de personnes contrôle aussi ou est réputé contrôler aussi la société;

c) la société, la personne ou le groupe de personnes qui est propriétaire, à un moment donné, d'actions du capital-actions d'une autre société dont la juste valeur marchande correspond à plus de 50 % de la juste valeur marchande de toutes les actions émises et en circulation du capital-actions de cette autre société, ou qui est propriétaire, à ce moment, d'actions ordinaires du capital-actions de cette autre société dont la juste valeur marchande correspond à plus de 50 % de la

corporation having a fair market value of more than 50% of the fair market value of all the issued and outstanding common shares of the capital stock of the corporation are owned at that time by the other corporation, the person or the group of persons, as the case may be;

(d) where shares of the capital stock of a corporation are owned, or deemed by this subsection to be owned, at any time by another corporation (in this paragraph referred to as the "holding corporation"), those shares shall be deemed to be owned at that time by any shareholder of the holding corporation in a proportion equal to the proportion of all those shares that

(i) the fair market value of the shares of the capital stock of the holding corporation owned at that time by the shareholder is of

(ii) the fair market value of all the issued shares of the capital stock of the holding corporation outstanding at that time;

(e) where, at any time, shares of the capital stock of a corporation are property of a partnership, or are deemed by this subsection to be owned by the partnership, those shares shall be deemed to be owned at that time by each member of the partnership in a proportion equal to the proportion of all those shares that

(i) the member's share of the income or loss of the partnership for its fiscal period that includes that time is of

(ii) the income or loss of the partnership for its fiscal period that includes that time

and for this purpose, where the income and loss of the partnership for its fiscal period that includes that time are nil, that proportion shall be computed as if the partnership had had income for that period in the amount of \$1,000,000;

juste valeur marchande de toutes les actions ordinaires émises et en circulation du capital-actions de cette autre société, est réputé contrôler cette autre société à ce moment;

d) les actions du capital-actions d'une société dont une autre société est, à un moment donné, propriétaire ou réputée propriétaire en application du présent paragraphe sont réputées être la propriété à ce moment de chaque actionnaire de cette autre société dans la proportion égale au produit de la multiplication du nombre de ces actions par le rapport entre :

(i) d'une part, la juste valeur marchande des actions du capital-actions de l'autre société dont l'actionnaire est à ce moment propriétaire,

(ii) d'autre part, la juste valeur marchande de toutes les actions émises du capital-actions de l'autre société en circulation à ce moment;

e) les actions du capital-actions d'une société qui sont des biens d'une société de personnes à un moment donné ou qui sont réputées être la propriété de la société de personnes à ce moment en application du présent paragraphe sont réputées être la propriété à ce moment de chaque associé de la société de personnes dans la proportion égale au produit de la multiplication du nombre de ces actions par le rapport entre :

(i) d'une part, la part de l'associé sur le revenu ou la perte de la société de personnes pour l'exercice de la société de personnes qui comprend ce moment,

(ii) d'autre part, le revenu ou la perte de la société de personnes pour cet exercice;

à cette fin, dans le cas où le revenu et la perte de la société de personnes pour son exercice qui comprend ce moment sont nuls, ce produit est calculé comme si le revenu de la société de personnes pour cet exercice s'élevait à



(f) where shares of the capital stock of a corporation are owned, or deemed by this subsection to be owned, at any time by a trust,

(i) [Repealed, 2014, c. 39, s. 76]

(ii) where a beneficiary's share of the accumulating income or capital therefrom depends on the exercise by any person of, or the failure by any person to exercise, any discretionary power, those shares are deemed to be owned at that time by the beneficiary,

(iii) in any case where subparagraph (ii) does not apply, a beneficiary is deemed at that time to own the proportion of those shares that the fair market value of the beneficial interest in the trust of the beneficiary is of the fair market value of all beneficial interests in the trust, and

(iv) in the case of a trust referred to in subsection 75(2), the person referred to in that subsection from whom property of the trust or property for which it was substituted was directly or indirectly received shall be deemed to own those shares at that time; and

(g) in determining the fair market value of a share of the capital stock of a corporation, all issued and outstanding shares of the capital stock of the corporation shall be deemed to be non-voting.

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f) les actions du capital-actions d'une société dont une fiducie est à un moment donné propriétaire ou réputée propriétaire en application du présent paragraphe :

(i) [Abrogé, 2014, ch. 39, art. 76]

(ii) sont réputées être la propriété à ce moment de chaque bénéficiaire dont la part sur le revenu ou le capital accumulés de la fiducie est conditionnelle au fait qu'une personne exerce ou n'exerce pas un pouvoir discrétionnaire,

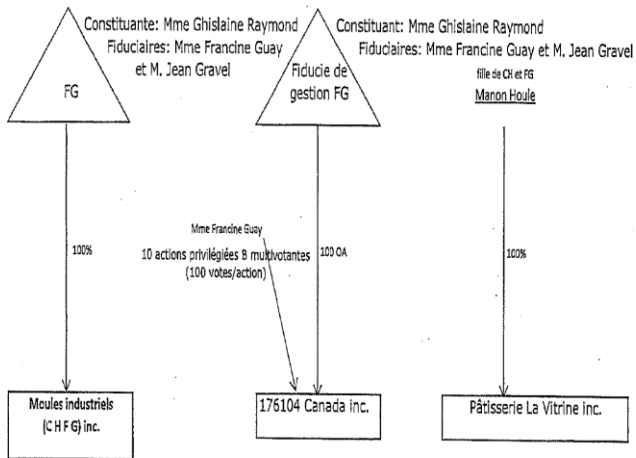
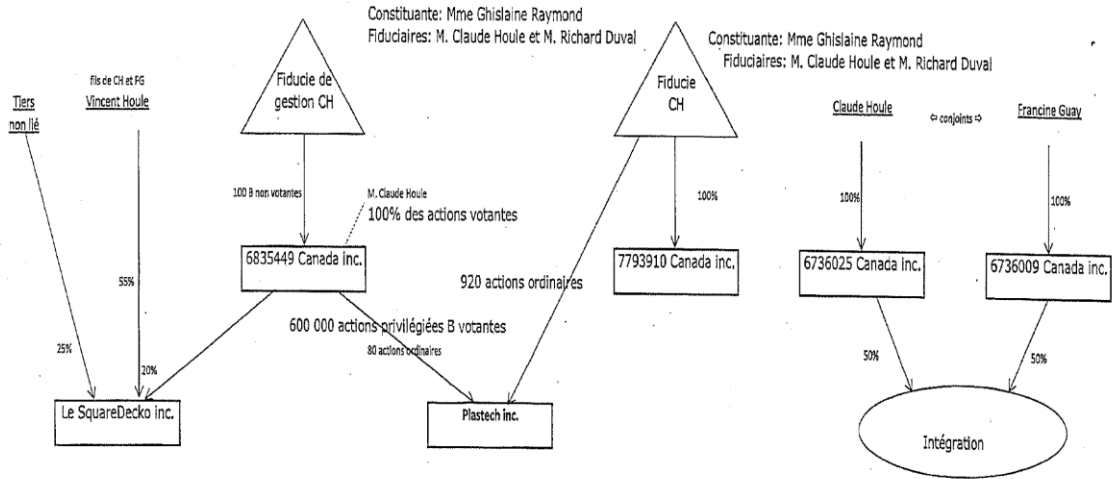
(iii) sont réputées, dans les cas où le sous-alinéa (ii) ne s'applique pas, être la propriété à ce moment de chaque bénéficiaire dans la proportion obtenue par la multiplication du nombre de ces actions par le rapport entre la juste valeur marchande de son droit de bénéficiaire sur la fiducie et la juste valeur marchande de tous les droits de bénéficiaire sur la fiducie,

(iv) sont réputées être la propriété à ce moment de la personne de qui des biens ou des biens qui leur sont substitués ont été reçus, directement ou indirectement, s'il s'agit d'une fiducie visée au paragraphe 75(2);

g) dans la détermination de la juste valeur marchande d'actions du capital-actions d'une société, toutes les actions émises et en circulation de ce capital-actions sont réputées ne pas conférer de droit de vote.

# APPENDIX II

Organigramme au 2014-06-30



CITATION: 2018 TCC 85

COURT FILE NO.: 2017-2518(IT)G

STYLE OF CAUSE: MOULES INDUSTRIELS (C.H.F.G.) INC.  
v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: November 17, 2017

REASONS FOR JUDGMENT BY: The Honourable Associate Chief Justice  
Lucie Lamarre

DATE OF JUDGMENT: May 3, 2018

APPEARANCES:

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Aicha Nafii

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