Docket: 2015-1475(IT)G

BETWEEN:

GUY LALIBERTÉ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 18, 19, 20, 2017,
and April 9, 10, 11, 2018, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Olivier Fournier Marie-France Dompierre Simon Lemieux Aicha Nafii Margaret R. Nixon (September 2017)
Counsel for the Respondent:	Christa Akey Naomi Goldstein Arnold Bornsetin Sébastien Budd

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JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2009 taxation year is allowed in part, with costs to the Respondent, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 12th day of September 2018.

"Patrick Boyle"

Boyle J.

Citation: 2018 TCC 186
Date: 20180912
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BETWEEN:

GUY LALIBERTÉ,

Appellant,

and

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REASONS FOR JUDGMENT

Boyle J.

1. Introduction

[1] The Appellant is the founder, and in 2009 was the controlling shareholder, of Cirque du Soleil. He has been reassessed a $41.8 million shareholder benefit in respect of the US $35 million cost of his twelve day trip to the International Space Station ("ISS") in September and October 2009.

[2] While on the ISS, on the tenth day of his trip, the Appellant appeared via live broadcast video link in a series of fundraising benefit concerts or entertainment events, collectively referred to as Poetic Social Mission - Moving Stars and Earth for Water, at venues in 14 cities around the world with a good number of other world-class entertainers including Bono and Shakira, and personalities including Al Gore, David Suzuki and Maude Barlow, as well as some Cirque du Soleil performers. The benefit fundraiser was for One Drop Foundation/Fondation One Drop ("One Drop"), a charity in support of the availability of clean pure water that is strongly and publicly associated with Cirque du Soleil, and to which the Fondation Guy Laliberté had pledged $100 million over 25 years. In addition, Cirque du Soleil produced a documentary, called Touch the Sky, of the Appellant's journey preparing for and travelling on his space trip, with both French and English versions, that it used for business promotion purposes. A

book of select photographs taken by the Appellant on his space trip, entitled Gaia[1], was published in multiple versions and used as a fundraiser for One Drop. The actual direct production and broadcast costs of approximately $5 million associated with the costs of these promotional and fundraising activities were borne by Cirque du Soleil and One Drop[2] and are not in issue in this appeal which deals solely with the $41.8 million cost paid to Space Adventures, Ltd. ("Space Adventures") for M. Laliberté's space travel.

[3] After the trip was completed by the Appellant, and paid for by his holding company, it was charged to the top operating company in the Cirque du Soleil group, Créations Méandres Inc. This company then deducted the $41.8 million cost of the trip, less a $4 million shareholder benefit reported by the Appellant, for financial accounting purposes. It did not deduct any of this amount for tax purposes in Canada or elsewhere, nor did any other company in the corporate group or the Appellant's family holding company.[3]

[4] The $4 million amount reported as a shareholder benefit was not an estimate of the shareholder benefit. The Appellant and his Chief Financial Officer maintained that there was no benefit but the CFO estimated the $4 million to be the value of avoiding a dispute with the tax authorities and the bad publicity if nothing was reported as a taxable benefit. This was confirmed in Deloitte's February 2013 memo to the CFO.

[5] The Appellant argues that his personal participation in these events was a stunt marketing event and the whole $41.8 million should therefore be deductible to Cirque du Soleil Group as a marketing or promotional expense, and that there was therefore no shareholder benefit to himself. Further, the Appellant maintains that Cirque du Soleil received unpaid, earned media from his trip which exceeded the cost of his trip and that this supports the entire cost of his trip being a proper business expense.[4] The Respondent maintains that the entire amount is a

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1 Which the Appellant described as a scientific word for planet Earth and also the name of his daughter.

2 The evidence describes the Appellant making a donation to One Drop equal to the full amount of One Drop's approximately $3 million share of the costs of its fundraising activities related to his space time.

3 It is not known how GST and TVQ were accounted for.

4 There appears to be at least a certain irony to referring to media coverage as free or unpaid when it is covering something that cost north of $40 million for which no other purpose was put forward than to get the media attention.

shareholder benefit, or an indirect benefit, and that the underlying reassessment is correct.

[6] Cirque du Soleil has not done any other major stunt-type marketing events before or since the 2009 ISS trip by the Appellant. Cirque du Soleil's then Chief of Marketing Officer globally said the marketing around the Appellant's trip was the group's first global event.[5] Cirque du Soleil marketing budget and efforts were normally focused on marketing individual shows as the tested and true formula for success in its business.

[7] There was a 20% arm's length shareholder in the Cirque du Soleil operating company to which the cost of the trip was charged in late December 2009, referred to as Dubai World. That shareholder was asked to approve the charge and the payment as part of a series of transactions that saw the amount paid by that operating company contributed directly back to it as a capital contribution. The result of this was that the 20% shareholder, Dubai World, bore no economic cost of the charge to, and payment by, the operating company for the Appellant's trip to the ISS. The effect of contributing the same promissory note received in payment back as capital resulted in the payor company, Créations Méandres, itself not bearing any economic cost of the trip either. The CFO of Cirque du Soleil said the purpose of this was to ensure the end result was neutral for Dubai World and that it did not have to pay 20% of the Cirque du Soleil expense reimbursement. There was a Deloitte memo to the same effect. I infer from the CFO's testimony on this point that it was known to him and Cirque du Soleil that Dubai World would not otherwise approve a charge back.

[8] Dubai World was not consulted about the decision not to deduct the expense for tax purposes by Créations Méandres nor any of its subsidiaries, even though the evidence from and in support of the Appellant is that Dubai World was facing very large financial problems at that time resulting from the 2008 financial crisis.

[9] It is the Appellant's position that the space trip was intended to be, and was in fact, used to help promote the 2009 launch of Cirque du Soleil's first show in Russia. None of the costs of the space trip were charged to the marketing budget for the Russia show, and it was reimbursed for expenses it incurred relating to the space trip. Cirque du Soleil's Russian operating subsidiary had arms length shareholders owning 25% of the Russian company, George Cohon and Craig

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[5] Neither the Russia stilt walking event nor the support of Cirque du Soleil for disadvantaged Montreal youth are to my mind comparable.

Cohon, two Canadian investors with considerable knowledge and experience launching Russian operations. The capital contribution series of transactions involving the charge back of the cost of the trip to Cirque du Soleil's top operating company, combined with no allocation of the expense to the Russian subsidiary and reimbursement of any trip-related expenses it incurred, resulted in the Cohons not bearing any of the costs involved.

[10] There is no evidence of what discussions, if any, took place between the Cohons and the Appellant or Cirque du Soleil. Neither the Cohons nor anyone from Dubai World was called to testify.

2. Law

Benefit conferred on shareholder	**Avantages aux actionnaires**
15 (1) If, at any time, a benefit is conferred by a corporation on a shareholder of the corporation, … then the amount or value of the benefit is to be included in computing the income of the shareholder, for its taxation year that includes the time, except …	**15 (1)** La valeur de l'avantage qu'une société confère, à un moment donné, à son actionnaire … est incluse dans le calcul du revenu de l'actionnaire, … selon le cas, pour son année d'imposition qui comprend ce moment, sauf dans la mesure où cette valeur est …
Benefit conferred on a person	Avantage conféré à un contribuable
246 (1) Where at any time a person confers a benefit, either directly or indirectly, by any means whatever, on a taxpayer, the amount of the benefit shall, to the extent that it is not otherwise included in the taxpayer's income or taxable income earned in Canada under Part I and would be included in the taxpayer's income if the amount of the benefit were a payment made directly by the person to the taxpayer and if the taxpayer were resident in Canada, be	246 (1) La valeur de l'avantage qu'une personne confère à un moment donné, directement ou indirectement, de quelque manière que ce soit à un contribuable doit, dans la mesure où elle n'est pas par ailleurs incluse dans le calcul du revenu ou du revenu imposable gagné au Canada du contribuable en vertu de la partie I et dans la mesure où elle y serait incluse s'il s'agissait d'un paiement que cette personne avait fait directement au contribuable et si le contribuable résidait au Canada, être : a) soit incluse dans le calcul du revenu

(a) included in computing the taxpayer's income or taxable income earned in Canada under Part I for the taxation year that includes that time; or	ou du revenu imposable gagné au Canada, selon le cas, du contribuable en vertu de la partie I pour l'année d'imposition qui comprend ce moment;
…	…

3. The Purpose of the Space Trip

[11] I find that the motivating, essential and overwhelmingly primary purpose of the travel was personal. I find that the Appellant is the person who made the decision to travel on his space trip and that his overarching reasons for that decision were personal for the following reasons:

a) He intended to take the trip personally and it was never a possibility that any other Cirque du Soleil official, entertainer or promoter travel in his stead.

b) In his testimony, the Appellant grounded all of his travels including his space trip to his childhood visit to Expo 67, a family trip to Cuba when he was fourteen, watching Neil Armstrong walk on the moon, and St-Exupéry's Le Petit Prince.

c) There was no evidence Cirque du Soleil would have considered sending anyone else on this trip, or any comparable stunt, in 2009 to raise its brand awareness or to generate helpful media for its entry in the Russian market in the absence of M. Laliberté having first decided he was going on his space trip.

d) The cancellation insurance policy for the trip, as well as the accidental death and dismemberment policy for the Appellant while on the trip, were both taken out and borne by his family holding company, which was also the named beneficiary of the policy.

e) When the Senior Vice-President and CFO of Cirque du Soleil, who was also the Appellant's personal tax advisor and had signing authority for the Appellant's family holding company, authorized or signed the first two cheques to Space Adventures totalling

US$25 million, it was his understanding that the Appellant would take the space flight even if there was no Poetic Social Mission broadcast.

f) The resolution of the family holding company authorizing the payments to Space Adventures do not set out a purpose for the Appellant's trip, nor does it otherwise tie the trip or the payment in any way to Cirque du Soleil's business.

g) A reasonable inference from all of the evidence is that Cirque du Soleil would not have approved the expense of the trip at the time, and only did so two months after the trip ended when it was presented with the somewhat unusual ability to agree to pay for the trip provided it was assured to receive its promissory note issued in payment back directly as a capital contribution.

h) The Space Flight Agreement remained between Space Adventures and M. Laliberté and his family holding company. Cirque du Soleil was not added as a party even though substantial revisions were made to the Space Adventure draft dealing with the ability of the Appellant to promote Cirque du Soleil and One Drop.

i) Robert Blain said he negotiated the Space Flight Agreement with Space Adventures only representing the interests of the Appellant and his family holding company and not the interests of Cirque du Soleil.

j) The CFO did not suggest any thought was given to the reasonably expected value to Cirque du Soleil of the Appellant's space trip before it was completed.

k) It was not clear that a live broadcast of the Appellant as part of the Poetic Social Mission could be accomplished until very shortly before the launch when NASA agreed to allow the use of its technical equipment in the ISS and a US satellite for this purpose. The use of the Russian technology and equipment, pre-recorded clips or private commercial satellites would have had significant limitations that would have adversely affected the Poetic Social Mission. The first two would not have allowed any broadcast to be

live. While Cirque du Soleil was aware of these alternatives, they were not seriously explored. This is consistent with the CFO's understanding that the Appellant would be travelling in any event.

l) NASA, whose broadcast equipment and satellite were most desirable and were used, would not allow any commercial promotion as part of the Poetic Social Mission broadcast or the related documentary. Cirque du Soleil's logos are absent on M. Laliberté during the event and Cirque du Soleil is only mentioned four times in the video.

m) In arranging the Poetic Social Mission in support of One Drop, the material sent to other performers, celebrities and personalities did not describe the event as a promotion of Cirque du Soleil.

n) Both the Poetic Social Mission and Gaia were used to raise funds for One Drop. It is not clear how Gaia promoted Cirque du Soleil. These were the Appellant's photographs and it was the Appellant who had just recently announced that his personal foundation had committed $100 million over 25 years to One Drop. This appears more like personal social responsibility than corporate social responsibility.

o) Cirque du Soleil did not do any analysis or investigation of the value to it of the anticipated media coverage. This is consistent with my inference from the CEO's testimony (below), and my holding from the totality of the evidence, that Cirque du Soleil was told, not asked, by the Appellant that he was going on the space trip.

p) Cirque Russia's General Director testified she was only informed after the Poetic Social Mission was already planned, and that it had not been part of Cirque Russia's marketing plans in early 2009.

q) Cirque du Soleil did not monitor or analyze whether hits on its websites increased during and shortly following the Appellant's space trip.

r) Cirque du Soleil, its 20% shareholder, and the 25% shareholders of Cirque Russia did not bear any of the economic cost of the space trip.

s) Dubai World would not have agreed to bear its 20% share and the CFO of Cirque du Soleil anticipated that.

t) Cirque Russia was reimbursed for the expenses it incurred relating to the space trip.

u) While Cirque du Soleil recorded its reimbursement as an expense for accounting purposes, it was not charged to the marketing budget.

v) In the video M. Laliberté gives three reasons for making his space trip. One is to carry out the Poetic Social Mission in support of One Drop, and the other two are purely personal.

w) The Appellant refers to himself as a "space tourist" fulfilling a personal dream in one of the media clips in the documentary. [6]

x) The Appellant says in the video "I know that I had the privilege of being able to pay myself a trip up there." This lead solely to evasive, deflecting and distracting answers.

y) The Appellant was very evasive and dodgy when asked questions in cross-examination on two occasions about Deloitte's 2005 memo regarding the earlier space flight opportunity, and was awkward in his evasiveness about why he and his holding company were contracting for a Cirque du Soleil business event.

z) M. Laliberté's description of himself in his testimony to the Court as "the person chosen by Cirque and One Drop to go there" was very far from a fair characterization of the evidence. So too is

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6 The Respondent also stressed that the Appellant and Bono both described the Appellant's space trip as a childhood dream of the Appellant. I am not inclined to take this into consideration. What child has not had a dream of travelling to the moon or into space? I knew very little of my grandsons before I met them, but I knew they too liked to pretend they were on the International Space Station.

his later description that Cirque du Soleil had engaged and wanted to have this event happen "where I happen to be the one who will be flying in order to promote Cirque".

aa) The Appellant testified that he replied "no, thank you" to Space Adventures' March 2009 letter about an ISS trip. He said he later got to thinking and realized there may be an opportunity for Cirque du Soleil and One Drop to benefit from him taking the ISS space trip. This seems at odds with his later testimony that, when he first looked into a space trip in 2005 with Space Adventures and the Russian space agency to travel around the moon, he was planning it as a stunt marketing event for Cirque du Soleil and One Drop. This leaves me concerned about the Appellant's recollections of his purposes at the time of both the 2005 trip he investigated and his 2009 trip to the ISS.

4. Committing to the Space Trip

[12] The Appellant was first contacted by Space Adventures about a space trip in 2001 when the Russian space agency first placed a civilian in space. The Appellant had more serious discussions and made preliminary preparations in 2005 with Space Adventures for a trip around the moon but did not proceed with that. The reasons he gave Space Adventures at the time for not proceeding were personal.

[13] The Appellant received a letter in or around March 2009 from Space Adventures offering him the trip to the ISS. The Appellant made the decision to commit his family holding company, 2739-2224 Québec Inc., to pay for his space travel to the ISS shortly thereafter. Neither he nor his company sought to obtain approval of anyone else in the Cirque du Soleil group before doing so. That company signed the Orbital Space Flight Purchase Agreement with Space Adventures on April 19, 2009. The appropriate resolution was passed by the numbered family holding company.

[14] In this agreement, the holding company is defined as the client of Space Adventures and the holding company designates Guy Laliberté as the Space Flight Participant. The Appellant signed the contract for both himself and his holding company.

[15] While the Appellant testified that he consulted his CEO and CFO after consulting his family about taking the trip, based upon the evidence in particular of

the CEO and CFO I find that Cirque du Soleil was not consulted about whether it wanted him to take the trip, but only about how he and Cirque du Soleil could promote Cirque du Soleil and One Drop on his trip. The Appellant's testimony that he sought their consent or agreement on behalf of Cirque du Soleil for the trip is not supported by the testimony of any of the other witnesses including the CEO and CFO, nor by any of the many documents in evidence.

[16] The CEO of Cirque du Soleil, Daniel Lamarre, did not involve himself with the Appellant's personal affairs or ventures. His involvement with the Appellant was limited to Cirque du Soleil business.

[17] The CEO carefully described the space trip as "the Guy mission that he was doing", and that after some talk of a trip in 2005, the Appellant next "came back to us and then said that he was doing it in 2008."[7] He testified the Appellant told him "Look, you know, first and foremost, I'm going to be away for six months, so organize yourself and make sure that the company is not, you know, losing anything from me while I'm away. And now, you know, how can you make sure that Cirque and One Drop will benefit from that trip?" The CEO testified "And that's when we start working on laying out a plan".

[18] The CEO testified that, when the Appellant first discussed the space trip to the ISS with him, it was clear that One Drop and Cirque du Soleil were to pay for it.

[19] In cross-examination he would not clearly or directly answer whether the basis of any agreement in April 2009 that Cirque du Soleil would bear the cost of the space trip was based upon a conversation, a written exchange or "just understood." He was asked the question twice by Respondent's counsel, and then again by me. M. Lamarre is a smart, articulate and very successful business executive and fully understood the clear question. His refusals to answer with anything but deflection, avoidance and an autotrack, managed message answer leads me to infer that a direct answer from him would not have been helpful to the Appellant's case.

[20] In the circumstances, and given the rest of his testimony, I find that the Appellant informed the CEO that he was taking his space trip and asked him to make sure Cirque du Soleil capitalized on it as much as possible to enhance its business, but that neither the CEO or anyone else at Cirque du Soleil was asked by

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7 Should be 2009, not 2008, which is clear from his testimony.

M. Laliberté to authorize the space trip. This appears to have been to justify the company paying for the trip. There was no discussion or exchange or other basis for the CEO's understanding that Cirque du Soleil would pay for the trip. I conclude that the CEO was told that, expressly or implicitly, by the Appellant and he clearly understood that.

5. Cirque du Soleil's Role with respect to the Promotional Activities Undertaken during the Appellant's Space Trip

[21] The contracts were negotiated to include the Appellant's ability to associate Cirque du Soleil and One Drop with his space travel, and these opportunities were exploited for the benefit of Cirque du Soleil, One Drop and their Poetic Social Mission. In addition to logos being prominently displayed on flight suits and other apparel at press conferences and in media materials, Cirque du Soleil produced and released a documentary video, One Drop was the beneficiary of the video link fundraiser concert events, and the coffee table type book of the Appellant's personal photographs from space was published to benefit One Drop. These were not mere window dressings or other articles added to give the appearance or simulacra of business activity on the trip or of business use of the trip.

[22] I find that genuine, *bona fide* Cirque du Soleil business activities were undertaken by the Appellant while preparing for and during his space trip, and Cirque du Soleil used his space trip to promote itself and some of its activities, including its twenty-fifth anniversary, its opening in Russia, and its support of One Drop. All of the evidence amply supports this, that of the Appellant himself, his other witnesses, and the documents, photographs, book and videos put in evidence by the Appellant.

[23] I also find that, having decided to travel, he genuinely intended that he would use his time on the trip to promote Cirque du Soleil, and himself as its most recognizable public representative, to enhance the value of his business while he was on his trip to space. The General Director of Cirque Russia said that the Appellant's Russian space agency trip to the ISS literally opened the doors of the Kremlin for Cirque du Soleil.

[24] I find that the Appellant thereafter got Cirque du Soleil to develop promotional business-related plans, but that Cirque du Soleil was not given the opportunity to decide whether or not to participate either at the executive or senior management level or at the board of directors level.

6. Deductibility of Direct and Incremental Costs of Business-Related Promotional Activities

[25] The direct and incremental expenses associated with the production of the Poetic Social Mission event and the related video, the Touch the Sky documentary relating to the trip, and the publishing and distribution of the Gaia books appear to have been proper expenses to be recognized for tax purposes. Since those actual expenses were incurred for Cirque du Soleil's business purposes, or by One Drop for its fundraising purposes, that would be expected to suffice for tax purposes. The recognition of such expenses for tax purposes should not be affected by the fact that they were incurred during or in connection with a personal trip of the controlling shareholder. However, in this case the evidence is that Cirque du Soleil did not deduct them. No clear reason was given for this.[8]

7. Valuing the Benefit - Allocation Issues

[26] I find a benefit was conferred on the Appellant by his family holding company, 2739-2224 Québec, either providing the benefit directly when it signed the Space Flight Agreement and/or when it paid Space Adventures for the trip, and/or by allowing all or part of the benefit to be provided by another Cirque du Soleil company, Créations Méandres, when it reimbursed the Appellant's family holding company. I conclude from the evidence that this benefit was conferred on him by his family holding company because he was its controlling shareholder; given my finding that the trip's purpose was personal, and the reasons therefor, there is little other possible characterization.

[27] This is not a case of the Court second guessing the business judgment or decisions of a Canadian business or business person. The space trip itself simply was not a business decision. The evidence confirms that the trip was a personal decision and activity of the Appellant. However, the evidence also establishes that promotional activity was undertaken by the Appellant for Cirque du Soleil while he was preparing for and on his trip. In such a case, the Court is called on to determine the appropriate allocation of the expense of the trip itself as between deductible business expense and non-deductible personal expense. Having decided

[8] There was some evidence that discussions with CRA had been held as early as 2009 about the tax treatment of the planned trip to the ISS, and some suggestion that this had included as a topic for discussion not recognizing a shareholder benefit and not deducting any expense, but obviously no agreement or understanding was arrived at. There is no such middle ground in this Court in any event.

that the motivating purpose of this trip was personal, the Court needs to determine the appropriate portion of the cost of the trip itself that reflects the value of the use of this trip in Cirque du Soleil's business. Presumably, the value to Cirque du Soleil and One Drop of their trip-related activities was significantly heightened by the fact that this was a trip into space and to the ISS, as compared with almost any other trip its controlling shareholder might have taken.

[28] The allocation of the expense of the space trip by the Appellant between business and personal/shareholder benefit is a challenge in this case due to the paucity of evidence of the value of the business use of the space trip, notwithstanding the considerable evidence of business use of the space trip.

[29] I place no weight on the approval of Dubai World to support the reasonableness of the space trip or its cost as it relates to Cirque du Soleil's business. Dubai World only approved it if it did not affect its investment in Cirque du Soleil. If anything, it is suggestive of quite the opposite.

[30] The Appellant's argument that a benefit was not conferred because Cirque du Soleil was not impoverished after paying for the space trip as its annual revenues increased that year and the following year by a greater amount is not persuasive in the absence of any evidence of a causal link between the two. Cirque du Soleil had also opened new shows and new locations those years and that is just one possible cause or source of the increasing revenues. Nothing at all in the evidence connected the increased revenues to the space trip taken by M. Laliberté. Further, it appears that the family holding company was impoverished – if only because of the fact Dubai World and the Cohons did not bear their share of the expense.

8. The Influence Communications Advertising Value Equivalency Reports

[31] The only evidence put forward by the Appellant as evidence of the value of the space trip to Cirque du Soleil was done by a media monitoring, measurement and analysis company, Influence Communications, which monitored the world media for mentions of M. Laliberté, Cirque du Soleil or One Drop Foundation and ISS.[9] It then assigned an amount as the approximate gross cost to Cirque du Soleil had it purchased thousands and thousands of individual advertisements of

[9] The actual scope of the monitored words or phrases was not clearly set out in the evidence.

comparable size, each in a comparable media publication or outlet. It then totalled that amount and, in this case, came up with the amount of almost $600 million.

[32] The evidence is that this report was prepared and used solely for the purposes of the board of directors meeting at which the charge back and capital contribution series of transactions were to be decided. No one at that meeting, nor in preparation for that meeting, had any questions on the report. Influence was never asked a question by anyone at Cirque du Soleil on its report nor asked for any explanation or other follow up. The report did not break down international media coverage at all, neither to Russia nor to other countries in which Cirque du Soleil performed or operated. No other evidence or support of the value received by Cirque du Soleil from the Appellant's space trip was given to, or asked for by, the board members in making their decision. Nor was any other evidence presented to the Court to support the value of the business-related benefits to Cirque du Soleil of the Appellant's space trip.

[33] No input or other analysis of the trip-related activities was performed by the Russian marketing company helping Cirque Russia establish its brand presence or launch the Cirque du Soleil show in Russia. The General Director of Cirque Russia testified that public relations reports from Absolutpro assessing and evaluating the Russian media efforts during the period were obtained but no details were provided to the Court. Absolutpro estimated close to US$700,000 worth of media coverage had been generated for the Russian presence of Cirque du Soleil. Yet the board was not informed of this, nor was any part of the cost of the space trip allocated to Cirque Russia.

[34] The amount arrived at by Influence Communications was allocated as between Cirque du Soleil and One Drop on some basis relating to One Drop mentions. No allocation of value was made to M. Laliberté's further enhanced reputation or personal brand even though he is a household name in Quebec, is one of its wealthiest residents, and has other business investment activities.[10]

[35] The then global Chief Marketing Officer confirmed that Cirque du Soleil used Influence (and perhaps other media measurement companies) constantly and on an ongoing basis because media measurement was a very important measure to know how often Cirque du Soleil is being mentioned in the media. He described the attribution of a dollar value to each mention in an article as a measure of the impact of what Cirque du Soleil was doing.

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[10] By 2009 he had begun to sell his investment in Cirque du Soleil.

[36] The Appellant understood the Influence report to reflect the value of the equivalent media buying. He acknowledged that an analytical study of the impact of the space trip on the value of the Cirque du Soleil brand could have been ordered from Influence but wasn't.

[37] The founder and President of Influence, Jean-François Dumas, described his firm as a media monitoring and analysis firm. His personal expertise is in the analysis of media coverage. He is currently Vice-President of the Quebec Society of Public Relations Professionals – SQPRP. M. Dumas testified as a material or factual witness who was involved in the 2001 events because of the expertise he and his firm had. He did not testify as an expert witness, but as a material witness who had expertise in the area he had been involved with. He testified that Influence had done media coverage analysis for Cirque du Soleil over many years with respect to each of its shows.

[38] The mandate from Cirque du Soleil in 2009 regarding the space trip was to monitor world media mentions and compute the advertising value equivalency. Since no analysis was mandated, the reports are a purely quantitative formulaic assembly without qualitative analysis.

[39] Influence identified all media mentions worldwide of the Appellant's space trip in television, radio, newspapers and certain online media, noted its space, location, duration, circulation etc. and, using a number of advertising tariff or rate cards, computed an estimated cost of an equivalent ad buy. It is clearly an estimate of cost to place advertisements of comparable distribution, placement and/or duration. It does not address the value of the actual journalistic or editorial media coverage that occurred and that it is monitoring and measuring.

[40] Most of Influence's media monitoring clients receive an advertising value equivalency report daily. The reports, including changes in the ad value number, provide data points over time on what may impact a brand.

[41] Understanding this readily leads to the identification of a number of limitations on the usefulness of such reports as probative evidence of the value Cirque du Soleil enjoyed, or could have been expected or reasonably hope to enjoy, from the Appellant's space trip including his business-related activities while preparing for and on his trip:

> a) The ad value methodology makes a one-for-one assumption that the cost of an ad buy is equal to the value of any particular

> media coverage that mentions your name or event. There is no evidence to support this and M. Dumas could not establish this.
>
> b) The methodology in the reports ordered does not consider the impact on potential consumers of their intentions or perceptions resulting from the media coverage.
>
> c) M. Dumas did not provide any support for his view that the absence of any volume discounts in the methodology would be offset by a lack of premium for favourable editorial or journalistic contact – even net of the unfavourable editorial contact that arose at times particularly or largely in Quebec about a billionaire rich kid's trip etc.
>
> d) In some public relations professional circles that M. Dumas is aware of, there is evidence of a push to do away with the concept of advertising value as a measure of media coverage value – that it is preferable to measure outcomes rather than outputs. There is also a push to have media monitoring address both quantitative and qualitative considerations, and to recognize that advertising value is not representative of the public relations value of mediation mentions.
>
> e) Influence asked Cirque du Soleil specifically if it wanted the numbers broken down by country or region and M. Dumas was told that wasn't relevant to them in this mandate.
>
> f) The reports themselves do not even identify the particular words being monitored.

[42] However useful a business management tool such a metric as advertising equivalency value may be to measure the relative amount of a company's earned or unpaid media from time to time, this has virtually no probative value and should be given very little weight, and no weight at all on its own, in helping a court determine an amount of value or benefit as is required in a case such as this.

9. The Charge Back and Capital Contribution

[43] The charge back and capital contribution series of transactions was developed by Deloitte in response to a request from the CFO. The steps were

reordered at the suggestion of the law firm used by Cirque du Soleil and the Appellant. These were valid and legitimate transactions that have not been challenged or impugned by CRA.

[44] The CFO said it was developed because Dubai World's approval would require that it not bear any part of the cost of the Appellant's trip.

[45] M. Lamarre similarly said that, as CEO and board member, he had to protect the right of the minority shareholders, that whatever decision the Board made it had to protect their rights as well as the interests of the majority shareholder. He stressed that minority shareholder approval was very, very important at the December 2009 Board meeting.

[46] The CFO, Robert Blain, is on the board of Cirque du Soleil and is Chair of its Audit Committee. He is also on the board of One Drop, serves as its Treasurer and is Chair of its Audit & Investments Committee. In 2009 he was the long-serving Senior Vice President and CFO of Cirque du Soleil. In that capacity the Vice Presidents of Finance, Treasury, Legal and IT all reported to him. In 2009 he was also responsible for M. Laliberté's estate planning, family office, personal tax matters, its shareholdings in Cirque du Soleil, his family trusts, and everything else related to M. Laliberté personally. He described himself as essentially M. Laliberté's guardian. Overall, M. Blain was a credible and very candid witness.[11]

[47] The CEO said he left the responsibility for the allocation of the cost of the space trip (as between Cirque du Soleil, One Drop and the Appellant) to the CFO (which appears somewhat odd given that M. Blain was also formally advising M. Laliberté and his family holding company.) M. Blain said that he recommended a $4 million shareholder benefit be reported by the Appellant after consulting with Deloitte in order to avoid tax litigation in the future.

[48] The family holding company's primary source of income in the period in question was dividend income from its subsidiaries. In 2009 it received US $650 million of dividend income, substantially higher than normal as Dubai World had purchased its 20% of Cirque du Soleil in its 2009 fiscal year.

[49] The CFO described the purpose of the charge back and capital contribution series of transactions as to keep Dubai World whole. The Deloitte memo prepared

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[11] Though I do not fully accept his description of his July 2009 meeting with several tax professionals at Deloitte.

for him also describes it being done in order to avoid the minority shareholder having to absorb its 20% cost of the space trip to be charged to Cirque du Soleil.[12] M. Blain said he just thought these transactions resulted in a fair allocation to Dubai World.

[50] The conclusion to be reached is that Dubai World would not agree to any charge back that resulted in it bearing any part of the Appellant's trip to the ISS, that the CEO thought this was a proper balancing of the interests of the minority shareholder and the majority shareholder, and the CFO thought this resulted in a fair result to Dubai World.

[51] M. Blain testified that none of the cost of the space trip or the related production and broadcast costs was deducted for tax purposes because he is risk averse and concerned about the media and, in particular, bad publicity. The reason he gave Cirque du Soleil was that it was to avoid tax litigation. The clear inference from this is that the CFO wanted to avoid the risks of Cirque du Soleil (i) being challenged on the deduction of these expenses it had incurred, or (ii) being unable to justify any such expense if it was deducted and challenged.[13]

10. Conclusion

[52] As stated above, I find a benefit was conferred on the Appellant by his family holding company, 2739-2224 Québec, either conferring the benefit directly when it signed the Space Flight Agreement and/or when it paid Space Adventures for the trip he had arranged for primarily personal purposes, and/or by allowing all or part of the benefit to be provided indirectly by another Cirque du Soleil company, Créations Méandres, when it reimbursed the Appellant's family holding company. I find this benefit was conferred on him qua controlling shareholder. This is sufficient to engage each of subsection 15(1) and subsection 246(1).

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[12] Dubai World did bear its share of the direct incremental costs of the Poetic Social Mission broadcast etc.

[13] The CFO also put forward the further explanation that, if a proper allocation between the Cirque du Soleil companies was done- which it was not, some would only be deductible in lower tax jurisdictions such as Hungary and Luxembourg, and in Canada some would only get goodwill ECE treatment, resulting in lesser values to the available deductible amount. The Deloitte memo suggests it might have been difficult to justify a deduction for these expenses to the tax authorities in Hungary and Luxembourg and estimated that 80% of the amount was perhaps properly chargeable to the companies in these jurisdictions that held the Cirque du Soleil trademarks.

[53] I am simply unable on the limited evidence from the Appellant on the valuation and allocation issues to make a very good determination of the portion of the cost of the space trip taken by the Appellant that can be reasonably regarded as having been business-related.

[54] That said, I do recognize that the Cirque du Soleil promotional business-related activities in which the Appellant participated while on his trip were most probably more valuable having been from space than had they been from anywhere on earth. For that reason I could conclude that an allocation in the range of 0 to 10% of the cost of the space trip would be a reasonable charge to Cirque du Soleil. This range is limited by the evidence the Appellant presented on the issue of value.

[55] I am fixing the amount of the business-related portion of the cost at the top of that range at - $4.2 million. That is in the range of the amount of the direct incremental costs of the promotional activities of Cirque du Soleil and One Drop. I find that the remaining 90% of the cost of the trip, being $37.6 million, was the amount of the benefit conferred on and enjoyed by M. Laliberté.

[56] While the facts of this case are novel in some respects, it raises the relatively common and legally straightforward issue of benefits conferred by a company on a shareholder. I have approached my decision in this case as I would have had it involved an owner-manager of a business who decided that he personally wanted to go on a cross-country trip, and then decided that, he would stop in to visit business clients and suppliers and potential clients and potential suppliers along the way. One would expect his incremental direct costs associated with his business promotion activities and sidetrips should be deductible, but that little, if any, of the trip itself would be. If he could have his company pay for his whole trip, even if it did not deduct the cost for tax purposes, it would allow him to pay for his trip in pre-tax dollars. The shareholder benefit provisions exist for just such reasons, and going offside can often result in double taxation once corrected.

[57] Simply put, there is a difference between a business trip which involves or includes personal enjoyment aspects, and a personal trip with business aspects, even significant ones, tacked on. I have found that this space trip falls into the latter category, and the tax consequences to the business income are considered and determined accordingly.

11. Costs

[58] The Respondent is awarded costs. The parties shall advise the Court within 30 days if they are unable to agree on costs, in which case each party may file written submissions to a maximum of 10 pages within the following 30 days, and failing which costs will be at tariff amounts.

Signed at Ottawa, Canada, this 12th day of September 2018.

"Patrick Boyle"

Boyle J.

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COURT FILE NO.:	2015-1475(IT)G
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