

Date: 20080618

Docket: A-188-07

Citation: 2008 FCA 218

**CORAM: LINDEN J.A.
SHARLOW J.A.
TRUDEL J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

PERFECT FRY COMPANY LTD.

Respondent

Heard at Vancouver, British Columbia, on June 18, 2008.

Judgment delivered from the Bench at Vancouver, British Columbia, on June 18, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

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REASONS FOR JUDGMENT OF THE COURT

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SHARLOW J.A.

[1] This is an appeal by the Crown from a judgment of Justice Paris of the Tax Court of Canada (2007 TCC 133) allowing the income tax appeal of Perfect Fry Company Ltd. for the taxation years 1993 to 1998. The issue in the Tax Court was whether, in each of those years, Perfect Fry met the statutory definition of “Canadian-controlled private corporation” in subsection 125(7) of the *Income Tax Act*, R.S.C. 1985, c. F-7. Meeting that definition would entitle Perfect Fry to tax relief in the form of refundable investment tax credits for 1993 to 1995, the small business deduction for 1995,

and additional and refundable investment tax credits for 1996 to 1998. Justice Paris concluded that Perfect Fry met the statutory definition in all of those years.

[2] The Crown is appealing the Tax Court judgment only in relation to 1996, 1997 and 1998. The Crown's position is that Justice Paris incorrectly interpreted paragraph (b) of the definition of "Canadian-controlled private corporation" in subsection 125(7) as in force for 1996 and subsequent taxation years.

[3] The relevant facts are not in dispute. Throughout 1996, 1997 and 1998, Perfect Fry was a corporation resident in Canada, all of the shares of which were owned by Perfect Fry Corporation, a Canadian public corporation. More than 50% of the shares of Perfect Fry Corporation were owned by a group of Canadian resident individuals who acted in concert.

[4] It is common ground that, given these facts and the decision of this Court in *Parthenon Investments Ltd. v. Canada* (1997) 214 N.R. 396, 97 D.T.C. 5343, [1997] 3 C.T.C. 152 (F.C.A.), Perfect Fry was controlled *de jure* by a group of Canadian resident individuals who acted in concert, and not by Perfect Fry Corporation. It follows that, for 1995 and prior years, Perfect Fry met the definition of "Canadian-controlled private corporation" that was in force in those years. That definition reads as follows:

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| "Canadian-controlled private corporation" means a private corporation that is a Canadian corporation other than a corporation controlled, directly or indirectly in any manner whatever, by one or more non-resident persons, by one or | «société privée sous contrôle canadien » Société privée qui est une société canadienne autre qu'une société contrôlée, directement ou indirectement, de quelque manière que ce soit, par une ou plusieurs personnes non-résidentes, par |
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| <p>more public corporations (other than a prescribed venture capital corporation), or by any combination thereof.</p> | <p>une ou plusieurs sociétés publiques (autre qu' une société à capital de risque visée par règlement), ou par une combinaison de celles-ci.</p> |
|---|--|

[5] For 1996 and subsequent years, the definition was amended to read as follows:

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| <p>"Canadian-controlled private corporation" means a private corporation that is a Canadian corporation other than a corporation</p> <p>(a) controlled, directly or indirectly in any manner whatever, by one or more non-resident persons, by one or more public corporations (other than a prescribed venture capital corporation), or by any combination thereof,</p> <p>(b) that would, if each share of the capital stock of a corporation that is owned by a non-resident person, or a public corporation (other than a prescribed venture capital corporation) were owned by a particular person, be controlled by the particular person, or</p> <p>(c) a class of the shares of the capital stock of which is listed on a prescribed stock exchange.</p> | <p>«société privée sous contrôle canadien » Société privée qui est une société canadienne, à l'exception des sociétés suivantes :</p> <p>a) la société contrôlée, directement ou indirectement, de quelque manière que ce soit, par une ou plusieurs personnes non-résidentes, ou par une ou plusieurs sociétés publiques, sauf une société à capital de risque visée par règlement, ou par une combinaison de celles-ci;</p> <p>b) si chaque action du capital-actions d'une société appartenant à une personne non-résidente, ou à une société publique, sauf une société à capital de risque visée par règlement, appartenait à une personne donnée, la société qui serait contrôlée par cette dernière;</p> <p>c) la société dont une catégorie d'actions du capital-actions est cotée à une bourse de valeurs visée par règlement.</p> |
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[6] The Crown argued in the Tax Court that Perfect Fry falls outside the definition for 1996, 1997 and 1998 because of paragraph (b) of the definition. Justice Paris rejected that argument for reasons that are explained in paragraphs 74 to 94 of his reasons for judgment. The Crown argues that his conclusion is wrong in law.

[7] Despite the able submissions of Crown counsel, we agree with the conclusion reached by Justice Paris, substantially for the reasons he gave. In particular, we agree that paragraph (b) of the definition of “Canadian-controlled private corporation” in subsection 125(7), as it read for 1996, 1997 and 1998, applies only in situations where a majority of the voting shares of a corporation are held by non-residents or public corporations but no person or group of persons has *de jure* control.

[8] The appeal will be dismissed with costs.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DELIVERED FROM THE BENCH BY: SHARLOW J.A.

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