Federal Court of Appeal

Cour d'appel fédérale

Date: 20210610

Docket: A-25-20

Citation: 2021 FCA 115

[ENGLISH TRANSLATION]

CORAM: **NOËL C.J.**
NADON J.A.
RIVOALEN J.A.

BETWEEN:

BRESSE SYNDICS INC.
ACTING FOR THE BANKRUPTCY OF CO2
SOLUTION TECHNOLOGIES INC.

Appellant in continuance of suit

and

HER MAJESTY THE QUEEN

Respondent

Videoconference hearing organized by the Registry, on May 13, 2021.

Judgment delivered at Ottawa, Ontario, on June 10, 2021.

REASONS FOR JUDGMENT: NOËL C.J.

CONCURRED IN BY : NADON J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal filed by Bresse Syndics inc. acting for the bankruptcy of CO2 Solution Technologies inc. (the appellant) from a decision of the Tax Court of Canada (2019 TCC 286) in which Smith J. (the TCC judge) confirmed the correctness of an assessment issued regarding the appellant's 2009 taxation year. This assessment disallowed the investment tax credit claimed by

the appellant under subsections 127(10.1) and 127.1(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act).

[2] The TCC judge ruled that the appellant was not entitled to the credit claimed on the ground that it was controlled directly or indirectly by a public corporation within the meaning of paragraph 125(7)(*a*) of the Act. The appellant submits that the TCC judge erred in law in reaching this conclusion and maintains that, throughout its 2009 taxation year, it had the status of a Canadian-controlled private corporation (CCPC).

[3] For the reasons set out below, I would dismiss the appeal. The provisions relevant to the analysis are set out in the annex to these reasons.

FACTS

[4] In March 2004, CO2 Solution inc., a company operating a high-tech business in the field of carbon dioxide capture and management became a public corporation (Public CO2).

[5] In 2005, as part of a reorganization involving several subsidiaries and a trust (Fiducie), Public CO2 transferred its scientific research and experimental development (SR&ED) activities to the appellant. A research agreement was then concluded between them.

[6] During this reorganization, Fiducie became the appellant’s sole shareholder and solely empowered to choose its directors, which would remain the case at all times relevant to the

dispute. According to the deed creating Fiducie (Fiducie’s deed of trust), its trustees had to be sitting directors of Public CO2 and accept the office of trustee in writing.

[7] In its 2009 tax return, the appellant claimed the refundable tax credit and the associated enhancement related to SR&ED expenses it incurred.

[8] In an assessment issued on December 31, 2012, the Minister of National Revenue disallowed the credits claimed on the ground that the appellant did not qualify as a CCPC for the taxation year in issue, as it was directly or indirectly controlled by a public corporation, namely Public CO2.

[9] The appellant brought the matter before the Tax Court of Canada.

JUDGMENT UNDER APPEAL

[10] The TCC judge first addressed the concept of *de jure* control. He stated that, following the teachings of the Supreme Court, the person holding the *de jure* control of a corporation is the person or group of persons who exercise effective control over it (Reasons at para. 60).

[11] In this case, the TCC judge states that it is relevant to look at the deed that created Fiducie, the appellant’s sole shareholder. According to the mechanism set out in this document, only members of Public CO2’s board of directors can be trustees of Fiducie. He concludes that this mechanism is sufficient to establish that Public CO2 exercised *de jure* control over the appellant (Reasons at paras. 61-63).

[12] The TCC judge then addressed the concept of *de facto* control set out in subsection 256(5.1) of the Act. He concludes that Public CO2 also had *de facto* control over the appellant because Fiducie's deed of trust is a "legally-enforceable arrangement," giving it the "clear right and ability to . . . influence in a very direct way" its sole shareholder following the criteria developed by the jurisprudence (Reasons at para. 65, citing *Silicon Graphics Ltd. v. Canada,* 2002 FCA 260, [2003] 1 F.C. 447 [*Silicon Graphics*] at para. 67; *Aeronautic Development Corporation v. Canada*, 2018 FCA 67 at para. 49; *McGillivray Restaurant Ltd. v. Canada*, 2016 FCA 99, [2017] 1 F.C.R. 209 [*McGillivray*]).

[13] He adds that Appendix C of the appellant's certificate of incorporation, which provides that only Public CO2 or its subsidiaries can own its capital stock, and the research agreement concluded between Public CO2 and the appellant are also legally-enforceable arrangements within the meaning ascribed by the case law (Reasons at paras. 67-68).

[14] The TCC judge concluded that the appellant, being controlled by a public corporation, was not a CCPC during its 2009 taxation year and that the appeal must consequently be dismissed (Reasons at para. 71).

<u>POSITIONS OF THE PARTIES</u>

[15] The appellant submits that the TCC judged erred in finding that Public CO2 exercised *de facto* control over it on the basis of the three arrangements which he qualified as legally-enforceable (Memorandum of the Appellant at paras. 70-72):

i. Fiducie's deed of trust cannot constitute an agreement between the two parties. Rather, it is a unilateral document which engenders an autonomous and separate patrimony (Memorandum of the Appellant at paras. 73, 85, 87). In addition, it submits that no provision of the deed aimed to restrict or limit Fiducie's power to appoint the appellant's board of directors; its provisions only limited the eligibility of people who could be trustees (Memorandum of the Appellant at para. 91);

ii. The research agreement was a business agreement drafted for the benefit of both parties; the terms of the research agreement were not dictated and applied at the will of a controlling entity (Memorandum of the Appellant at paras. 74, 110). The appellant does not deny that the research agreement made Public CO2 and itself interdependent in the conduct of their respective businesses, but maintains that this commercial interdependence did not provide Public CO2 *de facto* control over it (Memorandum of the Appellant at para. 103);

iii. Appendix C of the certificate of incorporation did not constitute an agreement or a contract. In addition, the possibility that Public CO2 or one of its subsidiaries could have become shareholders under the terms of this document never materialized (Memorandum of the Appellant at paras. 75-81).

[16] The appellant also submits that the TCC judge erred in holding that, because of the mechanism regarding the changing of directors and trustees in Fiducie's deed of trust, Public CO2 had *de jure* control over it (Memorandum of the Appellant at para. 114). It points out that he could not consider Fiducie's deed of trust in his analysis because it was a document "external" to the corporation (Memorandum of the Appellant at para. 116).

[17] Moreover, the appellant submits that as is the case with respect to *de facto* control, the TCC judge could not conclude that Public CO2 exercised *de jure* control over it based on the fact that Fiducie's deed of trust provided that people eligible to be trustees had to be directors of Public CO2 (Memorandum of the Appellant at para. 121). According to the structure put in place, the shareholders of Public CO2 did not appoint Fiducie's trustees since their appointment depended on another condition, namely the acceptance of the office in writing (Memorandum of the Appellant at paras. 122, 132).

[18] The appellant therefore asks us to conclude that Public CO2 did not exercise *de jure* or *de facto* control and confirm its status as a CCPC during the year in issue.

[19] The Crown for its part submits that the TCC judge correctly concluded that Public CO2 exercised *de jure* and *de facto* control over the appellant (Memorandum of the Crown at paras. 30, 43). The TCC judge properly considered Fiducie's deed of trust in his analysis of *de jure* control and correctly considered, in its analysis of *de facto* control, the three agreements pursuant to which Public CO2 exercised control over the appellant (Memorandum of the Crown at paras. 27, 28, 37).

ANALYSIS

[20] The issue at the core of this case is whether the TCC judge could conclude that a public corporation, in this case Public CO2, exercised *de jure* or *de facto* control over the appellant during the year at issue such that it was not a CCPC within the meaning of subsection 125(7) of the Act.

[21] The application of legal tests of control to the facts in issue raises a question of mixed law and fact that does not justify our intervention except in instances where a palpable and overriding error has been made, absent an extricable question of law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 8, 26-37).

A. *Legal framework*

[22] The *de jure* and *de facto* control tests both aim to determine who controls the composition of a corporation's board of directors and therefore the corporation itself (*Buckerfield's Limited v. Minister of National Revenue*, 64 DTC 5301 [*Buckerfield's Limited*]; *Silicon Graphics* at para. 67). The exercise of either of these types of control by Public CO2, if applicable, disqualifies the appellant from the CCPC status.

[23] The difference between these two tests is limited to the range of factors that can be considered in determining who controls a given corporation (*McGillivray* at paras. 47-48). The law is well settled that *de jure* control lies in the hands of those who have the power to appoint the board of directors. As a general rule, these are the majority shareholders. However, certain documents can modify or restrict their power. Thus, the *de jure* control analysis deals with any internal restriction—in the corporation's articles of incorporation or in a unanimous shareholder agreement—on these shareholders' power to elect the board of directors or to limit the ability of the board of directors to manage the affairs of the corporation (*Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795 [*Duha Printers*] at paras. 36-37, 85).

[24] *De facto* control, on the other hand, is a more recent concept that was introduced in the Act in 1988 with the addition of subsection 256(5.1). It is determined on the same basis as *de jure* control but allows for factors that are external to the corporation to be taken into account (*Duha Printers* at para. 55; *Silicon Graphics* at para. 66). As this Court held in *McGillivray*, the influence required to ground a finding of *de facto* control must come from "legally binding or enforceable arrangements" (*McGillivray* at paras. 33, 48). Although this approach was enlarged in 2017 by the adoption of subsection 256(5.11), the facts in this case occurred before it took effect. It is therefore necessary to abide by the more stringent approach propounded in *McGillivray*.

B. *Did Public CO2 control the appellant during the year in issue?*

[25] In support of its appeal, the appellant maintains that Fiducie's deed of trust should not be considered in the *de jure* control analysis because it is a document external to the corporation. In addition, it submits that none of the documents considered by the TCC judge, including Fiducie's deed of trust, established the existence of *de facto* control, as they were not legally-enforceable arrangements within the meaning of *McGillivray*.

[26] I agree with the appellant that the *de jure* control analysis must, in principle, be limited to the internal documents of the corporation in question, which, *prima facie*, excludes Fiducie's deed of trust. However, according to *Duha Printers*, it can be relevant to examine the deed creating a trust that is a shareholder of a corporation in order to determine whether this instrument restricts the ability of trustees to exercise their voting rights on the shares held by the trust (*Duha Printers* at paras. 48-50).

[27] In this case, it is not necessary to determine whether Fiducie's deed of trust imposed on the trustees this type of restriction because, in any event, that deed gave Public CO2 *de facto* control of the appellant following the criteria developed in *McGillivray*. The appellant is asking us to ignore the Fiducie's deed of trust on the ground that it is not a legally-enforceable arrangement within the meaning of this case. However, nothing in the reasoning of the Court in this case allows deeds of trust to be excluded from the concept of legally-enforceable arrangement. To the contrary, that case stands for the proposition that a legal document must be taken into consideration when it confers "a legally enforceable right and ability to effect a change to the board of directors or its powers, or to exercise influence over the shareholder or shareholders who have that right and ability" (*McGillivray* at para. 48). Fiducie's deed of trust granted Public CO2 this ability.

[28] Fiducie's deed of trust operated in such a way that by electing Public CO2's board of directors, Public CO2's shareholders also elected Fiducie's trustees, as they had to be directors of Public CO2. The result is that if a person ceased being a director of Public CO2, they automatically ceased being a trustee of Fiducie (Fiducie's constituting document, Appeal Book, vol. 2 at 348). Thus, Public CO2 had the power to terminate the trustees' functions by revoking or not renewing their mandate as directors.

[29] The fact that Public CO2's directors were not required to accept the office of trustee is immaterial. What matters is that the mechanism put in place clearly gave Public CO2 the ability to change the appellant's board of directors or to influence in a very direct manner those who had

that ability. The net result is that trustees' freedom to decide was subject to the will of CO2 Public.

[30] The TCC judge, therefore, properly concluded that Public CO2 controlled the appellant during the year in issue.

[31] In light of this conclusion, it is not necessary to determine whether the other documents considered by the TCC judge—i.e., the research agreement and Appendix C of the appellant's certificate of incorporation—were legally-enforceable arrangements that gave Public CO2 control over the appellant.

DISPOSITION

[32] For the above reasons, I would dismiss the appeal with costs.

"Marc Noël"
Chief Justice

"I agree.
M. Nadon J.A."

"I agree.
Marianne Rivoalen J.A."

ANNEX

***Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)**

Small business deduction

125 (7) Canadian-controlled private corporation means a private corporation that is a Canadian corporation other than

(a) a corporation 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), by one or more corporations described in paragraph (c), or by any combination of them,

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;

Control in fact

(5.1) For the purposes of this Act, where the expression “controlled, directly or indirectly in any manner whatever,” is used, a corporation shall be considered to be so controlled by another corporation, person or group of persons (in this subsection referred to as the “controller”) at any time where, at that time, the controller has any direct or indirect influence that, if exercised, would result in control in fact of the corporation, except that, where the corporation and the controller are dealing with each other at arm’s length and the influence is derived from a franchise, licence, lease, distribution, supply or management agreement or other similar agreement or arrangement, the main purpose of which is to govern the relationship between

***Loi de l’impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.)**

Déduction accordée aux petites entreprises

125 (7) société privée sous contrôle canadien Société privée qui est une société canadienne, à l’exception des sociétés suivantes :

a) la société contrôlée, directement ou indirectement, de quelque manière que ce soit, par une ou plusieurs personnes non-résidentes, par une ou plusieurs sociétés publiques (sauf une société à capital de risque visée par règlement), par une ou plusieurs sociétés visées à l’alinéa c) ou par une combinaison de ces personnes ou sociétés;

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;

Contrôle de fait

(5.1) Pour l’application de la présente loi, lorsque l’expression « contrôlée, directement ou indirectement, de quelque manière que ce soit, » est utilisée, une société est considérée comme ainsi contrôlée par une autre société, une personne ou un groupe de personnes — appelé « entité dominante » au présent paragraphe — à un moment donné si, à ce moment, l’entité dominante a une influence directe ou indirecte dont l’exercice entraînerait le contrôle de fait de la société. Toutefois, si cette influence découle d’un contrat de concession, d’une licence, d’un bail, d’un contrat de commercialisation, d’approvisionnement ou de gestion ou d’une convention semblable — la société et l’entité dominante n’ayant entre elles aucun lien de

the corporation and the controller regarding the manner in which a business carried on by the corporation is to be conducted, the corporation shall not be considered to be controlled, directly or indirectly in any manner whatever, by the controller by reason only of that agreement or arrangement.

dépendance — dont l’objet principal consiste à déterminer les liens qui unissent la société et l’entité dominante en ce qui concerne la façon de mener une entreprise exploitée par la société, celle-ci n’est pas considérée comme contrôlée, directement ou indirectement, de quelque manière que ce soit, par l’entité dominante du seul fait qu’une telle convention existe.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-25-20

APPEAL FROM A JUDGMENT BY THE HONOURABLE MR. JUSTICE GUY R. SMITH DATED DECEMBER 20, 2019, DOCKET NO. 2015-5635(IT)G

STYLE OF CAUSE:	BRESSE SYNDICS INC. ACTING FOR THE BANKRUPTCY OF CO2 SOLUTION TECHNOLOGIES INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 13, 2021
REASONS FOR JUDGMENT:	NOËL C.J.
CONCURRED IN BY:	NADON J.A. RIVOALEN J.A.
DATE:	JUNE 10, 2021

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