

Docket: 2004-1147(IT)G

BETWEEN:

CHRISTIAN LAROUCHE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of
2753-1359 Québec Inc. (2004-1153(IT)G), on April 29, 2008,
at Montréal, Quebec

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant: Serge M. Racine
Counsel for the Respondent: Nathalie Labbé

JUDGMENT

The appeal from the assessments made under the *Income Tax Act* ("the Act") for the 1993, 1994, 1995 and 1996 taxation years is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 3rd day of September 2008.

"François Angers"

Angers J.

Translation certified true
on this 15th day of May 2008.

François Brunet, Revisor

Docket: 2004-1153(IT)G

BETWEEN:

CHRISTIAN LAROUCHE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of
Christian Larouche (2004-1147(IT)G), on April 29, 2008,
at Montréal, Quebec

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant: Serge M. Racine
Counsel for the Respondent: Nathalie Labbé

JUDGMENT

The appeal from the assessments made under the *Income Tax Act* ("the Act") for the 1996 taxation year is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Ottawa,

Canada, this 3rd day of September 2008.

"François Angers"

Angers J.

Translation certified true
on this 15th day of May 2008.

François Brunet, Revisor

Citation: 2008 TCC 448
Date: 20080903
Dockets: 2004-1147(IT)G
2004-1153(IT)G

BETWEEN:

CHRISTIAN LAROUCHE,
2753-1359 QUÉBEC INC.,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Angers J.

[1] These two appeals were heard on common evidence. The Appellants have appealed from the assessments made regarding them under section 160 of the *Income Tax Act* ("the Act"). It is admitted by the Appellants that at all relevant times they were persons related to 9039-0618 Québec Inc. ("9039") within the meaning of the Act.

[2] The Appellant Christian Larouche received dividends from 9039 totalling \$141,250 during the years 1993 to 1996, and the Appellant 2753-1359 Québec Inc. received a dividend of \$41,980 from 9039 in 1996. At the time the dividends were paid, 9039 owed the Minister of National Revenue ("the Minister") for unpaid income tax, interest and penalties. On the date on which the Appellants were assessed, May 23, 2003, 9039's tax debt was as follows:

| Year | Taxes | Penalty | Interest | Total |
|-------------|--------------------|-------------------|--------------------|---------------------|
| 1993 | \$13,180.22 | | \$17,485.32 | \$ 30,665.54 |
| 1994 | \$22,972.39 | | \$28,575.12 | \$ 51,547.51 |
| 1995 | <u>\$27,584.59</u> | <u>\$2,758.45</u> | <u>\$33,247.60</u> | <u>\$ 63,590.64</u> |
| Total | \$63,737.20 | \$2,758.45 | \$79,308.04 | \$145,803.69 |

[3] The issue is whether the dividends paid to the Appellants constitute a transfer for which no consideration was given under section 160 of the Act. The amounts for which the Appellants were assessed correspond to the amount of the dividends paid to them by 9039. Section 160 of the Act reads as follows:

Tax liability re property transferred not at arm's length

- (1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to
- (a) the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,
 - (b) a person who was under 18 years of age, or
 - (c) a person with whom the person was not dealing at arm's length,

the following rules apply:

- (d) the transferee and transferor are jointly and severally liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and
- (e) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of
 - (i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and
 - (ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act.

[4] In order for section 160 to apply, there must therefore have been a transfer of property between two persons not dealing with each other at arm's length, a transfer of property for which no consideration was given or where the consideration was less than the fair market value, at a time when the transferor had a debt to the Minister in the year when the property was transferred or for any preceding year. It is understood that the transferee will not owe more than the value of the benefit received.

[5] In this case, and as the issue is framed *supra*, the question is whether there was a transfer of property, and if so, whether valuable consideration was given, within the meaning of section 160 of the Act, when a dividend was paid.

[6] This issue has been considered in several decisions of this Court, the Federal Court of Appeal and the Supreme Court of Canada. In *Algoa Trust v. The Queen*, [1993] 1 C.T.C. 2294, Rip J. of this Court held that section 160 of the Act applied to a dividend such that payment of the dividend constituted a transfer of property within the meaning of section 160. He made the following remarks:

The payment of a dividend in money or other property is a transfer of property within the meaning of subsection 160(1) of the Act. The corporation is impoverished and its shareholders are enriched. I fail to see the reason why a dividend is not a transfer of property. I do realize an unknowing shareholder not dealing at arm's length with the corporation may become jointly and severally liable under the Act for the liability of the corporation as a result of my interpretation of subsection 160(1). If this is an unintended effect of that provision - and I am not sure it is - Parliament surely will consider remedying the problem.

[7] That conclusion by Rip J. was affirmed by the Federal Court of Appeal on February 4, 1998, and followed by Sharlow J.A. of the Federal Court of Appeal in 2006 in *Addison & Leyen Ltd. v. Canada*, [2006] F.C.J. No. 489. At paragraphs 57 and 60 of her decision, Sharlow J.A. explained that section 160 could apply to dividends:

[57] . . . It is possible to imagine a corporation, especially a closely held one, using the payment of a dividend to divest itself of assets in order to avoid paying a tax liability, but in most cases the payment of a dividend is an ordinary commercial transaction. A dividend is also taxable income to the recipient (except for certain corporate recipients). . . .

[60] . . . Thus, the 1993 decision of the Tax Court in *Algoa Trust* is the leading authority for the proposition that section 160 may apply to a dividend.

[8] That decision by Sharlow J.A. was affirmed by the Supreme Court of Canada on other grounds.

[9] In *The Queen v. Gilbert*, 2007 FCA 136, Nadon J.A. reviewed the law and held that a dividend paid to shareholders constituted a transfer for which no consideration was given within the meaning of section 160 of the Act. The relevant remarks read as follows:

[11] With regard to the first issue, Lamarre Proulx J. determined that the dividends paid to the respondents amounted to a transfer without consideration within the meaning of paragraph 160(1)(a) of the Act. At paragraphs 30 to 32 of her reasons, she stated the following:

From my understanding of corporate law, it is when a corporation is wound up that the shareholders share the remaining property of the corporation. The issuing of a dividend is different in nature. I cannot accept the argument that receipt of a dividend causes the correlative impoverishment of the shareholder transferee. I do not believe that is the case in corporate law and it is decidedly not the case in tax law. In tax law, a person who receives a dividend must include it in computing his income because it is an increase in his income. For the corporation that issues it, it constitutes a reduction of its retained earnings and a reduction of its assets.

There is therefore impoverishment of the issuing corporation and enrichment of the transferee, as is the case in any transfer of property subject to section 160 of the Act.

As to the possibility of consideration to be given for the issuing of a dividend, I believe that the Supreme Court of Canada clearly stated in *Neuman (supra)* there was no such possibility. . . .

[12] In my opinion, Lamarre-Proulx J. did not err in dismissing the respondents' argument to the effect that a dividend was paid to them as shareholders of the corporation for consideration, since she was simply following the precedents of our Court and the Supreme Court.

[13] Specifically, Lamarre Proulx J. referred to *Newman v. M.N.R.*, [1998] 1 S.C.R. 770, at page 791, where the Supreme Court of Canada, referring with approval to the dissenting reasons of LaForest J. in *McClurg v. Canada*, (1990) 3 S.C.R. 1020), clearly confirmed that no consideration can be given for the payment of a dividend:

. . . a dividend is received by virtue of ownership of the capital stock of a corporation. It is a fundamental principle of corporate law that a

dividend is a return on capital which attaches to a share, and is in no way dependent on the conduct of a particular shareholder.

[14] This finding ratified the determination of Rip J. of the Tax Court of Canada in *Algoa Trust v. Canada*, [1993] 1 C.T.C. 2294, page 2303, a decision which our Court dismissed on appeal, on February 4, 1998 (Court docket A-201-93) :

When a person subscribes for shares of a corporation he or she is paying theoretically for the acquisition of a share of the ownership of the corporation and receives shares of a class in the capital stock of the corporation. The shareholder gives consideration for the shares and not for what the shares may bring. Ownership of shares gives the shareholder certain rights: right to vote as a shareholder, right to a distribution of capital on the winding-up of the corporation, right to receive dividends. (This list is not meant to be exhaustive.) When the shareholder receives a dividend it is not as a result of any consideration he or she gave the corporation and which the corporation is obliged to pay for investing. When a shareholder purchases shares he is not purchasing an income right. A shareholder receives a dividend solely because the right to a dividend is an attribute of owning shares.

[10] Leave to appeal was denied by the Supreme Court of Canada on September 20, 2007.

[11] The Respondent thus stands by the current law in support of her assessments, that is, that section 160 applies to the dividends paid in this case.

[12] Counsel for the Appellants argued that contrary to the current trend in the case law, payment of dividends by a corporation to its shareholders should not be regarded as a transfer within the meaning of section 160 of the Act. In support of his position, counsel for the Appellants submitted that there are two steps that must be followed in order to pay a dividend, and cited a remark from *Rondeau v. Poirier*, [1980] C.A. 35, a decision of the Quebec Court of Appeal, in which Lamer J.A., as he then was, concluded that there are two steps involved in paying dividends: (1) the declaration of the dividend, and (2) the payment of the dividend. The relevant passages of the decision are as follows:

[TRANSLATION]

With respect, it is my opinion that the respondents' reasoning is based on an erroneous premise: that declaration of a dividend merely makes a dividend payable when it already existed because of the existence of the share. I believe it is useful here to recall certain principles governing the rights and obligations of the shareholders and directors of a corporation and of the corporation itself. First, it must

be noted that the directors alone decide whether a dividend should be declared; they may do that only for the purposes of distributing profits and, with certain very specific exceptions, they may not encroach on capital. However, the fact that the corporation has made profits imposes no obligation on them to declare any dividend, or to decide the amount they intend to distribute if they find it advisable to declare a dividend. This is important, because it leads to the solution to the very problem before this Court. A shareholder in a corporation is not, properly speaking, a creditor of that corporation, as long as the directors have not declared a dividend; the shareholder is entitled not to the profits, because the directors are not obliged to distribute them, but to a proportional share of the profits, in accordance with certain terms for distribution, if and when the directors decide to distribute them, that is, to declare a dividend. That right to a distribution formula exists under a suspensive condition, the condition being not that there are profits, but that the directors wish to declare a dividend and are entitled to do that, that is, that there are profits to be distributed.

The existence of profits creates rights not in the shareholder, but in the directors: the right to declare the dividend in order to distribute all or part of the profits. If the directors choose to distribute profits by declaring a dividend, another right is added to the shareholder's patrimony: ownership of the profits on the terms set out in his or her shares in relation to the portion of the profits that the directors have decided to distribute and the payment terms they may have established, if any. The shareholder then becomes a creditor of the corporation. When the provisions of article 1085 C.C. are applied retroactively effect, as of the date on which the obligation was contracted, we must be very careful not to confuse the obligation contracted regarding the terms of distribution, if profits are to be distributed, with the obligation to distribute, which, in my opinion, is contracted only at the point when the dividend is declared (whether or not there are terms of payment or other conditions attached).

[13] In the submission of counsel for the Appellants, the consequences of this two-stage payment process for both the corporation and the shareholder arise only at the declaration stage; a debt arises in the corporation's liabilities and the shareholder becomes a creditor of the corporation. At the dividend payment stage, the undistributed profits are reduced by the amount of the dividend and the debt disappears. As far as the shareholder is concerned, the debt is paid and the right to payment of the dividend is extinguished.

[14] The consequence of all this, counsel for the Appellants submits, is that there can be no transfer given that there is no enrichment. He cites *Hamel v. Minister of National Revenue*, [1996] 2 C.T.C. 2046; in that case, Lamarre Proulx J. explained that a transfer occurs when the person who makes the transfer is impoverished and the person who receives the property is correspondingly enriched.

Did the payment by the corporation of the sum of \$350,000 to Mr. Allard in satisfaction of the amounts for which the Superior Court had given him judgment against the appellant constitute a transfer of property to the appellant? We have seen that the transfer does not have to be made directly to the transferee. There is a transfer if there is impoverishment of the transferor, whether the transfer is made directly or indirectly, and corresponding enrichment of the transferee. It is my view that this is what occurred in the instant case.

[15] Counsel for the Appellants also submits that not only have the Appellants not been enriched in this case, but the corporation has also not been impoverished. For the corporation, the debt disappears and the undistributed profits are reduced. For the shareholders, their liquidity is increased, and their claim is accordingly extinguished. The consequence means that there is no transfer in this case, as held in *Hamel*.

[16] Counsel for the Appellants pursued this argument and added a second perspective, based on the principle that a debtor who pays their debt is entitled to an acquittance (article 1568 of the *Civil Code of Québec*) and that the right to an acquittance is "property" as defined in the Act (property of any kind). If it is property, is that not the consideration given, the fair market value of which is equivalent to the amount of the dividend, so there was consequently consideration given by the shareholders, that is, the acquittance? He acknowledged that his argument lends itself well to a dividend paid in cash and that it would be more difficult to apply it to a dividend paid in kind. On that point, counsel for the Appellants pointed to the comments in *Algoa Trust* that support his reasoning; for instance, Rip J. said there is no transfer at the point when the dividend is declared. It must be noted that in *Algoa Trust* the analysis related to dividends paid in shares, and not dividends paid in cash as in the present case.

[17] To summarize, the Appellants' position is that a dividend was paid but that the payment was not a transfer because there was no enrichment of the shareholders corresponding to impoverishment of the corporation, and even if there was, paragraph 160(1)(e) cannot apply because, by that accounting logic, which follows the legal application of the principles stated, the shareholder has received a dividend and the consideration is the loss of the shareholder's right to bring action against the company for payment.

[18] It is important to note, first, what the nature of a dividend is and what payment of a dividend means. In *Neuman v. M.N.R.*, [1998] 1 S.C.R. 770, Iacobucci J. rejected the argument that payment of a dividend is related to the amount of effort deployed by the recipient on behalf of the corporation, which would constitute valuable consideration. He quoted a remark of La Forest J. in *McClurg v. Canada*, [1990] 3

S.C.R. 1020: "a dividend is received by virtue of ownership of the capital stock of a corporation" and it is "a fundamental principle of corporate law that a dividend is a return on capital which attaches to a share, and is in no way dependent on the conduct of a particular shareholder".

[19] In *Gosselin v. Canada*, [1996] T.C.J. No. 206, at paragraph 15, Dussault J. of this Court said, regarding the nature of a dividend:

The declaration of a dividend is essentially the allocation of a company's undistributed profits to its shareholders in proportion to the shares held by them and in accordance with the rights attached to those shares. Payment of the dividend is the act by which the dividends so allocated by the directors in their discretion, and in compliance with the principles of company law and the specific rules laid down in this regard, distribute to the shareholders the dividend allocated to each class of shares. In addition to the rules regarding solvency of the company there is the rule of equality of shares in the same class in terms of the privileges and limitations attached to shares in that class.

[20] Second, the definition of the word "transfer" has been considered in several cases, and in my view the leading decision defining a transfer is *Fasken Estate v. Canada*, [1948] Ex. C.R. 580, in which Thorson J. of the Exchequer Court defined it as follows, at paragraph 34:

That the word "transfer" . . . is not a term of art and has not a technical meaning. It is not necessary to a transfer of property from a husband to his wife that it should be made in any particular form or that it should be made directly. All that is required is that the husband should so deal with the property as to divest himself of it and vest it in his wife, that is to say, pass the property from himself to her. The means by which he accomplishes this result, whether direct or circuitous, may properly be called a transfer.

[21] However, it is in *Algoa Trust* that it was held that payment of a dividend is a transfer of property, and not only a transfer *per se* but also a transfer of property within the meaning of paragraph 160(1)(e); I quoted in paragraph 6 herein above the comments of Rip J.

[22] The fact that the corporation cannot have been impoverished and the shareholders enriched does not mean that there was no transfer of property when a dividend was paid. Payment of a dividend to a shareholder is a transfer, and so the only remaining question is whether payment of a dividend constitutes a transfer of property for which no consideration is given by the shareholder, and it was held by Rip J. in *Algoa Trust*, and also by Nadon J.A. of the Federal Court of Appeal in

Gilbert, who also quoted a comment of Sharlow J.A. in *Addison & Leyen Ltd. v. Canada* that I reproduced earlier, that it does.

[15] With regard to the issue of whether the payment of a dividend is a transfer of property within the meaning of section 160 of the Act, Sharlow J.A. in *Addison & Leyen Ltd. v. Canada* [2006] F.C.J. No. 489, at paragraphs 57 to 60, stated that dividends could be subject to section 160:

. . . One of the questions raised but not answered by the 1981 amendment to section 160 was whether the payment of a dividend could be a "transfer of property" within the meaning of section 160. It is possible to imagine a corporation, especially a closely held one, using the payment of a dividend to divest itself of assets in order to avoid paying a tax liability, but in most cases the payment of a dividend is an ordinary commercial transaction. A dividend is also taxable income to the recipient (except for certain corporate recipients) . . .

. . . Thus, the 1993 decision of the Tax Court in *Algoa Trust* is the leading authority for the proposition that section 160 may apply to a dividend.

[23] For the purposes of this case, the issue is really whether payment of a dividend constitutes a transfer for which no consideration was given. Rip J. was very clear on that point at page 34 of his judgment in *Algoa Trust*, a comment that Nadon J.A. quoted in *Gilbert* and that is found in paragraph 9 herein above.

[24] The word "consideration" has also been construed by this Court, by Bonner J. in *Ruffolo v. Canada*, [1998] T.C.J. No. 714, a decision upheld by the Federal Court of Appeal at [2000] T.C.J. No. 700. In that decision, Bonner J. set out the classical definition of the word. At paragraphs 3 and 7 of his case, he said:

The Appellants attack the assessments on two grounds. Firstly, they assert that consideration was given for the dividends. This argument starts with the well known principle that when a corporation declares a dividend to be payable on a certain date to its shareholders, a debt becomes payable on that date to each shareholder in the amount of the dividend. The Appellants' theory is that the shareholder pays consideration for the dividend equal in value to that dividend by giving up the right to receive which was vested in him as a consequence of the declaration. Thus, so the Appellants assert, the subparagraph 160(1)(e)(i) amount is nil.

...

It is clear that the first of the Appellants' arguments cannot succeed. The word "consideration" in subparagraph 160(1)(e)(i) is to be given its ordinary meaning, namely, something given in payment. Nothing in the statutory context or in the purpose which underlies section 160 suggests otherwise. The right to payment of a debt which is satisfied and therefore disappears when the debt is paid cannot be said to have been given up by the creditor in payment for the payment. When a dividend is paid by a corporation to a shareholder property flows in one direction only. The right of a shareholder to receive payment of a dividend which has been declared flows from his status as shareholder and not from any consideration given by him. Nothing in the decision of the Supreme Court of Canada in *Newman v. The Queen* supports the Appellants' position..

[Emphasis added].

[25] Several years earlier, in *Logiudice v. Canada*, [1997] T.C.J. No. 742, Bowie J. had made the following remarks regarding the definition of the word "consideration" in the context of section 160 of the Act:

16 The word consideration, as it is used in the context of section 160 of the Act, in its ordinary sense refers to the consideration given by one party to a contract to the other party, in return for the property transferred. The obvious purpose of section 160 is to prevent taxpayers from escaping their liability for tax, interest and penalties arising under the provisions of the Act by placing their exigible assets in the hands of relatives, or others with whom they are not at arms' length, and thus beyond the immediate reach of the tax collector. The limiting provision in subparagraph 160(1)(e)(i) of the Act is to protect genuine business transactions from the operation of the section, to the extent of the fair market value of the consideration given for the property transferred. It is apparent, therefore, that for a transferee to have the benefit of this saving provision she must be able to prove that the transfer of property to her was made pursuant to the terms of a genuine contractual arrangement.

[Emphasis added].

[26] An argument very similar to the argument made by counsel for the Appellants in this case was considered by Lamarre Proulx J. in *Gilbert, supra*. She said the following regarding the theory as to the consideration for payment of a dividend:

32 As to the possibility of consideration to be given for the issuing of a dividend, I believe that the Supreme Court of Canada clearly stated in *Neuman (supra)* there was no such possibility. The right to a dividend stems from ownership of the shares. The consideration given to acquire the shares must not be confused with the consideration for dividends. The consideration given to acquire shares is considered for the acquisition and disposition of shares. It is not a consideration given for a dividend.

[27] In *Gosselin, supra*, Dussault J. clearly stated, at paragraph 16, that a corporation that pays dividends receives no consideration from its shareholders.

[28] All of that case law derives, *inter alia*, from the following remarks of Iacobucci J. in *Neuman, supra*. I will quote some remarks from that decision here, in support of the argument that there is no consideration associated with payment of a dividend:

57 Dickson C.J. seemed to be of the view that the character of a shareholder's dividend income is to be determined by that shareholder's level of contribution to the corporation. This approach ignores the fundamental nature of dividends; a dividend is a payment which is related by way of entitlement to one's capital or share interest in the corporation and not to any other consideration. Thus, the quantum of one's contribution to a company, and any dividends received from that corporation, are mutually independent of one another. La Forest J. made the same observation in his dissenting reasons in *McClurg* (at p. 1073):

With respect, this fact is irrelevant to the issue before us. To relate dividend receipts to the amount of effort expended by the recipient on behalf of the payor corporation is to misconstrue the nature of a dividend. As discussed earlier, a dividend is received by virtue of ownership of the capital stock of a corporation. It is a fundamental principle of corporate law that a dividend is a return on capital which attaches to a share, and is in no way dependent on the conduct of a particular shareholder.

...

60 In my view, it is wrong to suggest that there may be an exception to the rule that s. 56(2) does not apply to dividend income where the recipient of the dividend income in a non-arm's length transaction has not made a "legitimate contribution" to the corporation. In so stating, I assume, of course, that proper consideration was given for the shares when issued. I am not aware of any principle of corporate law that requires in addition that a so-called "legitimate contribution" be made by a shareholder to entitle him or her to dividend income and it is well accepted that tax law embraces corporate law principles unless such principles are specifically set aside by the taxing statute.

...

64. To summarize, it is inappropriate to consider the contributions of a shareholder to a corporation when determining whether s. 56(2) applies. Dividends are paid to shareholders as a return on their investment in the corporation.

[Emphasis added].

[29] To come back to the argument made by counsel for the Appellants, that the corporation is not impoverished and the shareholder is not enriched, the remarks of Lamarre Proulx J. in *Gilbert, supra*, on this point, which were followed by Nadon J.A. of the Federal Court of Appeal, are still cogent and relevant (see paragraph 9 of these Reasons), as are the remarks of Dussault J. in *Gosselin, supra*, which are set out in paragraph 19 hereinabove.

[30] Lamarre Proulx J. held as follows in *Benoît Côté v. Canada*, [2002] T.C.J. No. 76:

[24] There are different paths a taxpayer may take in organizing his affairs, and each of those paths entails a specific tax treatment. It is well-settled in tax matters that the Court must consider what the taxpayer has done. Here the taxpayer chose not to pay himself a salary but to take advances and to repay those advances by means of a dividend. The tax treatment of a dividend is different from the treatment of salaries or other payments for services rendered. Unfortunately, I can only conclude as follows: the corporation's payment of a dividend to the appellant in 1992 was a transfer of property within the meaning of section 160 of the *Act*, and no consideration was given in respect of that property because, according to corporate law and the provisions of the *Act* applicable in the instant case, the dividend in question is a share of the corporation's profits allocated to the appellant as a shareholder. It is not a salary or other payment for services rendered.

[Emphasis added].

[31] Thus the very nature of a dividend means that no consideration can have been given by the shareholder to the corporation in exchange for the right to the dividend. The right of the shareholder referred to by counsel for the Appellants arises out of the declaration of the dividend, and nothing more. The creditor-debtor relationship is created once the dividend is declared, and it is on that relationship that counsel bases his argument that the shareholder renounces their right to bring action. However, that renunciation is not consideration for the declaration of a dividend. I even doubt that, in itself, it is consideration given for payment of a debt. The debtor is the one who is entitled to demand an acquittance.

[32] When a corporation declares a dividend, that can only impoverish the corporation even if payment of the dividend constitutes payment of a debt. Payment of a dividend does not arise from a debt incurred by the corporation because it has

received something in return, such as goods or services. The basis on which this distinction can be made is still the nature of a dividend itself.

[33] The same is true for the shareholder. The dividend is a benefit generated by their investment. Thus it can only enrich the shareholder, even if the value of the shares may have declined. In accounting terms, the consequence is that the shareholder may not have been enriched, except that, in order to reach that conclusion, we must disregard the dividend, payment of which must be made to the owners of the share capital available to a corporation.

[34] For these reasons, the appeals are dismissed with costs.

Signed at Ottawa, Canada, this 3rd day of September 2008.

"François Angers"

Angers J.

Translation certified true
on this 15th day of May 2009.

François Brunet, Reviser

CITATION: 2008 TCC 448

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STYLES OF CAUSE: Christian Larouche and Her Majesty the Queen
2753-1359 Québec Inc. and HMQ

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