

Docket: 2013-4357(IT)G

BETWEEN:

6610048 CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 29, 30 and 31 and on November 1, 2018, at
Montréal, Quebec

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant: Philippe-Alexandre Otis,
Olivier Verdon

Counsel for the respondent: Anne Poirier, Simon Vincent

JUDGMENT

The appeal from the reassessments made on June 18, 2012, pursuant to Part I of the *Income Tax Act* (the Act) for the appellant's taxation years ending October 31, 2009, and October 31, 2010, and the assessment made on August 8, 2012, pursuant to Part III of the Act in respect of the dividends payable by the appellant on October 19, 2009, is dismissed with costs, in accordance with the attached reasons for judgment.

Signed at Montréal, Quebec, this 15th day of November 2019.

“Réal Favreau”

Favreau J.

Translation certified true
on this 17th day of April 2020.

François Brunet, Revisor

Citation: 2019 TCC 255
Date: 20191115
Docket: 2013-4357(IT)G

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6610048 CANADA INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from two reassessments made by the Minister of National Revenue (the Minister) pursuant to Part I of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Suppl.) (the Act) dated June 18, 2012, for the appellant's taxation years ending October 31, 2009, and October 31, 2010, and the assessment made on August 8, 2012, pursuant to Part III of the Act in respect of the dividends payable by the appellant on October 19, 2009.

[2] Under the assessments dated June 18, 2012, and August 8, 2012, the Minister made the following adjustments subsequent to the Minister's determination that the appellant's land sales in its 2009 taxation year constituted business income and not a capital gain as reported by the appellant:

	2009	2010
Net income for prior tax year purposes:	\$5,859,335	\$107,225
Offset taxable capital gain:	(\$5,917,609)	
Additional business income:	\$11,835,218	
Net income for post-audit purposes:	\$11,776,944	\$107,225

Part III tax:	\$3,550,565	
Redemption of a refused dividend:	(\$1,440,308)	(\$79,015)

Issues

[3] The issues are whether:

- a) For the 2009 taxation year, the appellant's land sales, which produced earnings of \$11,835,218, should be taxed as a capital gain or business income.
- b) The Minister correctly to deny the dividend refunds of \$1,440,308 for the 2009 taxation year and \$79,015 for the 2010 tax year, and whether
- c) The Minister correctly assessed the appellant under Part III of the Act.

Facts

[4] The appellant was incorporated on August 10, 2006, under the *Canada Business Corporations Act*, and its fiscal year ends on October 31 of each year.

[5] On December 14, 2006, the appellant filed an initial declaration of registration with the Registraire des entreprises du Québec, which stated that its two main sectors of activity were real estate management and investment, and that Laurent Labrecque was the appellant's sole shareholder, director and officer.

[6] In 2006, Laurent Labrecque was familiar with the construction industry. He had interests in several companies, including 9177-6039 Québec Inc., formerly Les constructions Domicil Inc. (residential construction), and 9193-5593 Québec Inc., previously Corporation immobilière Ténor Inc. (purchase and resale of real estate), 9177-6070 Québec Inc., formerly Les développements Domicil Inc. (real estate development), 9123-6042 Québec Inc. (management company), Ébénisterie i-Design Inc. and Armoires i-Design Inc.

[7] Mr. Labrecque is the spouse of Ginette Lauzon, who became one of the appellant's shareholders through 6796974 Canada Inc., of which she is the sole shareholder.

[8] Mr. Labrecque's business partner in 9177-6070 Québec Inc., formerly Les développements Domicil Inc., and 9193-5593 Québec Inc., formerly Corporation immobilière Ténor Inc., was Eric Duchaine, through his management company, Gestion Éric Duchaine Inc.

[9] Éric Duchaine is the common-law partner of Mariette Tremblay, who became one of the appellant's shareholders through 67966982 Canada Inc., of which she is the sole shareholder.

Memorandum of understanding dated December 20, 2006

[10] According to the memorandum of understanding signed on December 20, 2006, but with an effective date of December 18, 2006, the Ville de Mascouche granted the appellant a binding purchase offer until April 30, 2007, on certain lots (portions of lots 356, 357, 358, 366, 367 and 368) located in Mascouche, with an area of 1,966,510.11 square feet for an approximate amount of \$3,933,020, or \$2.00 per square foot, plus applicable taxes. The sale price was payable as follows:

- \$393,302 upon signing the notarial deed; and
- \$3,540,000.22 within 60 months from the date of the notarial deed (the balance of the sale price with a 5% annual interest rate payable semi-annually on the 1st of the month following the 6th month of the deed of conveyance).

[11] According to the first paragraph of the preamble to the memorandum, the appellant is a real estate developer whose mission is to build various types and sizes of commercial and residential buildings, including a new project on the designated site located in the area known as a section of downtown Mascouche.

[12] Under this memorandum, the Ville de Mascouche was committed to facilitating the consolidation and development of these lots in order to allow the appellant to implement its development project.

[13] The Ville de Mascouche was also committed to amending its urban plan and planning bylaws when the purchaser submitted an overall plan to facilitate the implementation of a TOD (transportation-oriented development) on the lots. This would promote a variety of business, office and small business developments or multi-family residential zoning to densify areas served by public transit.

[14] The Ville de Mascouche undertook to have the lots covered by the memorandum open to the public before December 31, 2007, completing the Avenue de l'Esplanade extension and building the Autoroute 25 overpass.

[15] The appellant was required to complete its development. If it failed to erect buildings on the property by December 30, 2012, or on the date on which all the lots referred to in Appendix D had been transferred to the appellant, and the overpass and its accesses were not open to the public, the appellant undertook to pay the Ville de Mascouche annual tax compensation. The amount of compensation would be the product of the property tax in force each year, multiplied by the \$20 million property assessment set at that time.

[16] The signatory authorized to sign the memorandum on behalf of the appellant was Éric Duchaine and the two representatives of the appellant on the agreement management committee were Laurent Labrecque and Serge Boucher.

[17] On November 5, 2007, an addendum to the memorandum of understanding was signed between the appellant and the Ville de Mascouche renewing the memorandum signed on December 20, 2006. It removed some portions of the lots from the initial memorandum.

Lot purchases

[18] The appellant acquired many lots located in Mascouche. The transactions are summarized in the table attached to this judgment. The table was attached to the reply to the amended Notice of Appeal.

The transactions are briefly described below:

Acquisition 1

[19] On December 22, 2006, the appellant acquired a parcel of land (Lot 749-3) from the Ville de Mascouche, totalling 378,395 square feet, at a total cost of \$946,000 or \$2.50 per square foot.

[20] This parcel was not included in the memorandum signed on December 20, 2006.

[21] Payment of the \$946,000 was made as follows. The appellant paid \$94,600. The Ville de Mascouche financed the balance of \$851,400 at an annual rate of 5%, which was payable on December 22, 2011.

[22] On August 24, 2009, the appellant sold the parcel to 9186-4587 Québec Inc. for the total amount of \$1,450,000, or \$3.83 per square foot, for which the seller acknowledged having received a \$598,600 deposit. The balance of \$851,400 was payable to the Ville de Mascouche under the terms and conditions of the bill of sale dated December 22, 2006.

Acquisition 2

[23] On December 21, 2007, the appellant acquired several parcels of land (portions of lots 356, 357, 358, 366, 367, 368) from the Ville de Mascouche, totalling 2,418,514 square feet, at a total cost of \$5,861,224, or \$ 2.42 per square foot.

[24] Payment of the \$5,861,224 was made as follows. The appellant paid the seller \$510,000. The amount of \$76,122 was payable within 30 days of the sale. The Ville de Mascouche financed the balance of \$5,275,102 at an annual rate of 5%, which was payable within 60 months.

[25] On December 15, 2008, the appellant sold 9201-5684 Québec Inc. some of these parcels (portions of lots 358, 366, 367, 368) with a total area of 683,250 square feet, at \$7.10 per square foot. The seller acknowledged having received the lots and provided a receipt.

[26] On July 9, 2009, the appellant sold the Ville de Mascouche one of these parcels (a portion of lot 368), totalling 5,457 square feet, for a total consideration of \$16,914.28, or \$3.10 per square foot. The seller acknowledged having received the land and provided a receipt.

[27] On September 29, 2009, the appellant sold 9214-0078 Québec Inc. one of these parcels (a portion of lot 368), totalling 297,342 square feet, for a total of \$2,096,270.55, or \$7.05 per square foot. The seller acknowledged having received the sum of \$200,000 as a deposit. There was a 6% annual interest rate on the balance of \$1,896,270.55, which was payable on or before October 1, 2012.

[28] On September 29, 2009, the appellant sold one of these parcels (lots 1877 and 1878) to 9213-9393 Québec Inc., in consideration of the total sum of

\$9,481,102. The seller acknowledged having received the land and provided a receipt.

Acquisition 3

[29] On December 23, 2008, the appellant acquired parcels of land (portions of lots 356, 355-3, 355-6, 355-9) from the Ville de Mascouche, totalling 480,067 square feet, in consideration of \$1,745,790.16, or \$3.64 per square foot.

[30] Payment of the \$1,745,790.16 was made as follows. The appellant paid the seller \$174,570.02. The Ville de Mascouche financed the balance of \$1,571,211.14 at a an annual rate of 5%, which was payable on December 23, 2013.

[31] On April 28, 2009, the appellant sold these parcels to La Seigneurie du Chêne Inc. in consideration of the total amount of \$4,344,750.06, or \$9.05 per square foot. The seller acknowledged having received the land and provided a receipt.

Testimonies

André Desbiens

[32] Mr. Desbiens became a shareholder and director of the appellant and acted as the appellant's president and secretary. He explained the circumstances that led to his becoming a shareholder of the appellant. He said he was informed in May or April 2006 of the proposed acquisition of some 3 million square feet of land in Mascouche by Serge Boucher, with whom he was then working at AAM Bank, a European bank headquartered in Basel, Switzerland with offices in Luxembourg and Malaysia. In March 2006, the Government of Quebec announced the extension of the metropolitan rail system to Mascouche. Mr. Boucher, a lawyer practising corporate and commercial law, had clients or had business relationships with people who were well connected with the Ville de Mascouche and were very interested in the project.

[33] With Mr. Boucher's assistance, Mr. Desbiens was able to meet and discuss the project with Denys Laberge, Laurent Labrecque and his spouse, Ginette Lauzon, Eric Duchaine and his common-law spouse, Mariette Tremblay.

[34] The appellant was incorporated on August 10, 2006, by Marchand, Melançon, Forget, which also prepared the organizational resolutions. According

to the appellant's minutes book, the following persons became shareholders of the appellant on August 10, 2006:

André Desbiens	12.5	Class "A" shares
6796974 Canada Inc. (Ginette Lauzon)	25	Class "A" shares
Gestion D. Laberge Inc.	25	Class "A" shares
6796982 Canada Inc. (Marianne Tremblay)	25	Class "A" shares
Serge Boucher	12.5	Class "A" shares

[35] The Class "A" shares of the appellant carry one voting right and are participating shares of no par value. They were issued at a price of \$1.00 per share. A total of \$100 was credited to the paid-up capital account of Class "A" shares.

[36] Also according to the appellant's minutes book, on August 10, 2006, Mr. Desbiens became the appellant's sole director, and he was appointed president and secretary of the corporation.

[37] Mr. Desbiens paid \$140,000 to acquire his 12.5% interest in the appellant's capital stock. According to the witness, that sum was advanced in December 2007 and was recorded in the corporate books as a long-term debt. A \$280,000 investment was required to acquire a 25% interest in the appellant's capital stock. Mr. Desbiens explained that a disagreement arose between the appellant's shareholders towards the end of 2008 regarding the downpayments to be made by Laurent Labrecque's spouse and Éric Duchaine's common-law spouse. Laurent Labrecque's spouse and Éric Duchaine's common-law spouse did not have the money to pay for their interest and some shareholders gave them loans for this purpose. The dispute was settled in an out-of-court agreement under which the other shareholders of the appellant repurchased Mr. Boucher's interest in the appellant's capital stock. The terms of the out-of-court agreement could not be disclosed at the hearing because it included a confidentiality agreement. Following the out-of-court settlement, Mr. Desbiens' interest rose from 12.5% to 14.27%, and the other shareholders' interest increased from 25% to 28.57%.

[38] Mr. Desbiens specified that Ginette Lauzon and Marianne Tremblay were not at all involved in the management of the appellant's affairs. He further stated that not all of the appellant's shareholders had construction experience and that their respective intention was to make a long-term investment. According to the witness,

there were never any plans to develop the acquired land, and the shareholders did not take steps to develop the land.

[39] Mr. Desbiens also explained the circumstances surrounding the sale of the land. He said he received a call from Claude Duchesne, who asked him whether the land acquired from the Ville de Mascouche was for sale. He told him that the land was not for sale, but at a subsequent dinner, Mr. Duchesne made an unsolicited offer to buy the land at three times the purchase price. The parties signed a binding purchase and sale agreement dated October 9, 2008. The purchase and sale agreement covered all the lots referred to in the memorandum with the Ville de Mascouche, except for approximately 350,000 square feet. One of the provisions in the preamble to this offer stipulated that this offer replaced the offer dated July 3, 2008. The applicant did not provide an explanation regarding this matter.

[40] Regarding the lot acquired in Acquisition 1 and sold to 9186-4587 Québec Inc. on August 24, 2009. Mr. Desbiens said that during a round of golf with Yvon Labonté from the Bank of Montreal, Mr. Labonté informed him that he knew someone who was interested in acquiring the lot. An offer to purchase at \$3.83 per square foot was presented, and it was accepted without negotiation. Mr. Desbiens said he did not know Roberto Amato, a former member of the Rock Machine, who signed the bill of sale on behalf of 9186-4587 Québec Inc.

[41] With respect to the sale of the lot to 9214-0078 Québec Inc. on September 29, 2009, Mr. Desbiens indicated that the purpose of this transaction was to transfer ownership of this lot to a corporation in which Laurent Labrecque's spouse and Eric Duchaine's common-law spouse would not be shareholders. The shareholders of this corporation are André Desbiens, Denys Laberge, Laurent Labrecque and Éric Duchaine. They each hold the same percentage interest in the corporation's capital stock. According to Mr. Desbiens, this corporation still owns the acquired land, which is now worth \$8,275,000. When the lot was sold to 9214-0078 Québec Inc., 9214-0078 was represented by Hélène Lavigne, who was then Mr. Desbiens' personal secretary.

Éric Duchaine

[42] Mr. Duchaine explained that he was the one who had contacts with the Ville de Mascouche, which was why he signed the memorandum of understanding with the Ville de Mascouche on behalf of the appellant in December 2006. For this service, Corporation immobilière Ténor Inc., a company of which he was a

shareholder with Laurent Labrecque, invoiced the appellant for fees, finder's fees and commissions in the amount of \$118,233.81 after negotiations with Mr. Desbiens.

[43] Mr. Duchaine has always worked in single-family and bi-generational home construction industry and the condominium unit construction industry in association with François Barnabé (Le Groupe Habitation Domicil) and Laurent Labrecque (Les développements Domicil Inc., Les développements immobiliers Domicil Inc. and Corporation immobilière Ténor Inc.).

[44] Along with his activities as a builder and real estate developer, in 2005 Mr. Duchaine and his partners undertook the construction of a 23,000 square foot woodworking plant (cabinets) that was completed in 2007 at a cost of \$1.5 million and sold in March 2009. Construction of the woodworking plant and the termination of the partnership with François Barnabé, which occurred on December 18, 2006, after five to six months of negotiations, led to serious liquidity problems that would have prevented the other two former partners from participating in the acquisition of the lots from the Ville de Mascouche.

[45] Mr. Duchaine said he had known Denys Laberge since 2003-2004. According to the witness, Mr. Laberge sold his furniture manufacturing plants (Bermex) and invested his capital in the acquisition of lands with long-term development potential. Denys Laberge has owned land in Terrebonne in co-ownership with Corporation immobilière Ténor Inc. since 1997.

Laurent Labrecque

[46] Mr. Labrecque is an accountant by training. After having worked for more than eight years in accounting offices in Abitibi, he became the controller of a construction company in Repentigny. In 1990, he went into partnership with Éric Duchaine and François Barnabé, also a chartered accountant, and founded Les Habitations Domicil, a residential construction company operating in Repentigny. From 1993 to 2000, the three partners built condominium units in Repentigny under the names Le Groupe Corasol and Les Constructions Domicil Inc. From 1998 to 2000, the three partners purchased lots in Terrebonne, including Le Boisé de La Pinière. Subdivision permits for these lots, other than Le Boisé de La Pinière, were obtained in 2003, and the infrastructure was put in place from 2003 to 2006. Lot subdivision permits for Boisé de La Pinière were obtained in December 2005, but development was delayed in 2008-2009.

[47] During his testimony, Mr. Labrecque acknowledged that, as President of the appellant, he had signed acquisition agreement 1 with the Ville de Mascouche dated December 22, 2006, which was not part of the memorandum of understanding with the City. The Ville de Mascouche had requested this favour, because it needed money for an upcoming municipal election. Mr. Labrecque also signed Addendum No. 1 to the memorandum of understanding with the Ville de Mascouche, dated November 5, 2007, as well as acquisition agreement 2 with the Ville de Mascouche dated December 21, 2007.

[48] Mr. Labrecque also explained that, on April 19, 2004, Développements Immobiliers Domicil Inc. sold Gestion D. Laberge Inc. an undivided portion of 50% of the lots it owned in Terrebonne, commonly known as the “uplands” at a price of \$929,983. On July 9, 2004, Développements immobiliers Domicil Inc. and Gestion D. Laberge acquired from a third party another lot located in Terrebonne, commonly known as the “lowland”, at a price of \$453,600. The land was acquired by the two purchasers, in undivided co-ownership and in an equal proportion, although Gestion D. Laberge Inc. paid the full purchase price. Because Mr. Laberge was then 62 years old, he wanted to recover the result of his short-term investment within five years. To have his holdings bought back after five years, Mr. Laberge exercised his rights under the agreements governing his relationships with Les Développements immobiliers Domicil Inc., which resulted in a decision of the Superior Court dated January 6, 2011, (2011 QCCS 16) and a decision of the Appeal Court of Québec dated April 5, 2013 (2013 QCCA 586).

Serge Boucher

[49] At the beginning of his testimony, Serge Boucher was released from his obligation of professional secrecy. He said he was a personal friend of Denys Laberge and had previously made investments with him. He said he had reviewed the contracts the appellant had entered into, but did not provide any details on the memorandum of understanding. The appellant’s minute book was kept by a paralegal from its firm, and the annual statements with the Registraire des entreprises du Québec were produced by its firm.

[50] Mr. Boucher said he invested approximately \$200,000 to acquire 12.5% of the appellant’s capital stock. He also explained that he acted as an arbitrator on behalf of Messrs. Duchaine and Labrecque in the dispute with François Barnabé concerning the woodworking plant. A disagreement between him and Messrs. Duchaine and Labrecque arose following the arbitration of this commercial dispute, partly because of the fees claimed. The dispute was settled out of court in

June 2009 pursuant to which he surrendered his shares for the repayment of the advances he had made and an unspecified dividend.

Ginette Lauzon

[51] Ms. Lauzon is not a businesswoman. She left school after CEGEP. She married Claude Clermont, who operated a furniture store in Repentigny until 1994. She separated from Mr. Clermont in 2006 and married Mr. Labrecque in July 2007. She was working at the reception of the cabinet factory.

[52] She explained that her husband and Éric Duchaine had made representations to the Ville de Mascouche to buy the lots covered by the memorandum of understanding. However, they could not complete the project themselves because they were ending their partnership with Mr. Barnabé and were close to declaring bankruptcy.

[53] She declared that she became a shareholder of the appellant in August 2006 through her management company, 6796-6974 Québec Inc., with an initial \$200,000 investment. The shareholders were gradually making their investments in accordance with the appellant's needs. Her 25% interest rose to 27.4% after Mr. Boucher's departure. Her intention was to make a long-term investment, which she would have liked to have left to her three children.

[54] Ms. Lauzon did the appellant's bookkeeping and sent the financial information to the corporation's external accountant.

[55] Following the sale of the lots by the appellant, Ms. Lauzon received \$1 million after taxes via her management company and is entitled to receive her share of the amount of the notes payable to the appellant's shareholders totalling \$1,955,547.

Mariette Tremblay

[56] Ms. Tremblay has been Eric Duchaine's common-law spouse for 30 years. She completed a Bachelor's degree in Political Science at the Université du Québec à Montréal. Until 1999, she raised her two children at home and from time to time worked for her spouse, showing model homes. From 1999 to 2006, she worked for Le Groupe Habitation Domicil and Les développements Domicil Inc. in Repentigny and Terrebonne in her spouse's projects. In 2006, she helped Denys

Laberge finish his house in Le Boisé de La Pinière in 2007 and worked part time at a bookstore.

[57] Ms. Tremblay explained that she did not have the money to invest in the Ville de Mascouche land acquisition project and that Denys Laberge lent her the initial \$200,000 investment to acquire her 25% interest in the appellant's capital stock. According to her, the agreement with Mr. Laberge provided for the repayment of the loan when the lots were sold. She did not recall the exact amounts borrowed from Mr. Laberge, or whether interest was paid. She did not produce any documents relating to these loans and the amounts reimbursed. She indicated that repayments to Gestion D. Laberge were made by bank transfers to the CIBC branch in Terrebonne.

[58] Ms. Tremblay stated that in 2006 she set up her management company 6796982 Canada Inc. to acquire her interest in the appellant following a mandate from her nephew, Louis-René Hébert.

[59] Ms. Tremblay stated that she did not act as a nominee for her common-law spouse and that she did not obtain a suretyship from him for the loan provided by Mr. Laberge.

[60] Ms. Tremblay did not know the amount of profit she made as a result of the appellant's sale of the lots and said she invested the profit in 2010 in a new construction company started by her common-law spouse.

Claude Duchesne

[61] Claude Duchesne, a civil engineer by training, has always been active in the field of construction as a contractor and land developer. He approached Mr. Desbiens to inform him that he wanted to submit an offer for the purchase of the Ville de Mascouche lots. During an initial meeting, Mr. Desbiens told him that the land was not for sale but that he could still make a formal offer if he wanted to.

[62] Mr. Duchesne, acting on behalf of 9201-5684 Québec Inc., made an initial offer to purchase on July 3, 2008, which was replaced by the one dated October 9, 2008. Mr. Duchesne explained that the date of the offer was postponed because there had been delays in the infrastructure work that the Ville de Mascouche had performed in front of the lots. Mr. Duchesne wanted to buy all the lots acquired from the Ville de Mascouche because the Ville de Mascouche had consolidated them. The appellant accepted the offer to purchase on October 8, 2008. The agreed

purchase price was \$7.00 gross per square foot for a total amount of \$4,814,957.28. This price was to be adjusted based on the actual square footage sold.

[63] During his testimony, Mr. Duchesne said he did not see the Ville de Mascouche's 2006 call for tenders for the sale of the lots, the memorandum of understanding between the Ville de Mascouche and the appellant, or the project to implement a TOD (Transit-Oriented Development) for the Mascouche Station project that the appellant had undertaken to submit to the Ville de Mascouche. The TOD-implementation project was submitted to the Ville de Mascouche and the appellant at a meeting held on February 5, 2008.

[64] Mr. Duchesne explained that he purchased the appellant's lots through three notarial deeds respectively dated December 15, 2008, (9201-5684 Québec Inc.), September 29, 2009, (9213-9393 Québec Inc.) and April 18, 2009 (La Seigneurie Duchesne Inc.).

[65] The year after the lots were acquired, Mr. Duchesne sold Habitations Trigone the appellant's lots at a price of \$11.00 per square foot, except for the lot acquired by La Seigneurie Duchesne Inc. This lot is a landlocked commercial property located in a wetland and is still owned by La Seigneurie Duchesne Inc. The lot is currently under moratorium, and its current value is approximately \$20.00 per square foot.

Positions of the parties

For the appellant

[66] According to the appellant, Messrs. Labrecque and Duchaine, the two real estate promoters and developers, could not proceed with the acquisition of the Ville de Mascouche lots because they were in financial difficulty at the time. The appellant's shareholders did not have the necessary experience or financial ability, except perhaps Mr. Laberge, to develop the lots acquired from the Ville de Mascouche. Their interest in the appellant was a long-term investment for them. Messrs. Duchaine and Labrecque's role was to ensure that the conditions for acquiring the lots from the Ville de Mascouche did not change. This is why Mr. Labrecque signed the memorandum of understanding and the purchase agreement with the Ville de Mascouche dated December 21, 2007.

[67] According to the appellant, the lot purchase agreements dated December 21, 2007, and December 23, 2008, represented a sole transaction resulting from the memorandum of understanding. The lot purchase agreement dated December 22, 2006, was not part of a memorandum of understanding and was performed at the request of the Ville de Mascouche.

[68] The appellant did not apply for zoning amendments for lots acquired from the Ville de Mascouche and did not make any improvements to the lots. However, the Ville de Mascouche invested \$6 million to improve the water system in the area. These improvements were not provided for in the memorandum of understanding, and they increased the value of the appellant's lots.

[69] The appellant sold its lots primarily to Mr. Duchesne following an unsolicited offer through three notarial deeds that reflected the consolidation of the lots by the Ville de Mascouche and construction of the infrastructure.

[70] The appellant reviewed the criteria set forth by Rouleau J. in *Happy Valley Farms Ltd. v. Minister of National Revenue*, 1986 CarswellNat 375 to determine whether a profit realized on the sale of an asset should be treated as income or a capital gain:

- period of ownership: the periods of ownership must be calculated from the date of the memorandum of understanding, effective December 20, 2006;
- frequency and number of transactions: here only one transaction related to the signing of the memorandum of understanding;
- improvements to the lots: none by the appellant; the increase in the value of the lots is attributable to the economic situation prevailing along the North Shore and the improvement of the water system by the Ville de Mascouche;
- circumstances of the sale: unsolicited offer;
- intention when the purchase was made: long-term investment with no secondary intention to resell at the earliest opportunity.

[71] The appellant submits that its shareholders were not real estate developers, that the appellant never wanted to complete the TOD project for Mascouche Station itself and that the lots were sold to a direct competitor at a price lower than their fair market value, which allowed it to make a big profit in a short time.

[72] The appellant reiterated that it owed no obligation to the Ville de Mascouche to develop the lots and that it had no development plans or projects. It made a long-term speculative, but passive, investment without having made any improvements or resale efforts.

[73] According to the appellant, the facts assumed by the Minister to justify the assessments have been rebutted. As a result, the onus is on the Minister to show that the income from the sale of the land constitutes business income.

For the respondent

Burden of proof.

[74] The respondent submits that in this case the Court must apply the following burden of proof, as explained by Webb J.A. in *Samardi v. Canada*, 2017 FCA 131: the taxpayer has the onus of proving, on a balance of probabilities, the facts alleged by the taxpayer in their notice of appeal and, subject to certain exceptions, that the facts assumed by the Minister in reassessing the taxpayer are not true (see paragraph 31).

[75] Alternatively, the respondent submits that, if the Court follows the doctrine propounded by L'Heureux-Dubé J., in a minority opinion, *Hickman Motors Ltd. v. Canada*, [1997] 2 SCR 336, the appellant has failed to present a *prima facie* case that would allow the Court to find that the income generated by the sale of the lots should be characterized as a capital gain. As a result, all the evidence produced by both parties must be reviewed to determine whether a *prima facie* case has been presented. In this case, the testimony provided by the appellant was contradicted by extensive circumstantial and documentary evidence that the appellant acquired the lots to resell them at a profit.

[76] The appellant's intention at the time the lots were acquired must be established in view of the intention of the natural persons who manage and direct the appellant. In the case of a corporation with few shareholders, as in the appellant's case, the intention is manifested by its shareholders' intention. The appellant's statements when it acquired the lots must not be the sole basis of the review. They are not determinative in and of themselves. The taxpayer's intention must be considered in the light of all the circumstances.

[77] The respondent argues that the appellant was unable to provide the Court with the identities of the actual shareholders and officers and was therefore unable

to meet its burden of proof, which was to demonstrate its intention at the time each lot was acquired.

[78] In support of its allegations, the respondent submits that the evidence submitted by the appellant to establish who its shareholders were was produced after Mariette Tremblay and Ginette Lauzon's management companies were created in 2009. However, the witnesses presented by the appellant and the evidence submitted by the appellant suggest that these two companies were shareholders of the appellant as of August 2006.

[79] The respondent's allegations are based on the following facts:

(a) the appellant's minute book indicates that the appellant was created on August 10, 2006, and that the appellant's shareholders were Gestion D. Laberge, Serge Boucher, André Desbiens, 6796974 Canada Inc. and 6796982 Canada Inc. on that date;

(b) according to the Québec Business Register,

- i) the appellant was registered on December 14, 2006.
- ii) on February 1, 2008, Laurent Labrecque was still reported as a shareholder and director of the appellant;
- iii) on July 28, 2008, Laurent Labrecque was replaced by André Desbiens as director of the appellant;
- iv) on December 3, 2008, Laurent Labrecque was replaced by the law firm Marchand, Melançon, Forget, es qualité trustee as a shareholder of the appellant;
- v) on March 31, 2009, 6796974 Canada Inc. and 6796982 Canada Inc. were registered by Ginette Lauzon and Mariette Tremblay, respective spouses of Laurent Labrecque and Éric Duchaine;

(c) in its minute book and financial statements, the appellant listed 6796974 Canada Inc. and 6796982 Canada Inc. as shareholders since August 10, 2006. However, these corporations were only registered on March 31, 2009;

(d) the appellant's minute book showed that on April 27, 2009, several resolutions were signed by André Desbiens, including a resolution accepting his term as director and the first and second annual meetings;

Adventure in the nature of trade

[80] All circumstances pertaining to a transaction must be taken into account to determine whether a transaction is an adventure or concern in the nature of trade.

[81] Because the appellant's sole objective was to hold the lots acquired from the Ville de Mascouche for the purpose of reselling them at a profit, it is clear to the respondent that the lots are part of a speculative purchase and sale transaction designed to make a profit and that the lots were assets in inventory. Consequently, the lots were sold as part of an adventure in the nature of trade.

Secondary intention to resell

[82] At the time the lots were acquired, the appellant always had at least a secondary intention to resell them at a profit.

I. Applicable provisions of the Act

[83] The provisions of the Act that are relevant in this case are:

Income for taxation year

3 The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:

(a) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,

(b) determine the amount, if any, by which

(i) the total of

(A) all of the taxpayer's taxable capital gains for the year from dispositions of property other than listed personal property, and

(B) the taxpayer's taxable net gain for the year from dispositions of listed personal property,

(iii) exceeds

(ii) the amount, if any, by which the taxpayer's allowable capital losses for the year from dispositions of property other than listed personal property exceed the taxpayer's allowable business investment losses for the year,

Income

9(1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.

Loss

(2) Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of the taxpayer's loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source with such modifications as the circumstances require.

Gains and losses not included

(3) In this Act, "income from a property" does not include any capital gain from the disposition of that property and "loss from a property" does not include any capital loss from the disposition of that property.

Valuation of inventory

10(1) For the purpose of computing a taxpayer's income for a taxation year from a business that is not an adventure or concern in the nature of trade, property described in an inventory shall be valued at the end of the year at the cost at which the taxpayer acquired the property or its fair market value at the end of the year, whichever is lower, or in a prescribed manner.

Adventures in the nature of trade

(1.01) For the purpose of computing a taxpayer's income from a business that is an adventure or concern in the nature of trade, property described in an inventory shall be valued at the cost at which the taxpayer acquired the property.

Taxable capital gain and allowable capital loss

38 For the purposes of this Act,

(a) subject to paragraphs (a.1) to (a.3), a taxpayer's taxable capital gain for a taxation year from the disposition of any property is $\frac{1}{2}$ of the taxpayer's capital gain for the year from the disposition of the property;

Meaning of capital gain and capital loss

39(1) For the purposes of this Act,

(a) a taxpayer's capital gain for a taxation year from the disposition of any property is the taxpayer's gain for the year determined under this subdivision (to the extent of the amount thereof that would not, if section 3 were read without reference to the expression "other than a taxable capital gain from the disposition of a property" in paragraph 3(a) and without reference to paragraph 3(b), be included in computing the taxpayer's income for the year or any other taxation year) from the disposition of any property of the taxpayer other than

...

Definitions

129(4) The definitions in this subsection apply in this section.

...

income or **loss** of a corporation for a taxation year from a source that is a property

(a) includes the income or loss from a specified investment business carried on by it in Canada other than income or loss from a source outside Canada, but

(b) does not include the income or loss from any property

(i) that is incident to or pertains to an active business carried on by it,
or

(iii) that is used or held principally for the purpose of gaining or producing income from an active business carried on by it. (perte ou revenu)

PART III

Additional Tax on Excessive Elections

Tax on excessive elections

184(2) If a corporation has elected in accordance with subsection 83(2), 130.1(4) or 131(1) in respect of the full amount of any dividend payable by it on shares of any class of its capital stock (in this section referred to as the “original dividend”) and the full amount of the original dividend exceeds the portion of the original dividend deemed by that subsection to be a capital dividend or capital gains dividend, as the case may be, the corporation shall, at the time of the election, pay a tax under this Part equal to $\frac{3}{5}$ of the excess.

Definitions

248(1) In this Act,

...

business includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(c), section 54.2, subsection 95(1) and paragraph 110.6(14)(f), an adventure or concern in the nature of trade but does not include an office or employment; (*entreprise*)

Analysis

[84] With respect to the facts, the appellant accepted virtually all of the assumptions of fact upon which the Minister relied to make the assessments. The facts denied or ignored in the proceedings proved to be accurate pursuant to the witnesses’ testimony. The only points of disagreement between the parties concern (a) the identity of the appellant’s shareholders at the time the lots were acquired (b) the impact of the memorandum of understanding with the Ville de Mascouche as to the number of transactions and the periods during which the appellant held the lots.

[85] In summary, the situation in this case is:

- (a) the appellant admitted that the lots were not acquired for the purpose of producing property income;
- (b) the appellant did not intend to implement a TOD project on the lots on its own;

- (c) the appellant acknowledged that it did not have the financial means, experience, or willingness to develop the lot for income purposes and that it never intended to rent them;
- (d) when it acquired the lots, the appellant knew that it should quickly sell them to a third party for development in accordance with the memorandum of understanding with the Ville de Mascouche; and
- (e) the agreement to sell certain lots was entered into with Claude Duchesne on July 3, 2008, well before the appellant acquired the lots in December 2008. Indeed, a second contract to contract between the appellant and Claude Duchesne was signed on October 9, 2008.

[86] Given the facts adduced in evidence, I can only conclude that, at the time the lots were acquired, the appellant never had the opportunity to derive any property income from them. The lots in question were, therefore, assets in inventory during their respective periods during which the lots were held and the sale of these lots generated business income.

[87] The factors recognized by the case law and the interpretation bulletins also lead to the conclusion that the gain realized by the appellant following the sale of the lots is business income.

[88] In *Canada Safeway Limited v. Canada*, 2008 FCA 24, the Federal Court of Appeal followed the factors set out in Interpretation Bulletin IT-218R used to determine whether a transaction pertaining to real estate is an adventure in the nature of trade. These factors are:

- (a) the taxpayer's intention with respect to the real estate at the time of its purchase;
- (b) feasibility of the taxpayer's intention;
- (c) geographical location and zoned use of the real estate acquired;
- (d) extent to which intention carried out by the taxpayer;
- (e) evidence that the taxpayer's intention changed after purchase of the real estate;
- (f) the nature of the business, profession, calling or trade of the taxpayer and associates;

(g) the extent to which borrowed money was used to finance the real estate acquisition and the terms of the financing, if any, arranged;

(h) the length of time throughout which the real estate was held by the taxpayer;

(i) the existence of persons other than the taxpayer who share interests in the real estate;

(j) the nature of the occupation of the other persons referred to in (i) above as well as their stated intentions and courses of conduct;

(k) factors which motivated the sale of the real estate;

(l) evidence that the taxpayer and/or associates had dealt extensively in real estate.

[89] The application of these factors in this case leads to the following conclusions:

(a) the appellant's intent in the light of the facts adduced in evidence – It is clear to me that the appellant's motivation, at the time the lots were acquired, was to resell them at a profit, which was its sole motivation. The appellant clearly did not intend to implement the TOD project as the Ville de Mascouche wanted, and the appellant did not take any steps in this regard other than to order the report, as required by the Ville de Mascouche;

(b) Plausibility of the appellant's intention – The appellant clearly attempted to conceal the identity of its actual shareholders in order to conceal its real intention at the time the lots were acquired. As a result, the appellant did not meet its burden of demonstrating its intention at the time the lots were acquired. At this point, we should point out the relevant facts in this regard:

- Laurent Labrecque and Éric Duchaine represented the appellant until at least December 27, 2007;
- in its minutes book and financial statements, the appellant reported 6796974 Canada Inc. and 6796982 Canada Inc. as shareholders of the appellant since August 10, 2006, whereas these corporations were registered only on March 31, 2009;
- According to the annual return signed on May 28, 2009, but filed on July 23, 2009, Gestion D. Laberge, 6796974 Canada Inc. and 6796982

- Canada Inc. were listed for the first time in the appellant's profile submitted to the Régistraire des entreprises du Québec; and
- on November 30, 2009, the appellant filed its income tax return for the fiscal year ending October 31, 2008, and reported its shareholders as Gestion D. Laberge, Serge Boucher, 9136-6260 Québec Inc., 6796974 Canada Inc. and 6796982 Canada Inc., whereas the last two corporations did not exist as at October 31, 2008;
- (c) the geographical location of the lots and its zoning – The lots acquired by the appellant were vacant lots located near the future train station, whose project had been announced by the Government of Quebec in March 2006. The Ville de Mascouche wanted to develop this area by implementing a TOD promoting a mix of business, light commercial and multi-family uses. According to the agreement signed by the appellant with the Ville de Mascouche, the Ville de Mascouche committed itself to amending its plan and urban planning by-laws to facilitate the implementation of a TOD and to have the lots open to the public before December 31, 2007, completing the Avenue de l'Esplanade extension and building the Autoroute 25 overpass. Under these conditions, the lots would obviously surge in value swiftly due to their location;
- (d) the extent to which the appellant's intention was realized – as it intended, the appellant resold the lots at the first opportunity and realized an \$11,835,218 gain between December 15, 2008, and September 29, 2009;
- (e) evidence that the appellant's intention changed after the lots were acquired – the evidence shows that the appellant always intended to resell the lots for profit throughout the time it held them;
- (f) the nature of the business, profession, trade or occupation of the appellant and its partners (shareholders) – the appellant's business consisted in acquiring lots and reselling them. With the exception of Ginette Lauzon and Mariette Tremblay, who acted as nominees, the appellant's officers and shareholders are business people with significant and complementary collective experience in the real estate industry. They are specialized in real estate development and construction, business law, finance, taxation and accounting. The evidence shows that in 2004 and 2005, Messrs. Laberge, Labrecque and Duchaine invested together in real estate development projects in the municipality of Terrebonne;

- (g) the extent to which the money borrowed by the appellant was used to fund the acquisition of the lots and the financing terms and conditions – the appellant acquired the Ville de Mascouche’s lots based on extremely favourable financial terms, with an initial investment of only 10% of the purchase price of the lots and the balance funded by the Ville de Mascouche at the rate of only 5% per year payable in five years. According to the appellant’s financial statements as at October 31, 2008, with the comparative figures as at October 31, 2007, the appellant was undercapitalized. Its issued and paid-up share capital was only \$100. Also, the amounts that the shareholders invested to acquire their shares of the appellant were accounted for as non-interest bearing long-term debt. As at October 31, 2008, an amount of \$139,987 was due to a director, Mr. Desbiens; \$798,494 was owed to the shareholders; and \$181,234 (\$118,234 as at October 31, 2007) was due to Corporation immobilière Ténor Inc., a corporation controlled by Mr. Labrecque and Mr. Duchaine. The appellant’s low capitalization also confirms that it did not have the financial resources to develop the lots or make improvements. Operating losses of only \$14,056 for the fiscal year ended October 31, 2007, and \$59,056 for the fiscal year ended October 31, 2008, show the appellant’s low level of activity during these two periods;
- (h) the period during which the lots were held by the appellant – the appellant acquired three lots from the Ville de Mascouche through notarial deeds and completed six sales transactions through notarial deeds between December 22, 2006, and September 29, 2009. The periods during which the lots were held ranged from four months to 32 months for all the acquired lots, and from four months to 21 months for lots acquired under the memorandum of understanding with the Ville de Mascouche. Even if the acquisitions of the lots covered by the memorandum are considered to constitute a single transaction as the appellant argues, the number of sales transactions for the lots remains the same, i.e. six. This does not change the periods during which these lots were held by the appellant because the appellant could not be considered the owner of the lots until the Ville de Mascouche had acquired them from third parties.
- (i) the fact that ownership of the lots is shared with persons other than the appellant – this factor has no application in this case because the appellant was the sole owner of the lots before they were sold;

- (j) the nature of the professions of the other persons mentioned in (i) above, as well as their stated intentions and course of action – as with the factor in paragraph (i) above, this factor does not apply in this case;
- (k) factors that led to the sale of the lots – the first unsolicited offer for the overwhelming majority of the lots was quickly accepted; this clearly shows that the intention of the appellant and its shareholders was to resell the land as quickly as possible. The value of the lots was greatly increased by the improvements made by the Ville de Mascouche, and the appellant and its shareholders wanted to take advantage of the situation to sell at the first opportunity. In my view, the appellant and its shareholders never intended to make a long-term investment by purchasing the lots from the Ville de Mascouche. Ms. Tremblay and Ms. Lauzon completely opted out of the sale of the remaining parcel of lots to 9214-0078 Québec Inc. on September 29, 2009, and Denys Laberge had a short-term vision for his investments;
- (l) Evidence that the appellant and its shareholders are engaged in large-scale land deals – Mr. Labrecque and Mr. Duchaine have always acted as real estate developers through their roles as shareholders and directors of several companies involved in the purchase, development and resale of real estate. Mr. Laberge also invested in several real estate projects with Mr. Labrecque and Mr. Duchaine in 2004, when he was 62 years old. This was a short-term investment, as shown at the hearing.

Secondary intention

[90] Even if the appellant and its shareholders had succeeded in showing that their principal common intention was to make a long-term investment, the gain realized from the sale of the lots would nevertheless be taxable as business income because the appellant and its shareholders had always had, at the very least, the secondary intention to resell the lots at a profit, if, for whatever reason, their investment project was not implemented.

[91] Furthermore, the appellant has never denied having considered, from the outset, the possibility of reselling the lots.

[92] It should be noted here that the appellant is described in the memorandum of understanding with the Ville de Mascouche as a real estate developer and that it had undertaken to build residential and commercial buildings on the lots. The appellant never intended to realize the TOD project on its own. Rather, it intended

to resell the lots to a third party, who would realize the development project, in accordance with the commitments made by the appellant under the memorandum of understanding. In the context of the land sale transactions, the appellant required third parties to honour the commitments it made to the Ville de Mascouche under the memorandum of understanding and the addendum, including the commitment to develop the land. By the time he acquired the lots, Claude Duchesne knew that the lots had to be developed.

[93] Finally, it should be noted that the acquisition of the lots by the appellant involves a significant commercial risk, namely the expropriation and consolidation of the lots by the Ville de Mascouche. During his testimony, Claude Duchaine stated that he did not want to take any risk at this level because, in his experience, the risk was too great.

[94] For all these reasons, the appeal from the reassessments under Part I of the Act dated June 18, 2012, regarding the appellant's 2009 and 2010 taxation years and the assessment dated August 8, 2012, under Part III of the Act is dismissed with costs to the respondent.

Signed at Montréal, Quebec, this 15th day of November 2019.

“Réal Favreau”

Favreau J.

Translation certified true
on this 17th day of April 2020.
François Brunet, Revisor

Appendix 1

TABLE OF ACQUISITIONS

1. Lot 749-3

Purchase date/ Reg. No.	Area	Amount	Sale/Reg. No.	Buyer	Area	Sale price	Period of ownership
22/12/2006/ #13 913 758	378,395 sq. ft.	\$946,000 \$2.50 sq. ft.	24/08/2009/ #16496894	9186-4587 Québec inc. (Roberto Amato)	378,395 sq. ft.	\$1,450,000 \$3.83/sq. ft.	32 months

2. Lots 356, 357, 358, 366, 367, 368

Purchase date/ Reg. No.	Area	Amount	Sale/Reg. No.	Buyer	Area	Sale price	Period of ownership
21/12/2007/ #14 889 222	2,418,514 sq. ft.	\$5,861,224 \$2.42/sq. ft.	15/12/2008/ 15 841 551	9201-5684 Québec inc. Claude Duchesne	683,250\$ sq. ft.	\$4,849,350 \$7.10/sq. ft.	11 months
			29/09/2009/ 16 589 392	9213-9393 Québec inc. Claude Duchesne		\$9,481,102	21 months
			09/07/2009	Ville de Mascouche	5,457 sq. ft.	\$16,914 (\$3.10/sq. ft.)	18 months
			29/09/2009/	9214-0078 Québec inc. (Hélène Lavigne)	297,342 sq. ft.	\$2,096,270 (\$7.05/sq. ft.)	21 months
Total:		\$5,861,224				\$16,443,636	

3. Lots 356-3, 355-3, 355-6 and 355-9

Purchase date/ Reg. No.	Area	Amount	Sale/Reg. No.	Buyer	Area	Sale price	Period of ownership
23/12/2008/ #15 869 472	480,067 sq. ft.	\$1,745,790 (\$3.64 sq. ft.)	28/04/2009/ 16 116 306)	La Seigneurie Du Chêne Inc. Claude Duchesne	480,067 sq. ft.	\$4,344,750 (\$9.05/sq. ft.)	4 months
Total:		\$8,553,014			Sale:	\$22,238,386	

CITATION: 2019 TCC 255

DOCKET: 2013-4357(IT)G

STYLE OF CAUSE: 6610048 CANADA INC. AND HER MAJESTY THE QUEEN

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: October 29, 30 and 31 and November 1, 2018

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: November 15, 2019

APPEARANCES:

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Counsel for the respondent: Anne Poirier, Simon Vincent

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