

GAAR and sham are no match: Québec Court of Appeal greenlights repo transaction

April 24, 2019

BLG successfully acted for Kone Inc. (Kone) before the Court of Appeal of Québec who recently dismissed the appeal by the Agence du revenu du Québec (ARQ). The Court of Appeal confirmed the trial decision vacating seven years of tax assessments issued by ARQ to Kone for the 1999-2006 tax years under *Québec's Taxation Act* (QTA). The successful appeal resulted in a dismissal of tax assessments totalling interest income of over \$41 million, dismissing ARQ's denial of non-capital losses of over \$17 million. Kone will be entitled to a refund of taxes, interest of approximately \$2.5 million, and costs.

The assessments targeted a share purchase and repurchase agreement (commonly referred to as a REPO) constructed by Kone to finance two acquisitions by its parent company. Kone used the borrowed funds to acquire preferred shares of a U.S. Corporation from a non-Canadian affiliate.

Kone was able to benefit from the mismatch between the Canadian and U.S. tax regimes. The fact the transactions were treated as a loan for U.S. income tax purposes did not constitute a sham, nor did it change their legal substance (an acquisition and a sale of shares) for Québec tax purposes, thus reconfirming the primacy of legal form over economic substance for Canadian income tax purposes. The Court of Appeal rejected ARQ's argument that the recent decision in *Dean's Knight* from the Supreme Court of Canada changed the interpretation of the object, spirit and purpose of s. 127.6 QTA such that it was broad enough to capture any financing transaction by Canadian companies with non-residents that does not generate interest at a reasonable rate.

The BLG team consisted of [Laurie Goldbach](#) (at trial and on appeal), Frédérique Duchesne and [Greg Rafter](#).

By

[Thoburn](#)

Services

[Fintech](#)

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2025 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.