Docket: 2013-1264(IT)G

BETWEEN:

CAROLINE M. McDONALD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

---

Appeal heard on March 9, 2015, at Vancouver, British Columbia.

Before: The Honourable Justice Gerald J. Rip

Appearances:

| | |
|---|---|
| Counsel for the Appellant: | Harald Mattson |
| Counsel for the Respondent: | Max Matas |

---

**JUDGMENT**

The appeal from the assessment made under subsection 160(1) of the *Income Tax Act*, notice of which bears number 1518327 and is dated September 23, 2011, is dismissed, with costs.

Signed at Ottawa, Canada, this 30th day of March 2015.

"Gerald J. Rip"

Rip J.

Citation: 2015 TCC 73
Date: 20150330
Docket: 2013-1264(IT)G

BETWEEN:

CAROLINE M. McDONALD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

## REASONS FOR JUDGMENT

Rip J.

[1] This is an appeal by Ms. Caroline M. McDonald against an assessment pursuant to subsection 160(1) of the *Income Tax Act* ("*Act*") for tax in the amount of $30,235.68 which was transferred to her by Mr. Douglas Chapman in 2004, at the time his liability under the *Act* was not less than $72,425.62.

[2] Mr. Chapman, who died in 2011, was assessed income tax for 1999, 2000 and 2001 by notices of assessment dated April 7, 2005 and for 2002 on November 1st, 2004.

[3] Ms. McDonald and Mr. Chapman co-habitated with each other since "about" 2001 until his death in 2011.

[4] During May and June, 2004, Mr. Chapman transferred $30,235.68 to Ms. McDonald. At the time Ms. McDonald was aware Mr. Chapman was having "issues" with the Canada Revenue Agency ("CRA"). He had worked as an independent contractor and failed to pay any tax from his business from which he earned about $2,000 to $3,000 per month. He also had failed to file tax returns for several years. Sometime before 2004, Mr. Chapman started receiving Canada Pension Plan ("CPP") and Old Age Security ("OAS") payments. He also had a registered retirement savings plan ("RRSP").

[5] The amounts transferred by Mr. Chapman to Ms. McDonald were the following:

| Date of Cheque | Amount |
|---|---|
| April 27, 2004 | $ 4,500.00 |
| April 28, 2004 | 4,500.00 |
| April 29, 2004 | 4,500.00 |
| April 30, 2004 | 4,500.00 |
| May 3, 2004 | 4,500.00 |
| May 4, 2004 | 4,500.00 |
| May 6, 2004 | 3,235.68 |
| **TOTAL** | **$ 30,235.68** |

[6] Subsection 160(1) of the *Act* reads as follows:

| | |
|---|---|
| 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 | Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes: |
| (*a*) the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner, | *a*) son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait; |
| … | … |
| (*c*) a person with whom the person was not dealing at arm's length, | *c*) une personne avec laquelle elle avait un lien de dépendance, |
| the following rules apply: | les règles suivantes s'appliquent : |
| … | … |
| (*e*) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of | *e*) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants : |
| (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 | (i) l'excédent éventuel de la juste valeur marchande des biens au moment du transfert sur la juste valeur marchande à ce moment de |

| | |
|---|---|
| property, and | la contrepartie donnée pour le bien, |
| (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, | (ii) le total des montants dont chacun représente un montant que l'auteur du transfert doit payer en vertu de la présente loi au cours de l'année d'imposition dans laquelle les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années; |
| but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act. | aucune disposition du présent paragraphe n'est toutefois réputée limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi. |

[7] The term "transfer" was explained by Thorson P. in *Fasken Estate v. M.N.R.*[1]:

> 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. …

[8] Ms. McDonald explained the reason for the transfer to her: Mr. Chapman was having a problem with the CRA. He was negotiating a settlement of the taxes assessed. He thought that at the end of the day he would owe nothing. He feared that if the CRA seized his property – the CRA was already garnishing his CPP and OAS payments and he was endorsing GST cheques back to the CRA – and if later there was a settlement, CRA would not pay him back the money owed. He therefore asked Ms. McDonald to open a bank account at the National Bank of Canada. He would endorse, and did endorse, cheques out of his RRSP, paid to him by the National Bank, to Ms. McDonald who would deposit the cheques to a new bank account in her name at the same bank.

[9] It is the seven cheques that she so deposited that triggered the assessment against her by notice dated September 23, 2011 and which is being appealed.

---

1 [1948] Ex.C.R. 580; 49 D.T.C. 491 at p. 497.

[10] By June 30, 2005, Ms. McDonald had withdrawn all the funds from her bank account and returned the money to Mr. Chapman. The withdrawals started in May 2004 and continued each month until November 2004, the final withdrawal made on June 30, 2005, at which time a balance of $53.34 was in the account. The account was closed on February 9, 2010.

[11] Ms. McDonald's counsel referred me to *The Queen v. Jean Livingston*, a decision of the Federal Court of Appeal,[2] a decision, which argued Appellant's counsel, changed the case law with respect to subsection 160(1). In *Livingston*, the taxpayer opened a bank account in her own name at the request of a Ms. Davies. During the time Ms. Davies owed tax under the *Act* she deposited and directed others to deposit money owed to her into the taxpayer's bank account. Ms. Davies had the ability to withdraw funds from the account and was a person who received bank statements and thus was a person who knew what was in the account, although the taxpayer also had the right to withdraw funds and receive bank statements.

[12] In his reasons, the trial judge acknowledged that Ms. Livingston was well aware of her friend's collection problem but emphasized that the taxpayer Livingston did not obtain any benefit from the bank account[3]. The trial judge concluded that Ms. Davies received consideration from Ms. Livingston that could be characterized as a contractual relationship, for depositing funds into the account, the friend received a bank debit card and signed blank cheques from the taxpayer to withdraw funds as she wished. The trial judge allowed the appeal. The Crown appealed to the Federal Court of Appeal

[13] Sexton J.A. wrote, at paragraph 12 of his reasons, "that the [taxpayer's] purpose in opening the bank account was to enable [Ms. Davies] to place her funds beyond the reach of creditors, including the CRA. He even went out so far as to conclude that both parties conspired to prejudice CRA (at para. 6). He also found that Ms. Davies was the only person who used the account; that is, the respondent never deposited into, nor withdrew funds from the account."

[14] Sexton J.A., at paragraphs 18 and 19 stated that:

> [18] The purpose of subsection 160(1) of the *Act* is especially crucial to inform the application of these criteria. In *Medland v. Canada*, 98 DTC 6358 (F.C.A.)

---

2 2008 FCA 89.

3 2007 TCC 303.

> ("*Medland*") this Court concluded that "the object and spirit of subsection 160(1), is to prevent a taxpayer from transferring his property to his spouse [or to a minor or non-arm's length individual] in order to thwart the Minister's efforts to collect the money which is owed to him." See also *Heavyside v. Canada*, [1996] F.C.J. No. 1608 (C.A.) (QL) ("*Heavyside*") at paragraph 10. More apposite to this case, the Tax Court of Canada has held that the purpose of subsection 160(1) would be defeated where a transferor allows a transferee to use the money to pay the debts of the transferor for the purpose of preferring certain creditors over the CRA (*Raphael v. Canada*, 2000 D.T.C. 2434 (T.C.C.) at paragraph 19).
>
> [19] As will be explained below, given the purpose of subsection 160(1), the intention of the parties to defraud the CRA as a creditor can be of relevance in gauging the adequacy of the consideration given. However, I do not wish to be taken as suggesting as there must be an intention to defraud the CRA in order for subsection 160(1) to apply. The provision can apply to a transferee of property who has no intention to assist the primary tax debtor to avoid the payment of tax: see *Wannan v. Canada*, 2003 FCA 423 at paragraph 3.

[15] Ms. Livingston argued that the depositing of funds into her bank account was not, in itself, a transfer of property. A transfer of property requires the transferor to divest herself of the funds deposited into the bank account and this never happened.

[16] The Court of Appeal rejected Ms. Livingston's argument. Sexton J.A. explained (at paragraphs 21 and 22):

> [21] The deposit of funds into another person's account constitutes a transfer of property. To make the point more emphatically, the deposit of funds by Ms. Davies into the account of the respondent permitted the respondent to withdraw those funds herself anytime. The property transferred was the right to require the bank to release all the funds to the respondent. The value of the right was the total value of the funds.
>
> [22] In addition, there is a transfer of property for the purposes of section 160 even when beneficial ownership has not been transferred. Subsection 160(1) applies to any transfer of property – "by means of a trust or by any other means whatever". Thus, subsection 160(1) categorizes a transfer to a trust as a transfer of property. Certainly, even where the transferor is the beneficiary under the trust, nevertheless, legal title has been transferred to the trustee. Obviously, this constitutes a transfer of property for the purposes of subsection 160(1) which, after all, is designed, *inter alia*, to prevent the transferor from hiding his or her assets, including behind the veil of a trust, in order to prevent the CRA from attaching the asset. Therefore it is unnecessary to consider the respondent's argument that beneficial title to the funds remained with Ms. Davies.

[17] The Federal Court of Appeal allowed the Crown's appeal from this Court's judgment.

[18] Based on the comments of Sexton J.A. in paragraph 22 of *Livingston* and those of Noɹl J.A., as he then was, at paragraph 53 of *9101-2310 Quebec Inc. v. Canada*[4] ("*9101*"), it has been argued that a transferee is liable under subsection 160(1) only if the transfer was designed to prevent the transferor from hiding his or her assets in order to prevent the CRA from attacking the asset.

[19] This is the position of the appellant: that she did nothing to thwart the ability of the CRA to collect on Mr. Chapman's debt to it.

[20] In the case at bar, appellant's counsel argued that unlike Ms. Livingston, his client was not well aware of Mr. Chapman's collection problem. In his view this was a significant difference in the two appeals.

[21] Appellant's counsel also referred to two appeals in favour of taxpayers assessed under subsection 160(1) of the *Act*, *9101* and *Lemire v. Canada*[5] ("*Lemire*"). In both appeals, the courts relied on the civil law of Québec where the purported transfers of property took place.

[22] In both these cases money owed by each appellant was deposited by cheques payable to another person into the taxpayer's bank account at the time each other person was liable to the Crown. In *9101*, the controlling shareholder of the appellant was aware of the other person's liability; in *Lemire*, the trial judge concluded that the taxpayer was not aware of her common-law partner's financial situation. The appeals were allowed by this Court.

[23] The Federal Court of Appeal dismissed both of the Minister's appeals. In both cases the Court of Appeal concluded that the appellant's relationship with the other person was in the nature of a mandate and the deposits and eventual withdrawals were consistent with article 2130 of the *Civil Code of Quebec* ("*C.C.Q.*")[6]. Each appellant was acting on the other person's behalf and was

---

4 *9101 2310 Québec Inc. v. Canada* ("*9101*"), [2012] T.C.J. No. 299 (QL), [2013] F.C.J. No. 1128 (QL), 2013 FCA 241, 2013 D.T.C. 5170 (Fr), 2013 D.T.C. 5172 (Eng.)

5 *Lemire v. Canada*, 2012 D.T.C. 1302 (Fr.), 2013 D.T.C. 1065 (Eng.) (T.C.C.), 2013 FCA 242, 2013 CAF 242, 2013 D.T.C. 242 (Fr.), 2013 D.T.C. 5171 (Eng.).

6 Articles 2130 and 2146 of the *C.C.Q.* read in part :

obligated to return to him the money each appellant withdrew. The appellants were not authorized to use the money on their own accounts. This was in accordance with Article 2146 of the *C.C.Q.*, the other persons always remained owner of the deposited funds. As Noɹl J.A., as he then was, stated at paragraph 30 of *Lemire*:

> The TCC judge correctly analyzed the relationship between the parties in accordance with civil law and did not err in refusing to apply this Court's decision in *Livingston*. The rule set out in *Livingston* is based on the common law, and the TCC judge was bound to apply the civil law. From a civil law perspective, the sums deposited in the respondent's account remained the property of Mr. Dupuis. It is also clear that the right to withdraw that money was of no value to the respondent given her obligation to remit the sums to Mr. Dupuis, It follows that no property was transferred for the purposes of subsection 160(1). In this regard, I adopt the reasoning of this Court in *Her Majesty the Queen v. 9101-2310 Québec Inc.*, 2013 FCA 241, at paragraphs 42 to 63.

[24] Unfortunately, the concept of mandate is not part of the common law, the law of British Columbia. In a contract of mandate there is no divestment of ownership of property. Noɹl J.A. reviewed the civil and common law concepts of ownership at paragraphs 42 to 49 inclusive of *9101*. These cases are of no help to the appellant, a resident of British Columbia.

[25] It is obvious from reading subsection 160(1) that the purpose of Parliament enacting subsection 160(1) was to prevent a transferor indebted to the Crown from

---

| | |
|---|---|
| **2130**. Mandate is a contract by which a person, the mandatory, empowers another person, the mandatary, to represent him in the performance of a juridical act with a third person, and the mandatary, by his acceptance, binds himself to exercise the power. | **2130**. Le mandat est le contrat par lequel une personne, le mandant, donne le pouvoir de la représenter dans l'accomplissement d'un acte juridique avec un tiers, à une autre personne, le mandataire qui, par le fait de son acceptation, s'oblige à l'exercer. |
| **2146.** The mandatary may not use for his benefit any information he obtains or any property he is charged with receiving or administering in carrying out his mandate, unless the mandatory consents to such use or such use arises from the law or the mandate. | **2146**. Le mandataire ne peut utiliser à son profit l'information qu'il obtient ou le bien qu'il est chargé de recevoir ou d'administrer dans l'exécution de son mandat, à moins que le mandant n'y ait consenti ou que l'utilisation ne résulte de la loi ou du mandat. |

hiding his or her assets from the Crown. That is what Justices Sexton and Noɹl were referring to in their reasons.

[26] Sharlow J.A. described the weight of subsection 160(1) in *Wannan v. Canada*, at paragraph 3[7]:

> Section 160 of the *Income Tax Act* is an important tax collection tool, because it thwarts attempts to move money or other property beyond the tax collector's reach by placing it in presumably friendly hands. It is, however, a draconian provision. While not every use of section 160 is unwarranted or unfair, there is always some potential for an unjust result. There is no due diligence defence to the application of section 160. It may apply to a transferee of property who has no intention to assist the primary tax debtor to avoid the payment of tax. Indeed, it may apply to a transferee who has no knowledge of the tax affairs of the primary tax debtor. However, section 160 has been validly enacted as part of the law of Canada. If the Crown seeks to rely on section 160 in a particular case, it must be permitted to do so if the statutory conditions are met.

[27] And in *Woodland v. Canada*,[8] Campbell J., at paragraph 27, noted that:

> However, there is no reference to "intent" or "intention" in the statutory language of section 160. The Federal Court of Appeal in both *Livingston* and *Wannan* stated that the application of subsection 160(1) does not require an intention to defraud creditors. Paragraph 3 of *Wannan* clearly outlines that there is no due diligence defence in respect to a subsection 160(1) assessment and that it may apply to a transferee "who had no intention to assist the primary tax debtor to avoid the payment of tax" and/or had "no knowledge of the tax affairs of the primary tax debtor".

[28] Ms. McDonald knew full well that Mr. Chapman had "issues" with the CRA and cooperated with him to assist him to hide his funds from the CRA by opening a bank account in her name to hold the money. As owner of the bank account, she controlled what went into the account and what went out. That she may have held the funds in trust for Mr. Chapman does not assist her: subsection 160(1) is rather specific on this point. Whether she held the funds as agent of Mr. Chapman was not pleaded and therefore, not part of the evidence. At times the funds were transferred to Ms. McDonald, Mr. Chapman was liable under the *Act* for tax. He endorsed various cheques and gave them to Ms. McDonald for deposit in her account. She and Mr. Chapman were common law partners at the time of the

---

7 [2003] F.C.J. No. 1693 (QL), 2003 FCA 423.

8 [2009] T.C.J. No. 350 (QL), 2009 TCC 434.

transfers, she was not blind to Mr. Chapman's "issues" with the fisc and Ms. McDonald gave no consideration to Mr. Chapman for the funds.

[29] Accordingly, the appeal is dismissed, with costs.

Signed at Ottawa, Canada, this 30th day of March 2015.

"Gerald J. Rip"

Rip J.

| | |
|---|---|
| CITATION: | 2015 TCC 73 |
| COURT FILE NO.: | 2013-1264(IT)G |
| STYLE OF CAUSE: | CAROLINE M. MCDONALD v. HER MAJESTY THE QUEEN |
| PLACE OF HEARING: | Vancouver, British Columbia |
| DATE OF HEARING: | March 9, 2015 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice Gerald J. Rip |
| DATE OF JUDGMENT: | March 30, 2015 |

APPEARANCES:

| | |
|---|---|
| Counsel for the Appellant: | Harald Mattson |
| Counsel for the Respondent: | Max Matas |

COUNSEL OF RECORD:

For the Appellant:

| | |
|---|---|
| Name: | Harald Mattson, Barrister and Solicitor<br>Kitchener, Ontario |
| Firm: | |

| | |
|---|---|
| For the Respondent: | William F. Pentney<br>Deputy Attorney General of Canada<br>Ottawa, Canada |