Docket: 2009-3035(IT)G

BETWEEN:

TERRENCE GUILBAULT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 4, 2011, at Ottawa, Canada

Before: The Honourable Justice G. A. Sheridan

Appearances:

Counsel for the Appellant:	Roger Taylor Al-Nawaz Nanji Brian Studniberg
Counsel for the Respondent:	Suzanie Chua

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2005 taxation year is allowed, with costs, and the reassessment of the Minister of National Revenue is vacated.

Signed at Ottawa, Canada, this 25th day of August, 2011.

"G. A. Sheridan"

Sheridan J.

Citation: 2011TCC394
Date: 20110825
Docket: 2009-3035(IT)G

BETWEEN:

TERRENCE GUILBAULT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Sheridan J.

[1] The Appellant, Terrence Guilbault, is appealing the reassessment by the Minister of National Revenue which included $264,065 in his 2005 income for artwork which, according to the Minister, was transferred from a corporation owned by the Appellant to his former spouse in satisfaction of his liability to her under their divorce settlement. In these circumstances, the value of the artwork represented a benefit to the Appellant and was properly included in his income under subsection 56(2) or alternatively, under subsection 15(1) of the *Income Tax Act*.

[2] With the exception of subparagraphs 15(f), (g) and (h) of the Reply to the Notice of Appeal, the assumptions of fact upon which the Minister's reassessment was based are not generally in dispute:

a) on August 30, 1991 Canril Investments Inc. ["Canril Investments"] purchased artwork composed of a number of pieces of art (the "Artwork") from the Appellant and Mrs. Susan Riley, his spouse at the time ["Former Spouse"];

b) at all relevant times, the Appellant was the sole shareholder, director and controlling mind of Canril Investments;

c) as of the date of purchase in 1991, the Artwork was kept at the Appellant and Mrs. Riley's residence [the "Matrimonial Home"];

d) in 1995, the Appellant left the Matrimonial Home for matrimonial reasons, leaving the Artwork with his Former Spouse at the Matrimonial Home;

e) the Artwork remained in possession of his Former Spouse at the Matrimonial Home at least until June 10, 2005 when minutes of settlement (the "Minutes of Settlement") were entered into between the Appellant and his Former Spouse relating to their divorce;

f) pursuant to the Minutes of Settlement, the Appellant's Former Spouse became entitled to retain, as her sole and only property free from any claim, possession and ownership of the Artwork in her possession on June 10, 2005. These Minutes of Settlement were made in full satisfaction of the Former Spouse's claims for equalization of net family property and spousal support and the release by the Appellant in the Matrimonial Home;

g) the transfer of the Artwork from Canril Investments to his Former Spouse on June 10, 2005 was part of the Appellant's obligation resulting from his divorce settlement with his Former Spouse;

h) until the transfer to his Former Spouse on June 10, 2005, Canril Investments remained the sole owner of the Artwork since its acquisition on August 30, 1991;

i) the value of the Artwork at the time of the transfer to his Former Spouse on June 10, 2005, was at least in the amount of $264,065.[1]

Background

[3] As is often the case in tax matters arising out of marital breakdown, this bare recital of facts does not begin to tell the story. In 1991, the Appellant and his Former Spouse transferred the Artwork to Canril Investments. Contrary to assumption 15(c), the Artwork was not kept exclusively in the Matrimonial Home; as there was not enough room for the entire collection at the offices of Canril Investments, individual pieces were rotated from time to time between the office and the Matrimonial Home. It was not until 1993 when Canril Investments moved its business premises that all of the Artwork was temporarily relocated to the Matrimonial Home during renovations of the new space.

[1] Reply to the Notice of Appeal, at paragraph 15.

[4] One night in January 1995, the Appellant returned from work to find himself locked out of the Matrimonial Home. He immediately moved to other accommodations. Again, contrary to the implication in assumption 15(d) that the Appellant willingly left the Artwork with his Former Spouse, it is more accurate to say that it happened to be located at the Matrimonial Home the night he was barred from re-entry. Divorce proceedings quickly ensued but because of the contentious nature of their relationship, every issue became a battle: the custody of their two sons, spousal and child support, disposition of the Matrimonial Home, and division of matrimonial property. None of this is particularly relevant to the present matter except insofar as it spilled onto the Appellant's corporate holdings, in particular, the Artwork owned by Canril Investments. Their decade-long dispute generated a flurry of documents only some of which were before the Court: court orders, offers and counter-offers, correspondence and the Minutes of Settlement which finally brought hostilities to an end.

Appellant's Position

[5] Briefly stated, the Appellant's position is that the Minutes of Settlement did not effect a transfer of the Artwork owned by Canril Investments to the Appellant's Former Spouse. Given that the Artwork remained the property of Canril Investments at the time the Minutes of Settlement were executed, the lack of any reference to it in the very detailed list of items in Clause 2.1 of Schedule 'A' and the release in Paragraph 4 of the agreement supports the conclusion that the parties did not intend the transfer of the Artwork as part of the matrimonial property. Any ambiguity in the Minutes of Settlement must be resolved in the context of the surrounding circumstances, including documentation predating its execution, and the nature of the relationship between the Appellant and his Former Spouse from 1991 to 2005.

Respondent's Position

[6] Not surprisingly, the Minister takes the opposite view, arguing that it is clear on the face of the Minutes of Settlement, in particular, Clause 2.1 of Schedule 'A' thereto, that the Artwork owned by Canril Investments was transferred to the Appellant's Former Spouse in partial satisfaction of his liability to her under that agreement. There being no ambiguity in the Minutes of Settlement, there is no need to look beyond it for its interpretation. But even if there were, counsel contended, the Appellant's actions are consistent with the Artwork having been transferred; most notably, his failure to protect Canril Investments interest in the Artwork by gaining possession of it at his earliest opportunity. In these circumstances, the transfer

constitutes a benefit to the Appellant under either subsections 56(2) or 15(1) of the *Act.*

Legislation

[7] Beginning first with the legislative provisions, the relevant portions of subsection 15(1) of the *Act* provide that:

> 15. (1) Where at any time in a taxation year a benefit is conferred on a shareholder … by a corporation otherwise than
>
> …
>
> the amount or value thereof shall … be included in computing the income of the shareholder for the year.

[8] The relevant portions of subsection 56(2) of the *Act* read as follows:

> 56. (2) A … transfer of property made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person … shall be included in computing the taxpayer's income to the extent that it would be if the … transfer had been made to the taxpayer.

[9] For subsection 56(2) to apply, all of the four "pre-conditions" identified by the Supreme Court of Canada in *Neuman v. Minister of National Revenue*, [1998] 1 S.C.R. 770, must be satisfied:

> (1) the payment must be to a person other than the reassessed taxpayer;
>
> (2) the allocation must be at the direction or with the concurrence of the reassessed taxpayer;
>
> (3) the payment must be for the benefit of the reassessed taxpayer or for the benefit of another person whom the reassessed taxpayer wished to benefit; and
>
> (4) the payment would have been included in the reassessed taxpayer's income if it had been received by him or her.[2]

[2] At paragraph 32.

Issues

[10] The only real question for consideration is whether, on a proper interpretation of the Minutes of Settlement and the surrounding circumstances, there was a transfer of the Artwork from Canril Investments to the Appellant's Former Spouse. Counsel for the Appellant conceded condition 4; had the Appellant transferred Canril Investments' Artwork directly to himself, it certainly would have been a benefit taxable in his hands. I agree with counsel's further comment in argument that if a transfer were found to have occurred, it would have been a benefit to the Appellant under the first prong of condition 3 as it would have satisfied, in part, his obligations to his Former Spouse under the Minutes of Settlement. Furthermore, as a signatory to the Minutes of Settlement, the Appellant would have, if not directed, at least concurred in that transfer within the meaning of condition 2. In these circumstances, the Appellant would have received a benefit under either subsection 56(2) or subsection 15(1) of the *Act.*

Credibility

[11] Before considering the legal issues, it is important to say a few words about the Appellant's credibility. He was the only witness to testify. It might have been helpful to have heard from his Former Spouse but, given the hostile nature of their relationship, that is not necessarily so. Perhaps that is why she was not called by either party. Nor did the Court hear from any of the Canada Revenue Agency officials involved in the Appellant's files over the years. As a result, the decision in this case hinged to a large degree on the reliability of the Appellant's evidence.

[12] Notwithstanding the skillful efforts of counsel for the Respondent to diminish the force of the Appellant's evidence, I found him, on balance, to be a convincing witness. He struck me as a genuine sort of fellow who has worked hard all his life to make a success of himself. As one would expect under our adversarial system, the Appellant put his best foot forward in presenting his testimony; he did not, however, pretend to be a model of perfection in either personal or business matters. His answers to questions about transactions, audits and assessments involving several different companies engaged in a range of enterprises and which had occurred years ago (and were not necessarily relevant to the present matter) were straight-forward and sensible, especially given the passage of time and the diverse and complex nature of his businesses.

[13] I found the Appellant similarly credible in his response to counsel for the Respondent's suggestion that during the years leading up to the execution of the

Minutes of Settlement, he could have asserted and enforced Canril Investments' right to the Artwork. In a perfect world, I would agree. But the notional taxpayer who inhabits the pages of the *Income Tax Act* is blissfully unencumbered by the day-to-day concerns that afflict his human counterparts. In the Appellant's case, gaining possession of Canril Investments' Artwork was but a dim ember on a horizon ablaze with more pressing concerns. I mention this not to relieve the Appellant of his obligations under the *Act* but to inject a note of reality into the facts as perceived by the Minister.

[14] While more will be said about this aspect of the appeal below, the following exchange between counsel for the Respondent and the Appellant illustrates the candour with which he answered questions as to why he had not taken action on behalf of Canril Investments to recover the Artwork, especially since during that same period, he *had* gone to court to have released certain other corporate assets from a general restraining order his Former Spouse had obtained against him and his companies on February 15, 1996[3] ("1996 Restraining Order");

> … by the time [the Minutes of Settlement] were signed by you and [the Former Spouse], you were at the end of your tether, were you not?
>
> A. Well, yes, I would agree that -- if I understand the meaning of the word "tether" I was pretty fed up with the whole thing, absolutely, yes.
>
> Q. And you wanted to end the divorce?
>
> A. I wanted to end the divorce before it even started.
>
> Q. And you had every opportunity between the ten years to go into court to permanently vacate the 1996 Order with respect to the Artwork, don't you agree?
>
> A. Well, yes, I guess -- I think I understand the question. I am just thinking through it.
>
> So I guess what you are saying is I could have asked my lawyers to prepare a motion in court to ask for release so I could sell the art, for example, because I would not have wanted it back, I don't think. I would have sold it and raised money for the company.
>
> But –

[3] Exhibit A-1, Tab 4.

Q. You are expanding on my question.

A. I am trying to figure out why -- I am trying to answer your question in a sense that to show you that it would not have made any sense to ask for such a request.

You see, my business is real estate, okay.

And I mean, the Artwork is nice to hang on the walls to make your office look good, and I am a real avid of anything that is Canadian.

So -- but the reason we went for orders when we had to, because if we had sales or financing that had to be done in the general course of business, we went for one.

But we would not have bothered going and -- first of all, they [going to court] are extremely expensive. Some of these processes cost 50, 60, $70,000.

We would not have fought that fight over the Artwork as long as my sons were still telling me it was still all at the house.

If it disappeared, I might have.

So yes, I guess I could have, but to go to court to fight over that when I was fighting for my very survival and existence of my company and trying to raise my children because they were with me, after arriving on my doorstep … I had my hands full.

So I only went to court on really priority items.

In other words, if I had to raise money to buy a piece of property or I had to sell a piece of property because of this court order, which all my other lawyers agreed was poorly written and we shouldn't have agreed to, but there would not -- it would not -- it was not something that had to be dealt with at that time.

So it was not immediate, you know.

First of all, of course she would have fought it. It would have gone on and on and on. It just would not have been a rational thing to do after. It would have inflamed her anger even more[4].

…

[4] Transcript, page 107, lines 7-25 to page 110, line 1.

So it was too close and too personal and not in an ownership chance, but it was just too much. I wouldn't have gone there. I only went to court on matters of pure, immediate and necessary business.

Q. So Mr. Guilbault –

A. Could I have gone? Yes.

Why I did not go, I have offered you that explanation of why I did not go.

Q. Mr. Guilbault, you were in court four times and you could have had, at no extra cost to those applications by referring to the Artwork, is that correct?

A. No. No extra cost, that's a nice statement to make.

If you could -- if this Court would agree to loan me a quarter of a million dollars to pursue that Artwork now, I would be more than willing to pursue it.

But no, it's not that simple.

You add on only the Artwork, you are not going to jeopardize your whole family -- don't forget, she depended on my money and my children depended on my money.

Am I going to add Artwork which is going to drive her bananas …[5]

…

So there was no way I was going to get the -- so you say add it on. So let's -- you suggest add it on, so let's explore that.

So I add it in there.

I'm trying to get a multi-million dollar loan done, or in this case, a 36 million dollar sale done, and I add in oh, by the way, I want those paintings.

Oh my God!

I mean, it would not make any logical business sense to do that.[6]

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[5] Transcript, page 110, lines 8-25 to page 111, lines 1-8.

[6] Transcript, page 111, lines 19-25 to page 112, lines 1-4.

[15] It was clear from the Appellant's testimony and the questions posed by counsel for the Respondent that over the years, a raft of Canada Revenue Agency officials had been involved with the Appellant's files. Perhaps some of them could have provided the Court with a more balanced picture of events. But the appeal must be decided on what is, not what might have been. As will be further described below, all in all, I found the Appellant's evidence sufficiently credible to shift to the Respondent the onus of proving the assumptions underlying the reassessment[7].

Analysis

[16] Turning, then, to the issues at hand, a word need be said about the 1996 Restraining Order mentioned above. Approximately a year after the Appellant's exclusion from the Matrimonial Home, the Appellant's Former Spouse applied for and was granted, on consent, an order:

> … that the [Appellant] shall be restrained from dissipating, depleting, transferring, selling, disposing of or encumbering any assets in which he has an interest, directly or indirectly, or any assets which he may control in any capacity, directly or indirectly, PROVIDED that the [Appellant] shall be at liberty to act in a commercially reasonable manner for the purpose of preserving the assets, SUBJECT to such further agreement of the [Appellant] and [his Former Spouse] or Order of this Court.[8] [Emphasis added.]

[17] It is common ground that the Artwork was caught by the 1996 Restraining Order. Counsel for the Respondent contended that key to the determination as to whether there had been a transfer of the Artwork were the two alternative means contemplated by the 1996 Restraining Order for releasing corporate assets from its ambit: either by "further agreement" or a court "Order". Counsel for the Respondent emphasized that although on two occasions the Appellant had gone to court to have certain corporate assets vacated from the 1996 Restraining Order i.e., an Order of the Ontario Court (General Division) dated January 20, 1999[9] and an Order of the Ontario Superior Court of Justice dated March 19, 2003[10], he admitted

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[7] *Hickman Motors Ltd. v. R.*, [1998] 1 C.T.C. 213 at paragraphs 92-95. (S.C.C.).

[8] At paragraph 1.

[9] Exhibit A-1, Tab 8.

[10] Exhibit A-1, Tab 11.

he had taken no such action in respect of the Artwork. Accordingly, because at the time the Minutes of Settlement were signed the Former Spouse (probably) had physical possession of the Artwork, counsel submitted that the Minutes of Settlement represented a "further agreement" the effect of which was to transfer to her the Artwork from Canril Investments. In support of this contention, counsel noted that Clause 2.1 is identical to a provision in the settlement offer made just prior to the Minutes of Settlement, the "Respondent's Offer to Settle" dated March 24, 2005[11] ("March 2005 Settlement Offer"). In these circumstances, counsel for the Respondent submitted, "[t]he only reasonable conclusion is that the parties came to an agreement that was the [Minutes of Settlement] whereunder [the Appellant's Former Spouse] received the Artwork from [Canril Investments], as stated by paragraph 1 of the 1996 Restraining Order: 'subject to such further agreement of the Husband and Wife'"[12].

[18] The relevant portions of the Minutes of Settlement are Paragraphs 1 and 4 of the main text of the Minutes of Settlement and Clauses 2.1 and 2.2 of Schedule 'A' thereto:

> And Whereas the parties hereby agree to settle all matters in this action as follows:
>
> 1. In full satisfaction of the claims for equalization of net family property and spousal support and the release by the Respondent in the former matrimonial home, 18 Blenheim Road, Rockcliffe Park, Ottawa, the Respondent, Terrence Guilbault, (hereinafter referred to as the "husband") hereby agrees to pay to the Applicant, Susan Riley (hereinafter referred to as the "wife") the sum of ONE MILLION, SEVEN HUNDRED AND FIFTY THOUSAND DOLLARS ($1,750,000.00) by cheque, as directed, to the Applicant's solicitors, Cooligan, Ryan, in trust, upon the terms and conditions set forth in Schedule "A" hereto and as set forth below:
>
> …
>
> 4. The wife will forthwith vacate or dismiss any and all claims, security documents and Court Orders against the husband and any company and property in which he has an interest.
>
> …
>
> **Schedule A**

[11] Exhibit A-1, Tab 13 at page 75 of the Joint Book of Documents.

[12] Respondent's Written Submissions at paragraph 28.

...

2.0 PROPERTY AND OTHER DEBTS

2.1 Except as otherwise specifically provided in these Minutes, the parties will each be entitled to retain as their sole and only property free from any claim by the other, possession and ownership of all property of any kind owned or controlled by him or her or now in his or her name or possession, including but not exclusive of all, cash, stocks, bonds, securities, GICs, registered retirement savings plans, mutual funds, business interests, shares in privately-held corporations, professional practices or licenses, real estate, pensions, severance pay and other employment-related benefits, bank accounts, jewellery, vehicles, or assets in any other form. Except as otherwise specifically provided in these Minutes, the parties shall each be free to deal with any and all such assets he or she now owns or possesses free from any claim by the other and in such manner as he or she may choose. [Emphasis added.]

2.2 Each party hereby releases any and all interest in the property of the other.[13]

[19] Despite the very able submissions of counsel for the Respondent, I am not persuaded by the Crown's argument. First of all, it is important to distinguish the purposes of the 1996 Restraining Order and the Minutes of Settlement. The 1996 Restraining Order was meant merely to protect anything that might constitute matrimonial property pending its lawful distribution either by agreement or court order; unlike the Minutes of Settlement, it was not geared at making any final determination of either party's rights thereto. The 1996 Restraining Order was a blunt instrument; the Minutes of Settlement, a scalpel. It is against this background that their respective provisions must be considered. I note, however, that even from the time of the 1996 Restraining Order, a distinction was made between art owned by the Appellant personally and the Artwork owned by Canril Investments: the former in Schedule 'A' to the 1996 Restraining Order and the latter, in Schedule 'B' thereof.

[20] Turning, then, to the Respondent's contention that the Appellant ought to have taken legal action to have the Artwork vacated from the 1996 Restraining Order, as mentioned above, I found the Appellant's explanation entirely reasonable. In the context of his marital breakdown, the Appellant had to choose his battles. He was responsible for paying child and spousal support as well as maintaining the businesses he had spent a lifetime establishing. Given the fragility of their

[13] Exhibit A-1, Tab 15.

negotiations and the value of the Artwork relative to his commercial enterprises, I am unable to conclude that in making the viability of his companies a priority, the Appellant meant to transfer Canril Investments' interest in the Artwork to his Former Spouse. Deferring the enforcement of a right to a more opportune moment is not proof positive of its abandonment and even less so, of its transfer to another.

[21] As for the Respondent's argument in respect of Clause 2.1 of the Minutes of Settlement, I am unable to see how the fact that it remained the same in both the March 2005 Settlement Offer and the Minutes of Settlement leads inevitably to the conclusion that the parties intended to transfer the Artwork from Canril Investments to the Former Spouse. The best that can be said is that the provision is equally ambiguous in both documents; its reiteration in the Minutes of Settlement, in itself, does nothing to render it less so.

[22] The Respondent's argument also overlooks the fact that while Clause 2.1 may have remained the same, there were other significant differences between the March 2005 Settlement Offer and the Minutes of Settlement. Notably, under Paragraph 1, the Former Spouse gained a substantial increase in the lump sum amount payable by the Appellant: $1.75 million, up from the $1.2 million he had initially proposed. As counsel for the Respondent herself noted in cross-examination, "… [the Former Spouse] had negotiated very carefully to increase the amount for not very good reason …"[14] [Emphasis added.]. The evidence shows this to have been typical of the Former Spouse's negotiating style throughout the decade of litigation following the Appellant's exclusion from the Matrimonial Home in January 1995. Nothing in the evidence leads me to believe the Appellant's Former Spouse was a shrinking violet. She was at all times represented by counsel. From this I infer that had the parties intended the Artwork to have been transferred to her under the Minutes of Settlement, it is more likely than not that it would have been expressly included in the grocery list of items set out in Clause 2.1.

[23] I find further support for this conclusion in the changes to the release provisions in the March 2005 Settlement Offer and the Minutes of Settlement. In the March 2005 Settlement Offer[15], there was no provision specifically addressing the release of corporate assets; in the Minutes of Settlement, however, Paragraph 4 was added to provide that "[the Former Spouse] will forthwith vacate or dismiss any and all claims, security documents and Court Orders against [the Appellant] and any

[14] Transcript, page 92, lines 23-24.

[15] Exhibit A-1, Tab 13 at page 71.

company and property in which he has an interest"[16]. This provision is echoed in Clause 2.2 of Schedule "A": "Each party hereby releases any and all interest in the property of the other.", which had also been present in the March 2005 Settlement Offer.

[24] In my view, the combined effect of these provisions, together with absence of any reference to the Artwork in the list of assets in Clause 2.1, counters the submission of counsel for the Respondent that Clause 2.1 represented the "further agreement of the parties" to include the Artwork in the property transferred to the Former Spouse under the Minutes of Settlement. As I read that document, the parties intended to limit the application of the Minutes of Settlement to property in their possession to which each had legal entitlement at the time the agreement was executed. The mere fact that the Former Spouse may have had possession of the Artwork (which the Minister admits was, at all times prior to the Minutes of Settlement, the property of Canril Investments) does not lead inexorably to the inference that it was to be transferred to her as part of the matrimonial property distribution. Such a conclusion is at odds, not only with the clear wording of Paragraph 4 and Clause 2.2, but also with the stance consistently taken by the Appellant on behalf of Canril Investments well before the reassessment under appeal could have been contemplated. These documents are considered below.

[25] First, in a director's resolution dated December 20, 1994[17] (approximately a year before the marriage breakdown), Canril Investments authorized the pledging of an Alex Colville painting, part of the collection that would later be known as the Artwork, to the Canada Revenue Agency to secure the Appellant's outstanding tax debt. In May 1996, the painting was sold by Sotheby's and the proceeds were duly applied in accordance with that resolution. While counsel for the Respondent argued that this showed the Appellant's predilection to appropriating corporate assets for his personal benefit, there was insufficient evidence before me to conclude that there was anything untoward in his tax treatment of this transaction, especially given the attention which Canada Revenue Agency officials seem to have devoted to his and his companies' files during the decade under consideration in this appeal.

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[16] Exhibit A-1, Tab 15 at page 83.

[17] Exhibit A-1, Tab 2 at page 11.

[26] In the same vein, a letter written by the Appellant on behalf of Canril Investments dated July 3, 1996[18] informed the Canada Revenue Agency that the Artwork belonged to Canril Investments and that it ought to be returned to the company.

[27] Some three years later, the Appellant's then divorce lawyer proposed a settlement to his Former Spouse's counsel in a letter dated April 7, 1999[19] ("Epstein Offer 1999"). At that time, the Appellant was prepared to offer, among other things, a lump sum payment of $1 million and the Matrimonial Home; at paragraph 7 of that document, Mr. Epstein went on to assert that:

> The paintings in the house [the Artwork] belong to my client's company [Canril Investments]. They were the subject matter of a transaction in August 31, 1991, where the total value of the paintings was listed at $343,000.00, for which your client received a capital gain in 1991 on her income tax return. Both parties received a capital gains exemption for selling the paintings to the company and, unless this transaction is completed as was set out many years ago, both parties would be hit with a Revenue Canada capital gains assessment. Accordingly, the paintings must stay with my client's company, but otherwise, your client may have the balance of the contents in the home, provided the rest of the terms are acceptable. There are some personal effects belonging to Mr. Guilbault that he will want out of the home.[20]

[28] Here, it can be seen that in addition to maintaining his position that the Artwork was the property of the Canril Investments, the Appellant also continued to distinguish between the Artwork on the one hand and on the other, the contents of the Matrimonial Home and his personal possessions.

[29] Counsel for the Respondent characterized the Epstein Offer 1999 as "vastly different" negotiations from those giving rise to the March 2005 Settlement Offer and the Minutes of Settlement. With respect, I am not persuaded this is so. The Epstein Offer 1999 was part of one continuous negotiation spanning 1995 and 2005; over that 10-year period, for example, the lump sum amount payable to the Appellant's Former Spouse made its way from $1 million in the Epstein Offer 1999 to $1.2

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[18] Exhibit A-1, Tab 2 at page 8.

[19] Exhibit A-1, Tab 9.

[20] Exhibit A-1, Tab 9 at page 35 of the Joint Book of Documents.

million in the March 2005 Settlement Offer and finally, to $1.75 million in the Minutes of Settlement.

[30] Counsel also sought to discredit the Epstein Offer 1999 as "inaccurate" and by inference, unreliable, because of the misstatement of the value of the Artwork as $343,000. While I commend counsel for a valiant effort, for the purposes Mr. Epstein's letter was intended, I do not see as substantively significant his having failed to reduce the Artwork's initial value by the amount generated from the sale of the Colville painting in 1996. And as counsel for the Appellant respectfully noted after commenting on Mr. Epstein's capital gains analysis in the above passage, his specialty was divorce, not tax[21].

[31] Finally, from the time the Appellant and his Former Spouse transferred the Artwork to Canril Investments in 1991 until the year following the execution of the Minutes of Settlement in 2005, the Artwork was consistently shown as a capital asset in Canril Investments' financial statements[22]. It was not until 2006, on the advice of its accountants, that Canril Investments finally wrote off the Artwork[23]:

> Q. And is it your position that the Artwork disappeared from the 2006 financial statements of Canril Corporation at the time?
>
> A. Yes.
>
> Q. Because you no longer had possession of it?
>
> A. That was a decision made by my accountant, Rick Watson.
>
> My understanding was that he felt that he could not in good faith keep them as an asset in the corporation because of the fact that they were in someone else's hands and not withstanding it was my wife's and notwithstanding we might still have a claim against it, it could be very expensive to get back.
>
> So he could not honestly say that the full value was there.

[21] Transcript, page 146 at lines 18-19.

[22] Exhibit A-1, Tab 10 at pages 39 and 44 of the Joint Book of Documents (2002); Exhibit A-1, Tab 12 at pages 57 and 64 of the Joint Book of Documents (2003, 2004).

[23] Exhibit A-1, Tab 18 at page 115.

So that's why he recommended writing it off and taking a loss.[24]

[32] While counsel for the Respondent cross-examined the Appellant on its "disappearance" from the company's books in 2006, his motives were not challenged in argument nor was there any suggestion that the removal of the Artwork had resulted from its transfer to the Appellant's Former Spouse under the Minutes of Settlement. And in any event, the taxation year under appeal is 2005; at that time and in all the relevant years prior thereto, there is no question that the Artwork was shown as an asset in the corporation's financial records.

[33] In all the circumstances, then, I am unable to conclude that the Minutes of Settlement transferred the Artwork owned by Canril Investments to his Former Spouse in satisfaction of the Appellant's obligations under the Minutes of Settlement. As both counsel noted in their submissions, the word "transfer" is not a term of art and has no technical meaning; *Fasken Estate v. Minister of National Revenue*, [1948] C.T.C.265. The issue in *Fasken Estate* was the interpretation of a document to determine whether certain property had been transferred from a husband to his wife. The Exchequer Court ultimately concluded that it had, summing up the approach to be taken in such an inquiry as follows:

> 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. The plain fact in the present case is that the property to which Mrs. Fasken became entitled under the declaration of trust, namely, the right to receive a portion of the interest on the indebtedness, passed to her from her husband who had previously owned the whole of the indebtedness out of which the right to receive a specified portion of the interest on it was carved. If David Fasken had conveyed this piece of property directly to his wife by a deed such a conveyance would clearly have been a transfer. The fact that he brought about the same result by indirect or circuitous means, such as the novation referred to by counsel involving the intervention of trustees, cannot change the essential character of the fact that he caused property which had previously belonged to him to pass to his wife. In my opinion, there was a transfer of property from David Fasken to his wife within the meaning of the Act.[25] [Emphasis added.]

[24] Transcript, page 119, lines 7-25.

[25] Above, at page 279.

[34] A review of the jurisprudence dealing with subsections 56(2) reveals that the present matter differs from the more typical case in that its focus is the determination of the existence of a transfer rather than whether it occurred at the taxpayer's direction or with his concurrence (judicially interpreted to include "acquiescence") and if so, whether he benefited from the transfer or desired that the transferee benefit from it: *Boardman v. The Queen*, 85 D.T.C. 5628 (FCTD); *Outerbridge (Winter) v. Canada*, [1991] 1 C.T.C. 113 (F.C.A.); *Smith v. Minister of National Revenue*, [1993] 2 C.T.C. 257 (F.C.A.); *Scott Jones and Ascot Enterprises Ltd. v. R.*, [1996] 1 C.T.C. 384 (F.C.A.); similarly, in regard to subsection 15(1), see *Broitman v. Minister of National Revenue*, [1986] 2 C.T.C. 2283 (T.C.C.); *Kondrat v. The Queen*, [1995] 1 C.T.C. 2630 (T.C.C.); *Osadchuk v. The Queen,* [1995] 1 C.T.C. 2067, (T.C.C.).

[35] However, one aspect in the two latter cases cited above, *Osadchuk* and *Kondrat*, is instructive in the present matter: in determining whether a benefit had been conferred on the taxpayers under subsection 15(1), the Court took into account whether the taxpayer's company had been a party to the marriage settlement agreement. In *Osadchuk*, the Court found that taxpayer's corporations were signatories to the agreement between him and his former spouse. Because the payments made by the corporations were in satisfaction of the taxpayer's obligations under that agreement, a benefit was held to have been conferred on him. In the present matter, it is common ground that Canril Investments was not a party to the Minutes of Settlement between the Appellant and his Former Spouse. In this regard, it is more akin to *Kondrat* in which the Court rejected the taxpayer's argument that his company had paid an amount to his ex-wife for its own benefit:

> 37 The rights Mrs. Kondrat sought in her action against Kondrat are rights borne of their marriage. The corporation is not a party to the action. It is not unusual for an action in law against a majority shareholder of a corporation to indirectly affect the corporation. However, the corporation in the appeal at bar, for example, has no obligation to the plaintiff spouse and any payment by the corporation to the plaintiff is a payment made for the benefit of the spouse who is its shareholder. In such circumstances the corporation confers a benefit on its shareholder: ….

[36] Similarly, Canril Investments was under no obligation to the Appellant's Former Spouse. Considered in light of *Fasken Estate*, the evidence does not support the conclusion that the Minutes of Settlement divested Canril Investments of its interest in the Artwork or caused it to pass to the Appellant's Former Spouse. I agree with counsel for the Appellant that if, subsequent to the execution of the Minutes of Settlement in June 2005, a third party had acquired Canril Investments, the Minutes

of Settlement would not have prevented the new owner from asserting the company's rights to the Artwork.

[37] Finally, in considering the evidence in the present case, I am guided, in part, by the words of Décary, J.A. in *Scott Jones and Ascot Enterprises Ltd. v. R.* In making the following comment the learned appellate judge was specifically considering whether the taxpayer had "desired" to transfer the property in question but logically, such judicial restraint would seem to apply equally to the analysis of the evidence in respect of the other conditions under subsection 56(2):

> 16 The fact that the application of subsection 56(2) may lead to harsh consequences is an additional reason for the Court, when it assesses the evidence in a case where the motive is not obvious, not to infer too hastily that a taxpayer has evinced a desire such as to attract the application of the provision.

[38] For all the reasons set out above, the Appellant has persuaded me on a balance of probabilities that there was no transfer of the Artwork to his Former Spouse under the Minutes of Settlement. The requirements of condition 1 of subsection 56(2) not having been met, that provision is without application to the Appellant's situation. Similarly, there having been no transfer of the Artwork to the Former Spouse, no benefit was conferred on the Appellant within the meaning of subsection 15(1) of the *Act.* The appeal is allowed, with costs, and the reassessment by the Minister of National Revenue of the Appellant's 2005 taxation year is vacated.

Signed at Ottawa, Canada, this 25th day of August, 2011.

"G. A. Sheridan"

Sheridan J.

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