Docket: 2010-862(IT)G

BETWEEN:

DANIELLE LEMIRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 17, 2012, at Montréal, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the appellant:	Serge Fournier
Counsel for the respondent:	Benoît Mandeville

JUDGMENT

The appeal from the assessment made under section 160 of the *Income Tax Act* is allowed and the assessment is accordingly vacated, with costs to the appellant.

Signed at Ottawa, Canada, this 18th day of October 2012.

"Alain Tardif"

Tardif J.

Translation certified true
on this 6th day of February 2013

François Brunet, Revisor

Citation: 2012 TCC 367
Date: 20121018
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<u>**REASONS FOR JUDGMENT**</u>

<u>Tardif J.</u>

[1] This is an appeal from an assessment made under section 160 of the *Income Tax Act* (ITA). In order to explain and justify the assessment, the respondent relied on the following assumptions of fact:

> [TRANSLATION]
> 14. In making the assessment in issue, the Minister relied on the following facts:
>
> (a) Throughout the period in issue (1997 through 2001), Mr. Dupuis was the appellant's "common-law partner" within the meaning of subsection 248(1) of the ITA.
>
> (b) At the time the assessment in issue was made, Mr. Dupuis remained liable to pay the following amounts under the ITA in respect of the taxation years 1994 through 2001:

Year	Tax liability (tax, penalties and interest)
1994	$18,436.79
1995	$33,951.58
1996	$17,694.35
1997	$38,296.13
1998	$41,328.32
1999	$49,247.28
2000	$45,254.82
2001	$35,275.54
Total	$279,484.81

(c) During the years 1997 through 2001, Mr. Dupuis deposited the following amounts into the account (EOP folio number [redacted]) that the appellant held at the Caisse populaire de Chambly (the Deposits):

Year	Total amount deposited
1997	$104,991.30
1998	$134,739.36
1999	$146,458.18
2000	$154,491.89
2001	$145,821.31
Total	$686,502.04

(d) The appellant gave no consideration for the Deposits.

(e) Mr. Dupuis was a chartered accountant during the relevant period.

(f) Mr. Dupuis declared bankruptcy a first time on or about March 12, 1993.

(g) Mr. Dupuis declared bankruptcy a second time on July 5, 2007.

15. In support of the assessment in issue, the Deputy Attorney General of Canada adds the following facts.

(a) The appellant and Mr. Dupuis acted in concert with respect to the Deposits.

(b) As mentioned in paragraph 5 of this Reply, in a letter written to Franca Timpano, appeals officer with the Canada Revenue Agency, the representative in the appellant's matter admitted that the appellant and Mr. Dupuis were "common-law partners" during the relevant period.

The following facts emerge from the evidence:

[2] Dupuis was an accountant and the appellant was a nurse.

[3] After they met in 1993, a bond of friendship and trust developed between Dupuis and the appellant. During the period from 1997 through 2001, they even had a "long-term relationship" in which Dupuis resided at the appellant's home from time to time. Indeed, Dupuis acknowledges signing a lease in which he gave the same address as the appellant's.

[4] During the relevant period, Dupuis owed substantial amounts under the ITA with respect to the taxation years 1994 through 2001. According to the Minister, Dupuis' total liability was $279,484.81 at that time.

[5] Because of his financial problems, Dupuis had trouble cashing his cheques at the relevant time; the bank held cheques for a long time before freeing up the funds.

[6] These delays made it difficult for Dupuis to manage his accounting practice, so he turned to the appellant and asked her to negotiate certain endorsed cheques by clearing them through her personal account.

[7] The appellant was willing to help and agreed to do so. Therefore, throughout the relevant period, she went to the automated teller machine, deposited the cheques, and withdrew the amount or amounts equal to the cheques, which she remitted to Dupuis.

[8] As a general rule, the amounts obtained after the cheque deposits were registered directly in the appellant's personal bank account and then withdrawn in full the same day.

[9] On rare occasions, the amounts remained in the appellant's bank account for a few days. Sometimes, Dupuis expressly asked her to use some of the deposited funds to pay herself back for small disbursements that she had had to make. However, this was a very marginal portion of the total amounts deposited by the appellant. Moreover, they were essentially expenditures made at Dupuis' request, such as tickets for shows, hockey games, etc.

[10] There was no written agreement between the appellant and Dupuis. However, things were very straightforward. The appellant negotiated the cheques for cash, which she promptly handed to Dupuis. The only exceptions involved small expenditures made by the appellant at Dupuis' express request.

[11] Dupuis never told the appellant about his financial problems, let alone his tax debts.

[12] During an audit by Revenu Québec in 2002, when told about the risks inherent in such a practice, the appellant immediately stopped changing cheques on Dupuis' behalf.

[13] The deposits were clearly identified by a special and distinctive code. So were the withdrawals. This characteristic was clearly shown. The following excerpt from the appellant's testimony attests to this.

> [TRANSLATION]
> . . .
> A. My name is Danielle Lemire.
> Q. Now, Ms. Lemire, there are annotations in this booklet. Sometimes a capital "A" appears, and at other times, there are names like Canadian Tire, Hydro and Videotron.
> A. Mm-hm.
> Q. Who made these notes in your deposit book?
> A. Me.
> Q. Pardon?
> A. It was always me.
> Q. What do the capital A's mean, Ms. Lemire?
> A. They stand for Albert.
> Q. For Mr. Albert Dupuis?
> A. That's right.
> Q. Okay Ms. Lemire, I handed you the binder which is reproduced. If you go to the first page 3 of the document, for the period concerned, which is 1997, the code "DGA" for automated teller deposit ("*dépôt au guichet automatique*") appears for January 6 and the amount is $500.
> A. Yes.
> Q. You wrote "A".
> A. Mm-hm.
> Q. And the same day, you wrote "RGA". What's written is
>
> "Automated teller withdrawal (*Retrait au guichet automatique*), $500" -- As read
>
> Q. What does that stand for, Ms. Lemire?
> A. It meant that I deposited the cheque, withdrew it right away, and gave him the money.
> Q. If I turn to page 4, the first page 4, you see January 7?
> A. Yes.
> Q. $800.

A. Mm-hm.
Q. And you can see...
HIS HONOUR: $800, because you're adding the two deposits there?
Mr. FOURNIER: No, it's a deposit… If you look, your Honour, the $800---
HIS HONOUR: Oh, no! Okay.
Mr. FOURNIER: ---the DGA is the deposit.
HIS HONOUR: Okay. I see. And then $300, plus $500, were withdrawn.
Q. Is that correct?
A. Yes, that's right.
Q. I'm moving ahead now. On January 14, there's a deposit of $1,000.
A. Mm-hm.
Q. You have two withdrawals on the same day?
A. Yes, that's right.
Q. Now on January 14, you have a $1,000 deposit and two $500 withdrawals.
A. Mm-hm.
Q. On January 15, a $122 deposit and a $120 withdrawal, is that correct?
A. Yes.
Q. Can you explain to me again how that worked? When you see a deposit, you were depositing a cheque for Mr. Dupuis?
A. Yes. And I always withdrew the money right away and gave it to him. Quite simply. I was always the one who went to the Caisse. It was my card.
Q. Did it sometimes happen, Ms. Lemire, that the amounts were not remitted immediately, but were kept for a certain time, a certain number of days?
A. Yes, and that was at his request.
Q. Could you explain what you mean by "at his request", Ms. Lemire?
A. Okay. Sometimes I put things on my Visa card, like a theatre reservation, a reservation for a play, and to pay me back, he told me: . . .

. . .
Q. On the same day, you have two withdrawals?
A. Yes, that's right.
Q. And on January 14, you have a $1,000 deposit and two $500 withdrawals.
. . .

[14] It was also shown, on a balance of probabilities, that the deposits were subject to clear and precise instructions that the appellant followed to the letter:

[TRANSLATION]
. . .
A. So he asked me if I could help him out by changing his cheque.
Q. When you say changing his cheque, what do you mean?
A. I went to the machine, I changed it and I gave him the money right away. Well, right away… as soon as I saw him again.
Q. But how did you withdraw it?
A. At the machine, completely.

Q. How would it happen? He would give you the cheque, say, on Monday afternoon?
A. Yes, he would sign it. He would endorse it. He would ask me if I could do him that favour and the next time I saw him, I gave him the money. In fact, I took note of it each time in my deposit book.
. . .

. . .
Q. That was the agreement you had with him?
A. Yes, that's right.
Q. Ms. Lemire, did you use, for personal reasons, any portion whatsoever of the amounts or the cheques that you cashed for Mr. Dupuis?
A. Never.
Q. Ms. Lemire, you put an end to this accommodation for Mr. Dupuis in 2002. Can you give us the background for that?
A. Revenu Québec questioned me. I don't know if that's the right way of saying that. They looked at all that, they met with me, and Mr. Dupuis too — both of us — and they told me that if I wanted to avoid problems, I should stop that, and I never changed a single cheque for Mr. Dupuis again.
Q. During the ten years, or, roughly, let's say the seven years that you had a special relationship, to suggest a word that avoids confusion, did you have discussions with Mr. Dupuis regarding his financial situation?
A. I had absolutely no idea about it. We didn't talk about money.
Q. You weren't interested in knowing his financial situation?
A. I was never the questioning type about the subject. I trusted him.
Q. Just to go back a little, Ms. Lemire, wherever there's an "A" next to "DGA" in Exhibit A-2, the book in front of you, it means you deposited a cheque payable to Mr. Dupuis?
A. Yes.
Q. And where the entry "RGA" appears, it's an automated teller withdrawal, and where there's an "A" next to it, it means you gave the money to Mr. Dupuis?
A. Exactly.
Q. Were there limits on the amounts that you could withdraw from the automated teller machine during the years '97 to 2001? Per day or per transaction, Ms. Lemire?
A. Per day, I believe… That's far back; that's many years ago, but it seems to me it was $1,000. But that's far back.
Q. And per transaction, per visit?
A. Per visit? A visit, that's it, that's $1,000, I imagine.
Q. It's because I'm trying to understand why, when there's an $800 cheque, there's a $500 withdrawal and a $300 withdrawal on the same day in your booklet.
A. Because, if I deposited $800, I withdrew $800.
Q. But why didn't you withdraw $800 in one shot? Why does the book say…
A. Oh! No, it's because you can't do that at the machine. I think that in those years, you couldn't put $800. That's why it was $500 and then $300. That's far back, it's 15 years ago.
Q. Mm-hm.

A. I don't think you could put $800, or else I would have done that.

. . .

[15] A few cases concerning assessments made under section 160 of the ITA were rendered very recently:

(1) *Stéphanie Lapierre v. Her Majesty the Queen*, docket 2010-1542(IT)G, Justice Angers, September 11, 2012.

(2) *Sylvia Imola Bragg-Smith v. Her Majesty the Queen*, docket 2009-3124(IT)G, Justice Hogan, July 12, 2012.

(3) *9101-2310 Québec Inc. v. Her Majesty the Queen*, docket 2009-2880(IT)G, Justice Archambault, October 2012.

[16] These new cases hold that a transfer of property contemplated by section 160 that is simultaneously subject to precise obligations as part of a specific mandate related to the property in question does not constitute a transfer within the meaning of section 160 of the Act.

[17] In other words, if, as part of a mandate, a transfer of property referred to in the notice of assessment is subject to clear and precise conditions agreed to by the two parties, the transfer does not have the effect of impoverishing the transferor's patrimony or enriching the transferee's patrimony, and therefore cannot be caught by an assessment under section 160 of the ITA.

Applicable law

[18] Subsection 160(1) of the ITA reads:

160. (1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

(*a*) the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,

(*b*) a person who was under 18 years of age, or
(*c*) a person with whom the person was not dealing at arm's length,

the following rules apply:

(*d*) the transferee and transferor are jointly and severally liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and

(*e*) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of

(i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and

(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

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

[19] As the Federal Court of Appeal (FCA) stated in *Canada v. Livingston*, 2008 FCA 89, the application of subsection 160(1) is subject to the following four conditions:

(1) The transferor must be liable to pay tax under the Act at the time of transfer.

(2) There must be a transfer of property, either directly or indirectly, by means of a trust or by any other means whatever.

(3) The transferee must either be

i. the transferor's spouse or common-law partner at the time of transfer or a person who has since become the person's spouse or common-law partner;

ii. a person who was under 18 years of age at the time of transfer; or

iii. a person with whom the transferor was not dealing at arm's length.

(4) The fair market value of the property transferred must exceed the fair market value of the consideration given by the transferee.

<u>The concept of transfer</u>

[20] The concept of transfer was applied very strictly by the FCA in *Livingston*, *supra*.

[21] Before the Federal Court of Appeal, Ms. Livingston argued that there had been no transfer, because the transferor did not part with the funds deposited into the account, The FCA rejected this argument and held that a deposit made by one person into another person's bank account constitutes a transfer within the meaning of subsection 160(1):

> 21 <u>The deposit of funds into another person's account constitutes a transfer of property.</u> 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.
>
> 23 The respondent cites the Tax Court of Canada's decision in *Leblanc v. The Queen* 99 DTC 410 (T.C.C.). In that case, Tax Court Justice Hamlyn found that following a deposit into a jointly held bank account the property did not vest in or pass to the wife as the wife was acting as agent for her ill husband. That finding in and of itself is suspect: there was certainly a transfer of property. Because Justice Hamlyn concluded that there was no transfer of property, he did not consider whether the wife had provided consideration.

[22] Thus, the *Livingston* case seems to overrule a well settled line of cases standing for the proposition that there is no transfer where a mandate or agency between the transferor and the transferee exists.

[23] Since it is the keystone of a remedy under section 160 of the ITA, it is of course important to specify the scope of the concept of "transfer" as used in that provision. It should be noted that the term "transfer" is not defined in the ITA.

[24] As a starting point, numerous cases regarding the application of section 160 of the ITA cite *Fasken Estate v. Minister of National Revenue*, [1948] Ex. C.R. 580, where President Thorsen of the Exchequer Court stated at paragraph 12:

> [FRENCH TRANSLATION]
> Le mot "transfert" n'est pas un terme technique et n'a pas de sens technique. Il n'est pas nécessaire qu'un transfert de biens d'un mari à sa femme revête une forme particulière ou qu'il soit fait directement. Il suffit que le mari se départisse [*sic*] des biens en faveur de sa femme, c'est-à-dire qu'il lui cède les biens. Le moyen par lequel il parvient à ce résultat, que ce soit directement ou indirectement, peut à juste titre être appelé un transfert. ...

[25] The original English version of this passage is even more telling:

> . . . All that is required is that the husband should so deal with the property <u>as to divest himself of it and vest it in his wife, that is to say, pass the property from himself to her</u>. . . .
>
> [Emphasis added.]

[26] In *St. Aubyn v. Attorney-General*, [1952] A.C. 15, Lord Radcliffe circumscribed the concept of "transfer" in a manner very similar to President Thorsen when he wrote:

> If the word 'transfer' is taken in its primary sense, a person makes a transfer of property to another person if he does the act or executes the instrument which divests him of the property and at the same time vests it in that other person. (page 53)

[27] Another relevant case concerning the concept of transfer is *Dunkelman v. Minister of National Revenue* (1959), 59 D.T.C. 1242 (Can. Ex. Ct.), also decided by the Exchequer Court of Canada. There, as in *Fasken Estate*, *supra*, the issue to be determined was whether the attribution rules were applicable. However, *Dunkelman* also raised the issue of whether a loan to a trust constituted a transfer for the purposes of subsection 22(1) of the ITA. After citing *St. Aubyn*, *supra*, Justice Thurlow stated as follows at paragraph 11:

> The expression "has transferred" in Section 22(1) has, in my opinion, a similar meaning. <u>All that is necessary is that the taxpayer shall have so dealt with property belonging to him as to divest himself of it and vest it in a person under 19 years of age</u>. The means adopted in any particular case to transfer property are of no importance, as it seems clear that the intention of the subsection is to hold the transferor liable for tax on income from property transferred or on property substituted therefor, no matter what means may have been adopted to accomplish the transfer. Nor is the scope of the provision affected or qualified by expressions such as "as if the transfer had not been made", which appeared in the corresponding section of the *Income War Tax Act*. *Vide McLaughlin* v. *Minister of National Revenue*, [1952] Ex. C.R. 225, [1952] C.T.C. 104. On the other hand, it is also clear that the subject matter of a transfer that is within the section must be property of the transferor, not that of some other person, <u>and if the subsection is to apply, such property must have been vested by him in a person under 19 years of age.</u>
>
> [Emphasis added.]

[28] The doctrine of the Exchequer Court of Canada in *Fasken Estate, supra*, have been applied by the Tax Court of Canada, notably in *Raphael v. The Queen*, [2000] 4 C.T.C. 2620, affirmed [2002] 2 C.T.C. 75 (F.C.A.). In addition, see the decision of the Federal Court of Appeal in *Medland v. Canada*, [1999] 4 C.T.C. 293.

[29] The remarks of President Thorsen were also cited with approval by Justice Archambault in *Tétrault v. The Queen*, [2004] 4 C.T.C. 2234, where, after providing a particularly thorough overview of the relevant case law concerning the concept of "transfer" used in subsection 160(1) of the ITA, he added as follows at paragraph 39:

> The *Fasken* and *Dunkelman* decisions indicate, in my opinion, that in order for there to be a transfer of property for the purposes of the attribution rules, it is essential that the transferor be divested of his ownership and that the property has vested in the transferee. <u>The mere possession of a property that has been loaned with the obligation to return it does not satisfy this condition</u>. That, I think, is the meaning that must be given to the expression "pass the property from himself to her". That is also the appropriate interpretation of subsection 160(1) of the Act. . .
>
> [Emphasis added.]

[30] Thus, it appears that, under the doctrine propounded in *Fasken*, *St. Aubyn* and *Dunkelman* that in order for there to be a transfer of property for the purposes of the attribution rules, it is indispensable that the transferor relinquish his ownership and that the property pass to the transferee. Mere possession of property does not satisfy this condition because a transfer "is a juridical act the consequence of which is the transfer of the ownership of the property which is the subject of the transfer. In other words, the transferred property changes patrimonies. The property leaves the

patrimony of the transferor to become part of the patrimony of the transferee . . .” (see *Doucet v. The Queen*, 2007 D.T.C. 1029 at paragraphs 23-24).

[31] In *Livingston*, *supra*, the Federal Court of Appeal made comments that are somewhat difficult to reconcile with the rich case law on the subject of “transfer”. At paragraph 21 of the decision, Justice Sexton commented that a deposit of funds into another person’s bank account is a transfer within the meaning of section 160 of the ITA. With respect to the conditions required for a transfer, it is interesting to consider paragraph 22 of the decision, which is quoted above.

[32] Thus, the Federal Court of Appeal appears to hold the categorical view that deposits of money into another person’s bank account are automatically transfers of property. In this regard, in circumstances such as the deposit of cheques by a loved one, Justice Sexton justifies his legal syllogism by stating that the transferred property is not the proceeds of the cheque as such, but the right to demand from the bank the total amount deposited. The value of that right is the total value of that amount.

[33] The Federal Court of Appeal appears to have distanced itself from the doctrine laid down earlier in *Fasken*, *St. Aubyn* and *Dunkelman*, according to which, as we have seen, in order for there to be a transfer of property for the purposes of the attribution rules, it is indispensible for the transferor to have renounced his right of ownership. In *Livingston*, the Federal Court of Appeal appears instead to make the application of section 160 contingent on the effective control exercised or theoretically exercisable by the appellant over the amounts of money that have been transferred, without it necessarily being found that the right of ownership over these amounts has changed hands. See *Livingston*, *supra*, at paragraph 21.

[34] Is it in keeping with the essence of subsection 160(1) to allow it to apply to situations that simply involve a transfer of effective control over property? Subsection 160(1) is meant to protect the integrity of a tax debtor’s patrimony against measures taken by the debtor to frustrate the tax authorities. Hence, if there is a transfer, consideration equal to the fair market value of the transferred property is essential, or else the transferee becomes liable for the transferor’s tax liability, up to the value of the advantage or benefit obtained upon the transfer. See *Larouche v. The Queen*, [2010] 4 C.T.C. 202 (F.C.A.).

[35] The fact that an item of property is simply in the possession or control of a third party does not have the effect of removing it from the tax debtor’s patrimony. Although the scope of the word “transfer” is broad, a transfer still requires the

transferor to meet a condition precedent, namely, to have actually vested the property in the alleged transferee or recipient.

[36] Moreover, following the transfer, the mechanics of section 160 limit the transferee's joint and several liability to an amount equal to the value of the property transferred to him, less the value of the consideration given in exchange, up to the amount of tax owed by the transferor. The purpose of the logic behind the calculation in paragraph 160(1)(*e*) with regard to the quantum of the transferee's liability is to place the transferee in the position that he was in prior to receiving the transfer. It is nonetheless a requirement that the transferee's patrimony actually receive the property in question, and that the transfer result in an enrichment. If the effect of the alleged transfer is neutral, the transferee will not be liable to the tax authorities.

[37] A few months after *Livingston*, the Tax Court of Canada, per Justice P. Boyle, made certain remarks in a case where the Crown had referred abundantly to the comments of Justice Sexton. These remarks were made in *Gambino v. The Queen*, [2009] 3 C.T.C. 2129.

[38] There, Mrs. Gambino cashed seven $1,500 disability cheques issued to her son by Manulife Financial. Mrs. Gambino was instructed by her son to cash the disability cheques as they came in. Accordingly, she walked to a nearby Canada Trust branch with the cheques endorsed by her son, endorsed them herself at the branch, and then cashed the cheques. She returned home with the cash value of the cheques and gave the cash to her son.

[39] At paragraphs 29 and 30 of his reasons in *Gambino*, Justice P. Boyle states as follows:

> 29 No such tax collection avoidance motives exist here. Nor, given the chance, could the Crown describe any way the CRA could have been prejudiced by Mrs. Gambino cashing her son's cheques before he spent them instead of cashing them himself before spending the money. Had CRA been aware that Manulife was sending regular payments to Francesco Gambino, it could have effectively garnished the amounts by issuing a requirement to pay to the financial institution. . . .
>
> 30 <u>The Minister's position is completely lacking in common sense. Its obvious fallacy is that the Minister could make the same arguments against Mrs. Gambino even if her son had used the cash to pay CRA to reduce his tax debt. Even more ridiculous is that the Crown's technical arguments could be advanced had Mrs. Gambino's son given her his endorsed Manulife cheques and asked her to walk them to the CRA taxation office and credit the amounts towards his much larger tax liability.</u>

[Emphasis added.]

[40] In another case involving fact pattern similar to this case, Justice C.J. Miller adopted the reasoning of his colleague Justice P. Boyle. See *Pearson v. The Queen*, 2009 TCC 338, at paragraph 16.

[41] Although *Livingston* is of precedential value, several cases of the Tax Court of Canada stand for the proposition that amounts paid to a mandatary for the sole benefit of the mandator, or according to the mandator's specific instructions, do not constitute a transfer within the meaning of subsection 160(1).

[42] Firstly, in *LeBlanc v. The Queen*, 99 D.T.C. 410 (T.C.C.), Justice Hamlyn held that amounts deposited into the spouses' joint bank account had not been transferred because the appellant used the amounts to look after the finances of her sick husband. Justice Hamlyn found that the moneys did not vest in or pass to the appellant. The Court also accepted the argument made by counsel for the appellant, to the effect that, during the relevant period, his client was acting as the representative of her frail husband and that it was only in her capacity as his agent that she withdrew the funds from Dr. Leblanc's accounts and used them. See *LeBlanc*, *supra*, at paragraph 24.

[43] Similarly, in *Tétrault*, *supra*, Justice Archambault expressed the view that if there is a valid mandate between the transferor and transferee, and the mandatary does not use the amounts for his or her benefit, the money does not pass to the mandatary's patrimony and there is no transfer. In this regard, he specifies as follows at paragraph 40 of his reasons:

> 40 It follows from the analysis of the notion of transfer used in subsection 160(1) of the Act that sums paid to a mandatary to be spent for the benefit of the mandator do not constitute a transfer for the purposes of this subsection, either. In such circumstances the mandator is not divested of his ownership of the sums entrusted to the mandatary and they are not vested in the mandatary. The mandator remains the owner of these sums. . . .

[44] However, the Federal Court of Appeal appears to have put a damper on this line of cases in *Livingston*, *supra*. In fact, Justice Sexton specifically refers to Justice Hamlyn's holding in *LeBlanc* that a mandate or agency can mean there is no transfer:

> 23 The respondent cites the Tax Court of Canada's decision in *Leblanc v. The Queen* 99 DTC 410 (T.C.C.). In that case, Tax Court Justice Hamlyn found that following a deposit into a jointly held bank account the property

> did not vest in or pass to the wife as the wife was acting as agent for her ill husband. That finding in and of itself is suspect: there was certainly a transfer of property. Because Justice Hamlyn concluded that there was no transfer of property, he did not consider whether the wife had provided consideration.

[45] Nonetheless, since *Livingston*, some cases of the Tax Court of Canada have continued to take the concept of mandate or agency into account in determining whether there has been a transfer under section 160. The reasoning of Justice C.J. Miller in *Pearson*, *supra*, is interesting in this regard:

> [14] But even if I found she did return the monies to her father, did she do so as she was simply his agent, akin to an arm's length employee conducting her employer's banking? The stories from the Pearsons are just not cohesive enough for me to find an agency arrangement: no employment contract, no banking documents, no trace of funds – just not enough.

[46] In fact, in *Gambino*, Justice Boyle found that there was sufficient consideration. Ms. Gambino cashed her son's disability cheques at the bank and then brought him the cash obtained:

> [31] I accept that Mrs. Gambino intended to and did oblige herself to bring the cash from the cashed cheques promptly back to her son. I also accept that Mrs. Gambino intended for her son to repay the $500 she had loaned him. <u>I accept that she did not understand her son was intending to make a gift to her of any of the amounts. I am satisfied that there was consideration as that term is used in section 160 for all amounts that briefly passed through her hands</u>. I am also satisfied that her commitment to do that, or in any event, her actually doing that, was at the time of the transfer of the endorsed cheques to her.
>
> [Emphasis added.]

[47] In *Pearson*, Justice C. Miller accepted Justice Boyle's interpretation in *Gambino* and cautioned against the overly strict interpretation that the Crown was seeking to apply:

> [16] Somewhat to my surprise, respondent's counsel suggested this was wrongly decided, implying that the clear wording of section 160 had been met, and that the Court ruled from sympathy in the *Gambino* situation. Such a strict interpretation by the Crown would not only lead to excessively harsh results, it would lead to broader collection powers than section 160 was ever intended to provide. <u>No, *Gambino* was wisely decided. There was consideration flowing from mother to son in the form of an obligation to return the full amount</u>. . . .
>
> [Emphasis added.]

[48] However, he concluded that the evidence in that case was not sufficient for it to be asserted that there was an obligation that could warrant a finding that Ms. Pearson gave adequate consideration:

> [16] . . . Maybe she would return some, maybe she would not. Maybe she did, maybe she did not. Too many maybes and not enough credible concrete evidence. On balance, I find there was no adequate consideration. Thus all four requirements of section 160 have been met and Ms. Pearson is indeed jointly and severally liable for the cash she received from the father.

[49] *Miller v. The Queen*, 2011 TCC 412, is also a very interesting case; a husband deposited funds in his wife's bank account. She withdrew nearly $60,000 in order to cover expenses associated with her husband's dental practice. Justice Little decided that there was a legally enforceable obligation to reimburse the expenses.

[50] Most of the cases that have been cited involved transfers of cheques, which were most often deposited into the alleged transferee's account. Money is fungible property which is subject to a special rule concerning the transfer of ownership.

[51] The *Civil Code of Québec* (C.C.Q.) provides as follows at article 1453(2):

> § 3. — Special effects of certain contracts
>
> I. — Transfer of real rights
>
> 1453**.** The transfer of a real right in a certain and determinate property, or in several properties considered as a universality, vests the acquirer with the right upon the formation of the contract, even though the property is not delivered immediately and the price remains to be determined.
>
> <u>The transfer of a real right in a property determined only as to kind vests the acquirer with that right as soon as he is notified that the property is certain and determinate.</u>
>
> [Emphasis added.]

[52] In *Chua c. Von Braun*, J.E. 93-1872, (Que. S.C.), Justice Croteau noted that in order for a person to establish a right to a sum of money, the money in question must be identifiable, since it is fungible property. From the moment money is mingled with the funds of a particular account, the deposited money loses all its identity.

[53] In *Les Boutiques San Francisco Inc. c. Claudel Lingerie Inc*, J.E. 2004-1359 (Que. S.C.), at paragraph 57, Justice Clément Gascon came to the same conclusion:

> [TRANSLATION]
> As everyone knows, money is fungible property. In order for ownership to be claimed, it must be clearly identifiable. It is not enough for it to be merely quantifiable. Our Court has said this several times.

[54] The Supreme Court of Canada laid down this principle as early as 1989 in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24. There, a seller collected provincial sales tax and mingled those amounts with his other income. Although it would seem beyond doubt that the money did not belong to the bankrupt, the Supreme Court held that since the amounts were mingled with the other assets of the bankruptcy, the tax authorities could not claim ownership of those amounts under a common law trust. Justice McLachlin, as she then was, wrote:

> . . . If, on the other hand, the money has been converted to other property and cannot be traced, there is no "property held . . . in trust" under s. 47(*a*). The Province has a claim secured only by a charge or lien, and s. 107(1)(*j*) applies.
>
> . . .
>
> . . . The Province has a trust interest and hence property in the tax funds so long as they can be identified or traced. <u>But once they lose that character, any common law or equitable property interest disappears</u>. . . .
>
> [Emphasis added.]

[55] The Quebec Court of Appeal reiterated this principle in *9083-4185 Québec Inc. (Syndic de)*, 2007 QCCA 1837. Justice Duval Hesler, citing the remarks of Professor Louise Lalonde,[1] wrote:

> [TRANSLATION]
> [59] Hence, it must be concluded that [TRANSLATION] "from the moment the funds are intermingled with all the other funds in an account, they are no longer identifiable and the mandator can no longer assert his right of ownership."

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[1] Louise Lalonde, "La TPS et la TVQ : Le loup de retour dans la bergerie", in *Annual Review of Insolvency Law*, (Toronto: Thomson Carswell, 2005), at page 387.

[56] In the same decision, Justice Duval Hesler cited *British Columbia v. National Bank*, 30 C.B.R. (2d) 358. There, Justice Hollingrake of the British Columbia Court of Appeal wrote:

> [52] . . . There is a difference between calculating what one is owed over a set period of time as opposed to tracing the funds that initially represented that debt in the form of money in the hands of the debtor.
>
> . . .
>
> [56] . . . With SDM and Red Carpet having intermingled the "tax money" with all their other funds, and the time frame being as it is, I cannot see how this "tax money" could possibly be identified to permit successful tracing.

[57] This was another tax collection case and it could not be claimed that the bankrupt owned the money collected on behalf of the government.

[58] The case of *Fonds Norbourg Placements équilibrés (Liquidation de)*, 2006 QCCS 4072, affirmed by the Quebec Court of Appeal, 2007 QCCA 1076, would seem to be of great interest under the circumstances:

[59] The dispute in that case was essentially about the merits of the liquidator's proposed choice of fund distribution method upon the liquidation and distribution of the property of Fonds Norbourg. Essentially, the case pitted the holders of certain trust funds that been pillaged, against the holders of funds that had been spared to some extent.

[60] At first instance, Justice Mongeon held as follows:

> [TRANSLATION]
> [203] Indeed, in the case at bar, we know the names of the given Fund's unitholders, and the number of units held by each. The issue is to ensure that the cash remaining in the same fund is not from other sources, so that it can be concluded that the cash in question cannot belong to anyone other than the unitholders. This would mean that they are entitled to a share of the cash prorated to the number of units that they hold.
>
> . . .
>
> [207] Indeed, the reality, in which the Groupe Norbourg records make it possible to assign to each Fund its very precise list of investors and the number of units that each investor holds, must be distinguished from a situation in which all

the investors' money is intermingled in a single Fund, making it literally impossible to trace each person's investment. The only problematic element that remains is the reliability of the remaining balances of each Fund. Once again, if these remaining balances are reliable in terms of the source or origin of the cash therein, the only way they can be distributed is rateably based on the number of units held by the unitholders of each Fund in question.

[221] The Supreme Court held that the amounts in question could not be clearly identified, meaning that it was not possible to distinguish between the property belonging to the debtor and the property held in trust on behalf of Her Majesty. At common law, there is no longer a trust when the tax amount is mingled with the other amounts, such that it is impossible to trace or identify it.

[224] According to the Supreme Court, the segregation of the amount in a separate account is certainly very helpful, but is not essential. What needs to be analysed, however, is the content of the bank or securities account, so that one can determine whether the amounts therein can be identified or traced back to deposits of tax amounts in accordance with generally accepted accounting principles applicable to such circumstances. If the account can be reconstructed without uncertainty, the identification and tracing operation can be carried out.

[Emphasis added.]

…

[232] *Portus* confirms that

> (72) Where trust assets can be traced, there must be an equitable reason to deprive the beneficiaries of the property of the trust. Once trust property can be traced and is ascertainable, it too will be trust property. (See *Eron Mortgage Corporation, Te* 1999 CanLII 6283 (BC SC), (1999), 10 C.B.R. (4th) 257 *per* Tysoe J. of the British Columbia Supreme Court at paragraph 52 and *Ontario (Securities Commission) v. Consortium Construction Inc.* (1993), 1 C.C.L.S. 117 *per* Rosenberg J. of this Court at paragraph 64.).[54]

[233] This decision not only confirms the legal rule that the Court applies in this instance, but also the fact that, in the final analysis, it is the proof of the reliability of the balances (identification and traceability) that must guide the Court in its choice.

[61] The Quebec Court of Appeal, per Justice Brossard, confirmed the approach followed at first instance:

[TRANSLATION]

> [68] It is true that the amounts paid by the investor clients were provisionally deposited into a general trust fund. However, by the end of the day in which they were deposited, they were immediately converted into units or shares in a specific Fund, with a determinate value, and were credited to each investor client.
>
> [Emphasis added.]
>
> [69] In addition, as the respondent notes and as the judge at first instance found, the fact that each client's cash was put into the same trust account is not decisive because the names of the investor clients, the amount paid, and the number of units purchased by each, are known and properly recorded.
>
> [Emphasis added.]
>
> [70] This situation is therefore very different from the facts of some of the cases cited by the appellant, where money was simply deposited with financial institutions or in trust accounts held by professionals, and where the money lost all of its specific identity merely by virtue of the deposit. This is the distinction that the judge at first instance made, by way of example, when he referred to *In Re Major Trust Co.*, where it was impossible to identify in any way the amounts deposited by clients into a single account with a view to purchasing guaranteed investment certificates which were ultimately never issued before the Funds were misappropriated.
>
> [Emphasis added.]
>
> . . .
>
> [76] In other words, the accounting and transfer books and records in this case, which prevent any confusion regarding the cash and make it possible to identify and trace the amounts and the transactions, are just as valuable as the simple legal fiction resulting from section 18(1)(*b*) of the statute in question in *Henfrey Samson Bélair Ltd.*
>
> [77] Here, the uncontradicted evidence shows an absence of any confusion of the cash between the different trusts or investment funds, or between the specific trusts and the overall general assets of the various Groupe Norbourg corporations.
>
> [Emphasis added.]

[62] Thus, in *Norbourg*, the fact that the accounts could be traced made it possible to consider the amounts separately based on the owners of each amount that could be identified and traced.

[63] The Quebec Superior Court applied the *Norbourg* doctrine in *GE Financement commercial aux détaillants Canada c. Banque Nationale du Canada*, 2009 QCCS 5843. At paragraphs 79 and 81, the Court held:

> [TRANSLATION]
> [79] GE cannot be content merely to note that the $79,000 entered the account. <u>It must succeed in separating and distinguishing it from the other deposits and transfers which were clearly made into the account during the same period.</u>
>
> [81] This, in the Court's opinion, is the doctrine that *Norbourg* really stands for. Unless the $79,000 can be separated from the other deposits into the account, GE's ownership of the amount cannot be recognized. <u>In *Norbourg*, it was because the different mutual funds were clearly separated or separable that it was possible to acknowledge the true owners of each deposit.</u>

[64] In *GE Financement commercial aux détaillants Canada*, Justice Pierre Dallaire ultimately found that the amounts in question could not be identified or traced in a manner similar to the way that they were in *Norbourg*.

[65] The first step is undoubtedly to ask whether there has been a "transfer" as defined by the case law.

[66] To begin with, it should be recalled that *Fasken*, *St. Aubyn* and *Dunkelman* stand for the proposition that in order for there to be a transfer for the purposes of the attribution rules, it is indispensable for the transferor to have renounced his right of ownership.

[67] That being said, the Federal Court of Appeal seems to have categorically held that a deposit of funds into another person's bank account automatically constitutes a transfer of property. In *Livingston*, Justice Sexton appears to agree with the Quebec Court of Appeal's past remarks to the effect that [TRANSLATION] "from the moment the funds are intermingled with all the other funds in an account, they are no longer identifiable."

[68] On the other hand, the recent decision of the Quebec Court of Appeal in *Norbourg*, *supra*, specifies that a distinction should be drawn between a situation where deposited funds are mingled into an account such that it is literally impossible to trace the origin of the different deposits and withdrawals, and a situation where the chequebooks and bank books make it possible to precisely follow the funds deposited and withdrawn.

[69] Admittedly, the proceeds of the cheques deposited by the appellant were provisionally deposited into her personal account. However, in view of the evidence, the same amounts were withdrawn in full on the very same day and were then remitted to Dupuis.

[70] In the case at bar, the appellant’s chequebooks and bank books enable us to trace the money deposited and then withdrawn. As a general rule, these amounts only remained in the appellant’s account for a few hours before being withdrawn and brought back to Dupuis.

[71] In the case at bar, the evidence showed that Dupuis never wanted to transfer ownership of the cheques to the appellant, any more than he wanted ownership of the cheques to vest in the appellant. At no time did the appellant have the right to use, enjoy or dispose of the proceeds of the deposited cheques as she saw fit. The evidence has established unequivocally that she never took any initiative; she followed Dupuis’ strict and precise instructions.

[72] Ownership of the cheques was never transferred to the appellant in the case at bar. If the property had been individualized, I do not believe there would have been any dispute, since the absence of transfer would have been clear or obvious.

[73] The difficulty lies in the fact that the property in question is fungible. In order for a transfer of ownership to exist, regardless of the nature of the property, it is essential that the two parties to the transaction give their consent, and this requires true consent, which, I acknowledge, can be tacit.

[74] The appellant, an intelligent and educated person, agreed to help her friend; Dupuis’ explanations were plausible and she saw no problem in agreeing to do him a favour. In her assessment as an honest and reasonable person, her involvement in the transaction solicited by Dupuis did not make her the owner of the money that transited through her bank account.

[75] She never gave her express or tacit agreement to any transfer of clearly identified property. At most, she agreed to act as depositary of property which was subject to a contract of mandate that she complied with, to the letter, as a mandatary. She never did anything whatsoever that would permit another interpretation. On the contrary, she did things that validate and confirm the absence of a transfer, notably through codes indicated on each transaction, strict compliance with Dupuis’ instructions, and, lastly, the immediate cessation of the transactions when cautioned by Revenu Québec auditors.

[76] Was she an associate or accomplice in a scheme intended to deprive the State of an exigible tax liability?

[77] Was the appellant negligent, careless, neglectful and/or even wilfully blind? I do not believe that she was. At most, she was a bit naïve in acceding to the requests of her friend, who clearly abused her good faith. Dupuis was trained as an accountant and undoubtedly was perfectly aware of all the potential consequences of his request of the appellant. But he knew that he could count on the absolute honesty of the appellant, who considered herself a temporary depositary of her property.

[78] The amounts deposited into the appellant's account were substantial; as a general rule, the deposited money was very quickly withdrawn and remitted to Dupuis in cash. There is no doubt that the appellant never believed the deposits would profit her, or even that she could appropriate them, in whole or in part.

[79] On very rare occasions, she kept small amounts at the express request of Dupuis, to cover expenses and/or disbursements that she had already incurred for him.

[80] The appellant was misinformed, misled and essentially used by Dupuis, an accountant, who did not hesitate to make incomplete representations to the appellant, who agreed to do him a favour.

[81] It is clear beyond a doubt that the appellant's consent was essentially to an act that consisted in depositing cheques in order to obtain cash in return and then remit it forthwith to its owner Dupuis. Indeed, the appellant always acted as a depositary, in that she precisely noted all the transactions so that she could account for them. Moreover, the methodology was simple, clear and easily verifiable by any person, including a third party that might have been interested in enforcing a writ of seizure. In such circumstances, I am convinced that the appellant would have collaborated and remitted the property to the creditor that initiated the seizure proceedings.

[82] This interpretation of the facts is confirmed by the rapid, clear and spontaneous reaction of the appellant, who, after a tax audit by Revenu Québec which raised the issue of the possible consequences of the strategy, immediately ceased depositing any of Dupuis' cheques into her account.

[83] The appropriate conclusion, based on these very specific facts, is that the assessment must be vacated, since there were never any true transfers, and transfers

constitute an essential foundational element of an assessment under section 160 of the ITA.

[84] If I had found that a true transfer existed, I would still have vacated the assessment under appeal despite *Livingston*, based on the recent case law of the courts of the province of Quebec.

[85] In any event, I believe that this case is special in that it is very different from *Livingston*. Indeed, not only was the appellant not associated with a questionable scheme, she unequivocally made a firm commitment — a commitment she scrupulously honoured — to remit the full amounts deposited, in accordance with Dupuis' instructions. She took no initiative regarding the amounts deposited into her bank account. She constantly, and without exception, kept very valid accounting, which enabled her to account reliably for what had been done in every instance.

[86] In the case at bar, there is no doubt as to the appellant's undertaking vis-à-vis the supposed transferor. The same evidence also established, on more than a balance of probabilities, that she never obtained a benefit, never enriched herself, and expressly followed the instructions of the supposed transferor, and this, based on the decisions of the Federal Court of Appeal, constituted consideration which was valid and sufficient to defeat an assessment under section 160.

[87] Consequently, if my analysis or interpretation of the facts that have emerged from the evidence had caused me to conclude that the very numerous deposits into the appellant's bank account had constituted veritable transfers, I would nonetheless have allowed the appeal and vacated the assessment because there is no doubt that the transfers, if they existed, were done as part of a mandate whose object was very well defined, and because the obligations of the mandatary, that is, the appellant, were equally clear and precise; and, in view of the facts, the appellant quickly complied with all her obligations and undertakings without ever deriving any benefit, thereby supplying valid and sufficient consideration.

[88] As for whether the appellant was Dupuis' common-law partner, I would respond to this question in the affirmative; indeed, based on the significance of the services rendered, the fact that Dupuis gave the appellant's address as a personal address, and the entire set of facts and circumstances of the relationship between Dupuis and the appellant, I am satisfied that they were common-law partners.

[89] For all these reasons, the appeal is allowed and the assessment made under section 160 of the Act is accordingly vacated, with costs to the appellant.

Signed at Ottawa, Canada, this 18th day of October 2012.

"Alain Tardif"

Tardif J.

Translation certified true
on this 6th day of February 2013

François Brunet, Revisor

CITATION:	2012 TCC 367
COURT FILE NO.:	2010-862(IT)G
STYLE OF CAUSE:	DANIELLE LEMIRE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 17, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice Alain Tardif
DATE OF JUDGMENT:	October 18, 2012

APPEARANCES:

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