Docket: 2009-2880(IT)G

BETWEEN:

9101-2310 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 12, 2012, at Val-d'Or, Quebec

Before: The Honourable Justice Pierre Archambault

Appearances:

Counsel for the appellant:	Simon Corbeil
Counsel for the respondent:	Simon Olivier de Launière

JUDGMENT

The appeal from the assessment bearing the number 46859 and made by the Minister of National Revenue under the *Income Tax Act* on February 5, 2008, is allowed, and the assessment is vacated, with costs to the appellant.

Signed at Magog, Quebec, this 18th day of October 2012.

"Pierre Archambault"

Archambault J.

Translation certified true
On this 15th day of May 2013

François Brunet, Reviser

Citation: 2012 TCC 365
Date: 20121018
Docket: 2009-2880(IT)G

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9101-2310 QUÉBEC INC.,

Appellant,

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REASONS FOR JUDGMENT

Archambault J.

[1] 9101-2310 Québec Inc. (2310) is appealing from an assessment made by the Minister of National Revenue (the Minister) under subsection 160(1) of the *Income Tax Act* (the Act). By this assessment, the Minister holds 2310 jointly liable with Alain-Guy Garneau for the payment of $63,433.46 on account of Mr. Garneau's tax liability for the 1993, 1994, 1995, 1998 and 1999 taxation years. The two main submissions advanced by 2310 in support of its position that subsection 160(1) does not apply and that the assessment should be vacated are that there was no transfer within the meaning of the subsection, and that Mr. Garneau and 2310 were at arm's length from each other. Moreover, even if section 160 of the Act applies, 2310 submits that the assessment should be reduced because the Minister received a partial payment of Mr. Garneau's tax debt after the assessment was made.

Factual background

[2] 2310, a management company, was incorporated on February 19, 2001, but was essentially inactive during the years 2002 and 2003 (see Exhibit A-1). For example, 2310 had no employees, and the financial statements[1] show gross revenues of $22 in 2002 and zero in 2003 (see Exhibit A-5). The sole shareholder and director of 2310 was Daniel Pratte.

[3] Mr. Pratte is a business acquaintance and friend of Mr. Garneau's. Although they did not sit together on a board of directors,[2] Mr. Pratte and Mr. Garneau met on many occasions during social activities and at sports, artistic and other events. Mr. Pratte has known Mr. Garneau since the early 1990s when he settled in Val-d'Or, where Mr. Garneau lived. At the time, Mr. Pratte represented Molson's Brewery, which sponsored several activities and events in the region. Mr. Pratte estimated that they saw each other roughly twice a week in bars or at social or sports activities. Mr. Pratte has a special interest in mining exploration financing and Mr. Garneau is an engineer involved in the financing of exploration activities by means of flow-through share issues.

[4] Mr. Pratte left Molson's Brewery in the early 2000s to concentrate on his own businesses. Through one of his companies, he looks after kitchens and the supervision of mine workings.

[5] Following litigation regarding entitlement to compensation for damages incurred during a fire, Mr. Garneau received $305,441.32. Upon receiving this amount, Mr. Garneau was experiencing financial problems, including a dispute with the Federal Business Development Bank (FBDB). If Mr. Garneau had deposited this amount into his own bank account, it would have been seized by the FBDB. As a favour to a friend, Mr. Pratte, who was aware of this situation, offered Mr. Garneau to have the amount deposited into the bank account of one of his management companies, namely 2310. The company was not paid for this favour. The objective was to give Mr. Garneau more time to negotiate a settlement with the FBDB.

[6] On March 19, 2002, Mr. Pratte deposited the amount of $305,441.32 into 2310's only bank account.[3] The balance of that account prior to the deposit was $1,795.70. On the same day, a withdrawal of $28,879.71 was to pay the fees of the

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1 The fiscal year-end is February 28. (See Exhibit A-5.)

2 Contrary to what is alleged in the Reply to the Notice of Appeal.

3 See the deposit slip adduced in evidence (Exhibit I-1, tab 14). The signature of the deposit slip resembles the signature on 2310's cheques at tab 17.

lawyers and experts retained by Mr. Garneau for the purposes of the aforementioned litigation. Slightly less than a month later, on April 12, 2002, Mr. Garneau instructed 2310 to pay $150,004.50 to the FBDB. Further amounts were then paid to the FBDB, namely $10,000 on November 12, 2002, and $15,004.50 on December 27, 2002. In addition, on December 27, 2002, there was a payment of $1,668.23 (not $1,663.29 as stated in Exhibit A-4, the cheque reconciliation prepared by Mr. Pratte). The cheque reconciliation discloses that amounts were also paid to Mr. Garneau, some of his children and some of Mr. Garneau's creditors including Les Foreurs hockey team, a hunting outfitter, Télébec and the SAAQ (see the copies of the cheques at tab 17 of Exhibit I-1 as well).

[7] Generally, Mr. Garneau told Mr. Pratte who the payees of 2310's cheques were to be, and Mr. Pratte complied without obtaining any details about the reasons for the payments requested by Mr. Garneau. According to Mr. Pratte, apart from a 10-15 day period during which Mr. Pratte was not available, Mr. Garneau did not have access to the ATM card, and Mr. Pratte was the one who signed the cheques and was the only person authorized to do so. Other than the withdrawal of March 19, 2002, and the withdrawals to pay the bank fees, I note that there were no other withdrawals on 2310's bank statements prior to February 3, 2003, a date that is subsequent to December 27, 2002, which is when the amount of $305,441.32 was used up. All the withdrawals from the account are described as "cheques". In addition, I found none of the ATM withdrawals in the cheque reconciliation.[4]

[8] Before accepting the deposit of the funds belonging to Mr. Garneau, Mr. Pratte consulted his advisor at the National Bank in order to ensure that it would not pose a problem for the company. In addition, a letter was requested from Mr. Garneau, confirming the agreement between him and 2310. The letter (Exhibit A-2), signed on March 23, 2002, states as follows:

> [TRANSLATION]
>
> I hereby request that, through your company, you manage the money that I deposit into your account for the purpose of paying my accounts due or that become due in the future.
>
> I therefore release you from liability for income tax and other implications of the effects that may result.

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4 This question was broached at the examination for discovery and Mr. Pratte undertook to provide the date on which Mr. Garneau used the ATM card, but this information was not adduced in evidence at the hearing. (See Exhibit I-2, page 25.)

[Emphasis added.]

[9] At the examination for discovery, Mr. Pratte described the situation as follows:

> [TRANSLATION]
>
> Q. [72] So there is no document stating that the company owed Mr. Garneau money?
>
> A. Mr. Garneau gave me the mandate to manage the deposited amount of three hundred and five thousand dollars ($305,000).
>
> Q. [73] But there was no document stating that the company owed money?
>
> A. The company didn't owe money, the company managed his money for him. I do not understand the subtlety in your question, counsel. The company did not borrow money, the company managed an insurance settlement cheque at his request.[5]

[Emphasis added.]

[10] Mr. Pratte stated that he was not aware of Mr. Garneau's problems with the federal tax authorities at the time. He claimed that he only found out about the tax liability when he received the assessment made on February 5, 2008 under section 160 of the Act (see Exhibit I-1, tab 1, for a copy of the notice of assessment). In her testimony, the officer handling the objection confirmed the existence of the tax liability of $63,433.46 at the time that the cheque for $305,441.32 was deposited. However, she acknowledged that the Minister received a partial payment of $17,948.76 in August 2009, after the 2008 assessment, leaving a balance of $45,484.70 to pay (see Exhibit I-1, tab 18, 4th sheet). In her testimony, the officer also acknowledged that 2310 had cooperated fully with the Minister's representatives.

[11] Mr. Pratte stated that no part of the amount given by Mr. Garneau was used for 2310's benefit or for 2310's own purposes.[6] The amount was used solely for Mr. Garneau's benefit. However, my analysis of 2310's banking transactions shows that, during two distinct periods, the withdrawals or cheques made by that company for its own benefit exceeded the amount of the deposits of 2310's own funds. The deficit was $415.55 on March 27, 2002, the beginning of the first period, and $6,323.42 on May 9, 2002, the end of that period. The second period begins on

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[5] Exhibit I-2, pages 26-27.

[6] There was no evidence that Mr. Garneau deposited other amounts prior to December 28, 2002.

October 2, 2002, when the deficit is $13,599.54, and ends on December 13, 2002, when the deficit is $6,345.54.

[12] For this analysis, I have used 2310's bank account statements and the cheque reconciliation which Mr. Pratte prepared at the respondent's request and which the respondent adduced in evidence (see Exhibit I-1, tabs 15 and 16; these documents were also adduced by 2310 as Exhibits A-3 and A-4.) This analysis has enabled me to reconcile the amounts belonging to Mr. Garneau and the amounts belonging to 2310. It has also enabled me to see that the amount of $305,441.32 received by Mr. Garneau and deposited into 2310's bank account on March 19, 2002, had been completely spent, to Mr. Garneau's benefit, as at December 27, 2002. In fact, with the payment of $15,004.50 to the FBDB, the balance remaining from the amount held by 2310 for Mr. Garneau was exceeded by $7,183.86. In other words, the latter amount could be viewed as a loan or advance from 2310 to Mr. Garneau.

[13] This conclusion assumes that the amounts shown on the cheque reconciliation done by Mr. Pratte, who identified all the payments made for Mr. Garneau's benefit, were truly paid out for Mr. Garneau's benefit. I note that this conciliation appears at tab 16 of Exhibit I-1, produced by the respondent, and is corroborated in part by the cheques produced at tab 17 of the same exhibit. Some of the cheques show Mr. Garneau's name or the name of one of his relatives in the memo area. For example, the memo [TRANSLATION] "in full and final payment, box 120 Alain Guy Garneau" on the $1,799.77 cheque bearing the number 117 and payable to "Les Foreurs de Val-d'Or" (see Exhibit I-1, tab 17; see also cheques #24, #69, #71 and #124). I should point out that, in Mr. Pratte's reconciliation, the cheque for $2,160.94, bearing #24, was said to be part of the amounts paid for Mr. Garneau's benefit, when in fact only $1,660.94 was attributable to those amounts. Indeed, $500 was for an expense of Mr. Pratte's (see Exhibit I-1, tab 17). Lastly, the respondent did not challenge the probative value of the conciliation on cross-examination.

[14] I would point out that the amount of the loans or advances appears to have stood at $11,102.15 as at February 28, 2003, $22,492.93[7] as at February 28, 2004, and $28,195.10 as at February 28, 2005, but that these amounts are not on 2310's balance sheet. The balance sheet only records advances to corporations (see the 2004 balance sheet with the 2003 comparative statement and the 2005 balance sheet, Exhibit A-5). The same inconsistency can be found with the bank account balance as at February 28, 2003, which does not match the amount indicated as [TRANSLATION]

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[7] It should be noted that I excluded from Mr. Pratte's reconciliation an amount of $1,250 for two reasons: first, cheque #104 is for $250 and not $1,250 (thus there is a data error); second, this cheque seems to have been returned. (See Exhibit A-3.)

"cash". It should be emphasized that the 2003 balance sheet was prepared by Mr. Pratte himself. At the hearing, held on June 12, 2012, Mr. Pratte stated that the advances or loans in question were completely or close to completely reimbursed by Mr. Garneau, in cash or services.[8]

[15] According to the Minister's data, Mr. Garneau became bankrupt on "2007 09 10" and Mr. Pratte did not make any claim (see Exhibit I-1, tab 18, 3rd sheet). Mr. Pratte is not certain whether Mr. Garneau owed him any money at the time.

The respondent's position

[16] Counsel for the respondent submits that all the conditions set out in subsection 160(1) are met. In particular, there was a transfer, and the transfer was to a person with whom Mr. Garneau was not, on the facts, dealing at arm's length. According to counsel, the $305,441.32 cheque which Mr. Garneau remitted to 2310 constituted a transfer. In this regard, he bases his position to a large extent on a case of the Federal Court of Appeal, *Livingston v. Canada*, 2008 FCA 89, [2008] F.C.J. No. 360 (QL), 2008 3 C.T.C. 230, and, in particular, on paragraph 21:

> 21 The deposit of funds into another person's account constitutes a transfer of property. To make the point more emphatically, the deposit of funds by Ms. Davies into the account of the respondent permitted the respondent to withdraw those funds herself anytime. The property transferred was the right to require the bank to release all the funds to the respondent. The value of the right was the total value of the funds.
>
> [Emphasis added.]

Counsel for the respondent also submits that the contract of mandate (agency) invoked by 2310 is invalid because it is contrary to public order. Consequently, he submits that the contract is null.

[17] In support of his position that there is a *de facto* non-arm's length relationship between Mr. Garneau and 2310, counsel for the respondent cited several cases, including a case decided by the Supreme Court of Canada, *Canada v. McLarty*, 2008 SCC 26, [2008] S.C.J. No. 26 (QL), [2008] 2 S.C.R. 79, [2008] 4 C.T.C. 221, where, in the context of a purchase of seismic data, the Court based its reasoning, in part, on Canada Revenue Agency Interpretation Bulletin IT-419R2 entitled "Meaning

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[8] At the examination for discovery held on June 29, 2010, Mr. Pratte asserted that Mr. Garneau still owed money to 2310. (See Exhibit I-2, page 21.)

of Arm's Length" (paragraph 62 of the decision). He also cited another case of the same court, namely *Swiss Bank Corp. et al. v. M.N.R.*, [1974] S.C.R. 1144.

Analysis

[18] When addressing an issue involving the application of the provisions of the Act, it is always useful to quote the provisions in question. The key provision here is section 160 of the Act.[9] The most relevant excerpts of the section are as follows:

Tax liability re property transferred not at arm's length

160. (1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly,

Transfert de biens entre personnes ayant un lien de dépendance

160. (1) Lorsqu'une personne a, depuis le 1er mai 1951, transféré

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[9] Subsection 160(1) is analogous to R.S.C. 1952, c. 148, subs. 53(1), which in turn was similar to s. 49A, which was enacted — and this was the first time that such a provision was enacted — in 1951 by S.C. 1951, c. 51, s. 17. Subsection 49A(1) was worded as follows:

Tax on income from property transferred between husband and wife or to minors.

49A. (1) Where a person has, on or after the first day of May, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatsoever,

(a) to his spouse or to a person who has since become his spouse, or

(b) to a person who was under nineteen years of age, the following rules are applicable:

(i) 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 section 21 or 22, as the case may be, in respect of income from the property so transferred or from property substituted therefor; and

(ii) the transferee and transferor are jointly and severally liable to pay the lesser of

(A) any amount that the transferor was liable to pay under this Act on the day of the transfer, or

(B) a part of any amount that the transferor was so liable to pay equal to the value of the property so transferred;

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

[Emphasis added.]

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

des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :

a) son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait;

b) une personne qui était âgée de moins de 18 ans;

c) une personne avec laquelle elle avait un lien de dépendance,

les règles suivantes s'appliquent :

d) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement d'une partie de l'impôt de l'auteur du transfert en vertu de la présente partie pour chaque année d'imposition égale à l'excédent de l'impôt pour l'année sur ce que cet impôt aurait été sans l'application des articles 74.1 à 75.1 de la présente loi et de l'article 74 de la *Loi de l'impôt sur le revenu*, chapitre 148 des Statuts revisés [*sic*] du Canada de 1952, à l'égard de tout revenu tiré des biens ainsi transférés ou des biens y substitués ou à l'égard de tout gain tiré de la disposition de tels biens;

e) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :

(i) l'excédent éventuel de la juste valeur marchande des

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.

…

biens au moment du transfert sur la juste valeur marchande à ce moment de la contrepartie donnée pour le bien,

(ii) le total des montants dont chacun représente un montant que l'auteur du transfert doit payer en vertu de la présente loi au cours de l'année d'imposition dans laquelle les biens ont été transférés ou d'une année d'imposition antérieure ou pour une de ces années;

aucune disposition du présent paragraphe n'est toutefois réputée limiter la responsabilité de l'auteur du transfert en vertu de quelque autre disposition de la présente loi.

…

Discharge of liability

(3) Where a particular taxpayer has become jointly and severally liable with another taxpayer under this section in respect of part or all of a liability under this Act of the other taxpayer,

(*a*) a payment by the particular taxpayer on account of that taxpayer's liability shall to the extent of the payment discharge the joint liability; but

(*b*) a payment by the other taxpayer on account of that taxpayer's liability discharges the particular taxpayer's liability only to the extent that the payment operates to reduce that other taxpayer's liability to an amount less than the amount in respect of which the particular taxpayer is, by this section, made jointly and

Extinction de l'obligation

(3) Dans le cas où un contribuable donné devient, en vertu du présent article, solidairement responsable, avec un autre contribuable, de tout ou partie d'une obligation de ce dernier en vertu de la présente loi, les règles suivantes s'appliquent :

a) tout paiement fait par le contribuable donné au titre de son obligation éteint d'autant l'obligation solidaire;

b) tout paiement fait par l'autre contribuable au titre de son obligation n'éteint l'obligation du contribuable donné que dans la mesure où le paiement sert à réduire l'obligation de l'autre contribuable à une somme inférieure à celle dont le contribuable donné est

severally liable.

solidairement responsable en vertu du présent article.

[19] Since paragraph 160(1)(*d*) refers to sections 74.1 to 75.1 of the Act and to section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952 (the 1952 Act), which sections lay down what are commonly known as the "attribution rules", [10] it is helpful to reproduce certain provisions of those sections:

Transfers and loans to spouse or common-law partner

74.1 (1) If an individual has transferred or lent property (otherwise than by an assignment of any portion of a retirement pension under section 65.1 of the *Canada Pension Plan* or a comparable provision of a provincial pension plan as defined in section 3 of that Act), either directly or indirectly, by means of a trust or by any other means whatever, to or for the benefit of a person who is the individual's spouse or common-law partner or who has since become the individual's spouse or common-law partner, any income or loss, as the case may be, of that person for a taxation year from the property or from property substituted therefor, that relates to the period in the year throughout which the individual is resident in Canada and that person is the individual's spouse or common-law partner, is deemed to be income or a loss, as the case may be, of the individual for the year and not of that person.

Transfers and loans to minors

(2) If an individual has transferred

Transfert ou prêt à l'époux ou au conjoint de fait

74.1 (1) Dans le cas où un particulier prête ou transfère un bien — sauf par la cession d'une partie d'une pension de retraite conformément à l'article 65.1 du *Régime de pensions du Canada* ou à une disposition comparable d'un régime provincial de pensions au sens de l'article 3 de cette loi —, directement ou indirectement, par le biais d'une fiducie ou par tout autre moyen, à une personne qui est son époux ou conjoint de fait ou qui le devient par la suite ou au profit de cette personne, le revenu ou la perte de cette personne pour une année d'imposition provenant du bien ou d'un bien y substitué et qui se rapporte à la période de l'année tout au long de laquelle le particulier réside au Canada et tout au long de laquelle cette personne est son époux ou conjoint de fait est réputé être un revenu ou une perte, selon le cas, du particulier pour l'année et non de cette personne.

Transfert ou prêt à un mineur

[10] The attribution rules are anti-avoidance provisions which seek to counter certain tax planning aimed at splitting a taxpayer's income by allocating it between persons whose marginal tax rate is lower than the taxpayer's.

or lent property, either directly or indirectly, by means of a trust or by any other means whatever, to or for the benefit of a person who was under 18 years of age … and who

(*a*) does not deal with the individual at arm's length, or

…

(2) Lorsqu'un particulier transfère ou prête un bien — directement ou indirectement, par le biais d'une fiducie ou par tout autre moyen — à une personne de moins de 18 ans qui a un lien de dépendance avec le particulier ou …

Transfers or loans to a trust

74.3 (1) Where an individual has lent or transferred property (in this section referred to as "lent or transferred property"), either directly or indirectly, by means of a trust or by any other means whatever, to a trust in which another individual who is at any time a designated person in respect of the individual is beneficially interested at any time, the following rules apply:

…

Transfert ou prêt à une fiducie.

74.3 (1) Lorsqu'un particulier prête ou transfère un bien — appelé « bien prêté ou transféré » au présent article —, directement ou indirectement, par le biais d'une fiducie ou par tout autre moyen, à une fiducie dans laquelle un autre particulier — qui, à un moment donné, est, en ce qui concerne le particulier, une personne désignée — a un droit de bénéficiaire à un moment donné, les règles suivantes s'appliquent :

…

Gain or loss deemed that of transferor

75.1 (1) Where

(*a*) subsection 73(3) or (4) applied to the transfer of property (in this subsection referred to as "transferred property") by a taxpayer to a child of the taxpayer,

(*b*) the transfer was made at less than the fair market value of the transferred property immediately before the time of the transfer, and

(*c*) in a taxation year, the transferee disposed of the transferred property and did not, before the end of that year, attain

Gain ou perte présumés pour l'auteur du transfert

75.1 (1) Lorsque :

a) les paragraphes 73(3) ou (4) s'appliquent au transfert de biens d'un contribuable à son enfant;

b) le transfert a été fait pour une somme inférieure à la juste valeur marchande que les biens transférés avaient immédiatement avant le transfert;

c) au cours d'une année d'imposition, le bénéficiaire des biens transférés en a disposé et n'a pas, avant la fin de cette

the age of 18 years,

the following rules apply:

…

année, atteint l'âge de 18 ans,

les règles suivantes s'appliquent :

…

[Emphasis added.]

[20] Sections 74.1 to 74.5 have, to a great extent since 1986, replaced subsection 74(1) of the Act.[11] That subsection, as it read prior to 1975, provided as follows:

(1) Where a person has, on or after August 1, 1917, transferred property either directly or indirectly, by means of a trust or by any other means whatever to his spouse, or to a person who has since become his spouse, the income for a taxation year from the property or from property substituted therefor shall, during the lifetime of the transferor while he is resident in Canada and the transferee is his spouse, be deemed to be income of the transferor and not of the transferee.

(1) Lorsqu'une personne a transféré des biens, directement ou indirectement, le 1er août 1917 ou après, par un acte de fiducie ou par tout autre moyen que ce soit à son conjoint, ou à une personne qui est depuis devenue son conjoint, le revenu, pour une année d'imposition, tiré des biens ou de biens y substitués, est réputée [*sic*], durant la vie de l'auteur du transfert, tandis qu'il réside au Canada et que le bénéficiaire du transfert est son conjoint, être le revenu de l'auteur du transfert et non de

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[11] Subsection 74(1) was repealed by S.C. 1986, c. 6, subs. 37(1), applicable to transfers of property made after May 22, 1985 and the attribution rules were included in the new sections 74.1 to 74.5, which were added by S.C. 1986, c. 6, subs. 38(1), applicable, as regards s. 74.1, subs. 74.2(1), s. 74.3 and subs. 74.5(1) through (11), to transfers of property made after May 22, 1985 and to loans not repaid on May 22, 1985 or thereafter; however, in the case of a loan not repaid on May 22, 1985, s. 74.1 and subs. 74.2(1) do not apply to loans repaid before 1988; and if a loan was not repaid before 1988, s. 74.1 does not apply to income or loss, as the case may be, related to a period ending prior to 1988.

Subsection 74(1) was analogous to R.S.C. 1952, c. 148, subs. 21(1), as amended by S.C. 1955, c. 54, subs. 3(1). In this regard it should be noted that subs. 21(1) of the *Income Tax Act*, S.C. 1948, c. 52, is worded as follows:

> Where a person has, on or after the first day of August, 1917, transferred property, either directly or indirectly, by means of a trust or by any other means whatsoever, to his spouse, or to a person who has since become his spouse, the income for a taxation year from the property or from property substituted therefor shall be deemed to be income of the transferor and not of the transferee.

[Emphasis added.]

celui à qui le transfert a été fait.

[Emphasis added.]

[21] In *Livingston, supra*, the Federal Court of Appeal recalled the interpretation principle that must guide the courts in applying subsection 160(1) of the Act. At paragraph 15, Justice Sexton writes as follows:

> **15** The Supreme Court of Canada's preferred approach to statutory interpretation remains Dreidger's modern principle (Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 67):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at 41; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paragraph 26.

[Emphasis added.]

[22] It is also worth recalling the comments of Justice Desjardins of the Federal Court of Appeal, who wrote, in *Medland v. Canada*, [1998] F.C.J. No. 708 (QL), 98 DTC 6358, 227 N.R. 183, [1999] 4 C.T.C. 293, at paragraph 14, that the tax policy embodied in, or the object and spirit of subsection 160(1), is to prevent a taxpayer from transferring his property to his spouse in order to thwart the Minister's efforts to collect the money which is [owed] to him." [Emphasis added.]

[23] There is another principle of interpretation, which holds that a phrase used in a statute should be presumed to have the same meaning throughout the statute. Justice Corey of the Supreme Court of Canada wrote, in *Thomson v. Canada (Deputy Minister of Agriculture),* [1992] 1 S.C.R. 385, at page 400: "Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an act."[12]

[24] This presumption should be even stronger where the phrase is used in the wording of two interrelated provisions. The treatment of the concept of transfer

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12 Pierre-André Côté, *Interprétation des lois*, 4th ed. (Montréal: Thémis, 2009), page 382, paragraphs 1235 *et seq*.

found in subsection 160(1) of the Act falls into this category.[13] Indeed, paragraph 160(1)(*d*) refers to section 74 of the 1952 Act[14] and to sections 74.1 to 75.1 of the Act, which contain the same concept of transfer. Not only is the same verb "to transfer" used, the same broader wording is essentially used as well: "transferred property, either directly or indirectly, by means of a trust or by any other means whatever" ("*transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de tout autre façon"*). Hence, in my view, it is entirely appropriate to adopt a judicial interpretation of the verb "transfer" that is the same for the sections enacting the attribution rules as it is for the sections enacting the tax collection rule in subsection 160(1) of the Act. In fact, such is the approach that the courts have taken. They have used the same judicial interpretation of the concept of "transfer", both for the purposes of the attribution rule and for the purposes of section 160, as we shall see further on.

[25] Let us apply these interpretation principles to define the scope of subsection 160(1) of the Act. The case law describes the conditions of application of subsection 160(1) in various ways. In *Tétrault v. Canada*, 2004 TCC 332, [2004] T.C.J. No. 265 (QL), [2004] 4 C.T.C. 2234, 2004 DTC 2763, a decision that I rendered on May 11, 2004, I describe these conditions at paragraphs 29-35. Essentially, one can assert that subsection 160(1) of the Act applies when two conditions precedent have been met: a transfer of property, and the fact that this transfer was made to certain designated persons, including a person with whom the transferor was not dealing at arm's length. When these two conditions precedent are met, two distinct rules can apply. I summarized them in *Tétrault*:

> **32** When the two aforementioned conditions are assembled, the following two rules apply. First is the rule set out in paragraph 160(1)(*d*) (paragraph 160(1)(*d*) rule),[15] according to which the transferee and the transferor are jointly and severally liable to pay a part of the income tax in respect of any income from, or capital gain from the disposition of, the property transferred to the transferee, where this income or gain is subject to the attribution rules laid down in sections 74.1 to 75.1 of the Act and in section 74 of the *Income Tax Act*, chapter 148 of R.S.C. 1952 (**1952 Act**). It should be pointed out that, in that case, there is no issue as to whether there is any amount by which the fair market value (**FMV**) of the property transferred exceeds the FMV of the consideration. The joint and several liability is applicable once there is a tax payable on the income or capital gain subject to the attribution rules. . . .

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13 The original version of subs. 160(1) was added to the *Income Tax Act* in 1951. See above at note 9.

14 The original version of which was only slightly different from that contained in the 1952 Act and was included in the *Income War Tax Act*, 1917.

15 I will use the same designation in these reasons.

> **33** Under the second rule, the paragraph 160(1)(*e*) rule,[16] the transferee and transferor are jointly and severally liable in regard to any amount that the transferor must pay under the Act during the taxation year in which the property was transferred. However, the transferee's liability is limited to the lesser of the following two amounts: (i) the possible excess of the FMV of the property at the time of the transfer over the FMV at the time of the consideration given for the property, and (ii) the amount of the transferor's tax debt.
>
> [Emphasis added and footnotes omitted.]

[26] In this instance, we are interested in the second rule, namely the paragraph 160(1)(*e*) rule, which applies to cases where property has been transferred at a time when the transferor owed the Minister money.

[27] For the purposes of deciding the dispute in *Tétrault*, I analyzed the concept of transfer as follows at paragraphs 36-40:

> **36** Before deciding whether there was a transfer, it is important to define the scope of this notion. In decisions concerning the application of section 160 of the Act, *Fasken Estate v. M.N.R.*, [1948] Ex. C.R. 580, has often been cited. In *Raphael*, my colleague Judge Mogan was no exception, so I will quote from paragraph 14 of his reasons:
>
>> 14 When applying subsection 160(1) to particular circumstances, many judges have cited the Exchequer Court decision of *Fasken Estate v. M.N.R.*, [1948] Ex. C.R. 580 in which Thorsen P. stated:
>>
>>> 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. . . .
>
> [Emphasis added.]
>
> **37** Another relevant decision, albeit cited less often, is *Dunkelman v. M.N.R.*, 59 DTC 1242, also by the Exchequer Court of Canada. In that case, as in *Fasken Estate*, the issue was whether the attribution rules were applicable.

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[16] I will, once, again, use the same designation in these reasons.

However, in *Dunkelman*, it was also necessary to determine whether a loan granted to a trust constituted a transfer for the purposes of subsection 22(1) of the *Income Tax Act*, S.C. 1948, c. 52.[17] After citing *Fasken Estate* and *St. Aubyn v. Attorney-General*, [1952] A.C. 15, Mr. Justice Thurlow stated, at page 1246:

> . . . I do not think it can be denied that, by loaning money to the trustees, the appellant, in the technical sense, transferred money to them, even though he acquired in return a right to repayment of a like sum with interest and a mortgage on the Butterfield Block as security, or even though he has since then been repaid with interest. But, in my opinion, it requires an unusual and unnatural use of the words "has transferred property" to include the making of this loan. ... I also think that, if Parliament had intended to include a loan transaction such as the present one, the words necessary to make that intention clear would have been added, and it would not have been left to an expression which, in its usual and natural meaning, does not clearly include such a transaction. To apply the test used by Lord Simonds, I do not think this transaction was one which the language of the subsection, according to its natural meaning, "fairly" or "squarely" hits. I am, accordingly, of the opinion that the making of the loan in question was not a transaction within the meaning of the expression "has transferred property" and that s. 22(1) does not apply.
>
> In reaching this conclusion, I have also considered the wide words "or by any other means whatsoever," but I think that they are directed to the means or procedure by which transfers may be accomplished, rather than to the scope of the expression "has transferred property" and that they do not expand that scope beyond the natural meaning of the expression.

[Emphasis added.]

38 In *McVey v. The Queen*, 96 DTC 1225, my colleague Judge Rip implicitly acknowledged this as the appropriate interpretation in the application of subsection 160(1) of the Act, when he held that the Minister's assessment was valid, whether the sums transferred were considered to have been transferred as a gift, in which case subsection 160(1) of the Act would apply, or whether they were considered a loan, in which case subsection 224(4) would apply.

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

[17] Hereinafter "the 1948 Act."

> vested in the transferee.[18] The mere possession of a property that has been loaned with the obligation to return it does not satisfy this condition. 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. As Madam Justice Desjardins said in *Medland*, *supra*, at paragraph 14: "...the tax policy embodied in, or the object and spirit of subsection 160(1), is to prevent a taxpayer from transferring his property to his spouse in order to thwart the Minister's efforts to collect the money which is owned [*sic*] to him." The loan of money would not constitute a method of thwarting the collection of the tax owed by the lender. Pursuant to subsection 224(4) of the Act, the Minister could garnish the sum loaned. This notion of "transfer" is therefore reconcilable with the purpose intended by subsection 160(1) of the Act.
>
> **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. For the purposes of this analysis, at least three distinct scenarios are conceivable. First, if the sums entrusted by the mandator (for example, the husband) have not yet been used by the mandatary (for example, the wife) for the purposes of purchasing goods and services for the family, the mandatary could be required to reimburse the mandator any sum that has not been used accordingly. A mandator may at any time terminate the mandate and a seizing creditor could demand that the mandatary deliver to him the property belonging to the debtor mandator. In such circumstances, the Minister could carry out a garnishment pursuant to section 224 of the Act.
>
> [Emphasis added and footnotes omitted.]

[28] Justice C. Miller of this Court adopted this interpretation, including the aspect related to the application of *Dunkelman.*[19] He wrote as follows at paragraph 20 of the decision in *Merchant v. The Queen*, 2005 TCC 161, [2005] T.C.J. No. 101 (QL), [2005] 2 C.T.C. 2169, 2005 DTC 377:

> **20** (i) Transfer of property. In the case of *Tétrault v. The Queen*, Justice Archambault addressed the issue of whether a loan constitutes a transfer of property for purposes of section 160 of the *Act* and concluded, based on the cases of *Dunkelman v. M.N.R.* and *McVey v. The Queen* that it does not. I agree with that conclusion. As Justice Archambault put it at paragraph 39:

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[18] This can be stated in another way: the property must leave the transferor's patrimony and enter the transferee's patrimony.

[19] In addition, see the decision of Justice Tardif in *Lacroix v. The Queen*, 2011 TCC 111, 2011 DTC 1101, particularly paragraphs 40-41.

> … The loan of money would not constitute a method of thwarting the collection of the tax owed by the lender.
>
> [Emphasis added and footnotes omitted.]

[29] It should be noted that *Fasken Estate*[20] and *Dunkelman* were decided by the

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[20] The provisions in issue in *Fasken Estate* are set out at pages 586 and 587 of that decision:

> The appeals involve the construction of the statutory enactments referred to by the Minister in his decision. Section 4(4) of the Income War Tax Act, 1917, Statutes of Canada, 1917, chap. 28, which will hereafter be referred to as the 1917 Act, provided as follows:
>
> > 4. (4) A person who, after the first day of August, 1917, has reduced his income by the transfer or assignment of any real or personal, movable or immovable property, to such person's wife or husband, as the case may be, or to any member of the family of such person, shall, nevertheless, be liable to be taxed as if such transfer or assignment had not been made, unless the Minister is satisfied that such transfer or assignment was not made for the purpose of evading the taxes imposed under this Act or any part thereof.
>
> By Section 7 of An Act to Amend the Income War Tax Act, 1917, Statutes of Canada, 1926, chap. 10, which will hereafter be referred to as the 1926 Act, it was provided:
>
> 7. Subsection four of section four of the said Act is hereby repealed and the following substituted therefor: —
>
> (4) For the purposes of this Act, —
>
> (*a*) Where a person transfers property to his children such person shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made, unless the Minister is satisfied that such transfer was not made for the purpose of evading the taxes imposed under this Act.
>
> (*b*) Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.
>
> … Finally section 32(2) of the Income War Tax Act, R.S.C. 1927, chap. 97, which will hereafter be referred to as the 1927 Revision, provides:
>
> 32.(2) Where a husband transfers property to his wife, or *vice versa*, the husband or the wife, as the case may be, shall nevertheless be liable to be

Exchequer Court of Canada and were applied in several cases of the Federal Court of Appeal. *Fasken Estate* was thereby applied — notably in *Sachs v. Canada,* [1980] F.C.J. No. 611 (QL), [1980] C.T.C. 358, 80 DTC 6291, *Boger Estate v. Canada (M.N.R.)*, [1993] F.C.J. No. 545 (QL), [1993] 2 C.T.C. 81, 93 DTC 5276, *Canada v. Kieboom* [1992] 3 F.C. 488, [1992] 2 C.T.C. 59, 92 DTC 6382 and *Paxton v. Canada (M.N.R.)*, [1996] F.C.J. No. 1634 (QL), 97 DTC 5012, 1996 CarswellNat 2400 — with respect to the application of the attribution rules and subsections 70(6), 70(9) and 73(5) of the Act. As far as the application of section 160 is concerned, *Fasken Estate* was applied in *Medland*,[21] *supra*, *2753-1359 Québec Inc. v. Canada*, 2010 FCA 32, 2010 DTC 5031, [2010] 4 C.T.C. 202, *Paxton*, *supra*, and *Yates v. Canada,* 2009 FCA 50, [2010] F.C.R. 436, [2009] 3 C.T.C. 183, 2009 DTC 5062.

[30] As for the decision in *Dunkelman*, it was applied by the Federal Court of Appeal in *Sachs*, *supra*. Here is what Justice Heald declared in *Sachs*:

> **25** Turning now to the first of these three submissions, I agree that before subsection 75(1) can apply, there must have been a vesting in the infant children. In dealing with the predecessor section in the *Income Tax Act* to subsection 75(1) Thurlow J. (as he then was) in the case of *Joseph B. Dunkleman v. Minister of National Revenue*, expressed the view that all that was necessary for the section to apply was ". . . that the taxpayer shall have so dealt with the property belonging to him as to divest himself of it and vest it in a person under 19 years of age." In that judgment, Mr. Justice Thurlow cited with approval similar views expressed by President Thorson of the Exchequer Court in *David Fasken Estate v. Minister of National Revenue* ((1948 Ex. C. R. 580) and by Lord Radcliffe in *St. Aubyn v. Attorney General* ((1952) A.C. 15).
>
> [Emphasis added and footnotes omitted.]

[31] *Dunkelman* has also been applied by other judges of the Exchequer Court, notably Justice Noël in *Robins v. Minister of National Revenue*, [1963] Ex. C.R. 171, [1963] C.T.C. 27, 63 DTC 1012, and President Jackett in *Oelbaum v. Minister of National Revenue*, [1968] Ex. C.R. 380, [1968] C.T.C. 244, 68 DTC 5176.

[32] In addition to the decisions of this Court in *Tétrault* and *Merchant*, *supra*, and the decisions of the Exchequer Court, there is the decision of former Chief Judge Couture of our Court in *Béliveau v. Minister of National Revenue*, 91 DTC 669, [1991] 1 C.T.C. 2683. He writes as follows at page 675 (DTC):

> taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made. [Emphasis added.]

[21] See in particular paragraph 17 of that decision.

> A loan cannot legally be a "transfer of property" as required by the provisions of 56(2), still less a payment, and the courts have clearly confirmed this interpretation. What the Act means by a "transfer of property" is not simply a physical transfer but a transfer of the right of ownership attached to the property.
>
> The decisions on this interpretation could hardly be more specific. In *Joseph B. Dunkelman v. Minister of National Revenue* 59 DTC 1242, the Court had to interpret the provisions of subsection 22(1) of the Act in effect at that time. That subsection read:
>
>> 22(1) Where a taxpayer has, since 1930, transferred property to a person who was under nineteen years of age, either directly or indirectly, by means of a trust or by any other means whatsoever, the income for a taxation year from the property or from property substituted therefor shall, during the lifetime of the taxpayer while he is resident in Canada, be deemed to be the income of the taxpayer and not of the transferee unless the transferee has before the end of the year attained the age of nineteen years.
>
> [Emphasis added.]

[33] In *Harvey v. Canada*, [1994] T.C.J. No. 391 (QL), 1994 CarswellNat 1243, [1995] 1 C.T.C. 2507, 94 DTC 1910, Judge Bowman acknowledges at paragraph 11 (QL Eng.) that *Dunkelman* is good law:

> The *Dunkelman* case is good law in Canada and has been followed on numerous occasions. The appellant relies also on Interpretation Bulletin IT-260R, paragraphs 3 and 4:
>
>> For the purposes of subsection 75(1), a transfer does not include a genuine loan made by a taxpayer to a trust for the benefit of a minor. No all-inclusive statement can be made as to when a loan can be considered to be 'genuine', but a written and signed acknowledgment of the loan by the borrower and agreement to repay it within a reasonable time ordinarily is acceptable evidence that it was so. If, in addition, there is evidence that the borrower has given security for the loan, that interest on the loan has been paid, or that actual repayments have been made, it is accepted that the loan was genuine. The fact that no interest is required to be paid does not mean, in itself, that a genuine loan has not been made.
>>
>> Where a loan has characteristics of a genuine loan (see 3 above) and there is no evidence that the terms of that loan are not being honoured by the minor, the Department considers that such a loan made directly to a minor is not a transfer of property for the purposes of subsection 75(1).
>
> [Emphasis added.]

[34] It was entirely appropriate for the Federal Court of Appeal to have applied *Fasken Estate* and that the Tax Court of Canada applied *Dunkelman* to the concept of transfer in the context of section 160, because the same concept is found in the sections enacting the attribution rules, namely section 74 of the 1952 Act and sections 74.1 to 75.1 of the Act. As we have seen, section 160 applies not only in the context of property transfers where the transferor is indebted to the tax authorities (the paragraph 160(1)(*e*) rule), but also where the attribution rules apply (the paragraph 160(1)(*d*) rule).

[35] In *Dunkelman,* Justice Thurlow stated that if Parliament wants loans to trigger the attribution rule found in subsection 22(1) of the 1948 Act, it would need to indicate this clearly. Parliament only decided to follow that advice 27 years later, in 1986, when it amended the attribution rules by adding sections 74.1 to 74.5 of the Act, which extend the attribution rules to loans. It must however be emphasized that Parliament did not enact an analogous measure for the purposes of subsection 160(1) of the Act. By stating, in section 74.1, that the attribution rule applies when there is a transfer or a loan, the Parliament of Canada was accepting the interpretation, adopted consistently by the courts, that a loan is not a transfer.

[36] It should also be emphasized that the interpretation adopted on October 26, 1959, by the Exchequer Court in *Dunkelman* has not been rejected by any subsequent cases, including *Livingston*, and that the tax authorities have even publicly accepted it for the purposes of the attribution rules.[22] To adopt the respondent's interpretation today would run counter to more than sixty years of consistent case law. And the courts are not accustomed to overruling such a consistent line of case law; quite the contrary.[23]

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[22] See Interpretation Bulletin IT-260R, cited in *Harvey*, *supra*, at paragraph 11 (QL Eng.)

[23] For example, see *Nadeau v. Canada (M.N.R)*, 2003 FCA 400, [2004] 1 F.C.R. 587, 2003 DTC 5736, 312 N.R. 257, [2004] 1 C.T.C. 293, at paragraphs 30-34. I shall reproduce paragraphs 29 and 30 of the Federal Court of Appeal's decision:

> [29] Were it not for this well-established jurisprudence, the thesis developed by Archambault T.C.J. would be quite tenable. But at the point where we are now, I have little difficulty in finding that income from a support payment is income from property and that as such the expenses incurred in obtaining the payment thereof may be deducted under the rules set out in subdivision b.
>
> [30] As Judge Bowie noted in *Sabour, supra*, this is the treatment that the Minister has advocated and applied for more than 40 years. It is logical to assume that if this treatment was in some way contrary to Parliament's wishes, an amendment would have been brought.

[37] Under these circumstances, it seems completely warranted to adopt an interpretation of the concept of "transfer" that is harmonious, for the purposes of the attribution rules in section 74 of the 1952 Act and of sections 74.1 to 75.1 of the Act, and for the purposes of paragraph 160(1)(*e*), which applies to transfers of property that occur when the transferor owes the Minister money. The existence of a "transfer" is a condition precedent to the application both of the paragraph 160(1)(*e*) rule (where the transferor has a tax liability) and the paragraph 160(1)(*d*) rule (where the attribution rules apply). And the foregoing analysis makes it clear that there can be no transfer when a lender lends money to a borrower. Consequently, an amount deposited in a borrower's bank account will not constitute a transfer for the purposes of the attribution rules or for the purposes of the paragraph 160(1)(*e*) rule. In my opinion, this interpretation is consistent with the rulings of the Supreme Court of Canada, which has stated that "the words of an Act are to be read in their entire context . . . ."[24]

[38] It goes without saying that there is also no transfer when a mandator (principal) gives money to his mandatary (agent), as I explained in *Tétrault*, *supra*, at paragraph 40. That doctrine is consistent with the Supreme Court of Canada's decision in *Victuni v. Minister of Revenue of Quebec*, [1980] 1 S.C.R. 580. There, the issue involved the computation of the tax on the paid-up capital[25] of a company that had acquired an immoveable in Montréal as a mandatary. Here is what Justice Pigeon wrote at pages 584-585:[26]

[Emphasis added.]

24 See paragraph 21 of these reasons.

25 Under the *Corporation Tax Act*, R.S.Q. 1964, c. 67, as amended.

26 A similar decision, albeit based on reasons expressed somewhat differently, was rendered by the Federal Court of Appeal in *ADP Canada Co. v. Canada*, 2009 FCA 117, 2009 CarswellNat 3906, [2009] 4 C.T.C. 277, 389 N.R. 55, 2009 DTC 5091. ADP paid its clients' employees their salaries and remitted the related statutory withholdings to the tax authorities on behalf of those clients. Like *Victuni*, it involved the calculation of the capital tax. Specifically, the issue was whether an amount of $1.1 billion received by ADP in order to make these payments was to be added to its "taxable capital" and its "taxable capital employed in Canada" as advances for the purposes of paragraph 181.2(3)(c) of the Act. Justice Létourneau wrote as follows:

> 25 The only debts that the clients had towards ADP were the fees for the contract for services. The $83 billion, of which the $1.1 billion in issue was part, were debts that the clients had towards their employees and the fiscal authorities. The Funds were for the payments of these debts by the debtors, i.e. ADP's clients. ADP was merely facilitating the payments by the debtors of their debts.

> Under the general principles of the law of mandate, it is clear that the obligation of a mandatary towards the mandator is not a debt. The person who has bought property on behalf of a third party who wishes to remain unknown is no more indebted for the price paid than he is the owner of the property. The true owner is the mandator, and the obligation of the mandatary nominee is to render an account to the mandator and deliver over what he has received on his behalf (*C.C.*, art. 1713). What he receives, even if it is money, does not belong to him: he is obliged to keep it separate from his own property. It is a crime for him to take control of it so as to make himself a debtor thereof instead of a mandatary: *R. v. Légaré* [[1978] 1 S.C.R. 275.]

[Emphasis added.]

[39] It is also interesting to note that, for the purposes of the *Act to authorize municipalities to collect duties on transfers of immoveables,* R.S.Q. 1977, c. M-39, the courts have held that there was no transfer giving rise to municipal transfer duties where a mandator transferred ownership of immovable property to a mandatary while retaining his own right of ownership in the property. For instance, in *Miracle Mile Industrial Park Corporation c. Ville de Montréal*, [1987] J.Q. No. 422 (QL), 10 Q.A.C. 5, [1987] R.D.I. 239, [1987] R.L. 6, 3 A.C.W.S. (3d) 438, the appellant company purchased an immovable located in Montréal from one of its principals.

> It was not the creditor of the Funds due and, therefore, these Funds could not have been an advance paid to ADP.
>
> 27 I do not think there can be any doubt that the $1.1 billion is an expenditure of the clients of ADP, not an expenditure of ADP which acted as a mere conduit in ensuring that the amounts due to the clients' employees for salaries and the fiscal authorities for taxes are transferred on time to the intended recipients. Not surprisingly, no such expenditure is claimed by ADP in its financial statements of 2001 and 2002 . . .
>
> 34 Under a contract for services, ADP acted as a facilitator and a conduit to ensure that the sums due by its clients to their employees and to the fiscal authorities were paid on time. The nature of the services provided by ADP implied the processing and transfer of the clients' Funds to those to whom they were due and who were the intended recipients. The Funds were the goods to be transferred. They were not "advances" to ADP because they were neither a payment made to ADP before it was due, nor an amount to be applied against the price of the service, paid before the service is rendered, nor an amount paid to ADP for an expenditure of ADP. [Emphasis added.]

Here, in my opinion, the word "transfer" (*transfert*) used by Justice Létourneau is being used in the sense of "*virer*". See the *Petit Robert* and my remarks at paragraph 62 of these reasons.

The evidence, in the form of a counter-letter between the same parties, showed that there was no true transfer of ownership. Here is what the Quebec Court of Appeal stated concerning the absence of transfer in the case of a mandate:

> [TRANSLATION]
>
> 11 Moreover, an examination of the provisions of the statute as a whole shows that the transfer duties are essentially conditional on transfers of ownership.
>
> 12 The definition that the legislator has chosen to give to the term transfer is fundamental here:
>
>> "transfer" means the transfer of the right of ownership on an immoveable as well as a contract of lease of an immoveable, provided the period running from the date of transfer to the expiry of the term of the contract of lease, including any extension or renewal mentioned therein, exceeds 40 years; the word "transfer" does not include transfer for the purpose only of securing a debt, nor reconveyance by the creditor." (Emphasis added)
>
> 13 Where, as here, there is no "transfer of the right of ownership" because there is merely a change in the name of the owner, or a nominee, no duty is imposed.
>
> 14 If the analysis needs to be taken further, sections 17 *et seq*. of the Act, entitled "Exemptions", point to the legislator's concern about exempting not only transfers preferred for legislative policy reasons (ss. 17 and 20) but also other transfers, which, while genuine, can be termed purely technical (ss. 18 and 19).
>
> 15 All the more reason to infer that the legislator did not wish to impose duties when there is no actual transfer.
>
> [Emphasis added.]

[40] Thus, when an amount is remitted to a mandatary, it does not belong to the mandatary; the mandator continues to be its true owner. Therefore, it cannot be concluded that the mandator has divested himself of it. The appropriate conclusion in these circumstances is that the mandator does not abandon his right of ownership over the amounts entrusted to the mandatary and that they do not pass to the mandatary. In other words, the money does not leave the mandator's patrimony and enter the mandatary's patrimony. Consequently, if the amounts received by the mandatary are deposited into a bank account, it cannot be concluded that these amounts constitute a transfer for the purposes of section 160 and the attribution rules. If a loan of money does not constitute a transfer for the purposes of these rules, the remittance of money to a mandatary should be even less so.

[41] In my opinion, the decision of the Federal Court of Appeal in *Livingston* does not help the respondent's case, and the respondent is misinterpreting its scope. First of all, the facts are different. Here, unlike in *Livingston*, the tax debtor did not deposit funds into the account of the taxpayer assessed under subsection 160(1) of the Act. At paragraph 5 of *Livingston*, Justice Sexton writes as follows:

> 5 The account was used only by Ms. Davies, however. Ms. Davies would deposit cheques into the account, and also direct other parties to pay amounts owed to her into the respondent's account. . . . [Emphasis added.]

[42] Here, it was 2310, through its director, that deposited the $305,441.32 cheque into 2310's account (see Exhibit I-1, tab 14).

[43] Moreover, Justice Sexton did not find that there was a mandate or agency relationship, as I do here. In my opinion, he was satisfied that the amounts that Ms. Davies had deposited into Ms. Livingston's account belonged to Ms. Livingston following the deposits, and that there was no valid agency. This is why he concluded, at paragraph 21, that "[t]he 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."

[44] At paragraph 28, Justice Sexton adds: "Why would Ms. Davies give an amount of money to the respondent in consideration for the ability to withdraw the money, when the respondent retains the power to take the money?" A bit further on, at paragraph 29, he writes: "Indeed, contrary to the finding of the Tax Court Judge, there was no contract. Rather, it is my opinion that the respondent simply acted out of a sense of moral obligation to Ms. Davies. Such an action does not constitute a binding agreement . . . ." A similar explanation was provided by Justice Sexton in *Raphael v. Canada*, 2002 FCA 23, [2002] F.C.J. No. 82 (QL), 2002 DTC 6798, [2002] 2 C.T.C. 75, 33 C.B.R. (4th) 288, 286 N.R. 389:

> 7 Before us it was argued by the Appellant that there was no transfer of the monies within the meaning of section 160(1) of the *Act*. The Appellant argued that given the Appellant's evidence that she believed she had a moral obligation to use the funds as her husband directed, which evidence was accepted by the learned Tax Judge, coupled with the evidence that in fact she used the funds to pay amounts which he directed, there was not a transfer of funds within the meaning of subsection 160(1).
>
> 8 The Appellant argued, as well, that a trust had been created for her husband so that there was no transfer of property. However, the intention of the husband

> and wife in the present case to put the husband's funds where they would be secure from his creditors in not consistent with the creation of a trust. If indeed a trust was established then the husband would be beneficially entitled to those funds and they would not be immune from garnishment proceedings at the instance of his creditors. Thus, clearly the intention of the parties was not to set up an arrangement whereby the funds remained beneficially owned by the husband. Thus no trust was created.

[Emphasis added.]

[45] It should also be noted that, in *Livingston*, Ms. Davies, the transferor, did not disclose, at the time of her bankruptcy, that she was the beneficiary of the trust funds held by Ms. Livingston (see paragraph 7 of the decision). All of this clearly suggests that Ms. Davies did not make Ms. Livingston her agent, but rather, that she gave her the amounts in issue.

[46] Furthermore, it should be noted that, in *Livingston*, Ms. Davies transferred her funds several times to new bank or brokerage accounts before the Canada Revenue Agency managed to trace and recover the amounts due. Here, Mr. Pratte was unaware of the existence of Mr. Garneau's tax liabilities. Mr. Garneau wanted to shelter the $305,441.32 from seizure by the FBDB in order to have time to negotiate a settlement. Later, the FADED received significant payments from Mr. Garneau.

[47] The only comment that Justice Sexton made about a possible agency or mandate in *Livingston* was in reference to *Leblanc v. The Queen*, [1999] T.C.J. No. 60 (QL), 99 DTC 410, in respect of which he asserts, at paragraph 23, that the finding of the judge at first instance "in and of itself is suspect: there was certainly a transfer of property." However, he did not say that there is always a transfer for the purposes of section 160 when a mandator or principal remits funds to a mandatary or agent so that the funds can be spent for the mandator or principal's benefit. The Federal Court of Appeal did not analyze the concept of transfer in the context of mandate or agency by applying the case law, such as *Fasken Estate* and *Dunkelman*, which the Court itself had applied in the past.

[48] In the instant case, there was a contract of mandate in accordance with the provisions of the *Civil Code of Québec* (the Code or C.C.Q.). Here is how article 2130 of the Code defines this type of contract:

> 2130. Mandate is a contract by which a person, the mandator, empowers another person, the mandatary, to represent him in the performance of a juridical act with a third person, and the mandatary, by his acceptance, binds himself to exercise the power.

> The power and, where applicable, the writing evidencing it are called the power of attorney.

[Emphasis added.]

[49] According to Professor Claude Fabien, "[t]he term [juridical act] is used here in its broadest classical sense: any manifestation of intention designed to produce legal effects. . . . But the definition need not be strictly applied. It also covers cases where the mandatary performs a unilateral act such as a payment or registration."[27] (Emphasis added.) Here, Mr. Garneau gave 2310 the mandate to pay his debts, and payment is a legal mode by which obligations are extinguished.[28] Thus, there is a legal effect.

[50] Here are some of the rules in the Code that are relevant to the instant case:

> 2132. Acceptance of a mandate may be express or tacit. Tacit acceptance may be inferred from the acts and even from the silence of the mandatary.
>
> 2133. Mandate is either by gratuitous title or by onerous title. A mandate entered into between two natural persons is presumed to be by gratuitous title but a professional mandate is presumed to be given by onerous title.
>
> 2146. The mandatary may not use for his benefit any information he obtains or any property he is charged with receiving or administering in carrying out his mandate, unless the mandator consents to such use or such use arises from the law or the mandate.
>
> If the mandatary uses the property or information without authorization, he shall, in addition to the compensation for which he may be liable for injury suffered, compensate the mandator by paying, in the case of information, an amount equal to the enrichment he obtains or, in the case of property, an appropriate rent or the interest on the sums used.

[Emphasis added.]

[51] Professor Fabien acknowledges that the "mandatary's powers are determined first by the contract. . . . The Code's rules on mandate and the administration of the property of others[29] complete the picture."[30] [Emphasis added.]

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27 In *Reform of the Civil Code,* vol. 2-C (Montréal: Susan Altschul, 1993), "Mandate" chapter, at page 4.

28 See notably art. 1671 C.C.Q.

29 Articles 1299 to 1370.

30 *Reform of the Civil Code,* vol. 2-C, *supra* note 26, at page 6.

[52] Here, the scope of the mandate was described well in a letter specifying that 2310 was to use the funds in question to pay Mr. Garneau's creditors. Under article 2146 C.C.Q., 2310 was not entitled to use the amounts deposited into its account for its own purposes, unless the mandator consented to such use. In the instant case, the mandate letter did not recognize the existence of such a right. It is true that, in reality, 2310 temporarily appropriated moneys belonging to Mr. Garneau, and that it used those amounts for purposes other than those contemplated in the contract of mandate. However, these amounts were reimbursed by 2310, and the full amount of $305,441.32 was used to pay Mr. Garneau's debts or was remitted to him. In fact, 2310 paid out a greater amount.

[53] The contract in the case at bar is governed by the Code, and the Supreme Court of Canada clearly confirmed in *Victuni*, *supra*, that the mandatary does not become the owner of the amounts of money remitted to him; consequently, in such cases, the courts have long settled that there is no conveyance of property that could constitute a transfer.

[54] I repeat: if a loan is not a transfer for the purposes of the attribution rules and subsection 160(1) of the Act, the remittance of a sum of money to a mandatary so that it can be paid to Mr. Garneau's debtors is not a transfer for those purposes either. To avoid any ambiguity, even if, in the instant case, Mr. Garneau had personally deposited the money into 2310's bank account as part of the mandate that he had conferred to pay his creditors, there would not have been a transfer for the purposes of subsection 160(1) of the Act.

[55] In *Livingston*, the Federal Court of Appeal held that the property transferred was the right to demand that the bank give Ms. Livingston the full amounts deposited.[31] The value of this right was the total value of those amounts. Here, I cannot conclude that such a transfer took place. Indeed, the right to demand from the National Bank that all the sums deposited into 2310's bank account be remitted to it existed well before the amount of $305,441.32 was deposited into the account. The right was created by virtue of the agreement between 2310 and the National Bank. Indeed, the account was opened before March 19, 2002, and there was a balance of $1,795.79 (Exhibit A-3) before the cheque belonging to Mr. Garneau was deposited. Consequently, Mr. Garneau did not transfer any property to 2310.

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[31] See paragraph 21 of that decision, reproduced above.

[56] Moreover, even if one could consider that there was a transfer of such a right under the contract of mandate that authorized 2310 to manage Mr. Garneau's money deposited into the company's bank account, I cannot conclude that the value of that right was the total value of the amount remitted by Mr. Garneau, that is to say, $305,441.32, because 2310's only right was to withdraw this amount for Mr. Garneau's benefit. No mandatary of sound mind would pay $305,441.32 for the right to withdraw this amount for the sole benefit of his mandator. Unless the mandator allowed him to retain the interest income — which is not the case here[32] — a mandatary would pay nothing for such a right. On the contrary, one could expect the mandatary to demand remuneration for the service that he is rendering to the mandator.[33]

[57] Consequently, not only did 2310's patrimony not increase, but, far more significantly, Mr. Garneau's did not diminish. The Minister could have garnished the funds under section 224 of the Act in order to recover Mr. Garneau's unpaid taxes and demand that 2310 give it a part of the balance of the $305,441.32 held by 2310, but he did not do so.

[58] In my opinion, counsel for the respondent has also ascribed too great a scope to the doctrine propounded in *Livingston*. It is possible that a deposit into a third party's bank account constitutes a transfer, but all deposits of money into bank accounts are not necessarily transfers. The scope of *Livingston* must be limited to the facts of that case.

[59] It should also be added that the position that I am adopting is consistent with the position enunciated in *Livingston* by Justice Sexton, who writes, at paragraph 27:

> . . . The very purpose of subsection 160(1) is to preserve the value of the existing assets in the taxpayer for collection by the CRA. Where those assets are entirely divested, subsection 160(1) provides that the CRA's rights to those assets can be exercised against the transferee of the property. . . .
>
> [Emphasis added.]

But here, due to the existence of a contract of mandate, the property was not removed from Mr. Garneau's patrimony. Mr. Garneau did not divest himself of the property because, as mandator, he continued to be the owner of the funds in question. Consequently, there is no reason to apply section 160. The Minister could have

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[32] The bank account statement shows no interest credits.

[33] As was the case in *ADP Canada Co.*, *supra*.

seized the amounts held by 2310 and belonging to Mr. Garneau. His recovery efforts were not thwarted by a transfer of property to a third party.

[60] That interpretation is also consistent with the purpose pursued by Parliament in enacting the attribution rules, namely sections 74.1 to 75.1 of the Act and section 74 of the 1952 Act. Indeed, it is not necessary to resort to the attribution rules to tax the interest income that might have been generated by the $305,441.43. As mandatary, 2310 would not have had to report that income. Rather, the mandator, as the true owner of the amount in question, would have had to report the interest income, if there had been any. Since he did not divest himself of this amount, Mr. Garneau remained its true owner, and he is the one who would have had to report the income derived therefrom.

[61] Both for the purposes of the attribution rules and for the purposes of the collection rules in subsection 160(1) of the Act, the interpretation of the term "transfer" which the courts have consistently adopted and which I adopt here, is consistent with the Supreme Court of Canada's doctrine that "the words of an Act are to be read in <u>their entire context</u>, in their grammatical and ordinary <u>sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament</u>." (See paragraph 21 above.)

[62] The word "transfer" can undoubtedly have a very broad meaning; it can mean the moving from one place to another, as in the case of a transfer of capital from one country to another, in which case "transfer" has the same meaning as the French word "*virement*". A transfer can also mean an act whereby a person conveys a right to another person, such as where ownership is conveyed, for example. The latter meaning is analogous to the French words "*aliénation*" (alienation) "*cession*" (cession) or "*transmission*" (transmission) (see the *Petit Robert*). For the purposes of section 160 and the attribution rules, it is clear that the concept of "*virement*", or movement, is not the one accepted by the case law, nor does it correspond to the aim that Parliament seeks to achieve.

[63] If Parliament wants any movement of funds from one person's account to another to be caught by section 160 for the purposes of applying the paragraph 160(1)(*d*) and paragraph 160(1)(*e*) rules, it will have to amend the Act by adding a new principle broadening the concept of "transfer" for the purposes of those rules. In the absence of such an amendment, making a person liable for a third party's income tax merely because he has come into contact with funds or because funds have been deposited into his bank account would constitute a grave excess. Here, 2310 received $305,441.32 and disbursed the entire amount on behalf of and for the benefit of

Mr. Garneau as his mandatary. 2310 was in no way enriched. Paragraph 160(1)(*e*) does not seek to give the Minister a tool to make up for his lack of diligence in carrying out a garnishment process in a timely fashion; rather, it seeks to permit the Minister to hold the transferee accountable where a tax debtor has divested himself of a part of his patrimony to the detriment of the Minister's interests. If there is no divesting, impoverishment or diminishment of patrimony, there is no ground to apply the paragraph 160(1)(*e*) rule.

[64] Here, to illustrate the abuse that could occur if the Minister's interpretation were adopted, is the example described by Justice Boyle in *Gambino v. Canada*, 2008 TCC 601, [2008] T.C.J. No. 538 (QL), [2009] 3 C.T.C. 2129, at paragraph 30:

> **30** 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.

[Emphasis added.]

[65] It should be mentioned that, in *Gambino*, as here, the Minister relied to a great extent on the doctrine of the Federal Court of Appeal propounded in *Livingston*. At paragraph 24, Justice Boyle writes: "As stated, the Crown relies heavily on the Federal Court of Appeal's decision in *Livingston*."

[66] Justice C. Miller, in *Pearson v. The Queen*, 2009 TCC 338, at paragraphs 14 and 16, also endorses Justice Boyle's reasoning, cited above.

[67] There is no doubt that, if Mr. Garneau had represented to the tax authorities that the amount remitted to 2310 was no longer in his patrimony because there had been a transfer of ownership, and if he had given them an apparent contract or a document supporting this description of the transaction even though a counter-letter created a contract of mandate, the situation would have been different. In such an event, the Minister could have relied on the apparent contract to recover the amounts owed to him by making an assessment under subsection 160(1) of the Act, and, under articles 1451 *et seq.* of the Code, he could have disregarded the hidden contract. In this regard, see *inter alia* my decision in *Bolduc v. The Queen*, [2002] T.C.J. No. 664 (QL), 2003 DTC 221, affirmed by the Federal Court of Appeal, 2003 FCA 411, 2003 DTC 5735, [2004] 2 C.T.C. 173. It should be noted

here that the Reply to the Notice of Appeal alleges no simulation on Mr. Garneau's part in handing over the sum of $305,441.32 to 2310. Nor did the evidence adduced at the hearing disclose the existence of such a simulation.

[68] It is important to note that the amount deposited into 2310's bank account was used to pay off debts of Mr. Garneau or of certain members of his family. Under such circumstances, it is difficult to see how a third party could have believed that the payments made by 2310 were being made on its own behalf, since the creditor knew perfectly well that the debtor was Mr. Garneau or a member of his family, not 2310. Thus, there is no ground to find that a simulation existed here.

[69] Counsel for the respondent attempted to challenge the validity of the contract of mandate by arguing that one of the conditions of its existence had not been fulfilled because its object ran counter to public order. Counsel has cited no cases in support of his claims in this regard. I see nothing illegal or against public order in the fact that Mr. Garneau gave 2310 the mandate to manage his funds and spend the amount that he entrusted to it. Those contracts can be found in the business world, notably where certain employers use the services of companies specializing in the payment of salaries to employees.[34] Even if the contract of mandate were invalid, this would not help the respondent's cause because the annulment of the mandate would not give rise to a gift equivalent to a transfer or to any other transaction of the same nature. Mr. Garneau never had the intention of transferring ownership of the insurance proceeds to 2310. The parties' intention was clear: Mr. Garneau was giving 2310 the mandate to spend the amount of the proceeds, that is to say, $305,441.32, and that is what 2310 did; indeed, it spent the entire amount between the months of March and December 2002. It should also be added that this intention of the parties is reflected in the letter of March 23, 2002, in which Mr. Garneau gives 2310 the mandate to manage his money and make expenditures in accordance with his instructions. In fact, a similar argument was made, unsuccessfully, in *Victuni*. Here is how Justice Pigeon of the Supreme Court of Canada describes the situation at page 586:

> Additionally, the Provincial Court judge properly observed:
>
> > [TRANSLATION] …if the contract R-10 is void, as learned counsel for the respondent contends, it does not automatically follow that Victuni thereby becomes the absolute owner of the land which is the object of the contract. <u>If the contract is void, it produces no effect and each party to the contract is restored to its prior position</u>: Victuni recovers bond R-13 and Place Victoria land R-12.

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34 See, *inter alia*, the decision in *ADP Canada Co.*, *supra*.

[Emphasis added.]

[70] Applying strictly the interpretation of the word "transfer" adopted by the case law, I cannot conclude that there was a transfer of property or that Mr. Garneau divested himself of the amount at issue in favour of 2310. As mandator, he kept the power to give instructions regarding the expenditure of this amount. As Justice Pigeon of the Supreme Court of Canada noted in *Victuni*, it would have been a crime for 2310 to appropriate it.

[71] In many respects, the facts of this appeal resemble those in *Armenti v. The Queen*, 2007 TCC 389, a decision rendered by Justice Bédard. I adopt his conclusion, which he worded as follows:

> [17] We will begin by considering the issue of whether there was a transfer of the first two cheques from the Corporation to the Appellant, that being the first condition for the application of subsection 160(1) of the Act stated in *Raphael, supra*. The Respondent submits that it was the Corporation, through its authorized agent, Enzo Armenti, who gave the first two cheques, endorsed in blank, to the Appellant, and not the father in his personal capacity who did so. In other words, the Respondent argues that there was no transfer between the Corporation and the father. The issue of whether it was the Corporation or the father who gave the two cheques to the Appellant would require a determination if giving these two cheques endorsed in blank constituted a transfer within the meaning of subsection 160(1) of the Act. However, in my opinion, giving a cheque endorsed in blank does not automatically constitute a transfer for the purposes of subsection 160(1) of the Act. The Respondent, invoking relevant provisions of the BEA, contends that giving over a cheque endorsed in blank does constitute a transfer because the person thus acquiring possession of the cheque automatically becomes the owner of the cheque or the holder of the right to cash it. In my opinion, the relevant provisions of the BEA merely allow third parties to assume that the person who has possession of a cheque endorsed in blank is the owner thereof and is also entitled to cash it. The BEA does not enable one to characterize the nature of the transaction that occurred in this case between the person who gave the cheque endorsed in blank and the person who received it. In this case, the evidence showed that the father, regardless of whether he was acting in his personal capacity or as the Corporation's authorized agent, never wanted to transfer ownership of the two cheques to the Appellant, nor did he want ownership of these cheques to pass to the Appellant. At no time did the Appellant have the right to use, enjoy or dispose of these two cheques as he saw fit. Thus, contrary to the Respondent's position that there could not be a mandate here, I am of the opinion that the transaction that occurred between the father — whether acting in his personal capacity or as the Corporation's authorized agent — and the son was in the nature of a mandate within the meaning of the *Civil Code of Québec*. Indeed, the evidence very clearly showed that in this case, the father, whether personally or as the Corporation's authorized agent, at most gave the Appellant the mandate to cash the two cheques and to hand over to him the amounts thereof,

> which mandate the Appellant carried out gratuitously. Since in this case there was never a transfer of ownership of these two cheques to the Appellant, I am of the opinion that with regard to these cheques, the Appellant cannot be held jointly and severally liable with the Corporation for its tax debt.
>
> [Emphasis added.]

[72] In a very recent case, *Lapierre v. The Queen*, 2012 TCC 299, Justice Angers reached a similar conclusion. Here is what he wrote at paragraph 22:

> [22] In my view, the father never personally, or as representative of 9077, intended to transfer ownership of the money in question, that is to say, the $100,000, or an even larger amount, given that he demanded that $114,000 be returned to him. He never intended the property of the amount to be transferred the Appellant, with the exception of the $10,000, which was for her. Therefore, she could not use this amount as she pleased, and in my opinion, she was simply acting as mandatary of her father, who represented 9077. What transpired between 9077 and the appellant was in the nature of a mandate within the meaning of the *Civil Code of Québec*.
>
> [Emphasis added.]

[73] Although the respondent did not make the argument in her oral submissions, I would like to discuss an argument that might be advanced in support of the respondent's position. According to this argument, one can accept that amounts remitted to a mandatary do not constitute a transfer so long as the money remains in a trust account separate from the mandatary's other bank accounts. If the mandatary deposits the money into a common account where it is mingled with the mandatary's other funds or with other mandators' funds, the mandator loses the right of ownership, and, consequently, a transfer has occurred. This argument is based on the nature of money, which constitutes fungible property. In several decisions, it has been recognized that where fungible property like money is mingled with the property of other persons, the owner of the property loses all rights to claim it. The argument is based, in part, on the following comment by Justice Hesler of the Quebec Court of Appeal in *9083-4185 Québec Inc.*,[35] at paragraph 59, where she cites an author for the proposition that [TRANSLATION] "from the moment the funds

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[35] The full cituation is *Raymond Chabot inc., ès qualités de syndic à l'actif de 9083-4185 Québec inc., faillie, et Caisse populaire Desjardins de Montmagny, c. Sous-ministre du Revenu du Québec et 9083-4185 Québec inc., et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation*, [2007] J.Q. No. 14712 (QL) 2007 QCCA 1837, J.E. 2008-155, [2008] R.J.Q. 39, [2008] R.D.F.Q. 5 (*9083-4185 Québec Inc.*).

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."

[74] In my opinion, this argument is attractive but erroneous. Indeed, the issue to be decided here is not whether a person has the right to claim ownership of certain amounts in the context of a seizure before judgment, a bankruptcy or a similar arrangement, but, rather, whether there has been a transfer for the purposes of subsection 160(1) of the Act. Furthermore, the fact that a person cannot claim fungible property does not necessarily mean that there has been a transfer of ownership.

[75] The context in which the right to revendicate property becomes important requires explanation. To cite an example, here is how Justice Hesler framed the issue and the stakes involved in *9083-4185 Québec Inc.*:

> [TRANSLATION]
>
> 20 The sole question that must be decided in order to dispose of these appeals is as follows: is the Deputy Minister of Revenue the owner of the sums of money collected or collectible as GST and QST by the bankrupt, or, on the contrary, is he merely a creditor of the bankruptcy who is subject to a collocation in accordance with the provisions of the *Bankruptcy and Insolvency Act*? If the Deputy Minister has a right of ownership in the money, as opposed to a claim against the bankruptcy, the trustee of the bankruptcy is not statutorily seized of the amounts concerned and those amounts are not part of the bankruptcy estate. Otherwise, he is merely an unsecured creditor of the bankruptcy, in which case the trustee will eventually distribute his share of the estate.
>
> [Emphasis added and footnote omitted.]

[76] Justice Hesler then zeroes in on the issue of revendication in the following terms:

> [TRANSLATION]
>
> 25 Secondly, we must examine the conditions under which a right to revendicate a sum of money exists.
>
> 26 We must do so because money is fungible property. A bank account holder, for example, is not the owner of the funds in the account. He or she has a claim against the bank for the amount on deposit. It must therefore be determined whether the Deputy Minister of Revenue is entitled to claim the amounts collected as GST and QST by the bankrupt debtor as the true owner of these amounts.

[Emphasis added.]

[77] Justice Hesler concluded that the Deputy Minister was merely an unsecured creditor. In *Les Boutiques San Francisco incorporées c. Claudel Lingerie inc.*, [2004] J.Q. No. 6606 (QL), J.E. 2004-1359, 2004 CanLII 639, Justice Gascon of the Quebec Superior Court had to decide whether a party that supplies property under a consignment contract has a [TRANSLATION] "right to revendicate the proceeds of the sale of the consigned property . . . In other words, is the consignor the owner or a creditor of these sums of money?"[36] Justice Gascon cited the answer provided by a Canadian doctrinal work:

> [TRANSLATION]
>
> 52 For their part, Houlden and Morawetz have written as follows concerning ownership of the proceeds of the sale of consigned property:
>
> > If there is a valid consignment agreement and the consignee goes into bankruptcy, the consignor will be entitled to the following remedies:
> >
> > (a) possession of any goods which can be identified: *Cocks v. Consort Trading Co.*, [1921] 3 W.W.R. 434, 65 D.L.R. 778 (Alta. K.B.). If the trustee sells the goods, the consignor will be entitled to the proceeds: *Re Adanac Grain Co.* (1922), 2 C.B.R. 376 (Man. Q.B.); *Cocks v. Consort Trading Co.*, *supra*;
> >
> > (b) amounts owing by customers of the bankrupt who purchased goods on credit: *Cocks v. Consort Trading Co.*, *supra*;
> >
> > (c) proceeds of the sale of consigned goods. If the proceeds have been kept in a trust account, the consignor will be entitled to the money in the account. If the proceeds have been used by the bankrupt but can be traced into some identifiable form, the consignor will be entitled to them in that form: *Cotter v. Mason* (1870), 30 U.C. Q.B. 181. If the proceeds have been so intermingled as not to be identifiable, the consignor will only be an unsecured creditor of the bankrupt estate: *Oglivie* [*sic*] *Flour Mills Co. v. C.C.M.T.A.* (1925), 7 C.B.R. 31 (Sask. C.A.); *Re Yachting & Sports Pigeon Inc.* (1995), 2 C.B.R. (4th) 236, 1995 CarswellQue 221 (Que. S.C.)

[Emphasis added and footnote omitted.]

[78] He pursues his analysis as follows:

> [TRANSLATION]

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[36] Paragraph 1 of the decision.

56 . . . The right to claim the consigned goods before their sale does not necessarily entail the right to claim the proceeds of their sale afterwards, since each constitutes distinct property.

57 The reason is very simple. It is common knowledge that money is fungible property. In order to be able to claim ownership of money, it must be clearly identifiable. It is not enough that it be merely quantifiable. Our Court has said this one more than one occasion.

58 In *Chua* *c. Von Braun*, Justice Croteau emphasized that, in order for a person to establish a right in a sum of money, it must be shown that the money claimed can be identified, because it is fungible property. From the moment the money is mingled with the funds of a particular account, the deposited money loses all its identity.

59 In *Yachting & Sports Pigeon inc.*, Justice Chaput came to the same conclusion. When called upon to determine whether a creditor owned a sum of money invested in a trust fund, he made the following remarks:

> . . . Between and after these deposits, other deposits were made into the account and several cheques were drawn. All the amounts were mingled in the same account, the balance of which fluctuated as the money came and went.
>
> (page 7 of the full text)
>
> . . .

Whether a trust or a mandate is involved, the important element in keeping property from coming under the bankruptcy trustee's administration is that the property be held for the bankrupt by a third party, that it be identifiable as such in his hands, and that it not be available to the third party for any purposes other than the performance of the mandate.

[Emphasis added and footnotes omitted.]

At paragraphs 4 and 5, Justice Gascon specifies:

[TRANSLATION]

Here, the consequence is major because BSF is currently under the protection of the *Companies' Creditors Arrangements Act* (CCAA).

Thus, if Claudel and Vanessa are merely creditors of the funds, the funds will be part of the arrangement plan that BSF must submit to all of its many creditors. But if Claudel and Vanessa own the funds, the amounts to which they are entitled do not get caught in the workings of the CCAA.

[Emphasis added and footnote omitted.]

[79] In all three cases, *Les boutiques San Francisco*, *Yachting & Sports Pigeon inc.*[37] and *9083-4185 Québec inc.*, the parties were unsuccessful in their claims of ownership but were nonetheless considered creditors.

[80] *Chua*,[38] referred to in paragraph 78 above, involved a seizure before judgment under the *Code of Civil Procedure* (C.C.P.). In order for a judge to authorize such a seizure, there must either be ground to fear that, without this remedy the recovery of the debt may be put in jeopardy,[39] or the property must be movable property that the person has a right to revendicate.[40] The judge annulled the seizure because the plaintiff did not succeed in showing that he had a right of revendication. The judge stated as follows:

> [TRANSLATION]
>
> 24 In *Montgomery*, [1977] C.S. 862, cited above, Justice Dugas wrote:
>
> > [TRANSLATION]
> >
> > In order to be entitled to the writ of seizure before judgment referred to in article 734, <u>one must be aiming at identified (or identifiable) movable property</u>, and the deposited property lost all its identity when it was mingled in the banks' mass of funds.
>
> 26 Thus, since the plaintiff is unable to identify the movable property that he revendicated in his seizure by garnishment before judgment, and this is a very important legal fact that must be established in order to be entitled to such a remedy, the Court has no choice but to declare that the two affidavits in support of the applications are insufficient within the meaning of article 738 C.C.P.
>
> [Emphasis added.]

[81] Thus, where a person has lost all rights to revendicate property in a bankruptcy or a seizure before judgment, that does not mean that he has transferred ownership of his property to someone else. It merely means that he will have to be treated like all other creditors and rateably share in the mass of the bankruptcy estate, or wait until he obtains the judgment in order to have his rights enforced.

[82] In order for there to be a transfer under subsection 160(1) of the Act, the transferor must intend to transfer the right of ownership in his property to the

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37 [1995] J.Q. No. 1872 (QL) EYB 1995-86811

38 [1993] J.Q. No. 2603 (QL), J.E. 93-1872, (S.C.).

39 Art. 733 C.C.P. .

40 Art. 734(1) C.C.P.

transferee. When a mandator remits a sum of money to a mandatary so that it can be disbursed to pay off the mandator's debts or given back to the mandator upon request, there is clearly no intention to transfer ownership of the money. Moreover, in cases where persons have an interest in revendicating property and that revendication is rejected, the case law holds that the person claiming the property is a mere creditor, not that ownership has been transferred. Under such circumstances, the person claiming the property is in the same situation as a person who has lent money to a borrower. In both cases, there is neither an impoverishment of the lender or mandator's patrimony, nor an enrichment of the borrower or mandatary's patrimony. Consequently, the tax authorities can carry out a garnishment in order to obtain the payment of the amount remitted to the mandatary, whether he be an owner or a mere creditor. Thus, for the purposes of subsection 160(1) of the Act, there is no valid distinction to be drawn between a case where the funds conferred on the mandatary are mingled with the mandatary's other funds, and a case where they are not. Moreover, in the instant case, I have been able to trace Mr. Garneau's funds within 2310's account thanks to the evidence adduced by 2310.

[83] Since it has been concluded that there was no transfer between Mr. Garneau and 2310, it is unnecessary to discuss with the question whether the parties were dealing with each other at arm's length. In any event, since there has been no transfer of ownership between the two parties, it is difficult to determine how the existence of a *de facto* non-arm's length relationship between 2310 and Mr. Garneau could be established. There was no statutory non-arm's length relationship between the parties, since Mr. Garneau and Mr. Pratte were unrelated to each other. Under the contract of mandate, 2310 was required to carry out Mr. Garneau's instructions — specifically, to pay his debts. Under such circumstances, there is no reason to be concerned with the concept of non-arm's length relationship because, by definition, a mandatary must always follow his mandator's instructions and because, for income tax purposes, no transfer has been made between the mandator and the mandatary.

[84] For all these reasons, I find that the Minister's assessment is unfounded and must be vacated due to the absence of one of the essential conditions for the application of subsection 160(1) of the Act, namely, a transfer of property.

[85] The appellant shall have its costs.

Signed at Magog, Quebec, this 18th day of October 2012.

"Pierre Archambault"

Archambault J.

Translation certified true
On this 15th day of May 2013

François Brunet, Reviser

CITATION:	2012 TCC 365
COURT FILE NO.:	2009-2880(IT)G
STYLE OF CAUSE:	9101-2310 QUÉBEC INC. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Val-d'Or, Quebec
DATE OF HEARING:	June 12, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice Pierre Archambault
DATE OF JUDGMENT:	October 18, 2012

APPEARANCES:

Counsel for the appellant:	Simon Corbeil
Counsel for the respondent:	Simon Olivier de Launière

COUNSEL OF RECORD:

For the appellant:

Name:	Simon Corbeil
Firm:	Cain Lamarre Casgrain Wells Val-d'Or, Quebec

For the respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada