

**Date: 20070404**

**Dockets: A-547-05  
A-548-05**

**Citation: 2007 FCA 136**

**CORAM: DESJARDINS J.A.  
DÉCARY J.A.  
NADON J.A.**

**A-547-05**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**ADELA GILBERT**

**Respondent**

**A-548-05**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**PIERRE GILBERT**

**Respondent**

Hearing held at Montréal, Quebec, on February 21, 2007.

Judgement delivered at Ottawa, Ontario, on April 4, 2007.

REASONS FOR JUDGMENT:

NADON J.A.

CONCURRED IN BY:

DESJARDINS J.A.  
DÉCARY J.A.

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**REASONS FOR JUDGMENT**

**NADON J.A.**

[1] This is an appeal of a decision by Madam Justice Lamarre Proulx of the Tax Court of Canada dated October 17, 2005, in dockets 2002-3402(IT)G and 2002-3401(IT)G, allowing the appeal of Adela and Pierre Gilbert (the respondents) against an assessment made in their regard by the Minister of National Revenue (the Minister or the appellant) pursuant to section 160 of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the Act).

[2] The appellant asked the Court to vary the Tax Court of Canada's decision by ordering that the fair market value of the dividends correspond to the actual amount of the dividend received by each of the respondents. The appellant also asked that the respondents' cross-appeal be dismissed with costs.

[3] For their part, the respondents asked the Court to vary the Tax Court of Canada's decision and to decide that the payment of dividends does not amount to a transfer without consideration within the meaning of paragraph 160(1)(a) of the Act.

**Statement of facts**

[4] The respondents were the sole shareholders of the corporation Sécovac Inc. (the corporation) and responsible for the administration and control of the corporation. Incorporated in 1996, the corporation was in the field of design and sales of lumber drying kilns.

[5] For tax years 1999 and 2000, the corporation paid dividends to each of the respondents totalling \$55,000. At the time the dividends were paid, the corporation had a tax debt of \$36,338.04 owing to the Minister of National Revenue.

[6] On June 6, 2002, the Minister assessed each of the respondents under section 160 of the Act, in the amount of \$55,000.

[7] The respondents appealed the Minister's decision to the Tax Court of Canada and on October 17, 2005, Lamarre Proulx J. allowed the appeal in part (*Gilbert v. Canada* [2005] T.C.J. No. 570). First, she determined that paying a dividend to a shareholder was a transfer without consideration within the meaning of subsection 160(1) of the Act. Second, she determined that the fair market value of the dividends paid to the respondents was the amount transferred less the tax payable by the transferee for the dividend received.

[8] On November 15, 2007, the appellant filed a notice of appeal before this Court challenging the second finding by the Tax Court of Canada. The respondents challenged the judge's first finding by way of a notice of cross-appeal.

### **Issues**

[9] Two issues are therefore raised by the appeal and by the cross-appeal. The first is whether the payment of dividends to the respondents was a transfer of property without consideration within

the meaning of paragraph 160(1)(a) of the Act. If we answer the first question in the affirmative, the second question arises regarding the fair market value of the dividends paid to the respondents.

### Analysis

[10] Prior to reviewing the judge's decision, I immediately refer to subsection 160(1) of the Act:

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

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

(b) a person who was under 18 years of age, or

(c) a person with whom the person was not dealing at arm's length, the following rules apply:

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

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

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

(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in

**160. (1)** Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes :

a) 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 révisés 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 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

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.

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.

[11] With regard to the first issue, Lamarre Proulx J. determined that the dividends paid to the respondents amounted to a transfer without consideration within the meaning of paragraph 160(1)(a) of the Act. At paragraphs 30 to 32 of her reasons, she stated the following:

[30] From my understanding of corporate law, it is when a corporation is wound up that the shareholders share the remaining property of the corporation. The issuing of a dividend is different in nature. I cannot accept the argument that receipt of a dividend causes the correlative impoverishment of the shareholder transferee. I do not believe that is the case in corporate law and it is decidedly not the case in tax law. In tax law, a person who receives a dividend must include it in computing his income because it is an increase in his income. For the corporation that issues it, it constitutes a reduction of its retained earnings and a reduction of its assets.

[31] There is therefore impoverishment of the issuing corporation and enrichment of the transferee, as is the case in any transfer of property subject to section 160 of the Act.

[32] As to the possibility of consideration to be given for the issuing of a dividend, I believe that the Supreme Court of Canada clearly stated in *Neuman (supra)* there was no such possibility. The right to a dividend stems from ownership of the shares. The consideration given to acquire the shares must not be confused with the consideration for dividends. The consideration given to acquire shares is considered for the acquisition and disposition of shares. It is not a consideration given for a dividend.

[12] In my opinion, Lamarre-Proulx J. did not err in dismissing the respondents' argument to the effect that a dividend was paid to them as shareholders of the corporation for consideration, since she was simply following the precedents of our Court and the Supreme Court.

[13] Specifically, Lamarre Proulx J. referred to *Newman v. M.N.R.*, [1998] 1 S.C.R. 770, at page 791, where the Supreme Court of Canada, referring with approval to the dissenting reasons of LaForest J. in *McClurg v. Canada*, (1990) 3 S.C.R. 1020, clearly confirmed that no consideration can be given for the payment of a dividend:

. . . a dividend is received by virtue of ownership of the capital stock of a corporation. It is a fundamental principle of corporate law that a dividend is a return on capital which attaches to a share, and is in no way dependent on the conduct of a particular shareholder.

[14] This finding ratified the determination of Rip J. of the Tax Court of Canada in *Algoa Trust v. Canada*, [1993] 1 C.T.C. 2294, page 2303, a decision which our Court dismissed on appeal, on February 4, 1998 (Court docket A-201-93):

When a person subscribes for shares of a corporation he or she is paying theoretically for the acquisition of a share of the ownership of the corporation and receives shares of a class in the capital stock of the corporation. The shareholder gives consideration for the shares and not for what the shares may bring. Ownership of shares gives the shareholder certain rights: right to vote as a shareholder, right to a distribution of capital on the winding-up of the corporation, right to receive dividends. (This list is not meant to be exhaustive.) **When the shareholder receives a dividend it is not as a result of any consideration he or she gave the corporation and which the corporation is obliged to pay for investing. When a shareholder purchases shares he is not purchasing an income right.** A shareholder receives a dividend solely because the right to a dividend is an attribute of owning shares.

[Emphasis added.]

[15] With regard to the issue of whether the payment of a dividend is a transfer of property within the meaning of section 160 of the Act, Sharlow J.A. in *Addison & Leyen Ltd. v. Canada* [2006] F.C.J. No. 489, at paragraphs 57 to 60, stated that dividends could be subject to section 160:



[57] . . . One of the questions raised but not answered by the 1981 amendment to section 160 was whether the payment of a dividend could be a "transfer of property" within the meaning of section 160. It is possible to imagine a corporation, especially a closely held one, using the payment of a dividend to divest itself of assets in order to avoid paying a tax liability, but in most cases the payment of a dividend is an ordinary commercial transaction. A dividend is also taxable income to the recipient (except for certain corporate recipients) . . .

[60] . . . **Thus, the 1993 decision of the Tax Court in *Algoa Trust* is the leading authority for the proposition that section 160 may apply to a dividend.**

[Emphasis added.]

[16] Despite his very clever arguments, Mr. Ryan, the respondents' counsel, did not persuade me that the respondents had given consideration for the dividend they were paid by the corporation. Moreover, he did not persuade me that there was a basis for reconsidering Rip J.'s determination that a shareholder receiving a dividend does not give any consideration.

[17] I now turn to the second issue. According to subparagraph 160(1)(e)(i) of the Act, the transferee and the transferor are jointly and severally liable to pay a tax debt in an amount equal to "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".

[18] In *Nash v. Canada*, 2005 FCA 386, our Court agreed with the definition of "fair market value" set out by Cattanach J. of the Federal Court in *Henderson Estate and Bank of New York v. M.R.N* (1973), 73 D.T.C. 5471, at page 5476 (affirmed by this Court in [1975] F.C.J. No. 613), namely:

. . . the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell. I would add that the foregoing understanding as I have expressed it in a general way includes what I conceive to be the essential element which is an open and unrestricted market in which the price is hammered out between willing and informed buyers and sellers on the anvil of supply and demand.

[19] Moreover, in *Hewett v. Canada*, [1997] F.C.J. No. 1541 (QL), our Court determined that the fair market value of property had to be assessed in the hands of the transferor and that the value of transferred property had to be the same in the patrimony of the transferor as it was in that of the transferee.

[20] In this case, the transferred property is a dividend in the amount of \$55,000 received by each of the respondents. Applying the definition of fair market value accepted by our Court in *Nash*, *supra*, I find that the fair market value paid to the transferor for the purposes of section 160 is \$55,000 for each of the respondents.

[21] It is therefore this amount which must be assessed, i.e. the amount that the Minister could have seized in the hands of the corporation had the transfer not been effected. It appears to me that this determination is the only one possible considering the fact that the fair market value must be assessed by considering that the property is still in the hands of the transferor, namely the respondents. This finding is consistent with section 160 of the Act, the purpose of which is to prevent taxpayers from transferring their property in order to circumvent the Minister's assessment for unpaid taxes.

[22] Moreover, I am satisfied that the fiscal consequences for the respondents resulting from the transfer are not at all relevant in regard to determining fair market value.

[23] Accordingly, in my opinion, Lamarre Proulx J. erred in deciding that the fair market value of a dividend is the amount of the dividend less the income tax payable on that dividend.

**Conclusion**

[24] I would allow the appeal with costs, I would dismiss the cross-appeal and I would set aside the decision of the Tax Court of Canada. Deciding as the Tax Court of Canada should have decided, I would dismiss the appeal filed by the respondent against the Minister's assessment with costs.

“M. Nadon”

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J.A.

“I concur with these reasons.  
Alice Desjardins J.A.”

“ I concur with these reasons.  
Robert Décary J.A.”

Certified true translation

Kelley A. Harvey, BCL, LLB

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-547-05

**STYLE OF CAUSE:** Her Majesty the Queen v. Adela Gilbert

**PLACE OF HEARING:** Montréal, Quebec

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**CONCURRED IN BY:** DESJARDINS J.A.  
DÉCARY J.A.

**DATE OF REASONS:** April 4, 2007

**APPEARANCES:**

Jane Meagher  
Marie-Aimée Cantin

FOR THE APPELLANT

Paul Ryan

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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**FEDERAL COURT OF APPEAL**

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