**Date: 20080307**

**Docket: A-213-07**

**Citation: 2008 FCA 89**

**CORAM:** **LÉTOURNEAU J.A.**
**SEXTON J.A.**
**PELLETIER J.A.**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**JEAN LIVINGSTON**

**Respondent**

Heard at Vancouver, British Columbia, on January 22, 2008.

Judgment delivered at Ottawa, Ontario, on March 7, 2008.

REASONS FOR JUDGMENT BY: SEXTON J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
PELLETIER J.A.

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## REASONS FOR JUDGMENT

**SEXTON J.A.**

[1] The power to tax means little without the power to collect. As a result, the *Income Tax Act* R.S.C. 1985, c. 1 (5th Supp.) (the "Act") provides for a myriad of powers to collect taxes owed that would otherwise not be obtainable when taxpayers attempt to evade their creditors. These powers must be interpreted in light of their intended purpose and within the contexts of the factual situations to which they are applied.

[2] This is an appeal by Her Majesty the Queen (the "appellant") of the judgment of Tax Court Justice Beaubier (the "Tax Court Judge") who held that section 160 of the Act had not been

engaged when Jean Livingston (the "respondent") accepted a taxpayer's funds in order to defeat the Crown as a creditor for unpaid taxes.

[3] For the reasons that follow, I would allow the appeal.

**FACTS**

[4] The respondent and Michele Davies ("Ms. Davies") have been friends for 11 years. Ms. Davies personally owed around $80,000 in taxes, and was potentially liable for over $700,000 in taxes and various remittances and interest as director of various corporations. When the Canada Revenue Agency (the "CRA") began attempting to collect Ms. Davies' tax debt, no funds could be collected. Ms. Davies repeatedly transferred funds into new banking and brokerage accounts before the CRA could locate and collect the money owed. The respondent was well-aware of Ms. Davies' collection problems. After numerous discussions, the respondent opened a bank account in her name only at a branch of CIBC. The respondent was the sole account holder and signatory with respect to the account.

[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. The respondent provided Ms. Davies with the only debit card in order to allow Ms. Davies to make withdrawals from the account. The respondent had also signed blank cheques on the account which Ms. Davies could use. The respondent had the ability to take money from the account at any time;

she also had the ability to close the account. All bank statements, however, were sent to Ms. Davies and not the respondent.

[6] During the period from October 16, 2001 to April 28, 2003, funds totalling $36,650.82 were deposited into the bank account. However, bank records seem to indicate that there was never more than $9,000 in the account at any one time. The funds included money withdrawn from Ms. Davies' RRSP, Canada Child Tax Benefit and GST Credit cheques, welfare cheques payable to Ms. Davies and spousal support seized from Ms. Davies' ex-spouse by the British Columbia Family Maintenance Enforcement Program.

[7] On April 30, 2003, Ms. Davies declared bankruptcy. When her estate was distributed, the CRA received $233 in satisfaction of the $80,000 tax debt. Ms. Davies did not disclose in her sworn statement in bankruptcy that she was the beneficiary of trust funds, despite the fact that on and around the date her statement was sworn, there was around $1,000.00 in the respondent's account.

[8] The respondent was assessed for the total amount of money that had been deposited into the account between October 16, 2001 to April 28, 2003, namely $36,650.82.

**DECISION BELOW**

[9] The Tax Court Judge determined that in order for subsection 160(1) of the Act to apply, the following four criteria must be met:

1) There must be a transfer of property;

2) The parties must not be dealing at arm's length;

3) There must be no consideration or inadequate consideration flowing from the transferee to the transferor (I would note that the trial judge considered the test to be "No consideration or inadequate consideration flowing from the **transferor** to the **transferee**" [emphasis added]: this is a mistaken quotation of the test as cited in *Raphael v. Canada* 2002 FCA 23.); and

4) The transferor must be liable to pay tax under the Act at that time.

[10] The Tax Court Judge found that the first, second and fourth criteria had been fulfilled. However, he found that there had been consideration flowing from the respondent to Ms. Davies. Specifically, he concluded the following (at paragraphs 3 & 5):

> The deposit by Ms. Davies of funds into Ms. Livingston's name and the delivery by Ms. Livingston to Ms. Davies of a bank debit card and signed blank cheques on the Account constitute an exchange of consideration. As a result, there was a form of contractual agreement between the parties.
>
> […]
>
> At all the times that Ms. Davies made the transfers of each sum, Ms. Davies had the ability to take each sum in full by using a signed blank cheque from the Appellant or by using the bank debit card. Ms. Davies even got the bank account statements so she, and not Mrs. Livingston, was the person who knew what was in the Account, although Ms. Livingston also had the power to find that out and to take anything in the Account at any time. But, in any event, these findings establish that at all times Ms. Livingston provided adequate consideration to Ms. Davies for the deposit of these funds by Ms. Davies.

The Tax Court Judge also emphasized that the respondent did not obtain any benefit from the bank account.

[11] However, the Tax Court Judge rejected the respondent's contention that the respondent was a bare trustee of the funds in question. He found that the Court will not favour a transferor where property is transferred with the intention of prejudicing a creditor. Nevertheless, as the third criterion had not been fulfilled, subsection 160(1) did not apply to the respondent.

[12] The Tax Court Judge made a number of findings of fact that are crucial for the purposes of this appeal. He found that the respondent's purpose in opening the bank account was to enable Ms. Davies to place her funds beyond the reach of creditors, including the CRA. He even went so far as to conclude that both parties conspired to prejudice the CRA (at paragraph 6). He also found that Ms. Davies was the only person who used the account; that is, the respondent never deposited into, nor withdrew funds from the account.

**ISSUES**

[13] Broadly speaking, there is only one issue in this appeal: was subsection 160(1) engaged when Ms. Davies made numerous transfers to the respondent's bank account? More specifically there are three areas of analysis to explore in this appeal:

1) What is the test for the application of subsection 160(1) of the Act?
2) Was there a transfer of property?
3) Was there adequate consideration flowing from the transferee to the transferor?

## STANDARD OF REVIEW

[14] In appellate review, the standard of review is governed by the nature of the question at issue. Questions of law are generally reviewed on a standard of correctness, while findings of fact or mixed fact and law will be set aside only if the trial judge has made an overriding and palpable error: see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

## ANALYSIS

*Interpreting Subsection 160(1)*

[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.

[16] Subsection 160(1) of the Act provides as follows:

| | |
|---|---|
| Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to | Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen d'une fiducie ou de toute autre façon à l'une des personnes suivantes: |
| (*a*) the person's spouse or common-law partner or a person who has since become the person's spouse or common-law | *a*) son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait; |

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 therefore, and

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

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

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

*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 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 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

| | |
|---|---|
| but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act. | d'une année d'imposition antérieure ou pour une de ces années;<br><br>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. |

[17] In light of the clear meaning of the words of subsection 160(1), the criteria to apply when considering subsection 160(1) are self-evident:

1) The transferor must be liable to pay tax under the Act at the time of transfer;
2) There must be a transfer of property, either directly or indirectly, by means of a trust or by any other means whatever;
3) The transferee must either be:
    i. The transferor's spouse or common-law partner at the time of transfer or a person who has since become the person's spouse or common-law partner;
    ii. A person who was under 18 years of age at the time of transfer; or
    iii. A person with whom the transferor was not dealing at arm's length.
4) The fair market value of the property transferred must exceed the fair market value of the consideration given by the transferee.

[18] The purpose of subsection 160(1) of the Act is especially crucial to inform the application of these criteria. In *Medland v. Canada* 98 DTC 6358 (F.C.A.) ("*Medland*") this Court concluded that "the object and spirit of subsection 160(1), is to prevent a taxpayer from transferring his property to

his spouse [or to a minor or non-arm's length individual] in order to thwart the Minister's efforts to collect the money which is owned to him." See also *Heavyside v. Canada* [1996] F.C.J. No. 1608 (C.A.) (QL) ("*Heavyside*") at paragraph 10. More apposite to this case, the Tax Court of Canada has held that the purpose of subsection 160(1) would be defeated where a transferor allows a transferee to use the money to pay the debts of the transferor for the purpose of preferring certain creditors over the CRA (*Raphael v. Canada* 2000 D.T.C. 2434 (T.C.C.) at paragraph 19).

[19] As will be explained below, given the purpose of subsection 160(1), the intention of the parties to defraud the CRA as a creditor can be of relevance in gauging the adequacy of the consideration given. However, I do not wish to be taken as suggesting as there must be an intention to defraud the CRA in order for subsection 160(1) to apply. The provision can apply to a transferee of property who has no intention to assist the primary tax debtor to avoid the payment of tax: see *Wannan v. Canada* 2003 FCA 423 at paragraph 3.

*Was There A Transfer of Property?*

[20] The Tax Court Judge concluded that Ms. Davies' deposits to the respondent's bank account constituted a transfer of property. The respondent argues that depositing funds into a bank account is not, in and of itself, a transfer of property to the account holder. Rather, there must also be a divesting by the transferor of the funds deposited into the bank account, which, it is submitted, never occurred. As a result, claims the respondent, there was no transfer of property, and the beneficial title to the funds remained with Ms. Davies, and not the respondent. The respondent

therefore asks the Court to find a resulting trust to Ms. Davies. I do not find this argument at all convincing.

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

[22] In addition, there is a transfer of property for the purposes of section 160 even when beneficial ownership has not been transferred. Subsection 160(1) applies to any transfer of property – "by means of a trust or by any other means whatever". Thus, subsection 160(1) categorizes a transfer to a trust as a transfer of property. Certainly, even where the transferor is the beneficiary under the trust, nevertheless, legal title has been transferred to the trustee. Obviously, this constitutes a transfer of property for the purposes of subsection 160(1) which, after all, is designed, *inter alia*, to prevent the transferor from hiding his or her assets, including behind the veil of a trust, in order to prevent the CRA from attaching the asset. Therefore it is unnecessary to consider the respondent's argument that beneficial title to the funds remained with Ms. Davies.

[23] The respondent cites the Tax Court of Canada's decision in *Leblanc v. The Queen* 99 DTC 410 (T.C.C.). In that case, Tax Court Justice Hamlyn found that following a deposit into a jointly held bank account the property did not vest in or pass to the wife as the wife was acting as agent for

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

[24] The trial judge emphasized in his reasons that the respondent ultimately received no monetary benefit. The respondent argues that this is a critical factor in considering whether there has been a transfer of property. In my opinion it is irrelevant whether or not the respondent ultimately received a "benefit." It does not matter that the funds went back to Ms. Davies. The respondent certainly received property at the time of transfer which is the relevant time for the purposes of subsection 160(1). That the money happened to go back to Ms. Davies in the end is not sufficient to reverse the triggering of the provision. As was stated by this Court in *Heavyside*, *supra* at paragraph 9:

> Once the conditions of subsection 160(1) are met… the transferee becomes personally liable to pay the tax determined under that subsection … That liability arises at the moment of the transfer … and is joint and several with that of the transferor. The Minister may "at any time" thereafter assess the transferee (subsection 160(2)) and the transferee's joint liability will only disappear with a payment made by her or by the transferor in accordance with subsection 160(3)). [Emphasis added.]

[25] For the reasons above, I find there was a transfer of property.

*Was There Adequate Consideration Flowing from the Transferee to the Transferor?*

[26] As outlined above, the Tax Court Judge concluded that there was adequate consideration flowing from the respondent to Ms. Davies by way of the respondent giving Ms. Davies the ability to take each sum in full by using a signed blank cheque from the respondent or by using the bank

debit card. The respondent, in the alternative, argues that the forbearance of the respondent from seizing the monies in the account constituted consideration. In my opinion, both the Tax Court Judge and the respondent are in error.

[27] Under subsection 160(1), a transferee of property will be liable to the CRA to the extent that the fair market value of the consideration given for the property falls short of the fair market value of that property. 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. However, subsection 160(1) will not apply where an amount equivalent in value to the original property transferred was given to the transferor at the time of transfer: that is, fair market value consideration. This is because after such a transaction, the CRA has not been prejudiced as a creditor. Applying such principles to the case at bar, it is clear that the transaction between Ms. Davies and the respondent left Ms. Davies without anything equivalent to the property transferred that could be collected by the CRA, and thus there couldn't possibly be consideration.

[28] The Tax Court Judge erred in law by failing to conduct any analysis of the fair market value of the consideration. He simply concluded that it was "adequate." I fail to see how the fair market value of the consideration, if any did exist, would be equivalent to the funds deposited. 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? No prudent, arm's length purchaser not motivated by the prospect of evading collection of their tax debt would pay the full

value of funds in exchange for the right of access that Ms. Davies received. There was no evidence on which the Tax Court Judge could conclude that what was provided by the respondent was equal to the fair market value of the money put into the account.

[29] Nor am I convinced that the respondent's failure to seize the money constituted consideration for the moneys deposited. While forbearance – the act of refraining from enforcing a right, obligation, or debt – can act as consideration for a promise given in return (S.M. Waddams, *The Law of Contracts*, 5th ed., at paragraph 121), in my opinion there was no legal forbearance in this case. 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: *Raphael v. Canada* 2002 FCA 23 at paragraph 10. This is supported by cross-examination of the respondent at trial:

> Q: And why did you agree?
> A: Why did I agree to do this bank account for Ms. Davies?
> Q: You wanted to help her.
> A: That's right and her four children.
> Q: And you were her friend.
> A: That's correct.

[30] For the reasons above, the Tax Court Judge erred in finding that there had been fair market value consideration.

**CONCLUSION**

[31] The Tax Court Judge made a palpable and overriding error by concluding that adequate consideration had been given. I would allow the appeal with costs and set aside the decision of the

Tax Court. Proceeding to render the decision that should have been rendered, I would dismiss with costs the respondent's appeal to the Tax Court of Canada.

"J. Edgar Sexton"
J.A.

"I agree
Gilles Létourneau J.A."

"I agree
J.D. Denis Pelletier J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-213-07 |
| **APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE D.W. BEAUBIER DATED MAY 23, 2007 AND REPLACED BY AN AMENDED JUDGMENT DATED JUNE 15, 2007, NO. 2005-2484(IT)G** | |
| **STYLE OF CAUSE:** | *Her Majesty The Queen* v. *Jean Livingston* |
| **PLACE OF HEARING:** | Vancouver, British Columbia |
| **DATE OF HEARING:** | January 22, 2008 |
| **REASONS FOR JUDGMENT BY:** | Sexton J.A. |
| **CONCURRED IN BY:** | Létourneau, Pelletier JJ.A. |
| **DATED:** | March 7, 2008 |

**APPEARANCES:**

| | |
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| J. Andre Rachert | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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