Cour d'appel fédérale | Federal Court of Appeal

Date: 20131018

Docket: A-483-12

Citation: 2013 FCA 241

CORAM: **NOËL J.A.**
GAUTHIER J.A.
MAINVILLE J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

9101-2310 QUÉBEC INC.

Respondent

Heard at Montréal, Quebec, on September 9, 2013.

Judgment delivered at Ottawa, Ontario, on October 18, 2013.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: GAUTHIER J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a decision of Justice Archambault of the Tax Court of Canada (the TCC judge) allowing the appeal of 9101-2310 Québec Inc. (the respondent or 2310) from an assessment made under subsection 160(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), (the Act).

[2] The purpose of this provision is to facilitate the collection of outstanding taxes by making the transferee in a property transfer made by a tax debtor solidarily liable for the latter's tax debt up to the value of the transferred property. In the present case, the assessment at issue holds 2310 solidarily liable for the tax debt of Alain-Guy Garneau (Mr. Garneau or the tax debtor) after the sum of $305,441.32 belonging to the tax debtor was deposited in 2310's bank account in the year 2002.

[3] The TCC judge vacated the assessment on the ground that no transfer had taken place because the parties had entered into an agreement to the effect that the sum in question still belonged to the tax debtor despite the deposit.

[4] For the reasons that follow, I would allow the appeal because, in light of the evidence, there was simulation within the meaning of article 1451 of the *Civil Code of Québec*, R.S.Q., c. C-1991 (C.C.Q.), and by application of article 1452 of the C.C.Q., the assessment made against the respondent is valid even if the ownership of the money remained unchanged.

BACKGROUND

[5] In 2002, an insurance company issued a cheque for $305,441.32 to Mr. Garneau as compensation for damages incurred when a building which he owned was destroyed by fire (Reasons at paragraph 5). At that time, Mr. Garneau, a resident of Val d'Or, in Abitibi, was embroiled in a considerable number of legal difficulties both civil and seemingly criminal (testimony of Mr. Pratte, transcript, Appeal Book, Vol. 2 at page 294, lines 1 to 13). In addition to being indebted to the fisc, Mr. Garneau owed a significant amount of money to the Federal Business Development Bank (FBDB) which had already seized some of his assets (Reasons at paragraphs 5

and 10; testimony of Mr. Pratte, transcript, Appeal Book, Vol. 2 at page 348 and page 293, lines 12 to 17).

[6] Before the TCC judge, the respondent took the position that had Mr. Garneau deposited the insurance proceeds in his own bank account, they would have been seized by the FBDB. The TCC judge accepted this testimony (Reasons at paragraph 5). In fact, Mr. Garneau did not have a personal bank account, for fear of having it seized (testimony of Mr. Pratte, transcript, Appeal Book, Vol. 2 at pages 295 and 296). He nonetheless wanted to have access to this money. These are the circumstances that led Mr. Garneau to agree to rely on Daniel Pratte, a long-time friend who offered to deposit the funds in the bank account of 2310 (Reasons at paragraph 5), a company held by Mr. Pratte in which Mr. Garneau had no interest and to which he had no apparent connection (testimony of Mr. Pratte, transcript, Appeal Book, Vol. 2 at page 317, lines 12 to 25).

[7] Mr. Pratte described the circumstances leading to the deposit into 2310's account as follows (testimony of Mr. Pratte, transcript, Appeal Book, Vol. 2 at page 295, lines 15 to 25, and at page 296, lines 1 and 2):

> [TRANSLATION]
> It came out that the . . . It happened in Amos, and at one point, Alain came and said, "Look, I've settled." That's what he told us. We had a beer on Friday or Thursday: "I've settled, etcetera, etcetera." Then later, at one point, we were all alone, and he said, "So, I have a cheque for $305,000, and I don't have a bank account." Because we knew what was going on, you know? Everything was seized, I think, at that time. So, I thought about it, and I told him, "Well, maybe one of my companies could help you out by depositing it and managing it for you. . . .

[8] The cheque was deposited in 2310's account. The TCC judge does not explain how the cheque was delivered, but according to the evidence, Mr. Garneau endorsed the cheque made out in his name by the insurance company and gave it to Mr. Pratte, who then deposited it in 2310's account (testimony of Mr. Pratte, transcript, Appeal Book, Vol. 2 at page 296, lines 7 to 11, at page 298, lines 19 to 25, and at page 299, lines 1 to 7; deposit slip, Appeal Book, Vol. 1 at page 154).

[9] In order to confirm that the money remained his, Mr. Garneau signed a letter addressed to Mr. Pratte in his capacity as president of 2310, dated March 23, 2002, the contents of which read as follows (Appeal Book, Vol. 1 at page 70):

> [TRANSLATION]
> I hereby request that, through your company, you manage the money that I deposit in 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.

[10] Mr. Pratte explained that he was the one who had requested this letter. He recounts the discussions he had with Mr. Garneau on this subject as follows (testimony of Mr. Pratte, transcript, Appeal Book, Vol. 2 at page 296, lines 11 to 17):

> [TRANSLATION]
> So, well, sign me a paper to the effect that this has nothing to do with me. I'll put it in that account because you need a bank account, and when you ask me for cheques, I'll write you cheques for the amount you want because I don't want this to have any real-life impact . . . .

[11] Mr. Garneau ended up settling his dispute with the FBDB which appears to have accepted a lesser amount than that which it was seeking to collect (*idem* at page 296, lines 24 and 25, and at page 297, lines 1 to 3). The evidence showed that even after this settlement, 2310 held on to what remained of the deposited funds until there was nothing left. When asked why the set-up remained in place, Mr. Pratte explained that after the settlement, [TRANSLATION] "Mr. Garneau's business [was not doing] much better" (testimony of Mr. Pratte, transcript, Appeal Book, Vol. 2 at page 310, line 16).

[12] The deposited funds were paid out by 2310 in accordance with Mr. Garneau instructions, as he saw fit. A little more than half of the funds were used to pay the sum that he had agreed to give to the FBDB (Reasons at paragraph 6). Some of Mr. Garneau's current expenses were paid using these funds, and a significant portion was returned to Mr. Garneau and his children (testimony of Mr. Pratte, transcript, Appeal Book, Vol. 2 at pages 336 to 341; cheques and reconciliation, Appeal Book, Vol. 1 at pages 113, 199 to 201, 203, 204, 214, 338 and 340).

[13] The evidence showed that Mr. Garneau had access to a debit card for a short period, but Mr. Pratte stated that he himself had made all the withdrawals (testimony of Mr. Pratte, transcript, Appeal Book, Vol. 2 at pages 334 and 335).

[14] Mr. Garneau declared bankruptcy in 2007, and his tax debt has remained unpaid.

[15] Assuming that the deposit of funds into 2310's account was a transfer within the meaning of subsection 160(1) of the Act, the Minister of National Revenue (the Minister) issued an assessment

holding 2310 solidarily liable for Mr. Garneau's tax debt, which totalled $63,433.46 at the time of the deposit.

[16] The only argument that the respondent raised against this assessment in the notice of appeal filed in the Tax Court of Canada was that the tax debtor and 2310 were dealing with each other at arm's length at the time of the deposit (Notice of Appeal, Appeal Book, Vol. 1 at page 50). The issue of whether or not ownership of the deposited funds had been transferred was not raised until the matter came to trial. It was in this context that Mr. Pratte produced the letter dated March 23, 2002, in order to show that the funds continued to belong to Mr. Garneau.

[17] The evidence otherwise revealed that Mr. Garneau divested himself of other assets during the same period and that subsection 160(1) was also invoked with respect to these transfers (testimony of Nathalie Laurier, Appeal Book, Vol. 2 at page 379, lines 15 to 23).

[18] Subsection 160(1) reads as follows:

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	**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*) the person's spouse or common-law partner or a person who has since become the person's spouse or common- law partner,	*a*) son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait;
(*b*) a person who was	*b*) une personne qui

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

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

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

DECISION OF THE TAX COURT OF CANADA

[19] The TCC judge devoted most of his reasons to the arguments of the appellant (respondent before him) that were based on the decision of this Court in *Canada v. Livingston*, 2008 FCA 89 (*Livingston*). He categorically rejected the argument that *Livingston* establishes that any deposit that a tax debtor seeking to evade paying tax makes into the account of a non-arm's length person is a transfer within the meaning of subsection 160(1).

[20] According to the TCC judge, a deposit of money into a third party's account may constitute a transfer, but such is not necessarily the case (Reasons at paragraph 58). In order for there to be a transfer for the purposes of subsection 160(1), the transferor must intend to transfer ownership of the deposited funds to the transferee (Reasons at paragraph 84). In other words, there must be a transfer of ownership of the sum in question.

[21] Furthermore, if the rule laid down in *Livingston* is that depositing funds in a third party's account constitutes a transfer even if the tax debtor retains ownership of the deposited funds, as counsel for the appellant submit, then *Livingston* marks a departure from settled law and was rendered without regard for the traditional approach and the legal precedents that apply in such cases (Reasons at paragraph 47). The TCC rejected the interpretation proposed by counsel for the appellant (Reasons at paragraph 58).

[22] After analyzing the facts and the law, the TCC judge concluded that despite the deposit in 2310's account, no transfer of ownership to 2310 had taken place.

[23] Indeed, Mr. Garneau had no intention of transferring to 2310 ownership of the funds. Although the arrangement was designed to conceal from the FBDB the fact that these funds were part of the tax debtor's patrimony in order to prevent them from being seized, the agreement as reflected in the letter dated March 23, 2002, was to the effect that the tax debtor remained the owner of this money, which was to be paid out in accordance with his instructions under a mandate governed by the C.C.Q. Therefore, there had been no transfer within the meaning of subsection 160(1).

[24] Regarding the non-arm's length relationship requirement set out in paragraph 160(1)(*c*), the TCC judge held as follows (Reasons at paragraph 83):

> . . . [S]ince 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.

[25] Considering the intended effect of depositing the funds in 2310's account, and considering the agreement of March 23, 2002, which confirmed that despite the deposit, Mr. Garneau was still the owner of the funds, the TCC judge felt it necessary to add on his own initiative a few remarks concerning simulation in Quebec law (Reasons at paragraphs 67 and 68):

> [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 [C.C.Q.], 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 in 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. Therefore, there is no ground to find that a simulation existed here.

POSITIONS OF THE PARTIES

[26] First, the appellant submits that the TCC judge erred in construing the notion of a transfer for the purposes of applying subsection 160(1) and that his interpretation was inconsistent with the object and spirit of this provision. The purpose of subsection 160(1) is to prevent the Minister's efforts to collect taxes owing to him from being thwarted (Appellant's Memorandum at paragraph 41). The appellant argues that the TCC judge was bound to apply the decision of this Court in *Livingston*, which according to the appellant establishes that any deposit made by a tax debtor in a third party's bank account is a transfer within the meaning of section 160 (Appellant's Memorandum at paragraph 43).

[27] On a different note, the appellant maintains that the tax debtor's intention was to elude his creditors and that in order to achieve this goal, there had to be a transfer of ownership, if only in appearance (Appellant's Memorandum at paragraph 46).

[28] If there is a mandate, as the TCC judge concluded, the appellant submits that it has no effect as against the Minister (Appellant's Memorandum at paragraphs 54 and 60). In allowing the funds to be deposited in its own account, 2310 acted as a front and allowed the tax debtor to hide from third parties, including the FBDB, the fact that he was the owner of these funds (Appellant's Memorandum at paragraph 58). Therefore, in accordance with articles 1451 and 1452 of the C.C.Q., the Minister could avail himself of the appearance of a transfer created by the parties (Appellant's Memorandum at paragraph 63).

[29] Furthermore, the evidence shows that there was a non-arm's length relationship between Mr. Pratte and 2310 on the one hand and the tax debtor on the other because even though they are not persons related by blood or marriage, they all acted in concert to allow the tax debtor to hide his assets (Appellant's Memorandum at paragraphs 76 et 77).

[30] The appellant added at the hearing that in any event, Mr. Pratte's mandate had an unlawful object and that, in light of article 1413 of the C.C.Q., the TCC judge could not enforce it. On this point, the appellant cites the decision of the Court of Appeal of Québec in *Durand c. Drolet*, 1993 CanLII 4058 (QC CA) at page 11.

[31] The respondent, on the other hand, submits that the TCC judge reached the right conclusion. Subsection 160(1) of the Act cannot apply unless there is a transfer of the ownership of the funds in the account. In the present case, since each party's patrimony remained unchanged, there cannot have been a transfer, and subsection 160(1) cannot apply (Respondent's Memorandum at paragraph 29).

[32] According to the respondent, it is incorrect to claim that the sole reason for the agreement was to remove the cheque in the amount of $305,441.32 from the tax debtor's patrimony (Respondent's Memorandum at paragraph 32). The goal was also to give the tax debtor time to settle his dispute with the FBDB and, [TRANSLATION] "above all", was necessary because the tax debtor did not have a bank account (Respondent's Memorandum at paragraph 34).

[33] Finally, it is inaccurate to speak of a counter letter because the transactions made do not suggest that there was a transfer of ownership. On the contrary, the only contract between the parties is the contract of mandate, as reflected in the letter dated March 23, 2002 (Respondent's Memorandum at paragraph 36).

ANALYSIS AND DECISION

[34] To dispose of the appeal, it is enough to refer to the testimony of Mr. Pratte before the TCC judge, according to which the cheque was given to Mr. Pratte and deposited in 2310's account in order to prevent the funds from being seized in the hands of the tax debtor. The only inference that can be drawn from this testimony is that the FBDB would have seized these funds if Mr. Garneau had let it be known that they belonged to him. In the present case, in giving the endorsed cheque to Mr. Pratte so that he could deposit it in 2310's account, the tax debtor gave the impression that the money belonged to 2310 despite the fact that, according to the agreement with Mr. Pratte, the money remained his. This amounts to a simulation within the meaning of article 1451 of the C.C.Q.:

1451. Simulation exists where the parties agree to express their true intent, not in an apparent contract, but in a secret contract, also called a counter letter.	**1451.** Il y a simulation lorsque les parties conviennent d'exprimer leur volonté réelle non point dans un contrat apparent, mais dans un contrat secret, aussi appelé contre-lettre.
Between the parties, a counter letter prevails over an apparent contract.	Entre les parties, la contre-lettre l'emporte sur le contrat apparent.

[35] When the Minister takes collection action, he may avail himself of the apparent contract, just as the FBDB could have done (*Transport H. Cordeau Inc. v. Canada*, [1999] F.C.J. No. 1659 (FCA) (QL); *Garas c. Canada (Procureur général)*, 2009 QCCS 2838, aff'd 2011 QCCA 528;

Vigneault v. Canada, [2001] T.C.J. No. 880 (QL); *Bolduc v. Canada*, [2002] T.C.J. No. 664 (QL), aff'd 2003 CAF 411). Such is the effect of article 1452 of the C.C.Q.:

1452. Third persons in good faith may, according to their interest, avail themselves of the apparent contract or the counter letter; however, where conflicts of interest arise between them, preference is given to the person who avails himself of the apparent contract.	**1452.** Les tiers de bonne foi peuvent, selon leur intérêt, se prévaloir du contrat apparent ou de la contre-lettre, mais s'il survient entre eux un conflit d'intérêts, celui qui se prévaut du contrat apparent est préféré.

[36] The fact that Mr. Pratte stated before the TCC judge that he had been unaware of Mr. Garneau's tax debt (Reasons at paragraph 10) is irrelevant for the purposes of applying subsection 160(1) (*Wannan v. Canada*, 2003 FCA 423 at paragraph 3). Mr. Garneau, on the other hand, was well aware of this debt, and what is important for our purposes he and Mr. Pratte knew that the set-up could have the desired effect on any unsuspecting creditor. On this point, I note that Mr. Pratte explained during his testimony that the remaining funds in 2310's account were not returned to Mr. Garneau after the settlement with the FBDB was reached, specifically because Mr. Garneau was still having financial problems (testimony of Mr. Pratte, transcription, Vol. 2 at page 310, line 16). The only conclusion that can be drawn from this testimony is that the set-up remained useful vis-à-vis other creditors.

[37] Contrary to what the TCC judge writes at paragraph 67 of his reasons, the tax debtor did not have to "represent" to the tax authorities that the funds did not belong to him in order for article 1452 to operate in favour of the Minister (Reasons at paragraph 67). It is enough that he

made it appear to third parties that the funds belonged to 2310 when in reality they were part of his patrimony.

[38] The TCC judge's comments at paragraph 68 of his reasons to the effect that it is difficult to see how a third party could have been misled by the arrangement is contradicted by the evidence because the desired objective in respect of the FBDB—as the TCC judge himself identified it—was achieved. Moreover, as is explained above, the only reason for keeping the set-up in place after the settlement with the FBDB had been reached was that it remained effective as against other creditors.

[39] Regarding the existence of a non-arm's length relationship between the tax debtor on the one hand and Mr. Pratte and his company on the other, the evidence could not be any clearer. Mr. Pratte, by allowing the tax debtor to use 2310's bank account to conceal the fact that the tax debtor was the true owner of the deposited funds, worked in concert with the tax debtor, acting strictly as a front (testimony of Mr. Pratte, Appeal Book, Vol. 2 at page 303, lines 18 to 25). A non-arm's length relationship may arise from the legal relationship between the parties or from the factual situation (*Swiss Bank Corporation v. M.R.N.*, [1974] S.C.R. 1144). Based on the facts the tax debtor was not dealing at arm's length with Mr. Pratte and his company.

[40] Finally, it is true that the Minister did not raise simulation in his reply to the notice of appeal, but this does not preclude the appellant's argument (Reasons at paragraph 67). The evidence adduced before the TCC judge shows that the arrangement was designed to remove the amount of the cheque from the tax debtor's assets and place it beyond the reach of his creditors, and the TCC judge was obliged to make a finding that is consistent with this evidence. In my opinion, the TCC

judge drew a conclusion that was contradicted by the evidence in holding that there was no simulation.

[41] It follows that the Minister was entitled to rely on the apparent transfer made by the parties. Thus the liability of 2310 is engaged by the combined effect of article 1452 of the C.C.Q. and subsection 160(1).

- *Livingston*

[42] I think it is nevertheless useful to comment briefly on the impact of this Court's decision in *Livingston* on the case at hand, given the controversy that *Livingston* has raised, as evidenced by the reasons of the TCC judge (Reasons at paragraphs 41 to 66).

[43] Before I address that decision, it is helpful to refer to the definition of "property" in subsection 248(1) of the Act:

"*property*" – "property" means property of any kind whatever whether real or personal or corporeal or incorporeal and, without restricting the generality of the foregoing, includes	« *biens* » - « biens » Biens de toute nature, meubles ou immeubles, corporels ou incorporels, y compris, sans préjudice de la portée générale de ce qui précède :
(*a*) a right of any kind whatever, a share or a chose in action,	*a*) les droits de quelque nature qu'ils soient, les actions ou parts;
(*b*) unless a contrary intention is evident, money,	*b*) à moins d'une intention contraire évidente, l'argent;
(*c*) a timber resource property, and	*c*) les avoirs forestiers;

(*d*) the work in progress of a business that is a profession;	*d*) les travaux en cours d'une entreprise qui est une profession libérale.

[44] A brief comment on the role of provincial law in the application of the Act is also appropriate. It is settled law that unless Parliament provides otherwise, the private law of the provinces plays a suppletive role (see section 8.1 of the *Interpretation Act*, R.S.C., 1985, c. I-21), so that a transfer of the ownership of property for the purposes of the Act takes place where ownership has changed under the civil law of Quebec or the common law of each of the other provinces of Canada depending on where the cause of action arises.

[45] According to the C.C.Q., ownership consists of the right to use, enjoy and dispose of property fully and freely, subject to the limits and conditions determined by law (article 947 of the C.C.Q.), such that intent to divest oneself of all these attributes and a concurrent intent to acquire them give rise to a change in ownership of the property in question.

[46] The common law does not provide a clear definition of ownership. It does however consist of two elements, legal title and beneficial ownership, which confer very distinct rights. As the decision of the Supreme Court in *Pecore v*. *Pecore*, [2007] 1 S.C.R. 795 (*Pecore*), illustrates, the nature of these rights can only be understood from an historical perspective (*Pecore* at paragraph 84):

> . . . In the 15th century, it was not uncommon for landowners in England to have title to their property held by other individuals on the understanding that it was being held for the "use" of the landowner and subject to his direction. This had the effect of separating legal [title] and beneficial ownership. The purpose of the scheme was to avoid having to pay feudal taxes when land passed from a landowner to his heir.

[47] For our purposes, there is no need to delve deeper into these two forms of ownership under the common law, except to note that despite their dual nature (*Pecore* at paragraph 4),

> . . . [t]he beneficial owner of property has been described as "the real owner of property even though it is in someone else's name": *Csak v. Aumon* (1990), 69 D.L.R. (4th) 567 (Ont. H.C.J.), at p. 570. . . .

[48] This explains why for tax purposes one is usually concerned with beneficial ownership and legal title is of little consequence when the common law applies (see for example the following cases, which confirm that where these two forms of ownership are separated, property cannot be disposed of – *i.e.* sold – for the purposes of the Act unless the seller divests him or herself of the beneficial ownership of the property: *M.N.R. v. Wardean Drilling Limited*, 69 D.T.C. 5194 (Exchequer Court); *The Queen v. Henuset Bros. Ltd.*, 1977 C.T.C. 228, 77 D.T.C. 5169 (TCC); *Kamsel Leasing Inc. v. Canada (M.N.R.)*, [1993] T.C.J. No. 12 (QL); *Gartz v. Canada*, [1994] T.C.J. No. 240 (QL)).

[49] *Livingston* deals with a situation that is similar to the one at issue here, but the facts arose in British Columbia. In order to help a tax debtor hide funds from the tax authorities and prevent their seizure, Ms. Livingston allowed the tax debtor to deposit the funds in question in her personal bank account. The scheme worked, and the tax debtor eventually declared bankruptcy without paying the income tax she owed. The Minister relied on subsection 160(1) to hold Ms. Livingston jointly and severally liable for the tax debtor's debt, arguing that there had been a transfer of the funds deposited in Ms. Livingston's bank account.

[50] The Court of Appeal confirmed the assessment. It rejected the appellant's argument that there had been no transfer because beneficial ownership of the deposited funds remained with the tax debtor (*Livingston* at paragraph 20).

[51] Relying on a contextual interpretation of subsection 160(1), the Court concluded that, in the circumstances, it was enough that the tax debtor had transferred legal title in the deposited funds to Ms. Livingston for subsection 160(1) to apply. Even though this provision applies without regard to the intention of the parties, the Court found the fact that Ms. Livingston and the tax debtor had conspired in order to deceive the tax authorities to be "crucial" (*Livingston* at paragraph 12).

[52] The crux of the argument raised by Ms. Livingston and of the Court's reasons for rejecting that argument emerges from the following paragraphs (*Livingston* at paragraphs 20, 21 and 22):

> [20] . . . 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 [Canada Revenue Agency] from attaching the asset. Therefore it is unnecessary to consider the respondent's argument that beneficial title to the funds remained with Ms. Davies.
>
> [Emphasis added.]

[53] The rule to be gleaned from this decision, as I understand it, is that the transfer of legal title in a sum of money may give rise to a transfer for the purposes of subsection 160(1) where it is intended to conceal the fact that the tax debtor is the beneficial owner of this sum and thwart the tax authorities' collection efforts.

[54] It is neither necessary nor appropriate to consider the merits of this rule in the context of the present case because being based on the common law, it does not apply in Quebec. The TCC judge's task was to analyze the legal relationship between the parties in accordance with the C.C.Q., which is what he did.

[55] This analysis led him to conclude that Mr. Pratte was holding the tax debtor's funds pursuant to a mandate and that the amounts remained those of the tax debtor. This conclusion is grounded in the evidence and gives effect to the provisions of the C.C.Q. that governed the relationship (articles 2130, 2132, 2133 and 2146). It is also consistent with article 911 of the C.C.Q., which deals with an administrator who has title to property belonging to someone else.

[56] The TCC judge also considered whether the mandatary's right to withdraw from its account the funds that belonged to the tax debtor could give rise to a transfer of property for the purposes

of subsection 160(1) (Reasons at paragraph 55). This right to withdraw funds is an incident of the mandate given by the tax debtor and is in the nature of a personal right from a civil law perspective.

[57] A personal right may be considered to be property within the meaning of articles 899 to 907 of the C.C.Q.—more specifically, incorporeal movable property—so long as it has some economic value (Pierre-Claude Lafond, *Précis de droit des biens*, 2d ed. Montréal: Thémis, 2007, at page 35). In the present case, the TCC judge enquired into the economic value of the mandatary's right to access the money belonging to the tax debtor and found that there was none, given the mandatary's obligation to withdraw the funds for the sole benefit of the tax debtor (Reasons at paragraph 56).

[58] This conclusion is consistent with the evidence. The value of the transferred property must be established at the moment of the alleged transfer (*Heavyside v. Canada*, [1996] F.C.J. No. 1608 (C.A.) (QL) at paragraph 9), and it is impossible to attribute any value to this right unless one accepts as a given that the mandatary was going to use the right to withdraw funds for his personal benefit. This requires that we assume that the mandatary would act contrary to the mandate conferred upon him. Under the civil law, good faith is to be presumed (article 6 of the C.C.Q.), and governs the conduct of the parties to a contract throughout from the moment when it is entered into (article 1375 of the C.C.Q.). The TCC judge correctly concluded that the right to withdraw funds had no value.

[59] Accordingly, this right was not property under the civil law, and in any event, the attribution of this right was of no consequence because subsection 160(1) limits a transferee's liability to the value of the transferred property.

[60] I believe it useful to add that the sole purpose of subsection 160(1) is to protect the integrity of the tax debtor's patrimony. This provision has been described as a draconian measure because it applies even if the transfer is made in good faith – *i.e.* not for tax reasons – and because it allows tax to be collected from a person other than the primary debtor, without any time limitation and without regard to what may have happened to the property transferred or its value since the transfer. In short, subsection 160(1) protects the tax authorities against any vulnerability that may result from a transfer of property between non-arm's length persons for a consideration that is less than fair market value regardless of the circumstances which give rise to the transfer.

[61] Given the intended purpose, there is no basis for applying subsection 160(1) where the tax debtor's patrimony remains intact. The problems stemming from simulated property transfers are undeniable, but they are not among the problems that subsection 160(1) was intended to solve. In contrast, articles 1451 and 1452 of the C.C.Q. which were designed to foil simulation, do address these problems, where applicable.

[62] Finally, I would note that in *Yates v. Canada*, 2009 FCA 50 (*Yates*), this Court does not give subsection 160(1) the effect that counsel for appellant argue it has (Appellant's Memorandum at paragraph 43). The Court's finding in that case was based on the fact that

Mr. Yates had "divested himself" of the funds deposited into his wife's account (*Yates* at paragraph 5). The trial judge in that case had held that the deposit evidenced a transfer in favour of his wife (2007 TCC 498 at paragraph 15). The only issue to be resolved was whether the wife had given any consideration for the transfer (*Yates* at paragraphs 6 to 21).

[63] I therefore conclude that the TCC judge was right to reject the argument of counsel for the appellant that *Livingston* dictated the outcome of the appeal before him.

DISPOSITION

[64] On the basis of the conclusion I reach at paragraph 41 of these reasons, I would allow the appeal with costs, set aside the decision of the TCC judge and, rendering the decision that should have been rendered, dismiss the appeal of 2310 with costs.

"Marc Noël"

J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Robert M. Mainville J.A."

Certified true translation

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-483-12

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE ARCHAMBAULT OF THE TAX COURT OF CANADA DATED JUNE 12, 2012, DOCKET NO. 2009-2880(IT)G.)

DOCKET:	A-483-12
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. 9101-2310 QUÉBEC INC.
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 9, 2013
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	GAUTHIER J.A. MAINVILLE J.A.
DATED:	OCTOBER 18, 2013

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