Docket: 2005-3343(IT)G

BETWEEN:

GILLIAN N. DARTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard together on common evidence with the appeal of *Gillian N. Darte* (2005-3344(GST)G) on December 6, 2007 at Charlottetown, Prince Edward Island

Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant: J. Michael McGonnell
Counsel for the Respondent: V. Lynn W. Gillis

JUDGMENT

The appeal under the *Income Tax Act* is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the maximum amount that may be assessed against the Appellant under section 160 of the *Income Tax Act* as a result of the transfer to her of the interest of Danny MacAdam in the Property located at 317 - 319 Fitzroy Street in Charlottetown, Prince Edward Island, is $70,000.

Signed at Halifax, Nova Scotia this 29th day of January 2008.

"Wyman W. Webb"

Webb J.

Docket: 2005-3344(GST)G

BETWEEN:

GILLIAN N. DARTE,

Appellant,

and

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Appeal heard together on common evidence with the appeal
of *Gillian N. Darte* (2005-3343(IT)G) on December 6, 2007
at Charlottetown, Prince Edward Island
Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant: J. Michael McGonnell
Counsel for the Respondent: V. Lynn W. Gillis

JUDGMENT

The appeal under the *Excise Tax Act* is allowed and the assessment No. A104501 dated March 10, 2004 issued under section 325 of the *Excise Tax Act* is vacated.

Signed at Halifax, Nova Scotia this 29th day of January 2008.

"Wyman W. Webb"

Webb J.

Citation: 2008TCC66
Date: 20080129
Dockets: 2005-3343(IT)G
2005-3344(GST)G

BETWEEN:

GILLIAN N. DARTE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in these appeals is whether the Appellant had any interest in or any right to any interest in the property located at 317 - 319 Fitzroy Street in Charlottetown, Prince Edward Island (the "Property") at the time that it was transferred to her by Danny MacAdam, her common-law partner, and therefore whether the assessments issued against her under section 160 of the *Income Tax Act* and section 325 of the *Excise Tax Act* should be reduced.

[2] Danny MacAdam has been the common-law partner of the Appellant for the past 20 years. The Appellant moved in with him approximately two months before she gave birth to their first child. At that time she was 19 years of age and in grade 10. She later received her GED from Holland College. Danny MacAdam's highest level of education was possibly grade 10. The Appellant and Danny MacAdam now have two children.

[3] In 1989, Danny MacAdam had an agreement to acquire the Property. The deed to the Property however was not executed until November 3, 1992. The deed conveyed the title to the property to Danny MacAdam as the sole grantee. The Property was acquired without either Danny MacAdam or the Appellant making any down payment toward the purchase price of the Property. The consideration for the

purchase of the Property consisted entirely of an assumption of an existing mortgage on the Property in favor of Royal Trust Corporation of Canada in the amount of $74,906.87 and a second mortgage granted to the vendor of the Property in the amount of $26,433.25. The mortgages that were on the Property were paid in full before the Property was transferred to the Appellant. The Appellant stated that she paid the mortgages. Based on the evidence presented at the hearing, I conclude that the mortgage payments were made from the rents that were collected.

[4] The Property had five units and required substantial renovations. The original plan, which was followed after the Property was renovated, was that the Appellant and Danny MacAdam would occupy one of the units and would rent the other four units. The Appellant and Danny MacAdam initially moved into one of the one-bedroom units until the unit that they would be occupying was renovated.

[5] The renovations that were completed were substantial, including ripping up the flooring and replacing it with new carpet or tile, painting, renovating the bathrooms, tearing down plaster walls and replacing the plaster with gyproc, adding new walls, installing a new backdoor and adding a parking lot. The Appellant performed many of the tasks herself including building walls and a partition, crack filling the gyproc and then sanding and painting, and cutting and installing all of the trim and mouldings around the windows, baseboards and along the ceiling.

[6] Only the Appellant testified during the hearing. It was clear from her testimony that the renovations were completed as a result of her efforts and not as a result of the efforts of Danny MacAdam. Danny MacAdam also did not provide any assistance in looking after the children while the Appellant worked on the Property. During this period of time Danny MacAdam was working outside the home and had very little, if any, involvement with the renovations that were being done to the Property. The Appellant also testified that Danny MacAdam was an alcoholic and was violent, although no specific acts of violence were mentioned. There was no evidence that the Appellant received any compensation for her work that she did in relation to the Property, other than the transfer of the Property to her in 2001.

[7] There were items that were donated by the Appellant’s mother and father, and the Appellant’s father and his friend helped with the labour required to complete the renovations. The Appellant also contributed some of her money to the materials acquired for the renovations although no actual amount was established. The only sources of funds for the renovations were the Appellant’s paycheques from her work, family allowance payments, and the rental income generated by the renting of the units in the Property.

[8] Danny MacAdam was involved in a car business and he encountered some problems with his business. He was assessed for unremitted GST and unpaid income taxes. As well, Danny MacAdam was incarcerated for a period of time in relation to certain offences related to provincial sales tax and, as part of his probation, he was prohibited from being involved in the car business. The total amount of Danny MacAdam's outstanding liabilities under the *Excise Tax Act* and the *Income Tax Act*, including penalties and interest, at the time that the Property was transferred to the Appellant was $59,143.92 under the *Excise Tax Act* and $78,791.76 under the *Income Tax Act* for a total of $137,935.68. The fair market value of the Property, as agreed upon by counsel for the Appellant and counsel for the Respondent, was $140,000. The Appellant was assessed $78,791.76 pursuant to section 160 of the *Income Tax Act* and $59,143.92 pursuant to section 325 of the *Excise Tax Act.*

[9] In the written submissions of counsel for the Respondent the issue is described as follows:

> 15. The sole issue in these cases is whether the Appellant is liable to pay the amounts of $78,791.76 and $59,143.92 with respect to the transfer of the Property from Danny MacAdam pursuant to section 160 of the *ITA* and section 325 of the *ETA*, respectively.
>
> 16. A determination of whether the Appellant had any right, title or interest in the Property, at the time it was transferred, aids in resolving this issue.

[10] The Appellant claims that she had an interest in the Property based on her claim that there was a constructive trust. In *Peter v. Beblow*, [1993] 1 S.C.R. 980, McLachlin J. (as she then was), stated the following on behalf of the majority of the Supreme Court of Canada:

> 3 The basic notions are simple enough. **An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment.** These proven, the action is established and the right to claim relief made out. At this point, a second doctrinal concern arises: the nature of the remedy. "Unjust enrichment" in equity permitted a number of remedies, depending on the circumstances. One was a payment for services rendered on the basis of quantum meruit or quantum valebat. **Another equitable remedy, available traditionally where one person was possessed of legal title to property in which another had an interest, was the constructive trust. While the first remedy to be considered was a monetary award, the Canadian jurisprudence recognized that in some cases it might be insufficient.** This may occur, to quote La Forest J. in Lac Minerals Ltd. v.

> International Corona Resources Ltd., [1989] 2 S.C.R. 574, at p. 678, "if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property". Or **to quote Dickson J., as he then was, in Pettkus v. Becker, [1980] 2 S.C.R. 834, at p. 852, where there is a "contribution [to the property] sufficiently substantial and direct as to entitle [the plaintiff] to a portion of the profits realized upon sale of [the property]." In other words, the remedy of constructive trust arises, where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed.**
>
> (emphasis added)

[11] In this case, it seems clear that Danny MacAdam was enriched as a result of the labour provided by the Appellant as well as the materials purchased by her and the labour and materials supplied by the Appellant's parents and the labour provided by the Appellant's father and his friend. There was also a corresponding deprivation to the Appellant and the absence of any juristic reason for the enrichment.

[12] In *Peter v. Beblow*, *supra* McLachlin J. (as she then was), also stated the following on behalf of the majority of the Supreme Court of Canada:

> 6 I share the view of Cory J. that the three elements necessary to establish a claim for unjust enrichment -- an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment -- are made out in this case. The appellant's housekeeping and child-care services constituted a benefit to the respondent (1st element), in that he received household services without compensation, which in turn enhanced his ability to pay off his mortgage and other assets. These services also constituted a corresponding detriment to the appellant (2nd element), in that she provided services without compensation. Finally, since there was no obligation existing between the parties which would justify the unjust enrichment and no other arguments under this broad heading were met, there is no juristic reason for the enrichment (3rd element). Having met the three criteria, the plaintiff has established an unjust enrichment giving rise to restitution.
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> …
>
> 12 **This Court has held that a common law spouse generally owes no duty at common law, in equity or by statute to perform work or services for her partner**. As Dickson C.J., speaking for the Court put it in Sorochan v. Sorochan, supra, at p. 46, the common law wife "was under no obligation, contractual or otherwise, to perform the work and services in the home or on the land". So there is no general duty presumed by the law on a common law spouse to perform work and services for her partner.

> …
>
> 24 **I doubt the wisdom of dividing unjust enrichment cases into two categories -- commercial and family -- for the purpose of determining whether a constructive trust lies. A special rule for family cases finds no support in the jurisprudence.** Neither Pettkus, nor Rathwell, nor Sorochan suggest such a departure. Moreover, **the notion that one can dispense with a link between the services rendered and the property which is claimed to be subject to the trust is inconsistent with the proprietary nature of the notion of constructive trust.**
>
> (emphasis added)

[13] Counsel for the Respondent argued that no constructive trust could arise in the circumstances of this case because the Appellant and Danny MacAdam were still living together at the time that the Property was transferred to her. In support of this proposition, counsel for the Respondent relied on the case of *Blackman v. Davison*, [1987] B.C.J. No. 200, 12 B.C.L.R. (2d) 24 (BCCA) and *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325. The decision of the British Columbia Court of Appeal in *Blackman v. Davison* was based on the *Family Relations Act* of British Columbia (which is not applicable in this case) and it was rendered before the decision of the Supreme Court of Canada in *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70.

[14] In the *Walsh* case, the issue before the Supreme Court of Canada was whether the matrimonial property legislation of the province of Nova Scotia contravened the *Canadian Charter of Rights and Freedoms* because it did not provide common-law partners with the same rights that were available to married couples. Counsel for the Respondent argued that the following excerpts from the *Walsh* case supported her position that no constructive trust could arise until there was a breakdown of the common-law relationship:

> 49 …The general principle is that, without taking some unequivocal consensual action, these cohabiting persons maintain the right to deal with any and all of their property as they see fit.
>
> …
>
> 59 …In these cases, the law has evolved to protect those persons who may be unfairly disadvantaged as a result of the termination of their relationship.

…

> 61 For those couples who have not made arrangements regarding their property at the outset of their relationship, the law of constructive trust remains available to address inequities that may arise at the time of the dissolution.

[15] The issue before the Supreme Court of Canada in *Walsh* was not whether a constructive trust can only arise if there has been a breakdown in the common-law relationship and none of these statements indicate that this is the only time that a constructive trust could arise. These statements simply provide that the law of constructive trust is available to address inequities that may arise at the time of the dissolution.

[16] In *Rawluk v. Rawluk, supra*, the Supreme Court of Canada specifically addressed the issue of when the property interest arises under a constructive trust. The issue in that case, as summarized by Cory J., was:

> At issue in this appeal is whether the doctrine of constructive trust can be applied to determine the ownership of assets of married spouses under the provisions of the Family Law Act, 1986, S.O. 1986, c. 4.

[17] Cory J. stated as follows on behalf of the majority of the Supreme Court of Canada in relation to the question of when a property interest arises under a constructive trust:

> 41 It is important in this respect to keep in mind that a property interest arising under a constructive trust can be recognized as having come into existence not when the trust is judicially declared but from the time when the unjust enrichment first arose. As Professors Oosterhoff and Gillese state, "the date at which a constructive trust arises ... is now generally accepted to be the date upon which a duty to make restitution occurs" (Oosterhoff and Gillese, A. H. Oosterhoff: Text, Commentary and Cases on Trusts (3rd ed. 1987), at p. 579). Professor Scott has stated in Law of Trusts, op. cit., at pp. 323-24, that:
>
> > The beneficial interest in the property is from the beginning in the person who has been wronged. The constructive trust arises from the situation in which he is entitled to the remedy of restitution, and it arises as soon as that situation is created. ... It would seem that there is no foundation whatever for the notion that a constructive trust does not arise until it is decreed by a court. It arises when the duty to make restitution arises, not when that duty is subsequently enforced.

> I agree completely with the position taken on this issue by the authors of these helpful texts.
>
> 42 As well in Hussey v. Palmer, supra, at p. 1290 (quoted by Dickson J. in Rathwell v. Rathwell, supra, at p. 455), Lord Denning M.R. noted that a constructive trust "may arise at the outset when the property is acquired, or later on, as the circumstances may require". As a result, even if it is declared by a court after the parties have already separated, a constructive trust can be deemed to have arisen when the duty to make restitution arose. It should therefore be considered as part of the property owned by the beneficiary at valuation date.
>
> 43 It must be emphasized that the constructive trust is remedial in nature. If the Court is asked to grant such a remedy and determines that a declaration of constructive trust is warranted, then the proprietary interest awarded pursuant to that remedy will be deemed to have arisen at the time when the unjust enrichment first occurred. But, as Professor Scott makes clear, the fact that the proprietary interest is deemed to have arisen before the remedy was granted is not inconsistent with the remedial characteristics of the doctrine.

[18] It is clear, based on the comments of the Supreme Court of Canada in *Peter v. Beblow*, *supra* and *Rawluk v. Rawluk*, *supra,* that no distinction is to be made between commercial situations and family situations in determining whether a constructive trust exists and the constructive trust, when granted, comes into existence when the unjust enrichment first arose. The constructive trust does not arise because of a breakdown in the relationship between common law partners but because one party has been unjustly enriched. As noted by the Supreme Court of Canada, in paragraph 12 of the decision in *Peter v. Beblow*, “a common-law spouse generally owes no duty at common law, in equity or by statute to perform work or services for her partner”. Since the Appellant did not owe any duty to perform work for or provide services to Danny MacAdam, she had no duty to perform any work on the Property (that was only registered in his name) and therefore she had a right to be compensated for her efforts. Since she was not compensated by Danny MacAdam for her efforts, the unjust enrichment (and the Appellant’s interest in the Property) would arise when she worked on the Property for no consideration.

[19] There has been no finding by a court of equity that there is a constructive trust in this case. The British Columbia Court of Appeal in *LeClair v. LeClair Estate*, 159 DLR (4th) 638 discussed the requirement that a constructive trust must be judicially declared. Ryan J.A., on behalf of the BCCA stated as follows, after quoting the above paragraphs from *Rawluk*:

> [45] The appellant says that because of the unjust enrichment, the property in question (one-half of the proceeds of the sale of Clair Manor) was automatically subject to a constructive trust before the death of John LeClair. He submitted that it followed from

this that the property was not John LeClair's to devise under his Will.

> [46] The flaw in the appellant's argument lies in its failure to take into account the remedial nature of the remedy of constructive trust and the requirement that the trust must be judicially declared. In my view, in the passage I have just quoted Cory J. addressed the question whether, once a court declares constructive trust, the interest arises at the time of judicial declaration, or, as of the time of the unjust enrichment. His answer was that it arises at the time of the unjust enrichment. However, contrary to the appellant's argument in this case, this passage does not negate the need for a court to first determine whether an unjust enrichment occurred and whether the appropriate remedy would be a constructive trust. The appellant's argument that a constructive trust arose automatically prior to John LeClair's death is not supported by Rawluk v. Rawluk.
>
> [47] The Rawluk case has not displaced the well-entrenched rule that the remedy of constructive trust does not follow automatically from a finding of unjust enrichment. In Sorochan v. Sorochan, [1986] 2 S.C.R. 38, 29 D.L.R. (4th) 1, Dickson C.J. said this, at p. 47:
>
>> The constructive trust constitutes one important judicial means of remedying unjust enrichment. Other remedies, such as monetary damages, may also be available to rectify situations of unjust enrichment. We must, therefore, ask when and under what circumstances it is appropriate for a court to impose a constructive trust.

[20] Therefore a declaration by a court of equity would be required to find that there was a constructive trust in the Property. Once so declared, the constructive trust would have come into existence when the unjust enrichment arose. Sobier J. made the following comments on whether this Court is a court of equity in *Sunil Lighting Products v. Minister of National Revenue*, [1993] T.C.J. No. 666:

> **18** The jurisprudence clearly affirms that the Tax Court of Canada is not a court of equity and its jurisdiction is based within its enabling statute[6]. In addition, the Court cannot grant declaratory relief given that such relief is beyond the jurisdiction of the Court[7]. In an income tax appeal, the Court's powers are spelled out in subsection 171(1) of the Income Tax Act. Consequently, these powers essentially entail the determination of whether the assessment was made in accordance with the provisions of the Income Tax Act[8].

[21] As this Court is not a court of equity, the equitable remedy of constructive trust cannot be granted by this Court.

[22] The issue of whether the application of the equitable doctrine of constructive trust can affect an assessment under section 160 of the *Income Tax Act* has been

discussed in earlier decisions of this Court. There appear to be differing views of the Judges of this Court in relation to this matter. In *Savoie v. The Queen*, [1993] 2 C.T.C. 2330, 93 DTC 552, Bowman J. (as he then was) clearly stated that the doctrine of constructive trust could be invoked in determining, for the purposes of the application of section 160 of the *Income Tax Act,* the fair market value of a property transferred by a tax debtor. In the subsequent cases of *Raphael v. The Queen*, 2000 DTC 2434, [2000] 4 C.T.C. 2620 and *Burns v. Her Majesty the Queen* 2006 DTC 3383, [2006] 5 C.T.C. 2392, the principle of unjust enrichment was held to not be applicable in dealing with assessments issued under section 160 of the *Income Tax Act.* In neither *Burns* nor *Raphael* was there any reference to the decision of Bowman J. (as he then was) in *Savoie* nor were there any references to the Supreme Court of Canada decisions in *Peter v. Beblow* and *Rawluk v. Rawluk.*

[23] The issue before me is whether the existence of an interest of the Appellant in the Property or any right that the Appellant had to have an interest in the Property granted to her by a court of equity, can affect the assessments issued under section 160 of the *Income Tax Act* and section 325 of the *Excise Tax Act.* In my opinion, as a result of the decisions of the Supreme Court of Canada in *Peter v. Beblow* and *Rawluk v. Rawluk,* since the beneficial interest of the Appellant in the Property, if the equitable remedy of constructive trust would have been granted by a court of equity, would have come into existence when the unjust enrichment occurred (which was when the Appellant improved the Property for no consideration) the right of the Appellant to have a declaration by a court of equity of her beneficial interest in the Property as of the time of the unjust enrichment, is a right that the Appellant surrendered when the Property was conveyed to her in 2001 and hence would be consideration that she gave for the Property.

[24] Both sections 160 of the *Income Tax Act* and 325 of the *Excise Tax Act* are intended to prevent taxpayers from escaping their liability for taxes by transferring their assets to persons with whom they do not deal at arm’s length for inadequate consideration. Each section imposes a liability on a transferee who receives property from a non-arm’s length tax debtor for inadequate consideration. From the Appellant’s perspective, the issue, in relation to the application of these sections to the transfer of the Property to her, is to what extent should she be held liable for the tax debts of Danny MacAdam? The Appellant earned her right to an interest in the Property as a result of the substantial amount of work that she performed to improve the Property and her contributions of her own resources to the improvements. It would be unfair to not recognize her rights to an interest in the Property when dealing with an assessment under section 160 of the *Income Tax Act* and section 325 of the *Excise Tax Act*.

[25] Counsel for the Respondent also submitted that the law of constructive trusts could not be applied when the rights of creditors are affected. However in *Re Roberts Estate*, [1998] O.J. No. 1109, the Ontario Court of Justice (General Division) applied the law of constructive trust in a bankruptcy situation and found that the wife of the bankrupt held a constructive trust in part of the proceeds from the sale of shares and she was only required to return to the trustee in bankruptcy the portion of the proceeds that was not affected by the trust in her favour. This case was followed by Registrar Herauf of the Saskatchewan Court of Queen's Bench (in Bankruptcy and Insolvency) in the *Estate of John Allen Patrick*, [1999] S.J. No. 82. As well a constructive trust was found in a bankruptcy situation in *Ellingsen (Trustee of) v. Hallmark Ford Sales Ltd*., 2000 BCCA 458.

[26] In my opinion, a determination that the Appellant had a right to apply to a court of equity for a declaration that she had a beneficial interest in the property under a constructive trust in this case does not prejudice the Respondent because the Respondent did not become a creditor of Danny MacAdam based on any assumption or reliance on the fact that Danny MacAdam was the owner of the Property.

[27] As a result, I find that for the purposes of section 160 of the *Income Tax Act* and section 325 of the *Excise Tax Act,* the Appellant had a right to apply to a court of equity for a declaration that she had an interest in the Property at the time that the Property was transferred to her in 2001 and this right was surrendered when the Property was transferred to her and hence the surrender of this right was consideration that the Appellant gave for the transfer of this Property to her. The Appellant has established, on a balance of probabilities, that the elements of unjust enrichment, as set out above, are present in this case and that there is a direct link to the Property as the Property was the one on which the Appellant worked for no consideration. Therefore the Appellant had a right to apply to a court of equity for a declaration that she had an interest in the Property. The only evidence was that the Appellant, and not Danny MacAdam, was the person who did the work needed to improve the Property and who looked after renting the Property, collecting rents and, when necessary, evicting a tenant. There was no evidence of any work performed on the Property by Danny MacAdam or of any of his money (other than his share of the rental income) being used to pay for the Property.

[28] Counsel for the Appellant submitted that the fair market value of the Appellant's interest in the Property, at the time that the Property was transferred to her, was equal to one-half of the fair market value of the Property. Counsel for the Appellant did not call Danny MacAdam as a witness. Although the evidence that was

presented was clear that Danny MacAdam did not make any contribution of labour or capital to the Property and hence the Appellant may have a right to more than a 50% interest in the Property, without hearing from Danny MacAdam and with counsel for the Appellant only seeking a ruling that she had a 50% interest in the Property, I am not prepared to find that the Appellant had a right to any more than a 50% interest in the Property. The possibility that the Appellant may have a right to more than a 50% interest would, in my opinion, negate any discount that should be applied in determining the fair market value of her right to apply for a declaration that she had a 50% interest in the property. Since there has been no declaration by a court of equity that the Appellant had a 50% interest in the Property and, since this is an equitable remedy, there is no guarantee that such remedy would have been granted by a court of equity. However, this possibility that a court of equity may not have granted this remedy is, for the purposes of determining the fair market value of her right to apply for this declaration, offset by the possibility that she had a right to a declaration that her interest was greater than 50%, and therefore I find that the fair market value of her right to apply to a court of equity for a declaration of a constructive trust is equal to $70,000, which is one-half of the fair market value of the Property, for the purposes of sections 160 of the *Income Tax Act* and 325 of the *Excise Tax Act.*

[29] Counsel for the Respondent had also raised the issue that the Appellant had not reported any of the rental income on her tax returns. In the Reply filed by the Respondent it is stated that the Respondent "denies that until April 12, 2001, Danny MacAdam reported all rental income and expenses relating to the 317 - 319 Fitzroy Street Property and states that for taxation years 1999 and 2000, he failed to file [*sic*] in his income tax returns as required by the *Income Tax Act,* hence, he failed to report his income". Therefore it would appear that Danny MacAdam did not report the rental income either. The reporting of the rental income is not the issue in this case. The only issue in this case is the validity of the assessments issued under section 160 of the *Income Tax Act* and section 325 of the *Excise Tax Act.*

[30] As a result, the appeal under the *Income Tax Act* is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant gave consideration of $70,000 for the transfer of the Property to her as she surrendered her right to have a declaration by a court of equity that she had a beneficial interest in the Property at the time it was transferred from Danny MacAdam to the Appellant, for the purposes of the assessment issued under section 160 of the *Income Tax Act*.

[31] In addition to the assessment issued against the Appellant under section 160 of the *Income Tax Act* for $78,791.76, the Appellant was also assessed under section

325 of the *Excise Tax Act* for $59,143.92. Section 325 of the *Excise Tax Act* provides as follows:

> 325. (1) Tax liability re transfers not at arm's length — Where at any time a person transfers property, either directly or indirectly, by means of a trust or by any other means, to
>
> (a) the transferor's spouse or common-law partner or an individual who has since become the transferor's spouse or common-law partner,
>
> (b) an individual who was under eighteen years of age, or
>
> (c) another person with whom the transferor was not dealing at arm's length,
>
> the transferee and transferor are jointly and severally liable to pay under this Part an amount equal to the lesser of
>
> (d) the amount determined by the formula
>
> A – B
>
> where
>
> A is the amount, if any, by which the fair market value of the property at that time exceeds the fair market value at that time of the consideration given by the transferee for the transfer of the property, and
>
> B is the amount, if any, by which the amount assessed the transferee under subsection 160(2) of the Income Tax Act in respect of the property exceeds the amount paid by the transferor in respect of the amount so assessed, and
>
> (e) the total of all amounts each of which is
>
> (i) an amount that the transferor is liable to pay or remit under this Part for the reporting period of the transferor that includes that time or any preceding reporting period of the transferor, or
>
> (ii) interest or penalty for which the transferor is liable as of that time,
>
> but nothing in this subsection limits the liability of the transferor under any provision of this Part.

[32] Since the amount that can be assessed under section 325 of the *Excise Tax Act* is also based on the amount by which the fair market value of the Property at the time that it is transferred exceeds the fair market value of the consideration given for the Property, the above comments on the application of the equitable remedy of constructive trust and the Appellant's right to apply to a court of equity for this remedy, apply equally to an assessment under section 325 of the *Excise Tax Act*. Therefore the amount determined for A in the formula in paragraph 325 (1)(d) of the *Excise Tax Act* will be $70,000. Since the maximum amount that the Appellant can be assessed under subsection 160(2) of the *Income Tax Act* is $70,000 (which is less than the outstanding liability of Danny MacAdam under the *Income Tax Act*) and since there was no evidence that Danny MacAdam has paid any of his outstanding liability under the *Income Tax Act*, the amount determined for B in the formula in paragraph 325(1)(d) of the *Excise Tax Act* will be $70,000 and the assessment issued under section 325 of the *Excise Tax Act* is vacated.

[33] The Appellant, in her Notice of Appeal, did not ask for costs in this matter nor did the counsel for the Appellant ask for costs at any time during the hearing. Noël J.A. of the Federal Court of Appeal in *Canada (Attorney General) v. Pascal*, 2005 F.C.A. 31, made the following comments:

> After reviewing the record, I note that the notice of motion which led to the dismissal of the appeal did not claim costs. It is only in documentation submitted in support of the motion that the phrase [TRANSLATION] "with costs" is found. Under rule 359(b), the relief sought must be set out in the notice of motion. A party which fails to set out the relief sought in its notice of motion should not be surprised when it is not granted.

[34] The *Tax Court of Canada Rules (General Procedure)*, which are the rules that are applicable in this case, provide that the relief sought must be specified. The *Tax Court of Canada Rules (Informal Procedure)* do not require that the relief sought must be specified. As a result in *Andrews v. The Queen*, 2007 TCC 312, 2007 DTC 901, costs could be awarded even though the Appellant did not ask for costs. However, in this case since the applicable rules are the *General Procedure Rules* and not the *Informal Procedure Rules* and since there is no mention in the Notice of Appeal that the Appellant is seeking costs, I am unable to award costs to the Appellant.

Signed at Halifax, Nova Scotia this 29th day of January 2008.

“Wyman W. Webb”

Webb J.

CITATION:	2007TCC66
COURT FILE NO.:	2005-3343(IT)G and 2005-3344(GST)G
STYLE OF CAUSE:	Gillian N. Darte v. The Queen
PLACE OF HEARING:	Charlottetown, Prince Edward Island
DATE OF HEARING:	December 6, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	January 29, 2008

APPEARANCES:

:	J. Michael McGonnell
Counsel for the Respondent:	V. Lynn W. Gillis

COUNSEL OF RECORD:

For the Appellant:

Name:	J. Michael McGonnell
Firm:	Stewart McKelvey Stirling Scales

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada