

Docket: 2006-3725(IT)G

BETWEEN:

FERME KOIRIS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 25, 2008, and September 22, 2009,
at Rouyn-Noranda, Quebec.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant: Bernard Barrette
(September 25, 2008, only)

Agent for the Appellant: Raynald Ouellet
(September 22, 2009, only)

Counsel for the Respondent: Johanne M. Boudreau

JUDGMENT

The appeal from the reassessment under the *Income Tax Act*, the notice of which is dated February 7, 2006, and bears the number 30429, is allowed, with costs, and the reassessment is vacated, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 12th day of January 2010.

"Robert J. Hogan"

Hogan J.

Translation certified true
on this 28th day of April 2010.

Erich Klein, Revisor

Citation: 2010 TCC 20
Date: 20100112
Docket: 2006-3725(IT)G

BETWEEN:

FERME KOIRIS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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REASONS FOR JUDGMENT

Hogan J.

Introduction

[1] This is an appeal from a reassessment made on February 7, 2006, under section 160 of the *Income Tax Act* (ITA). The two questions in issue are as follows:

1. Can the doctrine of *res judicata* be set up against the reassessment, as the Appellant asserts?
2. Are the conditions for the application of section 160 met?

Summary of the facts

[2] In making and confirming the reassessment in issue, the Minister of National Revenue ("the Minister") made the following assumptions of fact:

[TRANSLATION]

- (a) The Appellant is a corporation that operates a cattle farm.
- (b) Ferme Normand et Frères Inc., the tax debtor, was a corporation that operated a dairy farm in St-André, Quebec.
- (c) By contract of sale under private writing dated June 7, 1993, Ferme Normand et Frères sold the Appellant the following property:

- ninety-eight (98) dairy cows;
 - twenty-seven (27) pregnant heifers;
 - twenty-five (25) heifers;
 - six (6) calves;
 - three (3) bulls;
 - the farm's entire equipment and rolling stock; and
 - the proceeds of the sale of 3,000 kg of processing milk fat
- (d) In consideration of the property listed in the previous subparagraph, the Appellant paid Ferme Normand et Frères Inc. the sum of \$175,000.
- (e) Eleven days later, on June 18, 1993, the Appellant sold part of the property listed in subparagraph (c) above at auction for a total of \$319,415.98.
- (f) As at June 7, 1993, the fair market value of the property listed in subparagraph (c) above was at least \$353,818.
- (g) On June 7, 1993, when the property listed in subparagraph (c) was transferred, the sole shareholder of Ferme Normand et Frères Inc. was 2971-3690 Québec Inc. and the sole shareholder of that numbered company was Roger Ouellet.
- (h) On June 7, 1993, when the property listed in subparagraph (c) was transferred, the sole shareholder of the Appellant was Immeuble Isjapa Inc., whose sole shareholder was Raynald Ouellet.
- (i) Raynald Ouellet is Roger Ouellet's brother.
- (j) At the time of the transfer referred to in subparagraph (c), Ferme Normand et Frères Inc. and the Appellant were related persons.
- (k) On May 26, 1995, Ferme Normand et Frères Inc. made an assignment of its property.
- (l) During its taxation year beginning June 1, 1993, and ending May 31, 1994, or in the course of a prior taxation year, Ferme Normand et Frères Inc. had a tax debt of \$93,509.74.

[3] Raynald Ouellet, the sole shareholder of the Appellant, testified concerning the facts surrounding the acquisition of the assets of Ferme Normand et Frères Inc. ("the Normand Farm") by the Appellant, which he represented for the purposes of the transaction.

[4] In the summer of 1993, Roger Ouellet, Raynald Ouellet's brother, told him that the Normand Farm was in the process of being liquidated or sold. According to the witness, the owners of the farm, the Normand brothers, were no longer in agreement about how to run the farm.

[5] The Appellant's farming operation is located in the regional county municipality of Rouyn-Noranda, and the Normand Farm is in the Rivière-du-Loup area, 1,200 km away.

[6] Raynald Ouellet testified that he had told his brother at the outset that he was only interested in purchasing the farm's livestock, part of its milk quota, and its equipment. He was not interested, he stated, in purchasing the remainder of the farm's assets (consisting of immovable property) because he felt that he lived too far away from the location to be able to look after the sale of those assets. However, he believed that the equipment and livestock could be sold quickly at an auction held within two weeks of the purchase of those farm assets.

[7] Raynald Ouellet testified that he visited the farm for the first time on his own, in order to meet the Normand brothers. From their body language, he saw that the Normand brothers no longer got along and were highly motivated to sell the assets. While there, he quickly noticed that the farm was generally being allowed to deteriorate: the stables were very poorly maintained and a number of cows were sick. A few were lying down and unable to get up. Raynald Ouellet testified that he thought he could purchase the assets and resell them at a profit if he took the time to properly care for the animals, slaughter the ones that were sick, and make minor repairs to the farm's equipment.

[8] Raynald Ouellet returned to the farm for a second visit, accompanied this time by his brother Roger, who was interested in acquiring the remainder of the farm's assets by purchasing the shares of the company that owned the Normand Farm. Raynald Ouellet made an offer to purchase the assets for \$175,000. He negotiated the price with the Normand Brothers, and they ultimately accepted the offer. Unbeknownst to his brother Raynald, Roger Ouellet negotiated the purchase of the farm's shares. Raynald Ouellet does not know the purchase price of the shares. The two brothers are no longer speaking to each other following that transaction, and all the banking documents concerning the transaction have been destroyed. A letter from the National Bank confirms, however, that the transaction took place and that the documents were destroyed.

[9] There are, however, two items of evidence in the record that indicate that Roger Ouellet borrowed \$500,000 from the National Bank in order to purchase the shares in the Normand Farm. The bank required each of the two brothers to provide a \$250,000 guarantee. Raynald Ouellet says that he had to guarantee his brother's loan until the sale of the assets at the auction and the payment of the \$175,000 owed to the Normand Farm. The bank was concerned that even though it had a security in the form of all the farm's movable and immovable assets, that security would cease to be effective as soon as the movable assets were sold and removed from the farm. Since buyers at auction pay with non-certified cheques, the National Bank wanted Raynald Ouellet to bear, until it cashed the cheques, the credit risk that the eventual purchasers posed. The witness confirmed that he was released from his suretyship when the National Bank confirmed that the purchase price was received.

[10] On June 18, 1993, the Appellant held an auction at which it sold the property that it had acquired on June 7, 1993. The proceeds of the auction, not including taxes, totalled \$231,004.27. It should be noted that these proceeds were not for all of the equipment and inventory, and did not include the proceeds of the sale of 2,400 kg of processing milk fat (the milk quota) that had been sold for the sum of \$76,824. The gross proceeds from both transactions, before expenses and not including sales taxes, totalled \$307,828. Raynald Ouellet testified that he incurred expenses of approximately \$10,000 for labour, \$8,000 for advertising and \$3,000 for farm equipment repairs. In addition, there were bank charges of roughly \$4,000, for a total cost of about \$26,000. In my opinion, the Appellant's net profit from the sale of the assets was approximately \$108,000. The Appellant paid tax on that profit.

[11] Raynald Ouellette says that he is surprised, for several reasons, that the Canada Revenue Agency (CRA) is hounding the Appellant. First of all, the transaction in issue dates back to 1993, and it is now 2010. The CRA sent the Appellant a first notice of assessment on December 20, 1993. The Appellant appealed that first assessment on August 4, 2000. Following various discussions between the parties' counsel, the Appellant filed a Consent to Judgment that put an end to the dispute. This consent, produced as Exhibit A-6 in the case at bar, was sanctioned by my colleague Justice McArthur on January 15, 2004. According to the Appellant, the reassessment under appeal pertains to exactly the same facts as those that were the subject of the first assessment. Both assessments were made under section 160 of the ITA. Raynald Ouellet is of the opinion that the Consent to Judgment put an end to this matter.

[12] Moreover, Raynald Ouellet believes that the Appellant paid a price corresponding to the fair market value of the property. That price was negotiated with the Normand brothers, who had an independent economic interest which motivated them to seek the highest possible price for the assets. According to the witness, if it was so clear that the property could have been sold for a better price at auction, the Normand brothers would have done it. It was only after the fact, when the property was resold, that it became clearer that the transaction was a good one for the Appellant. At the time of the purchase, however, it was not clear. Furthermore, the witness maintained that the certified appraiser employed by the CRA, who also testified (concerning her valuation, which was done at the request of CRA staff) at the hearing, was not qualified to value the Appellant's assets. He testified that the appraiser's expertise is in real estate. He stated that he himself is knowledgeable about agricultural property valuation because he was once employed by Quebec's ministry of agriculture, fisheries and food (ministère de l'Agriculture, des Pêcheries et de l'Alimentation, hereinafter referred to as MAPAQ), where his duties involved approving farm loans, and because the Appellant's activities frequently involve the purchase and sale of livestock and farm equipment.

The testimony of Nathalie Locas

[13] The Respondent's main witness was Ms. Locas, a certified appraiser with the CRA. Further to a request made by CRA auditor Éric Vaillancourt, Ms. Locas valued the assets purchased by the Appellant. Her findings are set out in a memorandum dated November 29, 2004, produced as Exhibit A-9. She assigned the following fair market values to the assets:

Livestock:	\$134,288
Proceeds from milk sales:	\$96,030
Farm equipment and rolling stock:	\$123,500
Total:	\$353,818

[14] Ms. Locas's expert report states that she used two methods to value the cattle, namely: an analysis of the actual livestock sale transactions at the June 18, 1993 auction, and a reference to the list prepared by the Comité de références économiques en agriculture du Québec. Using those two methods, Ms. Locas found that the selling price for each animal at the auction was representative of the market value at that time. She arrived at a total value of \$134,288, despite the fact that the selling price of

the animals was \$107,280, because only 123 animals were sold at the auction, while the herd comprised 159 head of cattle — hence the difference of \$27,008.

[15] Ms. Locas admitted that she made a mistake in calculating the fair market value of the 3,000-litre milk quota. Specifically, she forgot to take into account a 20% reserve applied by the Fédération des producteurs de lait du Québec. When that reserve was applied, the fair market value of the quota was determined to be \$76,824.

[16] Ms. Locas determined that the fair market value of the Appellant's equipment and rolling stock was \$123,500 on the basis of the proceeds of the sale of the farm equipment at the auction. Since not all the farm equipment was sold at the auction, Ms. Locas characterized as conservative her estimation of the value of the equipment and rolling stock.

Appellant's position

[17] The Appellant objects to the reassessment under appeal on the grounds of *res judicata*, in light of Justice McArthur's decision.

[18] Further, the Appellant submitted that Ms. Locas should not be recognized as an expert in farm equipment valuation. In its submission, Ms. Locas is experienced in real estate appraisal and has no relevant experience in the agricultural field.

[19] Lastly, for the reasons mentioned in Raynald Ouellet's testimony, the Appellant believes that the price of \$175,000 represents the fair market value of the assets purchased on June 7, 1993.

Respondent's position

[20] The Respondent's position is contrary to the Appellant's on each of the above points. As a result of the correction that Ms. Locas accepted in relation to the sale of the milk quota, the fair market value of the assets as determined by the Respondent is \$333,612.

Analysis

[21] Under the civil law, article 2848 of the *Civil Code of Québec* (C.C.Q.) provides as follows with respect to the issue of *res judicata*:

2848. The authority of a final judgment (*res judicata*) is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same.

However, a judgment deciding a class action has the authority of a final judgment in respect of the parties and the members of the group who have not excluded themselves therefrom.

[22] Jean-Claude Royer, in *La preuve civile*,¹ states the following regarding *res judicata*:

[TRANSLATION]

The authority of a final judgment preserves public order while protecting private interests. It is a legal presumption that avoids repeated or perpetual litigation, ensures the stability of social relations, and prevents conflicting judgments from being issued.²

[23] Further on, he adds:

[TRANSLATION]

The authority of a final judgment extends only to the reasons that are closely connected to the judgment.³

[24] Article 2848 C.C.Q. provides that three conditions must be met in order for the authority of a final judgment to be relied upon in a case in which there has already been a judgment. Briefly stated, there must be identity of cause, identity of object and identity of parties. Royer discusses these three identities in his book. With regard to identity of parties, he states:

[TRANSLATION]

Legal identity - Article 2848 C.C.Q. requires that the parties be the same and that they be acting in the same capacity.⁴

¹ Jean-Claude Royer & Sophie Lavallée, *La preuve civile*, 4th ed. (Cowansville Qc.: Yvon Blais, 2008).

² *Ibid.*, paragraph 790, page 635.

³ *Ibid.*, paragraph 822, page 695.

⁴ *Ibid.*, paragraph 823, page 696.

[25] With respect to identity of cause, the author writes:

[TRANSLATION]

. . . there is no identity of cause where the physical facts or juridical acts alleged in the trials are different, or where the legal characterization of those facts is different. Thus, there is no identity of cause between two claims that are based on different contracts or instruments. . . .

. . . As a general rule, identity of the legal characterization of the facts requires not only that the facts be the same, but also that the legal rule applicable to those facts be the same. . . .

. . . The true criterion for determining whether there is identity of cause is the legal characterization of the facts. As a general rule, where the legal characterization is the same, the legal rule is the same as well. If there are two different legal rules applicable to identical facts, there are two different causes, for distinct rules generally call for different legal characterizations.

On the other hand, in certain exceptional cases, there can be identity of cause even if the legal rules relied upon are different. In order for this to happen, there must, however, be identity of facts and identity of their legal characterization. The latter identity supposes identity as to the basis of the two legal rules and also as to the potential outcome of the application of each.⁵

[26] With regard to the third element, the identity of object, the author concludes as follows:

[TRANSLATION]

. . . The object of a legal action is the benefit that the litigant seeks, or the right that he seeks to have enforced, reduced or set aside. The presumption in article 2848 C.C.Q. does not require material identity of the thing applied for. It is sufficient that there be abstract or formal identity of the right asserted.⁶

[27] The juridical facts referred to in Justice McArthur's decision are not the same as those established for the purposes of the reassessment herein. The relevant part of the Consent to Judgment is worded as follows:

[TRANSLATION]

⁵ *Ibid.*, paragraphs 830 to 832, pages 707, 708, 709, 714 and 715.

⁶ *Ibid.*, paragraph 835, page 720.

[N]o transfer took place on June 29 and August 26, 1993, between Ferme Koiris Inc. and Ferme Normand et Frères Inc.

[28] The reassessment in issue pertains to a transfer that occurred on June 7, 1993, not the transfers that occurred on June 29 and August 26, 1993. In the earlier case that was decided, the transfers were of money. Counsel for the Respondent pointed out that the pleading referred to those two transactions, whereas the transfer in issue here involves the sale of assets, to which section 160 of the ITA applies. The purpose of the Consent to Judgment is specified in a letter dated November 25, 2003, to Bernard Barrette, the Appellant's lawyer at the time. In the letter, counsel for the Respondent clearly indicated that she was recommending that her client consider the possibility of assessing the Appellant pursuant to subsection 160(1) of the ITA with respect to the transfer of property that took place on June 7, 1993.

[29] Consequently, it is my opinion that *res judicata* cannot be asserted against the reassessment at issue in this case.

Fair market value

[30] The only issue with regard to the application of section 160 of the ITA is the fair market value of the assets purchased by the Appellant. There is no dispute between the parties with respect to the legal aspect of the definition of the term "fair market value." Consequently, the question that I must address is strictly a question of fact.

[31] Mr. Barrette, the Appellant's counsel, objected to Ms. Locas being recognized as an expert. In view of her education and professional experience, I am able to recognize Ms. Locas as a valuation expert. However, I share Mr. Barrette's view as to the weight to be given to her opinion. First of all, I note that she has a great deal of experience in real estate appraisal. Indeed, her appraisal report attests to this fact. At page 4 of the report, Ms. Locas states:

[TRANSLATION]

1. INTRODUCTION

1.1 PURPOSE AND DATE OF APPRAISAL

The purpose of this report is to estimate the fair market value of the property of Ferme Normand et Frères Inc. sold to Ferme Koiris Inc. on June 7, 1993.

Our mandate was to determine whether the price, namely \$175,000, of the transaction between the two aforementioned entities was representative of the fair market value of the property as at June 7, 1993.

This real estate appraisal is solely for our agent, for taxation purposes only.

It should be noted that the property was not seen by the author of this report because it had all been sold at the time of the initial valuation in November 2004.

1.2 DEFINITION OF MARKET VALUE

Market value is defined as the likeliest price at which a property would be sold on the real estate market, having regard to the following conditions:

- The market for the real estate is competitive, i.e. the interaction between supply and demand is normal.
- All normal and reasonable information regarding market conditions and opportunities circulates freely and the buyer and the seller have knowledge thereof.
- There is no undue pressure on either party.
- "Rational" or prudent economic behaviour is observed in both the buyer and the seller.
- A reasonable time frame is specified when the property is put up for sale.
- The payment methods are in keeping with market standards.

...

[32] It is clear that Ms. Locas made a mistake. However, I believe that the mistake is revelatory of the fact that Ms. Locas mainly does real estate appraisal. Indeed, she is with the CRA's real estate appraisal section in Quebec City. Moreover, during her cross-examination, I asked Ms. Locas whether the buyer should have benefited from a substantial discount because he was buying all the movable assets of the farm, whereas, at the auction, each subsequent buyer purchased specific items. I noticed that Ms. Locas had a great deal of trouble answering this question, and it is clear that she failed to address it in her report. Later during the hearing, she answered that, according to her calculations, some purchasers of cattle paid the same average price when they bought more than one animal. However, I would point out that these

buyers were not purchasing 100% of the assets. Furthermore, I believe Raynald Ouellet's testimony that certain animals were in a poor state at the time of the Appellant's purchase. Thanks to the work that he and his team did over a seven-day period, the condition of the animals improved appreciably. Since Ms. Locas did her appraisal on August 4, 2008, she was unable to make any findings regarding their condition. Lastly, if the Appellant's expenses are added to Ms. Locas's valuation, the Appellant, according to the CRA's position, should have incurred a loss. I find such a conclusion unlikely. Raynald Ouellet, who acted on the Appellant's behalf, took a calculated risk in making the purchase. He made a personal commitment in providing a \$250,000 surety for the Appellant in order to facilitate its purchase of the assets. The auction sale could have been less successful. The CRA is attempting to use the results of the auction after its success has been confirmed. A lot of people would get rich if they could set their purchase price after the results of the purchased assets' resale become known.

[33] Ms. Locas made other mistakes in her report. With respect to the sale of the milk quota, she failed to deduct the 20% reserve prescribed by regulation. In her initial report, she concluded that the reserve had been established through the Fédération des producteurs de lait du Québec and its centralized quota sales system. However, at the hearing, she admitted that she should have taken into account a 20% reserve, which was the percentage in effect at the time of the transaction. This shows in Ms. Locas a lack of knowledge in the agricultural field.

[34] Ms. Locas's conclusion is also contradicted by the facts of the transaction, as presented by Raynald Ouellet in his testimony. Raynald Ouellet testified that he negotiated the purchase price of the assets with the Normand brothers on his second visit to the Normand Farm. At the time of the negotiations, the Normand brothers owned the shares of the company that held the assets, and it was very much in their interest to get the best possible price for the assets. If they succeeded in selling the assets purchased by the Appellant at the best possible price, they would be able to command a higher price for the shares of the company that owned the Normand Farm, or pay themselves a dividend before selling the shares. They negotiated the price with their interests alone in mind, as unrelated parties do. My conclusion remains unchanged notwithstanding the fact that, at the time of the sale, the Normand Farm shares belonged to Roger Ouellet, Raynald Ouellet's brother. In my view, the essential point is how the purchase price was arrived at, and in that regard the evidence is uncontradicted. The Normand brothers, who were acting entirely and exclusively in their own interests, accepted the Appellant's \$175,000 offer. This is consistent with the conduct of people doing business with each other at arm's length.

[35] Moreover, if, as counsel for the Respondent argues, it was so clear that the assets could be resold at a profit at the auction, why did the Normand brothers not sell the assets by auction themselves? It was in their economic interest to conduct their business as they did. In my opinion, I must take into account the fact that, at the time of the sale to the Appellant, it was less clear that they would be able to obtain the same result as was achieved at the auction; it only became obvious once the Appellant had resold the assets at the auction. It is a well-accepted principle of valuation that one must not consider subsequent events in determining the price of an earlier transaction.

[36] In *Nash v. Canada*,⁷ the Federal Court of Appeal preferred to use the purchase price of the property, rather than its selling price.

29 Where there is a gap between the time an asset is acquired and disposed of, the cost of the asset will normally be an unreliable basis for estimating fair market value. But where the dates of acquisition and disposition are very close in time, barring evidence to the contrary, the cost of acquiring the asset will likely be a good indicator of its fair market value. . . .

⁷ [2005] F.C.J. No. 1921 (QL).

[37] In *Gilvesy Enterprises Inc. v. Canada*,⁸ this Court stated:

22 Finally, Ms. Senyk was, I think, somewhat influenced, whether consciously or not, by hindsight. . . .

23 . . . Faced with a choice between the highly theoretical opinion of Ms. Senyk, and the real transaction between these two very experienced business men, knowledgeable about the company and the industry, dealing in the real world with their own money, I have a strong preference for the latter as evidence of value. . . .

[38] The Appellant's position in this matter is supported by additional and independent facts. The National Bank lent \$500,000 to Raynald Ouellet's brother to help him purchase the Normand Farm shares. The bank required each of the Ouellet brothers to provide a \$250,000 guarantee. It was not at all in the National Bank's interest to allow the assets to be sold to the Appellant for less than their fair market value. If the Normand brothers accepted too low a price, the bank's credit risk exposure would be greater. It is true that the bank had a personal guarantee from Raynald Ouellet, but this guarantee ended when the assets were sold at auction and Ferme Normand received the \$175,000 selling price. Under the circumstances, I believe that the bank had sufficient assurance that the other assets of the company could cover the outstanding balance of the debt. Lastly, I would point out that it is clear that, under the circumstances, Roger Ouellet had an economic interest distinct from Raynald Ouellet's when the transaction of June 7, 1993 took place. If the assets could have been sold at a higher price, he might have made a better deal. I would note that things can often seem clearer after the fact. However, when we look at things as they were before the fact, they are not often quite so clear. Accordingly, I find, on a balance of probabilities, that the price of \$175,000 paid for the assets represented their fair market value. I would also point out that the Appellant provided further consideration for the assets. Specifically, Raynald Ouellet undertook to guarantee the loan from the National Bank, which was used to purchase the assets of the company that owned the Normand Farm, and he did so in order to facilitate the Appellant's purchase of the assets that were subsequently resold at auction.

Conclusion

[39] For all these reasons, I allow the appeal, with costs, and I order that the reassessment be vacated.

⁸ [1996] T.C.J. No. 1362 (QL), 97 DTC 811.

Signed at Ottawa, Canada, this 12th day of January 2010.

"Robert J. Hogan"

Hogan J.

Translation certified true
on this 29th day of April 2010.

Erich Klein, Revisor

CITATION: 2010 TCC 20

COURT FILE NO.: 2006-3725(IT)G

STYLE OF CAUSE: FERME KOIRIS INC. v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Rouyn-Noranda, Quebec

DATES OF HEARING: September 25, 2008, and September 22, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan

DATE OF JUDGMENT: January 12, 2010

APPEARANCES:

Counsel for the Appellant: Bernard Barrette (September 25, 2008,
only)

Agent for the Appellant: Raynald Ouellet (September 22, 2009,
only)

Counsel for the Respondent: Johanne M. Boudreau

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