Docket: 2008-1842(IT)G

BETWEEN:

ELENA SHULKOV,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 2-5, 2011, June 21–22, 2011,
December 5–8, 2011 and January 19–27, 2012 at Ottawa, Canada.

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

Counsel for the Appellant:	Terry D. McEwan Karine Veilleux Kristina M. Mahon (student-at-law)
Counsel for the Respondent:	Ifeanyi Nwachukwu Mélanie Sauriol Shane Aikat

---

JUDGMENT

The appeal from the reassessment issued by the Minister of National Revenue on March 6, 2008 and made under the *Income Tax Act* is dismissed, with costs to the Respondent, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 31st day of December 2012.

"S. D'Arcy"

D'Arcy J.

Citation: 2012 TCC 457
Date: 20121231
Docket: 2008-1842(IT)G

BETWEEN:

ELENA SHULKOV,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

D'Arcy J.

[1] The Appellant has appealed a reassessment issued by the Minister of National Revenue (the "Minister") on March 6, 2008. The reassessment was made pursuant to section 160 of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (the "*Act*"), in respect of shares transferred to the Appellant by her spouse.

[2] The Appellant argues that the Minister overstated the fair market value of the shares and failed to take into account consideration paid by her to her spouse for the shares.

[3] I heard the appeal over 17 days. In addition to being given a 39-page Partial Agreed Statement of Facts (the "PASF"), the Court heard from 8 witnesses (including 3 who were offered as expert witnesses) and was provided with 17 joint books of documents (containing over 400 exhibits), over 30 exhibits filed by the Appellant and over 110 exhibits filed by the Respondent.

Summary of Facts

[4] The Appellant was the common-law spouse of Mr. Tom Hinke from 1999 until they were married in September 2005.

[5] Mr. Hinke was the founder of Thermal Energy International Inc. ("TEI") a Canadian publicly-traded company which provides custom energy and emission reduction solutions.

[6] Between 1994 and November 2004, Mr. Hinke was the president and chief executive officer of TEI. TEI terminated his employment on June 21, 2005.

[7] On February 23, 2006, the Minister issued an assessment for $708,155, pursuant to section 160 of the *Act*, in respect of the transfer of the following shares of TEI by Mr. Hinke to the Appellant (the "Original Assessed Share Blocks"):[1]

Transfer Date Assumed by the CRA	**Number of Shares Transferred**	**Fair Market Value Determined by the CRA**
May 27, 2005	678,500	$210,335
August 3, 2005	426,000	$136,320
October 12, 2005	800,000	$208,000
January 5, 2006	300,000	$55,500
February 15, 2006	490,000	$98,000
Total	**2,694,500**	**$708,155**

[8] After receiving representations from the Appellant, the Minister reassessed the Appellant, reducing the amount of the assessment by $161,320 as follows:

- The Minister excluded the 426,000 shares of TEI that she previously assumed Mr. Hinke had transferred to the Appellant on August 3, 2005 (the "August 2005 Shares"). This resulted in the assessed amount being reduced by $136,320, being the amount the Minister assumed was the fair market value of the August 2005 Shares on the date they were transferred to the Appellant. When making this reduction the Minister assumed the Appellant had purchased the August 2005 Shares directly from TEI using her own funds.

[1] PASF, paragraph 3.

- The Minister concluded that the Appellant paid a consideration of $25,000 for the transferred shares. This consideration comprised amounts allegedly paid by the Appellant on behalf of Mr. Hinke for legal services.

[9] After making the above adjustments, the Minister reassessed the Appellant $546,835 with respect to the transfer of 2,268,500 TEI shares (the "Revised Assessed Share Blocks") with a fair market value of $571,835 less consideration of $25,000. The Revised Assessed Share Blocks comprised the following share transfers:

Transfer Date Assumed by the CRA	Number of Shares Transferred	Fair Market Value Determined by the CRA
May 27, 2005	678,500	$210,335
October 12, 2005	800,000	$208,000
January 5, 2006	300,000	$55,500
February 15, 2006	490,000	$98,000
Total	**2,268,500**	**$571,835**

[10] I heard testimony from both the Appellant and Mr. Hinke. As I will discuss in these reasons for judgment, the credibility of the Appellant and Mr. Hinke was destroyed during the six days that Mr. Hinke was cross-examined.

The Issues

[11] In *Wannan v. the Queen*,[2] Justice Sharlow of the Federal Court of Appeal described subsection 160(1) as follows:

> Section 160 of the *Income Tax Act* is an important tax collection tool, because it thwarts attempts to move money or other property beyond the tax collector's reach by placing it in presumably friendly hands. It is, however, a draconian provision. While not every use of section 160 is unwarranted or unfair, there is always some potential for an unjust result. There is no due diligence defence to the application of section 160. It may apply to a transferee of property who has no intention to assist the primary tax debtor to avoid the payment of tax. Indeed, it may apply to a transferee who has no knowledge of the tax affairs of the primary tax debtor. However, section 160 has been validly enacted as part of the law of Canada. If the Crown seeks to rely on section 160 in a particular case, it must be permitted to do so if the statutory conditions are met.

[2] 2003 FCA 423, 2003 DTC 5715, paragraph 3.

[12] Subsection 160(1) applies where a person transfers property, either directly or indirectly, by means of a trust or by any other means whatsoever, to the person's spouse. The Appellant accepts that Mr. Hinke transferred property to his spouse, that is, the Appellant.

[13] For the purposes of this appeal, the amount payable by the Appellant under subsection 160(1) is determined under paragraph 160(1)(*e*) and is 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 to the Appellant exceeds the fair market value at that time of the consideration given by the Appellant for the transfer of the property, and

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

[14] There is no dispute with respect to Mr. Hinke's liability under the *Act*. The parties agree that between May 2005 and February 2006 (the "Transfer Period") Mr. Hinke's liability under the *Act* exceeded $1.4 million.

[15] However, the parties do not agree on the amount determined under subparagraph 160(1)(*e*)(i). The parties raised the following three issues: the number of shares of TEI that were transferred to the Appellant, the fair market value of the TEI shares on their transfer date, and the consideration, if any, paid by the Appellant for the TEI shares.

[16] The Respondent argued that the property transferred for the purposes of section 160 was the Original Assessed Share Blocks. Counsel for the Respondent argued that the Minister's decision to remove the August 2005 Shares from the amount assessed under section 160 was an error caused by misrepresentations made by the Appellant.

[17] The Appellant disagreed. Counsel for the Appellant argued that the only property transferred was the Revised Assessed Share Blocks.

[18] Counsel for the Appellant argued that the fair market value of the property transferred was the fair market value of the Revised Assessed Share Blocks, which she calculated as being $271,895.

[19] Counsel for the Respondent argued that the fair market value of the property transferred was the fair market value of the Original Assessed Share Blocks, which she calculated as being $678,535.

[20] Counsel for the Appellant argued that the Appellant paid a consideration of $199,333 to Mr. Hinke for the Revised Assessed Share Blocks.

[21] The Respondent disagreed. Counsel for the Respondent argued that the Appellant did not pay any consideration to Mr. Hinke for the Original Assessed Share Blocks (which include the Revised Assessed Share Blocks).

[22] In summary, the Appellant accepts that she is liable under section 160 of the *Act*. However the Appellant believes the liability is $72,562 not the $546,835 assessed by the Minister. The Respondent believes that the Appellant is liable under section 160 for the $546,835 the Minister assessed.

Number of TEI Shares Transferred by Mr. Hinke to the Appellant

[23] The first issue I will address is the number of shares transferred by Mr. Hinke to the Appellant during the relevant period.

[24] When reassessing the Appellant the Minister excluded the August 2005 Shares from the transferred property on the assumption that the Appellant purchased the August 2005 Shares directly from TEI using her own funds.

[25] It is the Respondent's position that the Minister erroneously excluded the August 2005 Shares because of misrepresentations made by the Appellant. Counsel for the Respondent argued that the Appellant did not purchase the August 2005 Shares directly from TEI, rather the shares were transferred by Mr. Hinke to the Appellant. Further, counsel for the Respondent argued that the Appellant did not pay any consideration for the August 2005 Shares.

[26] The Respondent accepted that the Court cannot increase the tax payable beyond the amount assessed. However, counsel for the Respondent argued that, pursuant to subsection 152(9), the Minister is entitled to present alternative arguments to justify the amount assessed. In particular, counsel for the Respondent argued that I should include the August 2005 Shares when determining whether the Appellant's liability under subsection 160(1) was at least $546,835, the amount assessed by the Minister.

[27] Both the Appellant and Mr. Hinke testified that the Appellant received the August 2005 Shares directly from TEI as a result of the exercise of a stock option held by Mr. Hinke, using funds provided by the Appellant.

[28] The following excerpt from an affidavit sworn by Mr. Hinke before the Federal Court accurately summarizes his and the Appellant's sworn testimony before this Court with respect to the 426,000 August 2005 Shares:

> August 3, 2005: . . . On this date, I arranged for Ms. Shulkov to exercise stock options I held to purchase 426,000 shares of TEI at .18/share. I am advised by Ms. Shulkov, and believe, that she paid TEI the sum of $76,680 to acquire the shares on or about June 6, 2005. I also arranged for a business associate to exercise 50,000 options on that date, for the same price, who again paid TEI the sums required for purchase.[3]

[29] After reviewing the evidence, it is clear that the exercise of the option occurred as follows:

- On May 31, 2005, the CFO and treasurer of TEI wrote a letter to Mr. Hinke informing him that he held one million stock options that would be expiring on June 6, 2005.[4]

- On June 6, 2005, Mr. Hinke wrote a letter to the CFO and treasurer of TEI in which he stated that he was exercising his option to acquire 500,000 shares of TEI for $0.18 per share or $90,000.[5] The Appellant confirmed that the $90,000 was paid by a June 6, 2005 $70,000 TD bank draft[6] and a June 7, 2005 cheque for $20,000 written on the Appellant's TD bank account.[7]

---

3 Exhibit R-21, Tab 1, page 9.

4 Joint Book of Documents, Volume 7, Tab 69.

5 Joint Book of Documents, Volume 7, Tab 73.

6 The bank draft was purchased using $52,000 from the Appellant's "TD 294" account and $18,000 from Mr. Hinke's "TD 962" account. The $18,000 was provided to Mr. Hinke by a friend, a Mr. Proulx. Although Mr. Hinke provided conflicting evidence, it appears, in light of the objective documentary evidence before me, that $9,000 of the $18,000 was a loan by Mr. Proulx to Mr. Hinke and the remaining $9,000 was paid as consideration for the purchase of 50,000 shares of TEI. See Joint Book of Documents, Volume 7, Tabs 70, 71 and 104.

7 Joint Book of Documents, Volume 7, Tab 73(A); Transcript May 4, 2011, pages 513-514; Transcript, December 8, 2011, page 11. The TD bank account was referred to as the TD 294 account.

- On June 21, 2005, TEI terminated Mr. Hinke's employment.[8]

- Mr. Hinke stated the following in a June 22, 2005 email to the CFO and general manager of TEI, "It is now over two (2) weeks since June 6th/05 when I gave you $90,000 cash to exercise my $0.18 stock option to purchase 500,000 'free trading' common shares of Thermal Energy International Inc.. Please advise when and where my 500,000 shares will be provided to me?"[9]

- On June 22, 2005, Computershare issued share certificate number 0748 in the name of Mr. Hinke for 500,000 shares of TEI.[10] Mr. Hinke confirmed that this share certificate represented the shares purchased on the exercise of his option.[11]

[30] In summary, the option for 500,000 shares was exercised on June 6, 2005 and the shares were issued in the name of Mr. Hinke on June 22, 2005, as evidenced by the share certificate numbered 0748.

[31] On July 18, 2005, Mr. Hinke provided Computershare with written instructions to transfer 700,000 shares of TEI, represented by nine consecutively numbered share certificates (1758 to 1766). The nine consecutively numbered share certificates were all dated February 19, 2004. Mr. Hinke instructed Computershare to transfer the 700,000 shares as follows:[12]

- 426,000 shares were to be transferred to the Appellant.

- 50,000 shares were to be transferred to Mr. Proulx.

- 124,000 shares were to be transferred, in various amounts, to two individuals and a law firm.

- 100,000 shares were to be retained by Mr. Hinke.

---

8 Joint Book of Documents, Volume 16, Tab 167.

9 Joint Book of Documents, Volume 16, Tab 168. See also Transcript December 8, 2011, pages 13-15.

10 Exhibit R-43, Tab 18, Computershare was the authorized transfer agent for TEI.

11 Transcript, December 8, 2011, pages 16-17.

12 Joint Book of Documents, Volume 7, Tabs 75, 74.

[32] Computershare complied with Mr. Hinke's instructions and, in particular, issued share certificate number 0844 for 426,000 shares of TEI in the name of the Appellant on August 3, 2005.[13] Mr. Hinke agreed that the certificate for the 426,000 shares represented the August 2005 Shares.

[33] The objective documentary evidence before the Court shows that, in August 2005, the Appellant did not receive any of the 500,000 TEI shares issued by TEI on the exercise of Mr. Hinke's stock option. The 426,000 August 2005 Shares received by the Appellant were a portion of the 700,000 that, as evidenced by the nine consecutively-numbered share certificates, were issued to Mr. Hinke on February 19, 2004.

[34] Mr. Hinke eventually transferred the 500,000 TEI shares that he received on the exercise of his stock option to the Appellant. On October 7, 2005, Mr. Hinke instructed Computershare to transfer the 500,000 TEI shares, together with 300,000 other TEI shares, to the Appellant.[14]

[35] During cross-examination, counsel for the Respondent asked Mr. Hinke to reconcile his testimony that the Appellant received the August 2005 Shares directly from TEI with the evidence before the Court that Mr. Hinke transferred the August 2005 Shares to the Appellant using shares he had held since at least February 2004.

[36] He first explained this discrepancy as follows:

> I explained that because of the amount of time that had lapsed between the June 6th exercise date to when Thermal fired me on the 21st of June and then afterwards issued the 500,000 shares from the stock option, the people that had advanced funds to buy the shares [from] the stock option wanted the shares sooner and so that's why the date of this letter is July 18th, 2005.[15]

[37] Counsel for the Respondent then took Mr. Hinke to the evidence I just discussed, which clearly shows that he received the 500,000 shares on June 22, 2005, nearly a month before he instructed Computershare to transfer the 426,000 August 2005 Shares to the Appellant. He stated that his memory was not correct with respect to what occurred in June and July of 2005.[16]

---

13 Joint Book of Documents, Volume 7, Tab 82.
14 Exhibit R-43, Tab 18, 18(B).
15 Transcript, December 8, 2011, page 33.
16 Transcript, December 8, 2011, pages 34-36.

[38] Mr. Hinke then provided a second explanation of what had occurred: he stated that "There was a number of transactions that had been arranged during this period and so to in the -- in terms of being efficient I did an all in one instruction letter to Computershare."[17] This does not explain the inconsistency between his testimony that the Appellant acquired the 426,000 August 2005 Shares directly from TEI and the objective evidence before me.

[39] In summary, the objective documentary evidence before me clearly shows that the Appellant did not purchase the 426,000 August 2005 Shares from TEI. Rather, Mr. Hinke made the transfer of 426,000 shares to the Appellant in August 2005 using shares that he had owned since February 2004. As a result, for the purposes of subsection 160(1), the property transferred from Mr. Hinke to the Appellant during the relevant period included the 426,000 August 2005 Shares. Therefore, the total property transferred by Mr. Hinke to the Appellant was the Original Assessed Share Blocks.

[40] The Appellant's and Mr. Hinke's testimony with respect to the Appellant's acquisition of the August 2005 Shares seriously damaged (if not destroyed) their credibility.

Fair Market Value of the Original Assessed Share Blocks

[41] I must now determine the fair market value of the Original Assessed Share Blocks, that is, the property transferred by Mr. Hinke to the Appellant during the Transfer Period.

[42] The Court received the following statements and reports from persons put forward by the parties as expert witnesses:

- Affidavit of Mr. Lindsay Malcolm sworn on March 29, 2011.[18]

- Affidavit of Dr. Jamal Hejazi sworn on March 28, 2011 (referred to as "Dr. Hejazi's First Report").[19]

- Letter of Ms. Cheryl McCann dated April 12, 2011 filed in rebuttal to Dr. Hejazi's First Report.[20]

---

17 Transcript, December 8, 2011, page 37.

18 Exhibit A-3.

19 Exhibit A-1.

- Letter of Ms. McCann dated April 12, 2011 filed in rebuttal to Mr. Malcolm's affidavit.[21]

- Valuation Report of Ms. McCann filed on April 18, 2011.[22]

- Affidavit of Dr. Jamal Hejazi sworn on May 2, 2011 (referred to as "Dr. Hejazi's Second Report").[23]

- Letter of Ms. Cheryl McCann dated June 3, 2011 filed in rebuttal to Dr. Hejazi's Second Report.[24]

[43] The letters and reports relate to both the Revised Assessed Share Blocks and the Original Assessed Share Blocks (jointly referred to as the "Share Blocks").

[44] The Appellant put forward Mr. Lindsay Malcolm as an expert witness.

[45] Mr. Malcolm did not provide the Court with a c.v.. He stated in his affidavit that he has been self-employed as a corporate development and investor relations consultant for 27 years.

[46] Counsel for the Appellant argued that Mr. Malcolm had special knowledge and experience that qualified him to tell the Court what the effect was of placing large blocks of TEI shares on the public market. He argued that Mr. Malcolm was qualified to offer an opinion with respect to whether a price discount applied on the sale of the Share Blocks and regarding the quantum of that discount.[25]

[47] Mr. Malcolm agreed on cross-examination that the opinion he intended to provide was an estimate of the value of the Share Blocks.[26]

[48] Counsel for the Respondent did not accept Mr. Malcolm as an expert witness. It was the Respondent's position that Mr. Malcolm does not possess special knowledge or peculiar knowledge that would assist the Court in estimating the value

---

20 Exhibit R-100.
21 Exhibit R-102.
22 Exhibit R-98, R-99.
23 Exhibit A-2.
24 Exhibit R-101.
25 Transcript, May 2, 2011, page 188.
26 Ibid. page 143.

of the Share Blocks. In addition, the counsel for the Respondent argued that Mr. Malcolm does not possess the independence required of an expert witness.

[49] I reserved my decision with respect to whether I should qualify Mr. Malcolm as an expert witness. I did not feel that reserving my decision prejudiced either party. More importantly, it respected the Appellant's right to put forward the most complete evidentiary record possible that was consistent with the rules of evidence.

[50] After hearing Mr. Malcolm's oral testimony and observing his conduct during that testimony, I have concluded that he was not a credible witness. For this reason alone I have given no weight to either his testimony or his report. I have also concluded that Mr. Malcolm lacked the expertise and impartiality required to provide the Court with an opinion on the fair market value of the Share Blocks.

[51] I will first address his credibility. I do not believe that Mr. Malcolm was completely forthcoming during his testimony. One reason for my conclusion is his close personal relationship with the Appellant and her spouse. More importantly, in numerous instances he was simply not as forthcoming in his testimony as the Court would expect from an expert witness.

[52] The following two examples illustrate my concerns with respect to Mr. Malcolm's testimony:

[53] The first example relates to his testimony with respect to TEI shares that he received as compensation for his services. Mr. Malcolm stated in his affidavit that, in 2004, he received shares of TEI on two occasions: 32,998 shares on April 30, 2004 and 23,943 shares on September 24, 2004. He stated that he received these shares in satisfaction of amounts he was owed by TEI.[27]

[54] During cross-examination, counsel for the Respondent asked Mr. Malcolm if those were the only TEI shares that he received. Mr. Malcolm replied that they were the only shares he received.[28]

[55] The Respondent then filed two exhibits (R-3 and R-4) which show that TEI issued 100,000 shares to Mr. Malcolm on July 2, 2003 and that Mr. Malcolm received 60,000 TEI shares on February 20, 2003.

---

27 Exhibit A-3, paragraph 13.

28 Transcript May 2, 2011, page 171.

[56] When confronted with this evidence, Mr. Malcolm stated that he did not beneficially receive the 100,000 TEI shares issued on July 2, 2003. He did not explain who received the shares. He acknowledged that he did receive the 60,000 TEI shares on February 20, 2003. He then changed his testimony. Whereas he had previously stated that he had only received the 56,941 shares noted in his affidavit, after reviewing Exhibits R-3 and R-4 he stated that the shares noted in his affidavit were only examples of shares that were transferred to him. His testimony in this regard seriously damaged his credibility.

[57] A second example of Mr. Malcolm's evidence that I found troubling was his testimony with respect to the work he performed for TEI. He stated in his affidavit that he provided services to TEI during the period from December 2002 to December 2004.[29] During his testimony, he stated that he operated his consulting business as a sole proprietor for 27 years. After reading his affidavit and listening to his examination-in-chief, I thought he was telling the Court that he provided his services to TEI personally through his sole proprietorship.

[58] However, on cross-examination it became clear that he also carried on his business through a corporation, Compliant Capital Corp. Mr. Malcolm owned 100% of the shares of this corporation. Further, the Respondent produced a consulting agreement between Compliant Capital Corp. and Mr. Hinke (as president of TEI) dated October 1, 2004. The agreement states that Mr. Malcolm will provide consulting services to TEI through Compliant Capital Corp.[30] There is no evidence before me with respect to when the parties terminated the contract.

[59] It is not clear to me why Mr. Malcolm attempted to hide the fact that he provided services to TEI through Compliant Capital Corp. The fact that he did try to hide this fact further damaged his credibility.

[60] In addition to not finding Mr. Malcolm a credible witness, I believe he did not possess the requisite expertise to provide an opinion on the value of the Share Block.

[61] "Expertise" is a modest status that is achieved when the "expert… possesses special knowledge and expertise going beyond that of the trier of fact."[31] The witness may have acquired this special knowledge through either study or experience. It is

---

29 Exhibit A-3, paragraph 12.

30 Exhibit R-14.

31 David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 5th ed. (Toronto: Irwin Law, 2008), page 203.

important that the expert's special knowledge and expertise be in respect of the subject matter of his or her opinion.

[62] Mr. Malcolm indicated that much of his value to a company was in corporate development and dealing with investors in the company. He stated that he has provided services to hundreds of companies listed on the TSX Venture Exchange (and its predecessor exchanges). His services primarily involved the writing of news releases, advising companies on the timing of such releases in order to "have a positive effect on share prices" and acting as the primary public spokesperson for the company. He also testified that he was involved in creating presentations for investors and annual reports.[32]

[63] He testified that his role with his clients did not involve valuing shares. He also confirmed that he was not a chartered business valuator, a chartered accountant, a chartered financial analyst, or a certified general accountant. In addition, he has not taken any valuation courses offered by any of the institutions that govern those professions.[33]

[64] Counsel for the Appellant argued that Mr. Malcolm was qualified to give expert evidence on the value of the Share Blocks given his special knowledge and expertise with regard to the operation of the TSX Venture Exchange and his specific knowledge of TEI and the pricing of its shares on the TSX Venture Exchange.

[65] I do not agree. In my view, his personal experience does not provide him with the expertise required to value the Share Blocks. Mr. Malcolm certainly acquired knowledge of the TSX Venture Exchange and TEI through his work experience. However, this experience did not cause him to acquire the skills of a valuator. He acknowledged that he does not have any formal training as a valuator.

[66] Mr. Malcolm recognized a number of the approaches used to value shares, however, he admitted that he did not apply any of the accepted valuation approaches in valuing the Share Blocks. After listening to his testimony, I have concluded that, while he was aware of the valuation approaches, he did not possess the requisite skill to apply these approaches to a specific fact situation.[34]

---

32 Transcript, May 2, 2011, pages 128-135.
33 Transcript, May 2, 2011, pages 142-143.
34 Transcript, May 2, 2011, pages 144-146.

[67] Mr. Malcolm's affidavit (Exhibit A-3) reflects his lack of expertise. I found the affidavit to be a superficial attempt to value the shares.

[68] In summary, because of Mr. Malcolm's lack of expertise and the nature of his report, I do not find either the report or his testimony to be reliable.

[69] My third concern with respect to Mr. Malcolm is his objectivity.

[70] The party presenting the proposed expert witness must satisfy the trier of fact that he or she possesses not only the necessary expertise, but also the requisite independence as well.[35] An expert witness should provide independent assistance to the court and should not assume the role of an advocate.[36]

[71] It is clear from the testimony of Mr. Malcolm and Mr. Hinke that Mr. Malcolm and Mr. Hinke are close friends. Mr. Malcolm prepared his report because of that friendship.

[72] Mr. Malcolm testified that the Appellant did not retain him to provide the report. Rather, he prepared his report "on a gentleman's basis" for a friend[37]. He noted that he was asked to prepare the report one week before it was filed with the Court.[38]

[73] Mr. Malcolm's relationship with Mr. Hinke is not, in and of itself, sufficient to disqualify Mr. Malcolm as an expert. However, that relationship, when combined with his testimony during the hearing, is sufficient for me to conclude that he did not have the requisite independence to provide an expert opinion to the Court.

[74] A great deal of Mr. Malcolm's testimony was in the nature of advocacy. He clearly felt that his primary purpose in testifying was to support his close friend Mr. Hinke.

[75] For the foregoing reasons I have given no weight to Mr. Malcolm's affidavit.

---

35 *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, (2008), 298 D.L.R. (4th) 305 (Ont. C.A.).

36 Alan Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Markham, Ont.: LexisNexis, 2009), page 823.

37 Transcript, May 2, 2011, page 165.

38 Transcript May 3, 2011, page 205.

[76] The Appellant also put forward Dr. Jamal Hejazi as an expert witness. The majority of Dr. Hejazi's report and testimony related to the expert report filed by the Respondent. As a result, I will consider Dr. Hejazi's evidence after I have considered the evidence of the Respondent's expert.

[77] The Respondent put forward Ms. Cheryl McCann as an expert witness. Ms. McCann is a certified general accountant and certified business valuator. After hearing submissions from counsel, I qualified Ms. McCann as an expert witness for the valuation of the TEI shares at issue.

[78] Ms. McCann testified that her valuation report[39] is a *comprehensive valuation report* prepared in accordance with the practice standards of the Canadian Institute of Chartered Business Valuators (CICBV).[40] Her report provides a fair market value for the Original Assessed Share Blocks and the Revised Assessed Share Blocks at three separate groups of dates, namely, the transfer dates assumed by the CRA, the transfer dates assumed by the Appellant and the SEDI valuation dates.[41]

[79] Ms. McCann first, in accordance with CICBV standards, considered the economic environment at the time of the valuation, the industry in which TEI operated, and the business carried on by TEI itself, including the history of that business.

[80] After reviewing the history and overall operations of TEI, she determined that the going concern basis should be used for the purpose of valuing the shares. She then decided upon the market approach as the technique to apply in valuing the shares. She based this decision on the assumption that markets generally determine the value of a publicly-traded company's shares.

[81] She began her valuation by examining the trading data of the company. She reviewed trading data for two years prior to the first valuation date and for two years beyond the last valuation date.[42] She felt that a review of the trading data helped her

---

39 Exhibit R-98

40 Ms. McCann noted that there are three types of valuation reports: a calculation report, an estimate valuation report and a comprehensive valuation report (the comprehensive valuation report being the most comprehensive of the three).

41 This is the date reported in the System for Electronic Disclosure by Insiders, established by the Canadian securities regulatory authorities.

42 Ms. McCann noted that retrospective evidence is not permissible for the purpose of determining value at a given date, but can be used to test the quality of assumptions made at the valuation date.

understand the market for the shares and "it ultimately spoke to the nature of the shares".[43]

[82] She organized her review of the trading data into three sections: trend line and average trading volumes and prices, daily trading volume in excess of 250,000, and the nature of the shares. That review formed the basis of her valuation.

[83] The first section of her valuation report relating to trading data considered TEI's average daily trading price and daily trading volumes. After analyzing the data, Ms. McCann reached the following conclusions:

1. There was no reason to expect share prices to decrease over the valuation period due to the placement of the Share Blocks on the open market.[44]

2. Because there was regular trading activity and increasing share prices, there was no reason to expect share prices to decrease over the valuation period as a result of the placement of the shares on the open market.[45]

[84] The second section of her valuation report relating to trading data considered trading volumes in excess of 250,000 shares. Ms. McCann stated that she wanted to see how the market reacted to trades of large volumes of TEI shares. She wanted to determine if she could use this information to ascertain whether a blockage discount[46] applied to the sale of the Share Blocks and, if it did, what the amount of the discount was.

[85] After considering the trading volumes in excess of 250,000 shares, she reached the following conclusion:[47]

> Based on my observations, I would not expect that the Share Blocks would be subjected to a blockage discount imposed by open market trading during the valuation period because there were average increases in the Company's share price

---

43 Transcript, January 23, 2012, page 176.

44 Exhibit R-98, paragraph 66.

45 Transcript, January 23, 2012, pages 178-179.

46 For the purposes of her report, Ms. McCann used the following definition of blockage discount provided by the Canadian Institute of Chartered Business Valuators: "Blockage Discount is an amount or percentage deducted from the current market price of a publicly traded stock to reflect the decrease in the per share value of a block of stock that is of a size that could not be sold in a reasonable period of time given normal trading volume." Exhibit R-98, paragraph 7.

47 Exhibit R-98, paragraph 72.

> during the 2 years preceding the valuation period on dates where trading volumes exceeded 250,000.

[86] She noted that, with the benefit of hindsight, a maximum blockage discount of 4.86% could be considered that would be based on the average decrease in the share price over the previous day during the valuation period. However, during her testimony she stated that she did not apply the discount because she did not think it was warranted and because she did not use hindsight.[48] She stated that, if hindsight were to be used, consideration would have to be given to the fact that there were average increases in share prices observed in the two years subsequent to the valuation period.[49]

[87] In the third section of her valuation report relating to trading data, Ms. McCann considered the nature of the TEI shares. She reached the following conclusions:[50]

1. The TEI shares were *penny stock* since the shares traded at less than $1.00 per share during the review period.

2. The TEI shares were *speculative stock* since the shares were listed on the TSX Venture Exchange and because of TEI's history of losses and the actual trading price of the shares.

3. The TEI shares were not *highly illiquid* as they were listed on the TSX Venture Exchange (as opposed to shares of a private company or shares that are traded over the counter) and were not thinly traded. She based her conclusion that the shares were not thinly traded on her review of the public float versus insider holdings, and the trading volumes of the shares.

4. The TEI shares exhibited normal to moderate volatility. Ms. McCann used the Black-Scholes option pricing model to arrive at this conclusion. This model, which won its developers a Nobel Prize, calculates a hypothetical stock option price. Ms. McCann noted that a high calculated price relative to the stock price indicates that volatility is high. Conversely, a low option price indicates low volatility.[51] The calculation showed that the cost to guarantee the selling price

---

48 Transcript, January 23, 2012, pages 182-183.
49 Exhibit R-98, paragraph 72.
50 Exhibit R-98, paragraphs 74-82.
51 Transcript, January 23, 2012, page 188.

> of one of TEI's shares was .005 cents, which represented 1.8% of the volume-weighted average trading price.

[88] Ms. McCann concluded that her findings with respect to the nature of the shares did not support a finding that a blockage discount was required.

[89] After examining the trading data of TEI, Ms. McCann considered private placements and exchanges of TEI shares. She conducted this analysis in order to determine if the difference (if any) between issue prices and trading prices and the fact that there were restrictions on many of the issued shares could be used to determine whether a blockage discount should apply to the Share Blocks.[52]

[90] After examining 22 transactions, she concluded that there was no recognizable relationship between the quantities of shares issued, the associated restrictions, the issue prices and the trading prices. As a result, she could not use the data to determine if a blockage discount was warranted.[53]

[91] The next portion of Ms. McCann's expert report considers the sale of TEI shares by and on behalf of the Appellant and her spouse. She wanted to see how the market reacted to dispositions of large blocks of shares over time.[54] She considered open market sales, privately arranged sales and the sale by the Minister of seized shares.

[92] Ms. McCann first considered open market sales by the Appellant and her spouse for the two years prior to the first valuation date and during the valuation period. During that period, the Appellant and her spouse sold 4.9 million shares, including 2.7 million shares between May 2005 and February 2006 (that is, during the Transfer Period).

[93] After reviewing the sales, Ms. McCann reached the following conclusion:

> . . . it appears that dispositions of large blocks of shares, over a short period of time, did not generally result in a decrease in the market price. That is to say that where there were dispositions of large blocks of shares over a short period of time, the share prices were not subjected to a blockage discount imposed by open market trading.[55]

---

52 Ibid., at pages 197-198.
53 Ibid., at page 200.
54 Ibid., at page 201.
55 Exhibit R-98, paragraph 93.

[94] Ms. McCann then considered private market sales by the Appellant and her spouse. She reviewed two private market sales made by the Appellant: one of 100,000 shares and the second of 111,000. She determined that no blockage discount was imposed on these share sales.

[95] The third set of sales of the Appellant's and her spouse's shares considered by Ms. McCann was the sale of shares seized by the Minister. Ms. McCann noted that this was hindsight information that she used to test the assumption that a blockage discount was not required.

[96] Sales of these shares occurred at discounts of between 20% and 29% of the TSX trading price. Ms. McCann noted that one would expect such sales to draw a blockage discount since the seized shares represented a sizable block, considerably larger than any of the Share Blocks. She also considered the fact that the seized shares were not sold on the open market, but rather were sold in private sales. She concluded that the private sales would be subject to factors that would have affected the selling prices but not the trading prices and not fair market value.

[97] After considering the trading data of TEI, the private placements and exchanges of TEI shares, and the sale of TEI shares owned by the Appellant and her spouse, Ms. McCann considered certain jurisprudence relating to the valuation of shares.

[98] I have ignored that portion of her report. While it is perfectly acceptable for an expert to consider numerous factors coming within the scope of that expert's training as a chartered business evaluator, it is not acceptable for the expert to provide me with an opinion on the application of certain jurisprudence to the valuation of shares. That, in my view, is an attempt by the expert to provide an opinion on domestic law.

[99] My decision to ignore that portion of Ms. McCann's report has no impact on the conclusions reached in her report. The intent in that section of the report was to add additional support to her expert finding. Such additional support was not, in my view, required.

[100] After considering the results of her work, Ms. McCann reached the following conclusions:[56]

---

56 Ibid., paragraph 118.

1. A blockage discount is not warranted in determining the fair market value of the shares.

2. A discount may be warranted to represent the cost of selling the shares on the open market over a reasonable period of time.

3. In order to avoid potential distortions in a single day's trading, the fair market value of the Share Blocks should be based upon the volume-weighted average trading price of the Company's shares, calculated by dividing the total value by the total volume of shares traded for the five trading days immediately preceding the relevant date.

[101] Ms. McCann then determined that a discount in the range of 1.3% to 3.6% would represent the cost of selling the shares on the open market over a reasonable period of time. She used actual sales of TEI shares by the Appellant and her spouse to estimate a reasonable period of time to dispose of the shares (between 16 and 44 days) and used TEI's weighted average cost of capital (30% annual interest rate) to represent the cost of selling the shares over a period of time.[57]

[102] Counsel for the Appellant argued that Ms. McCann made an error in her determination of the discount by not incorporating days when the TSX was closed (i.e. weekends). If weekends were taken into account, the discount would be in the range of 2% and 5.5%. I would not expect such a small change to have a material impact on Ms. McCann's conclusion.

[103] On the basis of those conclusions Ms. McCann calculated the following valuations for the Share Blocks:[58]

	Revised Assessed Share Blocks[59]	Original Assessed Share Blocks[60]
Transfer dates assumed by CRA	$540,496	$678,535
Transfer dates assumed by Appellant	$525,867	$643,676
SEDI valuation dates	$532,964	$639,771

57 Ibid, paragraph 119

58 The values represent a midpoint between the value calculated without a discount for the cost of selling shares on the open market and the value calculated with a 4% discount.

59 Referred to in the valuation report as the "Four Share Block".

60 Referred to in the valuation report as the five Share Blocks.

[104] During cross-examination, the Appellant's counsel asked Ms. McCann a number of questions with respect to her report. He raised a number of issues, including her use of the Black-Scholes model, her determination of a reasonable time period for the disposition of the TEI shares, her conclusions with respect to the proceeds realized by the CRA on the sale of the seized shares, whether TEI shares were thinly traded shares, and the use of a blockage discount. Ms. McCann was, in my view, able to address each issue raised by counsel.

[105] After considering Ms. McCann's report and her testimony, I have concluded that her conclusions provide a reasonable valuation for the Share Blocks.

[106] Dr. Hejazi was put forward by the Appellant on the basis that he is "qualified to analyze and interpret statistical data and studies dealing with both arm's length and related party business transactions and to express an expert opinion whether and to what extent the data and the studies support or do not support conclusions based on the same."[61]

[107] Dr. Hejazi holds a Ph.D. in Economics and works in matters relating to transfer pricing and taxation. After hearing submissions from counsel, I qualified Dr. Hejazi as an expert witness with respect to the analysis and interpretation of statistical data.

[108] Dr. Hejazi presented two reports to the Court (Dr. Hejazi's First Report and Dr. Hejazi's Second Report).

[109] During his testimony, Dr. Hejazi stated that his expertise did not extend to valuing shares, and his reports did not attempt to value the Share Blocks.[62] He agreed that his reports did not provide any evidence or opinion with respect to key valuation issues such as whether a blockage discount should apply to the transfer of the Share Blocks[63] and whether the stock of TEI was thinly traded.[64] He also testified that he did not perform any analysis with respect to the number of shares of TEI held by insiders as opposed to being publicly floated,[65] or the open market sales of TEI shares by Mr. Hinke and the Appellant.

---

61 Transcript, May 2, 2011, page 31.
62 Transcript, May 2, 2011, pages 100-101, 112-113.
63 Ibid., page 103.
64 Ibid., page 110.
65 Ibid., page 110-111.

[110] Dr. Hejazi's First Report is a two-and-one-half-page report[66] that discusses a study referred to in a CRA estimate valuation report. Mr. Gilles Lapointe of the CRA prepared the estimate valuation report. It appears that the CRA used this estimate valuation report at the objection stage to support the assessment. The Minister did not rely on the report when she assessed the Appellant. Further, the Respondent is not now relying on the estimate valuation report. The Respondent is relying on the *comprehensive valuation report* prepared by Ms. McCann.

[111] Dr. Hejazi's First Report is not helpful to the Court. Dr. Hejazi stated that his first report does not opine on the value of the shares at issue and is not a rebuttal of Ms. McCann's comprehensive report. It is a report addressing a study used by a CRA valuator in preparing an estimate valuation report. As I have just noted, the Minister did not rely on the estimate valuation report when she assessed the Appellant, and the Respondent is not relying on it in this appeal. Dr. Hejazi stated, on cross-examination, that he was not aware of the fact that the Respondent was not relying on the estimate valuation report.[67]

[112] I will now consider Dr. Hejazi's Second Report.

[113] The nature and admissibility of Dr. Hejazi's Second Report was an issue during the hearing. Counsel for the Appellant argued that the second report was a supplemental report filed in response to the report of the Respondent's expert, Ms. McCann. He felt that it could best be described as a rebuttal report.

[114] Counsel for the Respondent argued that the second report was not a rebuttal report but rather a report that provided an estimated value for the shares. In either case, the Respondent objected to the filing of the second report on the basis that the Appellant did not file the report within the time limit set out in the Court's rules.

[115] The difficulty for the Appellant was that she filed Dr. Hejazi's Second Report less than 15 days before the commencement of the hearing. Thus, if it was a rebuttal report then, pursuant to subsection 145(3) of the *Tax Court of Canada Rules (General Procedure)*, it could only be filed late if the Court so directed.

[116] After a great deal of discussion, the Respondent withdrew her objection to the admission of Dr. Hejazi's Second Report, provided that she have the right to file a rebuttal report no later than fifteen days before the hearing resumed in June 2011.

---

66 Exhibit A-1.

67 Transcript, May 2, 2011, page 36.

The Court then allowed the Appellant to file Dr. Hejazi*'s* Second Report. The Respondent filed a rebuttal to the second report on June 3, 2011.[68]

[117] Dr. Hejazi's Second Report is three and one-half pages long and begins by quoting paragraph 119 of Ms. McCann's valuation report, as follows:

> I have used information concerning actual sales of the shares of the Company by the Appellant and her spouse to ascertain a reasonable period of time to dispose of the Share Blocks. At an average of 18,312 shares per day (see paragraph 109) it would take between 16 and 44 days to sell each of the Share Blocks…[69]

[118] The selling period of 16 to 44 days was one of two assumptions Ms. McCann relied upon when she concluded that a discount in the range of 1.3% to 3.6% would represent the cost of selling the shares on the open market over a reasonable period of time. She also concluded that the fair market value of the Share Blocks should be based on the weighted average selling price of the shares for the five trading days immediately preceding the relevant valuation date, with no blockage discount.

[119] After quoting Ms. McCann, Dr. Hejazi's Second Report calculates, using actual TEI market selling prices, the proceeds that would have been realized if a person had sold the Share Blocks in blocks of 15,000, 17,500 or 20,000 shares in the days immediately subsequent to the days the shares were transferred by Mr. Hinke to the Appellant. The report states that this calculation was performed to analyze the disposition over time of small blocks of TEI shares.

[120] After performing these calculations, Dr. Hejazi notes the following at paragraph 14 of his report:

> These data indicate to me that when blocks of TEI shares are sold in the assumed quantities, over time, at published market prices, that a discount of approximately 15% will apply. The close grouping of the three results from the different block sizes indicates a robust conclusion. The conclusion I draw from this analysis is that if TEI shares were sold in this fashion at published market prices a 15% discount would apply

[121] These comments do not represent a valuation of the Share Blocks. As noted previously, Dr. Hejazi testified that he was not an expert in valuing shares and his report was not a valuation of the shares.

---

68 Exhibit R-101.

69 Exhibit A-2, paragraph 2.

[122] During cross-examination, he stated that his second report does not conclude that a 15% discount should apply to the sale of the Share Blocks. He testified his conclusion was that the hypothetical sale of the TEI shares in blocks of 15,000, 17,500 and 20,000 would result in a 15% discount.[70]

[123] The purpose of the hypothetical calculation contained in Dr. Hejazi's Second Report is not clear to me. It does not represent a blockage discount since Dr. Hejazi testified that his report did not provide any evidence or opinion with respect to whether a blockage discount should apply to the transfer of the Share Blocks.

[124] If the purpose of Dr. Hejazi's Second Report is to question Ms. McCann's conclusions with respect to the cost of selling TEI shares over a certain period of time, then I have two concerns:

[125] First, it is a hindsight determination of a discount. Hindsight information is typically inadmissible unless it is being used to test the reasonableness of an assumption.[71] Dr. Hejazi was not able to explain to the Court how the 15% discount on the hypothetical sale of the Share Blocks related to either the valuation of the Share Blocks or Ms. McCann's expert report. In particular, he did not relate the calculation to any assumptions used by Ms. McCann when valuing the Share Blocks. It appears to me that the hypothetical calculation is attempting to value the Share Blocks on the basis of hindsight.

[126] My second concern relates to the nature of the calculations that form the basis of the report. They are simple mathematical calculations based upon evidence that is on the record. In my view, I do not require an expert witness to explain a simple mathematical calculation.

[127] For the foregoing reasons I find that Dr. Hejazi's First Report and Second Report contain no expert information that is helpful to the Court, and I have given them no weight.

[128] In summary, the only expert evidence the Court received that was credible and helpful to the Court was the expert report of Ms. McCann.

---

70 Transcript, May 2, 2011, pages 116-117.

71 See *Debora v. Debora*, (2006), 83 O.R. (3d) 81. (Ont. C.A.).

[129] During his closing argument, counsel for the Appellant raised a number of concerns he had with respect to Ms. McCann's report. These concerns relate primarily to the manner in which Ms. McCann applied her expertise. In my view, if the Appellant wished to challenge Ms. McCann's expert conclusions, she should have produced her own expert valuator.

[130] Counsel for the Appellant noted during his closing argument that the fact that the Appellant did not bring a valuator was problematic. It is only problematic for the Appellant. I must make my decision on the basis of the evidence before me. The only expert evidence before me that is credible and useful to the Court is the expert report of Ms. McCann. I accept her conclusion that the value of the Original Assessed Share Blocks on their transfer dates was between $639,771 and $678,535, depending on the transfer date.

[131] The parties disagree on the applicable transfer dates. The Minister assessed on the basis that Mr. Hinke transferred the TEI shares to the Appellant on the date that appears on the issued share certificates. Counsel for the Appellant argued that Mr. Hinke transferred the shares on the date he physically delivered the share certificates to the Appellant. I will only need to consider this issue if I find that the Appellant paid a consideration to Mr. Hinke for the Original Assessed Share Blocks.

The Consideration, if Any, Paid by the Appellant

[132] I will now consider the issue of whether the Appellant paid any consideration to Mr. Hinke for the Original Assessed Share Blocks.

[133] It is the Appellant's position that the transfer of the TEI shares represented the repayment of a debt owed by Mr. Hinke to the Appellant. Counsel for the Appellant argued that this debt arose because of Mr. Hinke's weak financial position, which resulted in the Appellant assuming the personal obligations and liabilities of Mr. Hinke. She noted that under this arrangement she made payments totalling $199,334 to Mr. Hinke, or on Mr. Hinke's behalf.

[134] During his cross-examination, Mr. Hinke summarized the arrangement as follows:[72]

> Q. And you don't have an acknowledgment and release agreement with respect to that indebtedness?

---

[72] Transcript, December 5, 2011, pages 174-175.

> A. No. That's how we were doing things during this period. She was assisting me as I needed her to assist me when I couldn't generate enough cash flow, and I was reimbursing her with shares. That is what we were doing all the way through this period, when it was necessary to do so. It was not a formal arrangement except that I had been doing it similarly with other creditors with Thermal where I was getting written acknowledgments. But we were essentially husband and wife. I was the man of the house and it was a traditional relationship, and she expected to me to do what was necessary to make sure that we would survive financially. And so I didn't feel there was anything needed in terms of something to be in writing between us during this time.

[135] Counsel for the Respondent argued that, in point of fact, the Appellant did not make any loans to Mr. Hinke. The Appellant did not have the independent financial resources to make the alleged advances to Mr. Hinke.

[136] It is the Respondent's position that the monies used to pay the family expenses were derived from the various TEI shares that Mr. Hinke transferred to the Appellant between February 3, 2000 and February 15, 2006. Further, counsel for the Respondent argued that Mr. Hinke retained control over these shares after he transferred them to the Appellant.

[137] Counsel for the Respondent also argued that, even if the Appellant made a loan to Mr. Hinke, the repayment of the loan did not constitute consideration for the purposes of subsection 160(1).

[138] During the seventeen hearing days, I heard a great deal of testimony with respect to the personal and financial history of the Appellant and Mr. Hinke between 1999 and 2006. The parties referred to the following three sets of share transfers made during that period:

- The 500,339 TEI shares that Mr. Hinke transferred to the Appellant between February 3, 2000 and October 31, 2004 (the "pre-November 2004 share transfers").

- The 1,242,507 TEI shares that Mr. Hinke transferred to the Appellant in November 2004 (the "November 2004 share transfer').

- The 2,694,500 TEI shares that were the subject of the subsection 160(1) assessment and were transferred to the Appellant between May 27, 2005 and February 15, 2006, i.e., the Original Assessed Share Blocks.

[139] Each of these transfers is relevant to the issue of whether or not the Appellant paid Mr. Hinke a consideration for the Original Assessed Share Blocks. Before discussing these transfers, I will first summarize the Appellant's financial position during the period in question.

[140] The Appellant and Mr. Hinke began a common-law relationship in September 1999. The evidence before me was that at the time the relationship started the Appellant had limited financial resources. For example, the Appellant and Mr. Hinke testified that Mr. Hinke gifted 100,000 TEI shares to the Appellant in November 2000. Mr. Hinke testified that he gifted the shares to assist the Appellant in bringing her mother to Canada. He stated that the Appellant needed the shares "to show sufficient financial means to be permitted by Canada immigration to sponsor her mum to come to Canada".[73]

[141] The Appellant earned modest income between July 2000 and May 2005 (the month in which Mr. Hinke transferred the first shares of the Original Assessed Share Blocks). The Appellant and Mr. Hinke's son was born on July 12, 2000. The Appellant then took a one-year maternity leave.

[142] In the summer of 2001, the Appellant established a company called Elena's Creations Inc. She was the sole employee of the company. The Appellant testified that she sewed clothes to order, repaired clothes, designed clothes and had a line of ready-made clothes. She reported total income of $7,040, $4,213 and $18,290 for the 2002, 2003 and 2004 taxation years respectively.[74]

[143] During that period, Mr. Hinke was the subject of substantial income tax assessments. It appears he first became aware in March 2000 that he faced a potential tax liability as a result of his failure to file income tax returns for the 1996, 1997 and 1998 taxation years.[75]

[144] On May 23, 2001, the Minister assessed Mr. Hinke $439,296 for the 1996 to 1998 taxation years.[76] On July 11, 2002, the Minister issued an additional assessment for Mr. Hinke's 1999-2001 taxation years. After the second assessment, Mr. Hinke

---

73 Transcript, June 21, 2011, pages 638-639.

74 PASF, paragraphs 7 and 10; Transcript, May 3, 2011, pages 323-324.

75 Exhibit R-24.

76 Joint Book of Documents, Volume 13, Tab 2A, page 1.

owed over $1.5 million.[77] The CRA began to take collection actions in May 2002, which continued throughout 2003 and 2004.[78]

The Pre-November 2004 Share Transfers

[145] Between February 2000 and November 2004 Mr. Hinke made the pre-November 2004 share transfers. Specifically, between February 3, 2000 and October 31, 2004, Mr. Hinke transferred 500,339 shares to the Appellant as follows:

- 20,000 shares on February 3, 2000 (the "February 2000 transfer")
- 100,000 shares on November 6, 2000 (the "November 2000 transfer")
- 200,000 shares on April 22, 2002 (the "April 2002 transfer")
- 180,339 shares on February 19, 2004 (the "February 2004 transfer").[79]

[146] The Appellant described the pre-November 2004 share transfers as gifts from Mr. Hinke.[80] Mr. Hinke provided numerous explanations for the transfers.

[147] His first explanation was that only the November 2000 transfer was a gift. He stated that he transferred the remaining shares to repay the Appellant for the advances and assistance she provided to him to help cover his expenses. Mr. Hinke testified that during this period he was not generating "enough cash flow". He could not provide any specific details of the financial assistance he allegedly received from the Appellant.[81]

[148] Mr. Hinke then stated that the February 2000 transfer was not the repayment of a loan made by the Appellant to Mr. Hinke, but rather was actually a loan Mr. Hinke made to the Appellant.[82]

---

77 Ibid., page 2.
78 Joint Book of Documents, Volume 11, Tabs 27-34; Exhibit R-41, R-46.
79 PASF, paragraphs 22, 24-26 and 29.
80 Transcript, May 3, 2011, pages 365-370.
81 Transcript, December 5, 2011, pages 171, 172, 174 and 175.
82 Transcript, December 5, 2011, pages 166-168.

[149] Mr. Hinke also changed his story with respect to the February 2004 transfer. He stated that it was not a "share-for-debt" transaction but rather a spousal contribution to an RSP. Upon further cross-examination, he changed his story one more time and stated that the February 2004 transfer was indeed a "share-for-debt" transaction. [83]

[150] Once the share certificates for the pre-November 2004 share transfers were issued in the name of the Appellant, the shares were deposited into one of the following investment accounts of the Appellant:

- A CIBC Wood Gundy self-directed registered retirement savings plan account, which was referred to as the "CIBC 938 account". It was opened in February 2000.

- A CIBC Wood Gundy brokerage account, which was referred to as the "CIBC 525 account". It was opened in November 2000.

- A CIBC personal Asset Advantage Account, which was referred to as the "CIBC 521 account."[84] It was opened in May 2001.

[151] On cross-examination, Mr. Hinke was asked whether he had a power of attorney over any of the Appellant's CIBC investment accounts. At first, he was evasive; however, he then indicated that he never had a power of attorney over the Appellant's CIBC investment accounts.[85]

[152] The Respondent's counsel then produced powers of attorney that the Appellant had executed granting Mr. Hinke full power and authority over her CIBC investment accounts. The Appellant executed the powers of attorney in respect of the CIBC 525 account and the CIBC 521 account at the time she opened the accounts.[86] She executed the power of attorney for the CIBC 938 account on Nov 3, 2000, nine months after she opened the account, and immediately before Mr. Hinke transferred the 100,000 TEI shares on November 6, 2000.[87]

[153] Mr. Hinke's story changed after he was shown the powers of attorney. After acknowledging that they did exist, he stated that he only used the powers of attorney

---

83 Transcript, December 5, 2011, pages 161-164.
84 PASF, paragraphs 22, 24-26, 29 and Appendix C; Exhibits R-78, R-79, R-80.
85 Transcript, January 19, 2012, pages 198-199.
86 Exhibits R-68 and R-69.
87 Exhibit R-68.

when the Appellant instructed him to use them. In his words, they were not used "willy-nilly".[88]

[154] In fact, Mr. Hinke used the powers of attorney on a continuing basis to effect all of the trades that were made in the Appellant's CIBC investment accounts.

[155] The Court heard testimony from Mr. Glen Evans, the CIBC investment advisor who was primarily responsible for the Appellant's CIBC investment accounts. Mr. Evans testified that only Mr. Hinke provided instructions to the CIBC with respect to share transactions in the Appellant's CIBC accounts. He did not receive any instructions from the Appellant.[89]

[156] Mr. Evans referred to the transactions in the Appellant's CIBC investment accounts as being mostly "unsolicited" trades, meaning that they were trades where Mr. Evans did not provide any recommendations with respect to either the sale or purchase of shares. The client initiated all transactions. In the case of the Appellant's CIBC accounts, Mr. Hinke initiated all of the transactions, using the powers of attorney.[90]

[157] He described Mr. Hinke as being very knowledgeable with respect to the market for TEI shares. He stated that the Appellant was not particularly knowledgeable with respect to the trading of securities.[91]

[158] In my view, the evidence before me clearly shows that the pre-November 2004 share transfers were neither a gift nor "share-for-debt" transactions. While Mr. Hinke transferred the shares into the name of the Appellant, this was done in an attempt to defeat his creditors, including the CRA. Through the powers of attorney, Mr. Hinke retained control over the shares. He used the proceeds from the sale of the shares to help fund **his** personal and family expenses and meet **his** ongoing financial obligations.

[159] Mr. Hinke's testimony with respect to the pre-November 2004 share transfers, particularly his denial of the existence of the powers of attorney, destroyed what little credibility he had retained after his previous testimony.

The November 2004 Share Transfer

---

88 Transcript January 19, 2012, page 200.

89 Transcript, January 23, 2012 pages 49-50.

90 Transcript, January 23, 2012, pages 37, 42-43, 49-50 and 55.

91 Transcript, January 23, 2012, page 55.

[160] By the second half of 2004, the financial pressures that Mr. Hinke had been facing since 2001 had intensified. His income tax liability exceeded $1.6 million.[92] On June 30, 2004, the Ontario Superior Court of Justice, Family Court, issued an order requiring Mr. Hinke to pay substantial amounts to his former spouse in respect of support payments.[93] On November 2, 2004, the CRA issued a requirement to pay to TEI for 50% of amounts owed to Mr. Hinke;[94] on November 5, 2004, the CRA issued a requirement to pay to the investment firm Bolder Investment Partners[95] ("Bolder"), and in November 2004 the CRA issued a requirement to pay on Mr. Hinke's CIBC Wood Gundy brokerage accounts.[96] Further, in November 2004, Mr. Hinke ceased to be president of TEI.[97]

[161] During that period, Mr. Hinke completed the November 2004 share transfer. Specifically, on November 17, 2004, Mr. Hinke instructed Computershare to transfer 1,242,507 TEI shares to the Appellant.[98]

[162] Both the Appellant and Mr. Hinke testified that the November 2004 share transfer represented the settlement of a $40,000 debt that Mr. Hinke owed the Appellant. In support of their testimony, the Appellant produced a handwritten acknowledgment and release document dated October 20, 2004 that was signed by both the Appellant and Mr. Hinke. This acknowledgment states that the Appellant "hereby agrees to accept 1,242,507 Common Shares of Thermal Energy in a 'Spousal Rollover of Shares' as full and final settlement of the $40,000 owed." The acknowledgement also notes that the debt was incurred to meet personal and business expenses over the preceding three and a half years (i.e. from mid-2001 to the end of 2004), primarily car expenses and babysitting expenses for their son.[99]

[163] Notwithstanding Exhibit A-4, the evidence before me does not support a factual finding that Mr. Hinke transferred 1,242,507 TEI shares to the Appellant to satisfy a $40,000 debt.

---

92 Joint Book of Documents, Volume 11, Tabs 33, 34.
93 Joint Book of Documents, Volume 11, Tab 36H.
94 Exhibit R-41.
95 Exhibit R-66; Transcript, January 19, 2012, page 81.
96 Transcript, January 19, 2012, page 102.
97 PASF, paragraph 13.
98 PASF paragraph 33; Joint Book of Documents, Volume 7, Tab 54.
99 Exhibit A-4.

[164] At the end of October 2004, Mr. Hinke held 2,242,507 TEI shares in his Bolder investment accounts. During his evidence-in-chief, Mr. Hinke testified that, in order to effect the transfer of the 1,242,507 shares to the Appellant, he instructed his broker at Bolder, a Mr. Jeske, to stop selling those shares, to convert them to certificate form and to send him the certificate. He testified that he provided these instructions sometime between October 14, 2004 and the last week in October 2004.[100]

[165] The documentary evidence before me shows that Bolder did not provide instructions to its supplier of administrative services (Haywood Securities Inc.) to convert Mr. Hinke's 2,242,507 TEI shares to certificate form until November 5, 2004.[101]

[166] Mr. Hinke testified that the delay was normal and that he had reminded Mr. Jeske in late October to convert the shares.

[167] The evidence before me does not support Mr. Hinke's testimony that he provided the instructions to Mr. Jeske in October 2004 to convert the shares into certificate form. Rather, on the evidence before me, I have concluded that Mr. Hinke provided the instructions to Mr. Jeske on November 5, 2004, the day the CRA served Bolder with the requirement to pay.

[168] In reaching this conclusion I have relied upon the following series of internal Bolder communications that were **all** sent on November 5, 2004 (the communications are listed in chronological order):

- An internal Bolder email in which the author states that Bolder has received a requirement to pay from the CRA in respect of Mr. Hinke's $1.7 million tax debt.[102] Mr. Jeske forwarded this email to Mr. Hinke.[103]

- An internal Bolder email in which Mr. Jeske states that Mr. Hinke "wants to withdraw [sic.] his position on a rush transfer basis."[104]

---

100 Transcript, June 21, 2011, pages 695-697. Mr. Hinke testified that shares are held in either street form or certificate form. Only shares in street form can be traded through a stock exchange.

101 Exhibit R-58, paragraph 6a) and Exhibit A.

102 Exhibit R-57, Exhibit B.

103 Exhibit R-70.

104 Exhibit R-57, Exhibit B.

- An internal Bolder email noting that Bolder cannot pay Mr. Hinke in cash due to the CRA requirement to pay; however Bolder can physically deliver the shares to Mr. Hinke.[105]

- A fax from Bolder to Haywood Securities directing them to prepare a share certificate for the 2,242,507 shares in the name of Mr. Hinke.[106]

[169] In my view, Mr. Hinke's decision to convert the 2,242,507 shares to certificate form had nothing to do with an alleged debt that he owed the Appellant, but rather was done solely to defeat the CRA requirement to pay that was issued to Bolder on November 5, 2004.

[170] With respect to Exhibit A-4, it is a self-serving document that does not evidence an actual debt between the Appellant and Mr. Hinke.

[171] After receiving the share certificate for the 2,242,507 TEI shares, Mr. Hinke, on November 17, 2004, provided the share certificate to Computershare and directed them to transfer 1,242,507 shares to the Appellant and prepare 10 share certificates, each for 100,000 shares, in his name.

[172] The Appellant then deposited the 1,242,507 TEI shares into a Bolder investment account that she had opened in August 2004. This was the first transaction in the account.

[173] Mr. Hinke also denied that he had a power of attorney over the Appellant's Bolder investment account. The Respondent did not produce a power of attorney for this account. However, on cross-examination, Mr. Hinke acknowledged that "on occasion" he provided instructions to Mr. Jeske with respect to the Appellant's Bolder investment account.[107] In other words, Mr. Hinke was able to exert the same control over the Appellant's Bolder investment account that he exerted over the Appellant's CIBC investment accounts.

[174] The evidence before the Court with respect to the November 2004 share transfer seriously damaged the Appellant's credibility.

Original Assessed Share Blocks

105 Exhibit R-57, Exhibits B and C.
106 Exhibit R-57, Exhibit D.
107 Transcript, January 19, 2012, page 213.

[175] Mr. Hinke's financial difficulties continued after November 2004. As a result of CRA garnishments of his employment income, the requirements to pay on his investment accounts and a garnishment issued in respect of his family support payments, he had very little cash.[108] Then, on June 21, 2005, TEI terminated his employment.[109]

[176] During the Transfer Period (May 27, 2005 to February 15, 2006), Mr. Hinke transferred the Original Assessed Share Blocks (2,694,500 TEI shares) to the Appellant.

[177] As discussed previously, it is the Appellant's position that she paid consideration of $199,335 for the shares in the Original Assessed Share Blocks. The Appellant argues that this consideration consisted of the repayment of loans previously made by the Appellant to Mr. Hinke by way of cash advances to him and payments to third parties made on behalf of Mr. Hinke. Specifically, the Appellant claims to have made the following payments between December 1, 2004 and March 2006 to Mr. Hinke and to third parties on behalf of Mr. Hinke:

- Cash loans to Mr. Hinke
- Car insurance payments
- Monthly car lease payments
- Mortgage payments for the family home
- Spousal and child support payments (previous marriage)
- Legal fees (employment litigation, family law litigation and tax matters)
- Accounting fees (tax and income analysis)
- Wedding expenses
- Business trip and family visit

---

108 Transcript, June 21, 2011, pages 669-770.

109 PASF, paragraph 13; Joint Book of Documents, Volume 16, Tab 167.

- Various household expenses
- Various payments to third parties.[110]

[178] The cash advances to Mr. Hinke made up $69,900 of the alleged loan.[111]

[179] In *The Queen v. Livingston*,[112] the Federal Court of Appeal noted the following when discussing the criteria contained in subsection 160(1):

> . . . In *Medland v. Canada* 98 DTC 6358 (F.C.A.) ("Medland") this Court concluded that "the object and spirit of subsection 160(1), is to prevent a taxpayer from transferring his property to his spouse [or to a minor or non-arm's length individual] in order to thwart the Minister's efforts to collect the money which is owned [*sic*] to him." See also *Heavyside v. Canada* [1996] F.C.J. No. 1608 (C.A.) (QL) ("*Heavyside*") at paragraph 10. More apposite to this case, the Tax Court of Canada has held that the purpose of subsection 160(1) would be defeated where a transferor allows a transferee to use the money to pay the debts of the transferor for the purpose of preferring certain creditors over the CRA (*Raphael v. Canada* 2000 D.T.C. 2434 (T.C.C.) at paragraph 19).

[180] The evidence before me shows that Mr. Hinke began transferring TEI shares to the Appellant in 2000 in an attempt to ensure that he had monies available to pay his personal expenses. Mr. Hinke transferred legal title to the relevant TEI shares to the Appellant while retaining control over the shares. This included the pre-November 2004 share transfers, the November 2004 share transfer and the Original Assessed Share Blocks (collectively referred to as the "Transferred TEI Shares").

[181] During closing argument, counsel for the Respondent took me to a detailed summary of the evidence on the record with respect to the activity in the Appellant's CIBC and Bolder investment accounts between February 3, 2000 (the date of the first transfer) and June 2006. The summary detailed withdrawals made from these accounts, transfers to the Appellant's personal bank account (held at the Toronto-Dominion Bank) and payments made out of the Toronto-Dominion Bank account and one of the CIBC accounts.

---

110 PASF, paragraphs 43, 55, 66, 81, 94 and Appendix D; Joint Book of Documents, Volume 17, Tabs 52, 54, 68 and 69.

111 PASF, paragraphs 43, 55 and 66.

112 2008 FCA 89, 2008 DTC 6233, paragraph 18.

[182] I agree with counsel for the Respondent that this summary shows that the Appellant paid the $199,334 of expenditures and advances to Mr. Hinke that make up the alleged loan by using the money generated from the sale of the Transferred TEI Shares. In many instances the funds can be traced directly to the sale of TEI shares. In others, the source of the funds was the sale of non-TEI shares. However, these non-TEI shares were purchased using proceeds from a previous sale of TEI shares.

[183] In short, Mr. Hinke controlled the very shares that the Appellant and he used to fund the third-party expenses and make the advances to Mr. Hinke.

[184] For example, between November 2004 and February 14, 2006, approximately $643,000 was realized from the sale of the Transferred TEI Shares. This represented nearly all of the Appellant's financial resources during that period.

[185] Mr. Hinke did the very thing subsection 160(1) was intended to prevent. In an attempt to give preference to certain creditors over the CRA, he transferred property to his spouse. This property was then, at Mr. Hinke's direction, sold, with the proceeds being used to pay his debts and fund his personal expenditures.

[186] The Appellant and Mr. Hinke have tried to characterize the transfers as the repayment of loans. In my view, there were no loans. All of the funds originated from the Transferred TEI Shares, shares that Mr. Hinke continued to control after they were transferred to the Appellant.

[187] For the foregoing reasons, I have concluded that the Appellant did not pay any consideration for the Original Assessed Share Blocks.

Conclusion

[188] Between May 27, 2005 and February 15, 2006 Mr. Hinke transferred to the Appellant 2,694,500 TEI Shares with a fair market value of between $639,771 and $678,535. The Appellant did not give any consideration for these shares. As a result, the amount determined under paragraph 160(1)(*e*) is at least $639,771. Since this amount exceeds the $546,835 assessed by the Minister, the appeal will be dismissed, with costs to the Respondent.

Signed at Ottawa, Canada, this 31st day of December 2012.

"S. D'Arcy"

D'Arcy J.

CITATION:	2012 TCC 457
COURT FILE NO.:	2008-1842(IT)G
STYLE OF CAUSE:	ELENA SHULKOV AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	May 2-5, 2011, June 21-22, 2011, December 5-8, 2011, January 19-27, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice Steven K. D'Arcy
DATE OF JUDGMENT:	December 31, 2012

APPEARANCES:

Counsel for the Appellant:	Terry D. McEwan Karine Veilleux Kristina M. Mahon (student-at-law)
Counsel for the Respondent:	Ifeanyi Nwachukwu Mélanie Sauriol Shane Aikat

COUNSEL OF RECORD:

For the Appellant:

Name:	Terry D. McEwan, Karine Veilleux, Kristina M. Mahon
Firm:	Gowling Lafleur Henderson LLP Barristers and Solicitors 2600-160 Elgin Street Ottawa, Ontario, K1P 1C3
For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada