

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20140924**

**Docket: A-118-14**

**Citation: 2014 FCA 212**

**CORAM: SHARLOW J.A.  
PELLETIER J.A.  
STRATAS J.A.**

**BETWEEN:**

**THE ESTATE OF THE LATE RAYMOND  
KRENBRINK**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Vancouver, British Columbia, on September 24, 2014.

Judgment delivered from the Bench at Vancouver, British Columbia, on September 24, 2014.

**REASONS FOR JUDGMENT BY:**

**SHARLOW, J.A.**

Federal Court of Appeal



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**REASONS FOR JUDGMENT**

**SHARLOW J.A.**

[1] We are all of the view that this appeal cannot succeed.

[2] The decision of Justice Graham (2014 TCC 22) cannot be reversed on appeal unless it is based on an error of law or a palpable and overriding error of fact (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[3] Justice Graham was not persuaded that the Crown, in pleading both carelessness and negligence in its Reply, was raising an alternative argument within the meaning of subsection 152(9) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.). We are not persuaded on that point either.

[4] However, Justice Graham concluded that even if he were to assume that subsection 152(9) was applicable, the Crown was entitled to plead and argue both carelessness and negligence because, in the circumstances of this case, the taxpayer would not be prejudiced by the alternative argument. In our view, Justice Graham did not err in law or in fact in reaching that conclusion.

[5] Nor are we persuaded that Justice Graham misapplied the burden of proof, which rested on the Crown because the reassessment was issued after the expiry of the normal reassessment period. Given the entire body of evidence presented in the Tax Court, it was reasonably open to Justice Graham to find as he did, on the balance of probabilities, that the executor was indifferent as to the accuracy of the tax return that she was responsible for preparing. We find no error of law or fact in Justice Graham's conclusion that the failure to report the income in issue was attributable to the negligence of the executor.

[6] For these reasons, the appeal will be dismissed with costs.

“K. Sharlow”

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:**

A-118-14

**(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE GRAHAM  
OF THE TAX COURT OF CANADA DATED JANUARY 27, 2014, NO. 2012-2210(IT)G.)**

**STYLE OF CAUSE:**

THE ESTATE OF THE LATE  
RAYMOND KRENBRINK v. HER  
MAJESTY THE QUEEN

**PLACE OF HEARING:**

VANCOUVER, BRITISH  
COLUMBIA

**DATE OF HEARING:**

SEPTEMBER 24, 2014

**REASONS FOR JUDGMENT OF THE COURT BY:**

SHARLOW J.A.  
PELLETIER J.A.  
STRATAS J.A.

**DELIVERED FROM THE BENCH BY:**

SHARLOW J.A.

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FOR THE APPELLANT

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FOR THE RESPONDENT

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