

Docket: 2012-691(IT)G

BETWEEN:

MARY E. KUCHTA,

Appellant,

-and-

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 27-28, 2014, at Windsor, Ontario

Before: The Honourable Justice Gaston Jorre

Appearances:

Counsel for the Appellant: Marcela S. Aroca

Thomas MacKay

Counsel for the Respondent: Ryan R. Hall

JUDGMENT

The Appeal of the subsection 160(1) assessment is dismissed with costs.

Signed at Ottawa, Canada, this 19th day of November, 2015.

“David Graham”

Graham J.

Citation: 2015 TCC 289

Date: 2015 11 19

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REASONS FOR JUDGMENT

Graham J.

[1] This Appeal was originally heard by Justice Jorré. By letter dated July 24, 2015, the parties agreed to have the Appeal decided by me, based on the transcripts and the court record. In addition, at my request, the parties provided supplemental oral submissions on November 2, 2015.

Background

[2] Mary Kuchta was married to Mathew Juba. Mr. Juba passed away in 2007. Ms. Kuchta was the sole designated beneficiary of two RRSPs held by Mr. Juba at the time of his death. As a result of Mr. Juba's death, Ms. Kuchta received \$305,657 from those RRSPs. Following the filing of Mr. Juba's 2006 tax return, the Minister of National Revenue assessed Mr. Juba \$55,592 in respect of his 2006 taxation year. When Mr. Juba's estate failed to pay that amount, the Minister then assessed Ms. Kuchta for the same amount pursuant to subsection 160(1) of the *Income Tax Act*. Ms. Kuchta has appealed that assessment.

[3] The four tests that must be met for subsection 160(1) to apply were set out by the Federal Court of Appeal in *Livingston v. The Queen*¹:

1) The transferor must be liable to pay tax under the Act at the time of transfer;

¹ 2008 FCA 89 at para 17

- 2) There must be a transfer of property, either directly or indirectly, by means of a trust or by any other means whatever;
- 3) The transferee must either be:
 - i. The transferor's spouse or common-law partner at the time of transfer or a person who has since become the person's spouse or common-law partner;
 - ii. A person who was under 18 years of age at the time of transfer; or
 - iii. A person with whom the transferor was not dealing at arm's length.
- 4) The fair market value of the property transferred must exceed the fair market value of the consideration given by the transferee.

[4] Ms. Kuchta accepts that the first, second and fourth tests have been met. She agrees that Mr. Juba was the transferor, that he was liable to pay tax under the Act at the time of the transfer, that the funds she received from the RRSPs were transfers of property within the meaning of subsection 160(1) and that the fair market value of the funds received exceeded the consideration provided by her. However, Ms. Kuchta submits that the third test has not been met.

[5] For the third test to have been met, Ms. Kuchta must have been Mr. Juba's spouse. The parties agree that the transfer of the RRSPs occurred immediately after Mr. Juba's death. They also agree that Mr. Juba's marriage to Ms. Kuchta ended immediately after his death. In other words, they agree that, at the time the transfer occurred, Ms. Kuchta was no longer married to Mr. Juba. Thus, since Ms. Kuchta and Mr. Juba were not married when the transfer occurred, the parties agree that there are only two ways in which the requirement that Ms. Kuchta be Mr. Juba's spouse could have been satisfied. The first is if the relationship between Ms. Kuchta and Mr. Juba is determined at a time other than the time that the transfer occurred. The second is if the word "spouse" in subsection 160(1) is interpreted to include a person who was, immediately before the tax debtor's death, his or her spouse.

Summary of the Parties' Positions

[6] Ms. Kuchta submits that the relationship between Mr. Juba and herself should be determined as of the time of the transfer and, since at that time he was no longer married to her, the third *Livingston* test has not been met. Ms. Kuchta further submits that the meaning of the word "spouse" in subsection 160(1) is clear

and cannot include a person who was, immediately before a tax debtor's death, his or her spouse.

[7] In arguing that the third test has not been met, Ms. Kuchta relies on the decision of Justice Lamarre, as she then was, in *Kiperchuk v. The Queen*². *Kiperchuk* dealt with an almost identical fact situation. Justice Lamarre found that Ms. Kiperchuk was not liable under subsection 160(1) because the third test had not been met.

[8] The Respondent was evidentially not satisfied with the decision in *Kiperchuk*. The Respondent raises two arguments, one of which was addressed by Justice Lamarre and one of which appears to be new.

[9] Primarily, the Respondent argues that the relationship between Ms. Kuchta and Mr. Juba should be determined as of the time when Mr. Juba designated Ms. Kuchta as a beneficiary of the RRSPs. Since Ms. Kuchta was clearly Mr. Juba's spouse at that time, the Respondent says that the third *Livingston* test has been met.

[10] In the alternative, the Respondent argues that, even if the relationship between Ms. Kuchta and Mr. Juba is to be determined as of the time that the RRSPs were transferred, the word "spouse" in subsection 160(1) includes a person who was, immediately before the tax debtor's death, his or her spouse.

Issues

[11] The issues in this Appeal are:

- a) When should the relationship between Ms. Kuchta and Mr. Juba be determined?
- b) Does the word "spouse" in subsection 160(1) include a person who was, immediately before a tax debtor's death, his or her spouse?

² 2013 TCC 60

When is the relationship determined?

[12] The Respondent asserts that the relationship between Ms. Kuchta and Mr. Juba is to be determined as of the date that Mr. Juba designated Ms. Kuchta as a beneficiary of the RRSPs. Since the designation occurred years before Mr. Juba's death, the Respondent submits that the third *Livingston* test is satisfied.

[13] Justice Lamarre specifically addressed this argument in *Kiperchuk* and concluded that the relationship was to be determined as of the date of the transfer, not the designation. I agree with her conclusion.

[14] The Respondent relies upon a decision of Justice Angers in *Homer v. The Queen*³ in which he concluded that the relationship between a transferor and transferee in respect of a transfer under a will was to be made at the time the will was executed. Justice Lamarre had difficulty adopting Justice Angers' conclusion and thus refused to follow it. I agree with her decision.

[15] The Respondent submits that I should not rely on *Livingston* to conclude that the relationship between a transferor and transferee must be determined at the time the transfer occurs. The Respondent points out that the phrase "at the time of transfer" that appears in the third test set out by the Federal Court of Appeal in *Livingston* does not actually appear in subsection 160(1). Since the time at which the determination of the relationship between the transferor and the transferee was not at issue in *Livingston*, the Respondent argues that the inclusion of the phrase "at the time of transfer" in the third test is *obiter*. I agree that the inclusion of the phrase in the third test is *obiter*⁴. As a result, I have not treated *Livingston* as binding in reaching my conclusion that the time at which the relationship is to be determined is the time of transfer.

[16] The Respondent argues that subsection 160(1) is silent as to when the relationship between a transferor and a transferee is to be determined. The Respondent wants me to interpret this silence as a licence for me to broaden the scope of the subsection.

³ 2009 TCC 219

⁴ I also note in passing that the phrase "at the time of transfer" was not included in the third branch of the third test in *Livingston*. I can only assume that the exclusion was accidental since there is no reason expressed in *Livingston* as to why the phrase would be excluded from that branch of the test.

[17] In my view, subsection 160(1) is not silent as to when the relationship between a transferor and a transferee is to be determined. As Justice Lamarre stated⁵:

There is nothing in the wording of that subsection that relates the relationship between the transferor and the transferee to any moment other than that of the transfer of the property (or a moment after the transfer in a case where the transferee has since become the transferor's spouse). The subsection refers throughout to the act of transferring and the time of transfer, without specifying that other moments in time, previous to the transfer, could be contemplated for the purpose of its application to the transferee.

[18] Having determined that the relationship between Mr. Juba and Ms. Kuchta must be determined when the transfer occurred, I must now determine whether the word "spouse" in subsection 160(1) is broad enough to catch Ms. Kuchta.

Does "spouse" include a person who was, immediately before a tax debtor's death, his or her spouse?

[19] In *Kiperchuk*, Justice Lamarre concluded that the transferee was not caught by subsection 160(1) because she ceased to be the transferor's spouse when the transferor died. There is no question that, in legal terms, marriage ends on death⁶. Both parties agree that this is the case, the law is clear on this point and it is acknowledged in subsection 248(23). Immediately following Mr. Juba's death, Ms. Kuchta was no longer married to him.

[20] However, the Respondent has raised a new argument that does not appear to have been raised before Justice Lamarre. The Respondent asserts that the fact that one's legal marital status ends on death does not necessarily mean that the word "spouse" could not, in subsection 160(1), include a person who was, immediately before a tax debtor's death, his or her spouse. The Respondent submits that the word "spouse" is sufficiently broad to include that meaning. In light of this submission, I think it is appropriate to conduct a textual, contextual and purposive analysis of the word "spouse" in subsection 160(1).

⁵ *Kiperchuk* at para 29

⁶ *Kindl, Re*, 1982 CarswellOnt 340 (Ont. H.C.), paragraph 10

Textual Analysis

[21] The word “spouse” is used extensively throughout the Act but is not defined⁷.

[22] Dictionary definitions of the word “spouse” clearly contemplate a relationship between two living people. Those definitions are in line with the legal meaning of the word. However, dictionary definitions do not necessarily reflect the ordinary usage of a word.

[23] People routinely use the word “spouse” to refer to the surviving member of a couple. For example, following a tragic plane accident, one would not be at all surprised if a reputable newspaper reported that “the spouses and children of the deceased passengers gathered at the crash site for a private memorial”. A person reading the article would be unlikely to comment that it would have been impossible for spouses to attend the memorial because they ceased being spouses the moment that their wife or husband died.

[24] The words “wife” and “husband” are simply gendered versions of the word “spouse” and are similarly routinely used to refer to the surviving member of a couple. The corresponding words for the surviving spouse of a deceased person are “widow” and “widower”. Yet, despite the existence of the words “widow” and “widower”, in certain contexts people commonly refer to a widow as a given deceased’s “wife” or a widower as a given deceased’s “husband”. This use of “wife” and “husband” to refer to widows and widowers occurs not just when discussing the events that occur soon after death, but also when discussing events in the future or those long in the past. For example, John, reflecting on the future, may tell his friend that, “When I die, my wife will continue to receive my pension.” When John ultimately passes away, his obituary will announce that, “John is survived by his loving wife Jane.” Years later, John’s friends may say, “John’s wife needs to get out more. Let’s invite her to dinner.” When Jane, as a result of that dinner, ultimately starts dating and then marries a new man, John’s friends may comment “John’s wife remarried about four years after he died.” None of these uses of the word “wife” seems odd or awkward. In fact, it would actually

⁷ Subsection 252(3) extends the ordinary meaning to cover parties to a void or voidable marriage but does not define the term itself.

be unusual today to replace the word “wife” with “widow” in any of these examples⁸.

[25] Ms. Kuchta submits that the use of “spouse”, “wife” and “husband” to refer to the surviving member of a couple has more to do with politeness or modern sensibilities than a misunderstanding of the legal status of the relationship. People understand that marriage does not survive death. When we say “John is survived by his loving wife Jane” we are not suggesting that John and Jane are still married. I agree.

[26] In my view, we are doing two things when we continue to use the words “spouse”, “wife” and “husband” after death. The first is that we are avoiding acknowledging (either publically or to ourselves) that the relationship is over. The second is that we are either consciously or unconsciously avoiding using the terms “widow” and “widower”. Much like “spinster” and “bachelor”, “widow” and “widower” are words that carry certain stigmas. The stereotypical images that “widow” and “widower” call to mind are not necessarily images that we would choose to have imposed on ourselves or to impose on others⁹.

[27] Ms. Kuchta submits that if everyone understands that marriage ends on death, then there can be no ambiguity in the ordinary meaning of the word “spouse” despite the fact that we regularly use the word in a way that expands that meaning. By contrast, the Respondent asserts that ordinary meaning of the word comes from how it is actually used, not from its legal meaning.

[28] I understand both of the parties’ positions. However, at this point in the analysis, it is sufficient to say that there are two different meanings of the word “spouse”: one legal and one colloquial. My conclusion as to whether those two

⁸ Another example of the broader meaning of the word "spouse" is that the reader most likely did not even notice the phrase "surviving spouse" in the second sentence of this paragraph. If one interprets the word "spouse" strictly, it would be impossible to be both surviving and a spouse at the same time and the term “surviving spouse” would be absurd. We do not find it to be an absurd term because we understand that the ordinary meaning of the word “spouse” can be broader than the strict dictionary meaning.

⁹ Despite the stigmas attached to the words “widow” and “widower”, I will use those words throughout the balance of these Reasons for Judgment when referring to a person in Ms. Kuchta’s position. The meaning of those words is clear. More importantly, it would be presumptive and confusing if I were to refer to widows and widowers using either the legal meaning of the word “spouse” supported by Ms. Kuchta or the colloquial meaning of the word “spouse” supported by the Respondent while analyzing which of those meanings was appropriate.

conflicting meanings cause any textual ambiguity is strongly informed by the contextual analysis below. Accordingly, I will leave my conclusion on the textual analysis until the end of the textual, contextual and purposive analysis.

Contextual Analysis

[29] The word “spouse” is used numerous times throughout the Act. There is nothing to be gained from analyzing its use in sections of the Act that deal with events that happen during a taxpayer’s lifetime. Those sections will not assist in understanding whether Parliament has used the legal or colloquial meaning of the word. Instead, the focus should be on how the word is used in the specific provisions of the Act that deal with transfers of property on death.

[30] My conclusion is that, rather than clarifying how the word “spouse” is to be interpreted in subsection 160(1), the usage of the word in provisions dealing with the transfer of property on death actually creates ambiguity. It demonstrates that Parliament has, in some instances, used the word “spouse” as if it includes widows and widowers and, in other instances, used the word as if it excludes those individuals. A review of the relevant provisions is set out below.

Subsection 160(1)

[31] The logical place to begin a contextual analysis is in subsection 160(1) itself since it is both the subsection in question and a subsection that deals, among other things, with transfers of property on death. Unfortunately, the context of subsection 160(1) does not provide any clarification as to the meaning of the word “spouse”.

[32] The relevant portion of subsection 160(1) reads:

Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

(a) the person's spouse or common-law partner or a person who has since become the person's spouse or common-law partner,

(b) a person who was under 18 years of age, or

(c) a person with whom the person was not dealing at arm's length,

...

[emphasis added]

[33] The word “spouse” appears twice paragraph 160(1)(a). The second half of that paragraph extends the net of subsection 160(1) to cover people who became the transferor’s spouse after the date of the transfer. Clearly Parliament turned its mind to catching people such as fiancées who would not otherwise be caught by the word “spouse”. One could conclude that since Parliament considered how to expand the class of people caught and did not specifically include widows and widowers, Parliament must have meant to exclude those individuals. That would, however, be circular reasoning. If one believes that the word “spouse” does not include widows and widowers, then one can look at paragraph 160(1)(a) and conclude that Parliament chose not to expand the class of people caught. However, if one believes that the word “spouse” may include widows and widowers in certain contexts, then one can look at paragraph 160(1)(a) and conclude that there was no need for Parliament to say anything more because widows and widowers were already caught by the word “spouse”. A contextual analysis must be conducted by examining whether a given context in the Act precludes one of the two meanings. The context of subsection 160(1) supports either meaning and thus is not helpful in determining whether Parliament has used the legal or colloquial meaning.

[34] The use of the term “common-law partner” in subsection 160(1) does not provide any clarity either. In the same way that marriage ends on death, common-law partnership ends on death. In the same way that people use the words “wife” and “husband” to refer to surviving spouses, people use “common-law partner” to refer to surviving partners. In fact, it is even more difficult to describe a surviving partner because there are no equivalent words to “widow” and “widower” for common-law partners in either English or French. The context of subsection 160(1) supports both the legal or colloquial meanings of “common-law partner” and thus is not helpful in determining which meaning Parliament used.

Subsection 146(8.91)

[35] Subsection 146(8.91) deals with transferring payments from a matured RRSP after death. This subsection is a strong example of Parliament using the word “spouse” not just to include widows and widowers, but to actually mean widow or widower. It reads:

Where, as a consequence of the death of an annuitant after the maturity of the annuitant's registered retirement savings plan, the annuitant's legal representative has become entitled to receive amounts out of or under the plan for the benefit of the spouse or common-law partner of the deceased and the legal representative

and the spouse or common-law partner file with the Minister a joint election in prescribed form,

(a) the spouse or common-law partner shall be deemed to have become the annuitant under the plan as a consequence of the annuitant's death; and

(b) such amounts shall be deemed to be receivable by the spouse or common-law partner and, when paid, to be received by the spouse or common-law partner as a benefit under the plan, and not to be received by any other person.

[emphasis added]

[36] The phrase “the spouse or common-law partner of the deceased” indicates that one still has a spouse after death. In fact, subsection 146(8.91) would be rendered meaningless if one did not accept that “spouse” could include a widow or widower. Without that interpretation, the phrase “the spouse...of the deceased” could not refer to anyone. Since I should presume that Parliament intended subsection 146(8.91) to have some meaning and avoid adopting a meaning that would render a provision meaningless¹⁰, I must therefore conclude that Parliament intended the word “spouse” to include “widows” and “widowers” in that subsection.

[37] Ms. Kuchta agrees that subsection 146(8.91) would be meaningless if the word “spouse” does not include widows and widowers. She is unable to provide a persuasive explanation why Parliament would have used the colloquial meaning of “spouse” in this subsection.

[38] Ms. Kuchta pointed out that subsection 146(8.91) is a deeming provision. I agree. She submitted that deeming provisions can cause a word or phrase to mean something entirely different than what they would mean without the provision. I also agree. However, Ms. Kuchta was not able to demonstrate that the deeming provisions in subsection 146(8.91) did anything to alter the meaning of the word “spouse”. Those provisions simply deem when a spouse becomes an annuitant and by whom amounts receivable under the plan, are receivable. They do not deem widows and widowers to be spouses.

[39] The French version of subsection 146(8.91) is consistent with the English version.

¹⁰ *Placer Dome Canada Ltd. v Ontario (Minister of Finance)*, 2006 SCC 20 at para 45

Subsections 70(6)

[40] Subsection 70(6) deals with the disposition and acquisition of capital property as a result of death. It too is a strong example of Parliament using the word “spouse” to mean widow or widower.

[41] The relevant portion of subsection 70(6) reads:

Where any property of a taxpayer who was resident in Canada immediately before the taxpayer's death that is a property to which subsection (5) would otherwise apply is, as a consequence of the death, transferred or distributed to

(a) the taxpayer's spouse or common-law partner who was resident in Canada immediately before the taxpayer's death, or

(b) a trust, created by the taxpayer's will, that was resident in Canada immediately after the time the property vested indefeasibly in the trust and under which

(i) the taxpayer's spouse or common-law partner is entitled to receive all of the income of the trust that arises before the spouse's or common-law partner's death, and

(ii) no person except the spouse or common-law partner may, before the spouse's or common-law partner's death, receive or otherwise obtain the use of any of the income or capital of the trust,

if it can be shown, within the period ending 36 months after the death of the taxpayer or, where written application therefor has been made to the Minister by the taxpayer's legal representative within that period, within such longer period as the Minister considers reasonable in the circumstances, that the property has become vested indefeasibly in the spouse or common-law partner or trust, as the case may be, the following rules apply:

...

[emphasis added]

[42] Subsection 70(6) describes an acquisition being made as a consequence of a taxpayer's death by “the taxpayer's spouse” or a trust under which “the taxpayer's spouse” is entitled to receive all of the income during his or her life. Thus, subsection 70(6) not only contemplates that a taxpayer may have a spouse after death, but also that that person's status as a spouse would continue for the rest of his or her life. This entire subsection would be rendered meaningless if one did not accept that the word “spouse” could include a widow or widower. The entire

purpose of the subsection is to allow a rollover of capital property to a widow or widower or a trust for the benefit of that person. If the word “spouse” did not include a widow or widower, there would be no one to whom capital property could be rolled. Again, since I must assume that Parliament intended subsection 70(6) to have meaning, I must therefore conclude that Parliament intended the word “spouse” to include “widows” and “widowers” in that subsection.

[43] Paragraph 70(6)(a) refers to “the taxpayer’s spouse...who was resident in Canada immediately before the taxpayer’s death”. In my view, the phrase “immediately before the taxpayer’s death” modifies when the spouse had to be resident in Canada. It does not require that the spouse had to have been a spouse immediately before the taxpayer’s death. I reach this conclusion by reviewing the equivalent provisions for spousal trusts in paragraph 70(6)(b). That paragraph requires that, for the rollover to apply to a spousal testamentary trust, the trust must be resident in Canada but makes no comment on when the spouse had to be a spouse.

[44] The French version of subsection 70(6) is consistent with the English version.

[45] Ms. Kuchta agrees that subsection 70(6) would be meaningless if the word “spouse” did not include widows and widowers. She is unable to provide a persuasive explanation why Parliament would have used the colloquial meaning of “spouse” in this subsection.

[46] Subsection 252(3) extends the ordinary meaning of the word “spouse” to include individuals who are parties to a void or voidable marriage. This extended definition applies only to certain provisions of the Act that are enumerated in subsection 252(3). Those sections include subsection 70(6). Ms. Kuchta submits that this extended definition may provide an explanation for the broader use of the word “spouse” in subsection 70(6) but she was unable to explain how that would be the case. I see nothing in subsection 252(3) that would cause the word “spouse” to include widows and widowers in the provisions enumerated therein. I also note that subsection 146(8.91) discussed above is not one of the provisions enumerated in subsection 252(3).

Subsections 72(2) and 148(8.2)

[47] Similar uses of the word “spouse” as being inclusive of widows and widowers are found in subsection 72(2) which deals with the transfer of rights on

death and 148(8.2) which deals with transfers of life insurance policies on death. Subsection 148(8.2) uses similar language to subsection 70(6). Subsection 72(2) refers directly to a spouse described in subsection 70(6).

[48] The French versions of these subsections are consistent with the English versions.

Subsection 146(8.8)

[49] Subsection 146(8.8) deals with the taxation of a RRSP on the death of the annuitant. It is a strong example of Parliament using the word “spouse” in a way that excludes widows and widowers.

[50] The relevant portion of subsection 146(8.8) reads:

Where the annuitant under a registered retirement savings plan (other than a plan that had matured before June 30, 1978) dies after June 29, 1978, the annuitant shall be deemed to have received, immediately before the annuitant's death, an amount as a benefit out of or under a registered retirement savings plan equal to the amount, if any, by which

(a) the fair market value of all the property of the plan at the time of death exceeds

(b) where the annuitant died after the maturity of the plan, the fair market value at the time of the death of the portion of the property described in paragraph (a) that, as a consequence of the death, becomes receivable by a person who was the annuitant's spouse or common-law partner immediately before the death, or would become so receivable should that person survive throughout all guaranteed terms contained in the plan.

[emphasis added]

[51] Subsection 146(8.8) specifically refers to the person in Ms. Kuchta's position not as “the annuitant's spouse” but rather as “a person who was the annuitant's spouse...immediately before the death”. This phrase clearly shows that, in subsection 146(8.8), Parliament intended the word “spouse” to exclude widows and widowers. If Parliament had intended those words to be included in the meaning of “spouse”, it would have been unnecessary for Parliament to describe the status of spouse as being something that was in place immediately before death.

[52] The French version of subsection 146(8.8) is consistent with the English version.

Subsections 146(1) “refund of premiums”, 146(5.1) and 248(23.1)

[53] Phrases similar to the phrase in subsection 146(8.8) are found in the definition of “refund of premiums” in subsection 146(1) and in subsections 146(5.1) and 248(23.1). All of these subsections are strong examples of Parliament using the word “spouse” in a way that excludes widows and widowers.

[54] The definition of “refund of premiums” in subsection 146(1) refers to “an individual who was, immediately before the death, a spouse...of the annuitant”.

[55] Subsection 146(5.1) deals with the deduction of contributions to a spousal RRSP in the year in which the contributor dies. It refers to “an individual who was the taxpayer’s spouse...immediately before the death.”

[56] Subsection 248(23.1) is a deeming provision relating to property transferred after a taxpayer’s death. It refers to transfers to “a person who was the taxpayers’ spouse...at the time of death.”

[57] The French versions of these subsections are consistent with the English versions.

Subsection 147.3(7)

[58] Subsection 147.3(7) deals with transfers of lump sum registered pension plan benefits on death. Differences between the English and French versions of the subsection make it unclear how Parliament viewed the words “spouse” and “époux”. The English version of subsection 147.3(7) reads:

An amount is transferred from a registered pension plan in accordance with this subsection if the amount

- (a) is a single amount no portion of which relates to an actuarial surplus;
- (b) is transferred on behalf of an individual who is entitled to the amount as a consequence of the death of a member of the plan and who was a spouse or common-law partner or former spouse or common-law partner of the member at the date of the member's death; and
- (c) is transferred directly to
 - (i) another registered pension plan for the benefit of the individual,
 - (ii) a registered retirement savings plan under which the individual is the annuitant (within the meaning assigned by subsection 146(1)), or

(iii) a registered retirement income fund under which the individual is the annuitant (within the meaning assigned by subsection 146.3(1)).

[emphasis added]

[59] Where the English version speaks of an individual who was the spouse at the date of death, the French version speaks of an individual who is the spouse at the date of death. Thus the English version suggests that the status of being a spouse ceases on death while the French version suggests the opposite. As a result of this inconsistency, subsection 147.3(7) is not helpful to a contextual analysis.

Ms. Kuchta's position

[60] I have outlined Ms. Kuchta's arguments above. In summary, Ms. Kuchta agrees with the meaning of the word "spouse" in all of the above provisions that support her position and disagrees with the meaning in those that do not. She agrees that the provisions she disagrees with would be rendered meaningless without the colloquial meaning. She is unable to provide persuasive explanations of why Parliament would have used that colloquial meaning in those provisions and the legal meaning in the other provisions.

Respondent's position

[61] The Respondent takes a somewhat surprising position¹¹. Rather than simply agreeing that Parliament has used the word "spouse" inconsistently and relying on that inconsistency to show that the word is capable of two different meanings, the Respondent takes the position that Parliament has used the word consistently in all of the above provisions in a manner that includes widows and widowers. The Respondent's argument is the same for all of the provisions that I have found support the legal meaning of the word "spouse". In each case, the Respondent focuses on the inclusion in the relevant provision of a phrase such as "immediately before death" that focuses the reader on when the test of being a spouse is to be met.

¹¹ I say it is a surprising position because, if I accepted it, there would potentially be far ranging and unforeseen implications for the meaning of the word "spouse" throughout the entire Act.

[62] I will address the Respondent's argument by examining the definition of "refund of premiums" in subsection 146(1). The relevant part of that definition reads:

"refund of premiums" means any amount paid out of or under a registered retirement savings plan (other than a tax-paid amount in respect of the plan) as [a] consequence of the death of the annuitant under the plan,

- (a) to an individual who was, immediately before the death, a spouse or common-law partner of the annuitant, where the annuitant died before the maturity of the plan, or

...

[emphasis added]

[63] The Respondent submits that, in drafting this definition, Parliament would have started with the phrase "to an individual who was a spouse or common-law partner of the annuitant". The Respondent submits that the word "spouse" in that phrase would have included widows and widowers. However, the Respondent points out that such a phrase would also have caught ex-wives and ex-husbands. Thus, the Respondent argues that Parliament added the phrase "immediately before the death", not to ensure that widows and widowers were caught by the subsection, but rather to ensure that ex-wives and ex-husbands would be excluded. I disagree.

[64] The Respondent's position presupposes that the drafters of the definition used complex language that then needed to be fixed to prevent a problem. In my view, the better view is that, if the drafters of the definition believed that "spouse" included widows and widowers, they would have used the simple phrase: "to a spouse or common-law partner of the annuitant". This simple phrase is consistent with phrases like "the spouse or common-law partner of the deceased" used in subsection 146(8.91), a subsection where Parliament appears to have accepted that "spouse" includes widows and widowers. Furthermore, unlike the Respondent's interpretation, that simple phrase would have followed the statutory convention of drafting in the present tense. It would also have avoided any purported problem with ex-wives and ex-husbands. In my view, the only logical reason to expand this simple language and introduce the use of the past tense by adding the phrase "an individual who was, immediately before the death" would have been to ensure that widows and widowers were included in the definition because Parliament believed that they were not otherwise included.

Conclusion

[65] Based on all of the foregoing, I am left with two conflicting uses of the word “spouse” in the Act. One use indicates that, in certain circumstances involving the transfer of property on death, Parliament intended that the word “spouse” include a widow or widower. The other use indicates that Parliament intended the opposite. Thus, the contextual analysis has highlighted the fact that the ambiguity shown in the textual analysis is more than simply theoretical. Parliament’s use of the colloquial meaning of “spouse” in certain provisions dealing with the transfer of property on death has shown that Parliament may also have intended to use that colloquial meaning in subsection 160(1).

Purposive Analysis

[66] A purposive analysis of subsection 160(1) strongly points in favour of an interpretation of the word “spouse” in that subsection that includes a widow or widower. The scheme of subsection 160(1) indicates that its purpose is to capture all transfers to non-arm’s length persons and to expand that net to capture transfers to even arm’s length persons on death. Looking more specifically at RRSPs, the scheme of subsection 160(1) appears to be designed to capture transfers of RRSPs on death.

[67] The most common example given of the type of situation that subsection 160(1) is designed to prevent is a husband who has an outstanding tax debt, transferring his assets to his wife. Any transfer of property from Mr. Juba to Ms. Kuchta during his lifetime would have been caught by subsection 160(1). Why would Parliament have not intended to catch a transfer of Mr. Juba’s RRSPs on his death? Was the purpose to exempt transfers of property on death from subsection 160(1)? Was the purpose to exempt transfers of property to widows or widowers? Was it to exempt transfers of property to people who were financially dependent or co-dependent on the tax debtor? Was it to exempt transfers of RRSPs on death? Was the purpose to exempt transfers of RRSPs on death to people who were financially dependent or co-dependent on the tax debtor? As set out below, I find that there is no evidence to support any of these purposes in subsection 160(1).

Transfers on death:

[68] There is nothing in the Act that would indicate that Parliament intended to give relief from subsection 160(1) to transfers of property on death. In fact, the opposite is true. Paragraph 160(1)(c) causes subsection 160(1) to apply to transfers to anyone who was dealing at non-arm’s length with the transferor. Paragraph 251(1)(b) deems an estate to deal at non-arm’s length with any beneficiary of the

estate. The combined effect of these two paragraphs is that anyone who receives property under a will is caught by subsection 160(1) whether or not they would otherwise deal with the deceased at arm's length. Thus, for example, a charity that receives a bequest from a tax debtor under a will is caught by subsection 160(1) despite the fact that that same charity would not be caught had the deceased made the gift during his or her lifetime.

Transfers on death to widows or widowers:

[69] There is nothing in the Act that would indicate that Parliament intended to give relief from subsection 160(1) to transfers of property on death to widows or widowers. Had Mr. Juba transferred property to Ms. Kuchta under his will, the transfer would have been caught even if the legal meaning of the word "spouse" was used in subsection 160(1). Despite the fact that Ms. Kuchta was no longer legally Mr. Juba's spouse, paragraph 251(1)(b) would have deemed her not to deal with his estate at arm's length so subsection 160(1) would have applied.

Transfers on death to people who are financially dependent or co-dependent on a tax debtor:

[70] There is nothing in the Act that would indicate that Parliament intended the application of subsection 160(1) to vary depending on whether the recipient of the property was financially dependent or co-dependent on the tax debtor. Subsection 160(1) applies to transfers to spouses, children, grandchildren and minors during a tax debtor's lifetime regardless of the financial impact its application may have. It similarly applies to transfers to widows, widowers, children, grandchildren and minors under a will regardless of the financial impact its application may have.

Transfers of RRSPs on death:

[71] There is nothing in the Act that would indicate that Parliament intended to give relief from subsection 160(1) to transfers of RRSPs on death. If Mr. Juba had designated his children as the beneficiaries of his RRSPs rather than Ms. Kuchta, subsection 160(1) would have caught this transfer. This is because the children would still be Mr. Juba's children after he died, would therefore still be related to him, would therefore be deemed to deal with him at non-arm's length under paragraph 251(1)(a) and would thus be caught under paragraph 160(1)(c). The same would have been true if Mr. Juba had designated his parents, grandparents, siblings or grandchildren as beneficiaries as all of those blood relatives retain their status as relatives after death. It would even be true if Mr. Juba had designated a

minor who was not related to him by blood since, under paragraph 160(1)(b), transfers to any minor are caught. Furthermore, under section 160.2, a transfer of an RRSP to any person whomsoever regardless of their relationship with the tax debtor makes that person liable for taxes arising from the termination of the RRSP itself¹².

Transfers of RRSPs on death to people financially dependent or co-dependent on a tax debtor:

[72] There is nothing in the Act that would indicate that Parliament intended to give relief from subsection 160(1) to transfers of RRSPs to people who are financially dependent or co-dependent on tax debtors. Subsection 160(1) applies to transfers of RRSPs to children, grandchildren and minors regardless the financial impact its application may have. There is nothing in the Act that would indicate that Parliament intended to treat financially dependent children, grandchildren and minors in one way but financially dependent or co-dependent widows and widowers in a completely different way. Parliament permits rollovers of RRSPs both to widows and widowers and to financially dependent children and grandchildren¹³. When Parliament uses the Act to assist widows and widowers with taxes, it does so by deferring the taxes payable on a deceased's death, not by eliminating those taxes or by forgiving unpaid taxes from prior years. If Parliament's intention was to reduce the overall financial burden faced by widows and widowers, exempting RRSPs from the application of subsection 160(1) would be a very strange way to do it. It would absurdly provide relief only to those individuals whose spouses had failed to comply with the tax system during their lifetimes. Widows and widowers who were in desperate financial straits but whose deceased husband or wife had dutifully paid his or her taxes over the years would receive no assistance. This hardly seems like a system that Parliament would intend to create. Even more irrationally, such a system would only provide relief if a tax debtor had a RRSP. The widows and widowers of tax debtors who died with other assets would not receive the same relief¹⁴. I cannot imagine Parliament intending such an outcome.

¹² While tax usually arises from the termination of a RRSP on death, RRSPs rollover to spouses on death thus avoiding this tax (subsection 146(8)). Since Mr. Juba's RRSPs were transferred to Ms. Kuchta, there was no tax arising from the termination of the RRSPs. Thus there was no tax to which section 160.2 could apply.

¹³ Paragraph (b) of the definition of "refund of premiums" in subsection 146(1)

¹⁴ For example, if a tax debtor died owing \$50,000 and holding \$75,000 in assets, the relief provided to his widow would depend on how those assets were held. If his assets were all

Ms. Kuchta's submissions:

[73] Ms. Kuchta was not able to provide me with anything that would indicate that Parliament specifically intended to exempt transfers of RRSPs to spouses from the application of subsection 160(1). She was also unable to provide an explanation that satisfactorily addressed the concerns that I have raised above.

[74] Ms. Kuchta submits that Parliament has a policy of exempting the transfer of property at the end of a marriage from the application of subsection 160(1). She argues that subsection 160(4) provides relief from the application of subsection 160(1) when property is transferred pursuant to a decree, order or judgment of a competent tribunal or pursuant to a written separation agreement. She says that Parliament may have chosen to follow a similar policy when a marriage ends on death and thus intentionally exempted transfers of RRSPs to widows and widowers. While I agree with Ms. Kuchta's description of subsection 160(4), I do not agree with her conclusion. As set out above, transfers of property to widows and widowers under a will are clearly caught by subsection 160(1). This indicates that Parliament's intentions were exactly the opposite of those that Ms. Kuchta is suggesting. For me to accept Ms. Kuchta's argument, I would have to conclude that Parliament had a policy of exempting the transfer of property at the end of a marriage from the application of subsection 160(1) but, in the case of marriages ending on death, only chose to apply that policy to RRSPs.

Analysis

[75] In summary, there are two different meanings of the word "spouse": one legal and one colloquial. A contextual analysis shows that Parliament has used both the legal and colloquial meanings in provisions of the Act involving transfers of property on death. This use of the both meanings demonstrates that there is textual ambiguity in the meaning of the word "spouse" in subsection 160(1). Given that ambiguity, it is appropriate to give weight to the purpose of the subsection. The purposive analysis points strongly in favour of an interpretation of "spouse" in subsection 160(1) that includes widows and widowers. Accordingly, I find that the word "spouse" in subsection 160(1) includes a person who was, immediately before the tax debtor's death, his or her spouse.

in RRSPs, the widow would receive relief from the entire \$50,000 debt. If he held \$20,000 in cash and \$55,000 in RRSPs, the widow would only receive \$30,000 in relief. If he held all \$75,000 in cash, she would receive no relief.

[76] Ms. Kuchta submits that a contextual analysis cannot alter the meaning of a word where the words of the statute are clear. I do not think that is what the contextual analysis has done in this matter. The contextual analysis has not altered the ordinary meaning of the word “spouse”. It has simply revealed that Parliament, in the same piece of legislation, in provisions dealing with the same subject matter, has used the word “spouse” in two different ways. In other words, the contextual analysis has revealed that Parliament accepts that the word has two ordinary meanings. The contextual analysis has informed my understanding of the textual analysis and leads me to conclude that the text of subsection 160(1) is ambiguous. This process was aptly described by the Supreme Court of Canada in *Canada Trustco Mortgage Company v. The Queen*¹⁵:

Even where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities. “After all, language can never be interpreted independently of its context, and legislative purpose is part of the context. It would seem to follow that consideration of legislative purpose may not only resolve patent ambiguity, but may, on occasion, reveal ambiguity in apparently plain language.” See P.W. Hogg and J.E. Magee, *Principles of Canadian Income Tax Law* (4th ed. 2002), at p. 563. In order to reveal and resolve any latent ambiguities in the meaning of provisions of the Income Tax Act, the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation.

[77] What Ms. Kuchta is essentially asking me to do is to stop my analysis after performing the textual analysis (based on her position that there was no ambiguity shown in that analysis). That is not my understanding of how a textual, contextual and purposive analysis is to be performed. Such an analysis is not a gated system whereby one only proceeds to the contextual analysis if one finds ambiguity in the textual analysis and then only proceeds to the purposive analysis if one finds ambiguity in the contextual analysis. On the contrary, one is to perform a complete textual, contextual and purposive analysis and then, looking at all of the results, apply an appropriate weighting to each aspect of the analysis in the circumstances in order to reach a conclusion.

[78] Had Parliament consistently used the legal meaning of the word “spouse” throughout the Act, then, despite the existence of the colloquial meaning of the word and the fact that the purposive analysis strongly supports that meaning, I would not have found that the word “spouse” in subsection 160(1) includes widows and widowers. The use of additional language in provisions such as

¹⁵ 2005 SCC 54 at para 47

subsection 146(8.8) to specifically include widows and widowers, would have convinced me that there was no textual ambiguity to the word “spouse” in subsection 160(1). It is not my role to interpret otherwise unambiguous text in a piece of tax legislation in a manner that ensures that Parliament’s goals are achieved¹⁶. This is particularly true in a far reaching “draconian” provision such as subsection 160(1). It is only because the contextual analysis revealed that Parliament has used both meanings of the word “spouse” in the Act in similar provisions that I am willing to give the weight that I have to the purposive analysis in order to determine which meaning Parliament intended in its ambiguous use of the word in subsection 160(1).

Qualification

[79] I would like to emphasize that the above finding applies only to the use of the word “spouse” in subsection 160(1). Any person wishing to apply a similarly broad interpretation of the word in other provisions of the Act would have to undergo a textual, contextual, and purposive analysis of the use of the word in that particular provision. The contextual ambiguity described above may not be present in provisions of the Act that do not deal with transfers of property on death. Similarly, the purpose of the provision in question may not so clearly support the colloquial meaning. Absent that contextual ambiguity and clear purpose, the mere existence of both legal and colloquial meanings of the word “spouse” may not be sufficient to result in a broader interpretation of the word in any given provision.

Conclusion

[80] Based on all of the foregoing, I find that the transfer from Mr. Juba to Ms. Kuchta meets the third *Livingston* test. Accordingly, the Appeal is dismissed with costs.

Signed at Ottawa, Canada, this 19th day of November, 2015.

“David Graham”

Graham J.

¹⁶ *Placer Dome Canada Ltd, v. Ontario (Minister of Finance)*, 2006 SCC 20

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