Docket: 2007-1662(IT)G

BETWEEN:

BONNIE WOODLAND,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 19, 2009, at St. John's, Newfoundland

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	Melanie Del Rizzo
Counsel for the Respondent:	Martin Hickey

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* with respect to the Notice of Assessment number 32188 dated February 8, 2006 is dismissed, with costs, in accordance with the attached Reasons for Judgment.

Signed at Summerside, Prince Edward Island, this 9th day of September 2009.

"Diane Campbell"

Campbell J.

Citation: 2009 TCC 434
Date: 20090909
Docket: 2007-1662(IT)G

BETWEEN:

BONNIE WOODLAND,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

[1] On February 28, 2001 or March 1, 2001 Donald Gordon Woodland transferred 46,848 shares of Icecap Equity Inc. (the "Shares") into the Appellant's self-directed Registered Retirement Savings Plan (the "RRSP") located at the Bank of Nova Scotia. The Appellant and Mr. Woodland are spouses and were married at the time of this transfer. This appeal arises because the Minister of National Revenue (the "Minister") assessed the Appellant in the amount of $28,108.80 pursuant to subsection 160(1) of the *Income Tax Act* (the "*Act*"). The parties agreed that Mr. Woodland owed taxes in the taxation year in excess of the amount of the face value of the shares that were transferred. Mr. Woodland subsequently declared bankruptcy in July 2001.

[2] The sole issue is whether the Appellant is liable to pay the Minister the amount of $28,108.80 pursuant to subsection 160(1) of the *Act*.

[3] The majority of the facts in this appeal are not in dispute. The Appellant, a teacher, and her husband, a lawyer, have been married since June 25, 1977. In the course of his legal career, Mr. Woodland became involved in the conduct of the legal

affairs of Iceberg Industries Corporation ("Iceberg") a Newfoundland private corporation that was in the business of harvesting icebergs to produce bottled water as well as vodka and beer from iceberg water. Mr. Woodland, one of the original shareholders of Iceberg, held 83,600 common shares.

[4] According to Lewis Stoyles, an accountant and CFO with Iceberg, the company was in the process of going public on the U.S. NASDAQ Exchange in May 1999 by a reverse takeover of D.V. Holdings Inc. ("D.V. Holdings"), a publicly traded U.S. company. Another company, Icecap Equity Inc. ("Icecap Equity"), was incorporated in Newfoundland to facilitate the takeover for the Canadian resident shareholders of Iceberg. This was essentially a shell company. Each Iceberg share was exchangeable for one and seven-tenths of Icecap Equity's preferred exchangeable shares (the "Icecap Shares"), to be held in trust by an appointed Depository. Prior to the transaction taking place, each shareholder, including Mr. Woodland, exchanged their common shares in Iceberg for preferred exchangeable shares of Icecap Equity. The value of the preferred exchangeable shares in Icecap Equity was assigned over time by the accounting firm of Price Waterhouse Coopers. Following the takeover transaction, the Icecap Shares were then exchangeable on a one for one basis for shares in the public company, Iceberg Corporation of America ("Iceberg America"), previously known as D.V. Holdings Inc. In order to dispose of Icecap Shares, a shareholder would first have to exchange those shares for shares in Iceberg America.

[5] Mr. Woodland testified that a "hold" period was placed on the trading of the Iceberg America shares. Therefore, if shareholders in Icecap Equity exercised their exchange rights for shares of Iceberg America, they would be subject to this one-year holding period following the date of exchange before the shares could be traded or resold.

[6] The Icecap Shares were exchangeable only for shares of Iceberg America and could not otherwise be sold. The reverse takeover transaction took place in May 1999. Mr. Woodland did not opt to exchange his Icecap shares for Iceberg America shares.

[7] Mr. Woodland was in the habit of contributing the maximum amount to his RRSP limit by transferring monies or shares into the Appellant's RRSP. On February 28, 2001 or March 1, 2001, he transferred ownership of 46,848 Icecap Shares to the Appellant's RRSP via Scotia McLeod (the "Share Transfer"). The book value of these shares on that date was $28,108.80, which was 20 cents less than Mr. Woodland's RRSP contribution limit for the 2000 taxation year. At the time of

the Share Transfer, the relevant documents indicated that the Icecap Shares had a fair market value ("FMV") of 60 cents each. Both Mr. Woodland and Mr. Stoyles indicated that this value was based on the NASDAQ value of Iceberg America shares. Although Mr. Woodland admitted that the FMV of the Icecap Shares was $28,108.80 at the time of the transfer, he emphasized that the shares could not be sold or transferred in any other manner on the market at the time. Aside from a transfer into an RRSP these shares were otherwise only exchangeable for Iceberg America shares.

[8] In May 1999 the share value of Icecap and/or Iceberg America shares began decreasing significantly and was essentially reduced to a nil value by 2002. The operation of Iceberg ceased in June 2002 with Mr. Woodland having already declared bankruptcy in July 2001.

[9] Mr. Woodland testified that his purpose in transferring the shares was to maximize his RRSP deduction for that year and not for the purpose of hiding any of his assets from his creditors or from Canada Revenue Agency ("CRA"). At the time of this transfer, he confirmed that he did not receive any money from the Appellant. However, he did receive a tax deduction from the transfer into the Appellant's RRSP which reduced his tax payable in his 2000 income tax return.

[10] The Appellant held a self-directed spousal RRSP with Scotia McLeod. She testified that any investments within this RRSP were made with the intention of being a long-term investment. The Appellant did not have any specific recollection of this Share Transfer. However, in her correspondence to Kelly Tobin of CRA, she did not specifically state that she was unaware of the Share Transfer at the time it took place. In addition, she never stated this fact in her Notice of Objection. Mr. Woodland acknowledged that he signed the "Registered Plans Special Holdings Purchase Contribution Authorization" form for this Share Transfer but stated that this form should have been signed by the Appellant.

[11] The Appellant also stated that, to her knowledge, she did not give any consideration for the Share Transfer which she received from her husband. In particular, she paid no money for this transfer of shares.

[12] At the time of the Share Transfer, Mr. Woodland had an outstanding tax liability relating to his 1999 and 2000 taxation years in the amount of $36,823.88. However, Mr. Woodland testified that he was solvent at the time of the transfer and that the transfer was not executed for the purpose of hiding assets from CRA.

The Appellant's Submissions:

[13] The Appellant's argument centered on four points:

(1) the intention of the parties in effecting the Share Transfer;

(2) whether the shares were properly transferred to the Appellant;

(3) the FMV of the shares at the time of the transfer; and

(4) the value of the consideration, if any, that passed between the parties for the Share Transfer.

[14] With respect to intention, Mr. Woodland was solvent at the time of the Share Transfer. His sole intention in transferring the shares was to contribute to the spousal RRSP and not to hide assets from CRA. If Mr. Woodland's intention was to hide assets, he would have transferred all of his shares in Icecap Equity and not just a portion of the shares which he held in the corporation.

[15] With respect to the proper transfer of the shares, the Appellant was not aware of this particular Share Transfer. She did not execute the form to consent to the transfer of these shares to her RRSP nor did she accept the risks involved with this transfer. Therefore the transfer was not properly effected.

[16] With respect to the FMV of the shares, the actual redeemable value of the preferred exchangeable shares of Icecap Equity was derived from the exchangeability of the shares in Iceberg America. The Icecap Equity shares had no par value and could not be traded on the market. Icecap Equity was simply a shell company and its only purpose was to reduce the tax liability for the Canadian shareholders of Iceberg involved with the reverse takeover transaction. The FMV of each Icecap share was one share of Iceberg America and upon acquisition of a share in Iceberg America the resale of these shares was subject to a restriction of a one-year hold period under U.S. securities legislation. This resale restriction should therefore reduce the FMV of the Icecap Equity shares to nil. If the Share Transfer had not occurred, CRA would not have been in a different position. By the time Mr. Woodland declared bankruptcy Icecap Equity shares had no value.

[17] With respect to the value of the consideration, the Appellant argued that the only value that the Icecap Equity shares had was the value obtained by using them as an RRSP reduction in tax liability. The Appellant submitted that consideration did

pass from the Appellant to Mr. Woodland because the Appellant did not use the RRSP deduction resulting from this Share Transfer into her RRSP and instead she effectively passed the value of the deduction to Mr. Woodland.

The Respondent's Submissions:

[18] The Respondent concentrated on the four conditions that must be met under section 160 of the *Act*. Contributions by a taxpayer's spouse to an RRSP constitute a transfer of property to which section 160 could potentially apply. Once Mr. Woodland transferred his shares into the Appellant's RRSP account, he divested himself of the shares in favour of the Appellant. If the value of the shares increased, the Appellant would receive the benefit of that value. Whether the Appellant had knowledge of the transfer is not important since the transferee's lack of knowledge does not preclude the application of section 160.

[19] The parties were not dealing at arm's length because they were married at the time of the share transfer.

[20] The Respondent argued that there was no consideration flowing from the Appellant in respect of this Share Transfer. The Appellant's argument that adequate consideration was received by Mr. Woodland through the RRSP deduction should be denied because the requirement is that consideration flow from the Appellant.

[21] Mr. Woodland had an outstanding tax liability in excess of $36,000.00 at the time of the Share Transfer and this was not at issue.

[22] Finally, the Respondent argued that the FMV of the Icecap Equity shares, at the time of the transfer, was $28,108.80, for which Mr. Woodland received an RRSP deduction for the contribution. The various documents consistently represented the FMV of the shares as $28,108.80 or 60 cents per share. The Appellant failed to produce evidence to show that the shares had a value other than 60 cents per share. Mr. Woodland had a market to which he could transfer the shares and that was the spousal RRSP. A particular FMV was used when they were transferred to the Appellant's RRSP "market". Simply because the shares lost their value subsequent to the transfer does not mean that they did not hold the value of $28,108.80 at the time of the transfer.

Analysis:

[23] The relevant portions of subsection 160(1) of the *Act* read as follows:

> 160(1) 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,
>
> the following rules apply:
>
> …
>
> (e) the transferee and transferor are jointly and severally liable to pay under this Act an amount 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 exceeds the fair market value at that time of the consideration given for the property, and
>
> (ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year,
>
> but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act.

[24] There are four conditions that must be satisfied before subsection 160(1) can be applied to find the Appellant liable in this appeal. In *The Queen v. Livingston*, 2008 DTC 6233, Sexton J.A. laid out the appropriate test for the application of subsection 160(1). After applying Driedger's modern principle of statutory interpretation to subsection 160(1), he stated at paragraphs 17 to 19:

> [17] In light of the clear meaning of the words of subsection 160(1), the criteria to apply when considering subsection 160(1) are self-evident:
>
> 1) The transferor must be liable to pay tax under the Act at the time of transfer;
>
> 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.

> [18] The purpose of subsection 160(1) of the Act is especially crucial to inform the application of these criteria. 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 to him." See also *Heavyside v. Canada* [97 DTC 5026] [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 DTC 2434 (T.C.C.) at paragraph 19).
>
> [19] … given the purpose of subsection 160(1), the intention of the parties to defraud the CRA as a creditor can be of relevance in gauging the adequacy of the consideration given. However, I do not wish to be taken as suggesting as there must be an intention to defraud the CRA in order for subsection 160(1) to apply. The provision can apply to a transferee of property who has no intention to assist the primary tax debtor to avoid the payment of tax: see *Wannan v. Canada* [2003 DTC 5715] 2003 FCA 423 at paragraph 3.

[25] In *Wannan v. The Queen*, 2003 DTC 5715, the Federal Court of Appeal affirmed the decision of this Court that upheld the Minister's assessment under subsection 160(1) where a wife received RRSP contributions from her husband. At paragraph 3, the purpose of subsection 160(1) was described as follows:

> [3] 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.

[26] Both the Appellant and Mr. Woodland testified that they had no intention of hiding assets or of fraudulently conveying assets when the Share Transfer occurred. Since the purpose of section 160 is to "thwart attempts to collect money or other property beyond the tax collector's reach", one of the Appellant's arguments was that the lack of intent precludes the application of section 160 in this appeal.

[27] However, there is no reference to "intent" or "intention" in the statutory language of section 160. The Federal Court of Appeal in both *Livingston* and *Wannan* stated that the application of subsection 160(1) does not require an intention to defraud creditors. Paragraph 3 of *Wannan* clearly outlines that there is no due diligence defence in respect to a subsection 160(1) assessment and that it may apply to a transferee "who had no intention to assist the primary tax debtor to avoid the payment of tax" and/or had "no knowledge of the tax affairs of the primary tax debtor".

[28] Although section 160 has often been referred to as a draconian provision, the words of the statute are clear. If all four conditions are met, then section 160 will apply to find the Appellant liable for the FMV of the Icecap Equity shares at the time of transfer that is in excess of the FMV of the consideration. Two of the four conditions have been admitted and are not at issue. First, the Appellant (transferee) and Mr. Woodland (transferor) are spouses of one another and are therefore in a non-arm's length relationship. This satisfies the condition that a transfer was made to "the person's spouse or common-law partner". Second, when the Share Transfer occurred, the Appellant admitted that Mr. Woodland was liable for tax under the *Act* in the amount of $36,823.88 in respect to his 1999 and 2000 taxation years. Therefore this condition is satisfied.

[29] I turn now to the remaining two conditions which are at issue in this appeal.

Was there a Transfer of Property?:

[30] The term "transfer" is not defined in the *Act*. *Black's Law Dictionary*, 6th Edition, defines "transfer" as:

> To convey or remove from one place, person, etc., to another; pass or hand over from one to another; specifically, to change over the possession or control of (as, to transfer a title to land). To sell or give. Chappell v. State, 216 Ind. 666, 25 N.E.2d 999, 1001.

The common law definition of “transfer” as found in the Exchequer Court decision of *Estate of David Fasken v. Minister of National Revenue*, 49 DTC 491, is often cited. At page 497, Thorson P. stated the following:

> The word "transfer" is not a term of art and has not a technical meaning. It is not necessary to a transfer of property from a husband to his wife that it should be made in any particular form or that it should be made directly. All that is required is that the husband should so deal with the property as to divest himself of it and vest it in his wife, that is to say, pass the property from himself to her. The means by which he accomplishes this result, whether direct or circuitous, may properly be called a transfer. …

[31] The Appellant does not dispute that her husband contributed 46,848 shares of Icecap Equity to her spousal RRSP account. However, the Appellant argued that these shares were never properly transferred to her because she was not aware of the transfer and did not provide her consent to the Share Transfer. Reliance was placed on the decision in *Mah v. The Queen*, 93 DTC 5267, to support the proposition that a lack of knowledge and/or consent may preclude a valid transfer under section 160.

[32] In *Mah*, the Federal Court Trial Division held that a legal transfer was never made between the parties because the alleged transferee had no knowledge of the transfer and never received beneficial interest in the property. However, this decision was subsequently clarified in *Goldberg et al. v. The Queen*, 2003 DTC 190, where Bonner J. stated the following at paragraphs 16 and 17:

> [16] There is no doubt that the Appellants were unaware of the fact that the Trust was paying the tuition and camp fees. The Appellants did not know that the Trust existed. Counsel took the position that a transaction effected entirely without the knowledge or consent of the transferee is not within the purview of s. 160(1). In this regard he relied on a decision of the Federal Court Trial Division in *Finley Mah v. Her Majesty the Queen*, 93 DTC 5267. In *Mah* the taxpayer's parents executed a transfer of land transferring title to their home to the taxpayer. They did so without the taxpayers knowledge or consent. On appeal by the taxpayer from an assessment under s. 160 the Court held the purported transfer was invalid. At page 5270 Jerome, A.C.J. wrote:
>
> > Can there be divestiture by Mr. and Mrs. Mah and vesting in Dr. Mah here? I think not. Surely a transaction done entirely without the plaintiff's knowledge or consent could not have that effect, nor do I understand why the Minister needs the assistance of section 160 unless the transfer is valid.

> In my opinion the decision in *Mah* does not stand for the proposition that knowledge and/or consent of the transferee is necessary to the operation of s. 160. *Mah* was quite simply a case in which s. 160 was held to be inapplicable to an unsuccessful attempt to transfer which happened to have been made without the knowledge of the transferee.
>
> [17] Nothing in the language or purpose of s. 160 can justify a conclusion that the transferee must be aware of or understand the mechanics of the transaction by which a transfer is effected. The imposition of such a restriction on the meaning of the word "transfer" would thwart the clear purpose underlying s. 160.
> (Emphasis added)

[33] Similarly, in *Kadola et al. v. The Queen*, 2008 DTC 4727, Paris J., at paragraph 32, held that a lack of knowledge of the transfer does not preclude the application of section 160:

> [32] With respect to Harish's appeal I would note that his lack of knowledge of the deposits to his bank account would not preclude the application of subsection 160(1). The funds deposited to his account were available to be withdrawn by him at any time and no consideration was given by him. In the decision of the Federal Court of Appeal in *Livingston v. The Queen*, [2008 DTC 6233] 2008 FCA 89 the Court made the following comments concerning deposits into another person's bank account:
>
> > 21. The deposit of funds into another person's account constitutes a transfer of property. To make the point more emphatically, the deposit of funds by Ms. Davies into the account of the respondent permitted the respondent to withdraw those funds herself anytime. The property transferred was the right to require the bank to release all the funds to the respondent. The value of the right was the total value of the funds.

[34] Recent caselaw has held that lack of knowledge and/or consent of a transfer does not necessarily preclude a valid transfer for the application of section 160. In this appeal, the Appellant received the legal and beneficial interest of the shares once they were deposited to her spousal RRSP account, unlike the facts in *Mah* where the Court held that the transfer itself was unsuccessful. In addition, in the facts of this appeal there was a history of the Appellant's spouse contributing to her spousal RRSP account by way of money or assets.

[35] At paragraph 15 of the decision of O'Connor J. in *Wannan v. The Queen*, 2003 DTC 76 (affirmed by the Federal Court of Appeal), the following was stated:

> [15] It seems quite obvious that a transfer did take place in the case at bar. The Appellant's spouse made contributions to her RRSP. Presumably, once in the RRSP, these funds were solely under her control and therefore, given the apparent absence of any other stipulations, in her possession. The case law treats acts similar to the one in question automatically as transfers.

[36] Similar to the facts in *Wannan*, Mr. Woodland divested himself completely of his shares by contributing them to the Appellant's Spousal RRSP. The share certificate in respect of the Icecap Equity shares was duly issued on February 28, 2001 to "Scotia McLeod ITF Bonnie E. Woodland" (Exhibit R-1, Tab 1). On March 1, 2001 Scotia McLeod issued an RRSP receipt to the Appellant in the amount of $28,108.80 showing Mr. Woodland as the contributor (Exhibit R-1, Tab 5). The Scotia McLeod Investment Account Statement for the Appellant's RRSP account dated December 31, 2001 (Exhibit A-9) confirms that a contribution of $28,108.80, representing the Icecap Equity shares was made in 2001. At this point, as the value of the shares increased, the Appellant would have been the sole beneficiary of that increased value. Clearly, Mr. Woodland's contribution to the Appellant's RRSP gave her exclusive control over these shares subsequent to this contribution.

[37] Therefore, this condition is satisfied because a "transfer of property" of these shares was made by Mr. Woodland to the Appellant.

[38] With the preceding three conditions satisfied, the Appellant is now liable under section 160 up to the amount that the FMV of the shares exceeds the FMV of consideration received for the property.

[39] The Appellant's argument here is two-fold; first, that the FMV of the shares is nil for the purposes of section 160 and second, that adequate consideration was received by Mr. Woodland for the transfer of the shares by virtue of the RRSP deduction that he claimed in his 2000 income tax return. However, the Respondent argued that the FMV of the shares is $28,108.80 as it was reported at the time of the Share Transfer and that no consideration flowed from the Appellant to Mr. Woodland in respect of this transfer of shares.

(A) The FMV of the Shares:

[40] Generally the determination of the FMV of a property is a question of fact. Since neither party tendered expert evidence to establish a valuation for the shares, I must rely on the evidence presented during the hearing together with the established legal principles and caselaw.

[41] It is clear from the language of paragraph 160(1)(e) that the transferred property is to be valued "at the time it was transferred". I must therefore determine the FMV of the shares on the date on which those shares were transferred into the Appellant's RRSP. The evidence that was presented during the hearing established that Mr. Woodland reported the FMV of the shares at $28,108.80 at the time of the Share Transfer. He testified that he determined that the FMV of the shares was 60 cents per share based on the NASDAQ value of the Iceberg America shares (formerly D.V. Holdings). Subsequent to the Share Transfer to his wife's RRSP account, he claimed an RRSP deduction of $28,108.80 in respect to this transfer (Exhibit A-8).

[42] In addition, the evidence supports that this valuation of 60 cents per share on February 28, 2001 was confirmed by professional advisors. Lewis Stoyles, the CFO of the Iceberg corporate group, signed an "Auditor's Initial Statement" in respect to these shares which stated that "in our opinion the fair market value of each of these shares is $0.60" (Exhibit R-1, Tab 3). Similarly, the accounting firm of Deloitte & Touche certified in an RRSP questionnaire that "the fair market value of the preferred shares of [Icecap] was last established on February, 2001" and that "at such time the value was determined to be $0.60 per share" (Exhibit R-1, Tab 4). The Scotia McLeod RRSP contribution tax receipt and the RRSP Investment Account Statement received by the Appellant both indicate that the FMV of the shares was $28,108.80 at the time of the transfer (Exhibit R-1, Tab 5; Exhibit A-9). Despite all of this evidence supporting a valuation of 60 cents per share at the time of transfer, the Appellant argued that the FMV of the shares should nevertheless be nil for the purposes of applying section 160. This argument was based on the fact that the Icecap Equity shares had no par value and that the restriction on the ability to sell the shares and the required one year hold period upon an exchange for Iceberg America shares should render the Icecap Equity shares valueless.

[43] I must reject the Appellant's argument for two reasons. First, the Appellant cannot be permitted to claim that for the purposes of this appeal the FMV of the shares at the time of the transfer is nil while on the other hand Mr. Woodland has claimed a RRSP deduction subsequent to this transfer based on a FMV of $28,108.80. The comments of Rothstein J., in the Supreme Court of Canada decision of *Redeemer Foundation v. M.N.R.*, 2008 DTC 6474, are pertinent. Although dissenting in part, but not on this point, he made the following statement respecting the concept of "reciprocity in the tax treatments" at paragraphs 53 and 54:

> [53] The Federal Court of Appeal was of the opinion that because there is a reciprocity in the tax treatment of most transactions, the CRA may use the information obtained from one taxpayer to ensure compliance by the other party to the transaction. The Court of Appeal stated:
>
> > The Minister has every interest in confirming that the amount claimed as a business expense by the buyer is the amount recorded as revenue by the seller. In the case of registered charities, the same reciprocity applies. If the Minister determines that donations received are not eligible for deduction, then he has an interest in reviewing the returns of those to whom a receipt has been issued in respect of those donations. This ability to subject both parties to a transaction to equivalent tax treatment is a fundamental aspect of the verification process.
> >
> > ([2006 DTC 6712] [2007] 3 F.C.R. 40, 2006 FCA 325, at para. 41)
>
> [54] I agree that there is reciprocity of tax treatment of many commercial and charitable transactions and that the CRA may have an interest in seeing how both the taxpayer and the other party to a transaction have recognized it for tax purposes. …

[44] Mr. Woodland's testimony respecting the FMV of $28,108.80 respecting these shares at the time of transfer is supported by the testimony of Mr. Stoyles and by all of the documentary evidence which was filed. This was the amount used by Mr. Woodland for the purposes of making his RRSP deduction and the Appellant cannot now be permitted to claim a different valuation in respect of the very same transaction, the same shares and the same date for the purpose of this appeal.

[45] Second, even if I permitted the Appellant to use a different valuation for the shares, an analysis to re-evaluate the FMV of the shares would not likely achieve a different result. The term "fair market value" is not defined in the *Act* but the generally accepted common law definition of that expression is set out in *Henderson Estate and Bank of New York v. M.N.R.*, 73 DTC 5471, at page 5476:

> … That common understanding I take to mean the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell. I would add that the foregoing understanding as I have expressed it in a general way includes what I conceive to be the essential element which is an open and unrestricted market in which the price is hammered out between willing and informed buyers and sellers on the anvil of supply and demand.

[46] Therefore, the essential element of this analysis requires that the market be open and unrestricted. In *M.N.R. v. Northwood Country Club*, 89 DTC 173, this Court explained that where no readily available market exists for a security then a notional market may be constructed for the purposes of the valuation of that security. At page 176, Kempo J. stated:

> There was a further consensus at trial by the business valuators called for each party as to the following basic principles. The definition and meaning of "fair market value" was described by the Minister's valuator, Mr. D. Alan Jones, at page 2 of his filed report (Exhibit R-2) thusly:
>
> > A generally accepted definition of the term "fair market value" to which I subscribe is contained in *Mann Estate v. Minister of Finance of British Columbia*, 1972 W.W.R. 23, at page 27:
> >
> > "fair market value" is the highest price available estimated in terms of money which a willing seller may obtain for the property in an open and unrestricted market from a willing knowledgeable purchaser acting at arm's length.
> >
> > In performing an equity valuation on a security, valuation practice requires that a business equity valuator look to a notional transaction taking into account the rights and restrictions applicable to the security at the date of valuation. The concept of a notional market assumes that for a moment in time, restrictions on the transfer of a security are lifted to allow a knowledgeable prospective purchaser to stand in the shoes of an equally knowledgeable vendor. The notional purchaser takes the security subject to the same rights and restrictions as the vendor - no more, and no less. It is also assumed that both notional parties are acting in good faith and that there was nothing in place at the valuation date which would result in either party acting in concert in such a way as to affect the value.
>
> Judicial authority for the concept that in the notional market the restrictions are lifted and then fall back in place again following the notional purchase is found in *Salvesen's Trustees v. Commissioners of Inland Revenue*, [1930] S.L.T. 387 at 391 and *Commissioners of Inland Revenue v. Ethel MacLean Crossman et al.*, [1937] A.C. 26 (H.L.).

[47] The concept of a notional market therefore requires that any restrictions on the sale of the security be lifted for the purposes of completing the notional purchase. In respect to this appeal that means that the restriction on the sale of the Icecap Equity shares to the general public must be lifted for the purposes of a valuation of those

shares. The question that must be asked: If the shareholders of Icecap Equity were free to sell their shares to any prospective buyer without restrictions, what would the value of these shares be? The value of an Icecap Equity share is essentially the value placed on an Iceberg America share at any given time. Although Icecap Equity was a shell company and did not hold any assets of its own, each shareholder had basically the same rights as a shareholder of Iceberg America (formerly D.V. Holdings). For example, the terms and conditions of the Icecap Equity shares indicate that: each share was exchangeable for one Iceberg America share at the option of the shareholder at any time; each share was entitled to receive dividends from Iceberg America despite not holding an Iceberg America share; each share carried voting rights in Icecap Equity and also indirectly to voting rights in Iceberg America; Icecap Equity shareholders were entitled to liquidation rights in the amount equivalent to the liquidation received per a share of Iceberg America in the event of liquidation (Exhibit A-1).

[48] The only restriction on the Icecap Equity shares was the one year hold period that applied to a newly exchanged share in Iceberg America. The Appellant referred to several valuation cases where the FMV of shares was discounted as a result of the various restrictions attached to the shares. However, the cases the Appellant referred to utilized expert witnesses in the valuation analysis. In addition, the shares in those cases were discounted as a result of characteristics, terms and conditions that do not exist with respect to the Icecap Equity shares. For example, in *Rodgers and 493800 Ontario Ltd. v. M.N.R.*, 89 DTC 78, the expert witness valued the shares at nil because of lack of asset backing, absence of earning history and the fact that the preferred shares were not retractable at the holders option.

[49] The Appellant argued that if an Icecap Equity shareholder exchanged their shares for shares of Iceberg America on February 28, 2001, the Iceberg America shares would have become valueless before the end of the one year hold period. In *Hallatt et al. v. The Queen*, 2001 DTC 128, Bowman A.C.J. (as he was then) explained that the valuation of shares in a closely held corporation should be based on common sense and commercial reality, subject to the assumption that the corporation will continue to carry on business as a going concern. At paragraph 30, he stated the following:

> [30] I have no particular difficulty in understanding the mathematical calculations provided by Mr. Johnson. It must however be borne in mind that what the court has to do in a valuation case of this type is to attempt to arrive at the price upon which willing and knowledgeable vendors and purchasers would settle. This is a relatively mundane task in which common sense and commercial reality necessarily play a large part. In general the shares of a private closely held corporation must be valued

> on the assumption that the corporation will continue to carry on business as a going concern. In other words the breakup value is not an appropriate criterion where the company is carrying on an active business. Mr. Johnson's valuation is of course premised on the assumption that the company would continue to carry on the nursing home business.

[50] On February 28, 2001, the Iceberg America shares were publicly trading at 60 cents per share. Subsequently these shares became valueless. However, as the *Hallatt* decision explained, the shares should be "valued on the assumption that the corporation will continue to carry on business as a going concern". The business of Icecap Equity was inextricably tied to the business of Iceberg America. If this Court accepts the assumption that the business of Iceberg America was proceeding forward as a going concern, then there would be no reason based on the evidence before me to adopt a FMV other than the market price for which the Iceberg America shares were being traded on February 28, 2001.

[51] In *Taylor v. M.N.R.*, 88 DTC 1571, Rip J. (as he was then) at page 1576 stated that:

> As a general rule, where an owner of property is not free to deal with the property as owner, the value of such property has been diminished to at least a certain degree. In *Steen v. The Queen*, 86 DTC 6498 (F.C.T.D.), Rouleau J. stated, at page 6504, that:
>
> > Furthermore, there is no clog on the disposal of [the] Plaintiff's shares that would justify a discount from the market price quotation...
>
> Hence where there is a clog on disposal of shares a discount should be justified.

This principle might be applied in this appeal because shares held in escrow as in the present appeal for newly exchanged Iceberg America shares, would be subject to being discounted for valuation purposes when compared to regular shares not held in escrow. However, the Appellant did not adduce evidence with respect to what the FMV of the Icecap Equity shares would be if their value was discounted by the requisite holding period. The argument was simply that the valuation of these shares should be nil. Essentially the same rights and terms attached to both the shares of Icecap Equity and Iceberg America. Therefore, Icecap Equity shares would not be discounted to nil merely because of the requisite hold period. The Appellant was unable to persuade me that the restrictions on the Shares would also affect its value after a notional purchase on a notional market has been completed.

[52] There was insufficient evidence presented to conclude that the FMV of these shares was anything other than 60 cents per share on February 28, 2001. In fact, all of the professional advisors, Mr. Stoyles as well as the accounting firm of Deloitte & Touche, who were all knowledgeable about the terms and conditions of these shares, valued them at 60 cents per share.

[53] Therefore, I conclude that the FMV of the Icecap Equity shares which Mr. Woodland transferred into the Appellant's Spousal RRSP were correctly valued at $28,108.80.

(B) FMV of the Consideration, if any:

[54] Sexton J.A. explained the purpose of the "adequate consideration" condition under subsection 160(1) in *Livingston* at paragraph 27:

> [27] Under subsection 160(1), a transferee of property will be liable to the CRA to the extent that the fair market value of the consideration given for the property falls short of the fair market value of that property. The very purpose of subsection 160(1) is to preserve the value of the existing assets in the taxpayer for collection by the CRA. Where those assets are entirely divested, subsection 160(1) provides that the CRA's rights to those assets can be exercised against the transferee of the property. However, subsection 160(1) will not apply where an amount equivalent in value to the original property transferred was given to the transferor at the time of transfer: that is, fair market value consideration. This is because after such a transaction, the CRA has not been prejudiced as a creditor. …

[55] The Appellant's argument is that, although the Appellant never paid money or transferred another type of consideration to Mr. Woodland for the transfer of the shares to her RRSP, there was consideration given to Mr. Woodland by virtue of the RRSP deduction that he was able to take in his 2000 income tax return.

[56] The phrase "consideration given for the property", as it is stated in subsection 160(1), was interpreted in *Livingston* at paragraph 17 to mean "consideration given by the transferee". Similarly in *Goldberg*, Bonner J. stated at paragraph 20:

> [20] Finally, as an alternative to submissions that no transfer had taken place in the circumstances, counsel for the Appellants suggested that the Trust received full consideration for the transfer of property in the form of services provided by the school and camp at its request. Since a transfer made without valid consideration is a pre-condition to the application of s. 160, it was said, no liability could be imposed on the Appellants. In my view the reference in subparagraph 160(1)(*e*) to consideration given for the property must, when the statutory language is read in

> context, be taken to be a reference to consideration given by the transferee of the property. This branch of the Appellant's argument must therefore fail.
> (Emphasis added)

[57] In *Yates v. The Queen*, 2009 DTC 5062, the Federal Court of Appeal at paragraphs 41 and 42 made the following comment:

> [41] … As I have already indicated, subsection 160(1) does not contain any ambiguity. If there is a transfer within the purview of the provision, then the transferee must satisfy the Court that he or she provided consideration at fair market value. In view of the wording of subsection 160(1), there is simply no basis for the position taken by the Judge.
>
> [42] The Judge had to determine whether Mrs. Yates had provided consideration at fair market value and, in my view, on the record before him, it is clear that the appellant did not provide such consideration. …

[58] The value of an RRSP deduction to Mr. Woodland on his 2000 income tax return and the corresponding reduction in his tax liability cannot be characterized as monies or funds or other consideration paid by the Appellant to Mr. Woodland. A government credit received as a result of a taxpayer's actions is not consideration that is received from another taxpayer and certainly not the type of consideration contemplated by subsection 160(1).

[59] As an alternative argument, the Appellant submitted that when she gave Mr. Woodland the ability to utilize the RRSP deduction this amounted to consideration for the transfer. However, no evidence was adduced to show whether the Appellant could have taken the RRSP deduction herself. Without a significant RRSP deduction limit for her 2000 taxation year, the Appellant would not have been able to use the RRSP deduction to her benefit or without incurring a penalty.

[60] Therefore the RRSP deduction claimed by Mr. Woodland on his 2000 income tax return will not qualify as "consideration given for the property" in the application of subsection 160(1).

Evidentiary Issue:

[61] Finally, I wish to briefly address the evidentiary issue respecting the Appellant's objection to the introduction into evidence of a letter written by the Appellant to the CRA (Exhibit R-1, Tab 10) dated January 30, 2006 and headed by the phrase "Without Prejudice". The Appellant invoked the settlement privilege with

respect to this document while the Respondent submitted that it was not part of a settlement negotiation and sought only to use it to establish certain facts, which had been outlined in this letter. I permitted the document to be entered subject to weight, if any, which I would consider giving it.

[62] The general principles, with respect to settlement privilege, were summarized in *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (Sopinka's Evidence), 3rd Edition (Markham: LexisNexis, 2009) at pages 1030 to 1033:

> **§14.313** It has long been recognized as a policy interest worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation, or, if an action has been commenced, encouraged to effect a compromise without resort to trial.
>
> …
>
> **§14.315** In furthering these objectives, the courts have protected from disclosure communications, whether written or oral, made with a view to reconciliation or settlement. …
>
> …
>
> **§14.322** There are a number of conditions that must be present for the privilege to be recognized:
>
> (a) A litigious dispute must be in existence or within contemplation.
> (b) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed.
> (c) The purpose of the communication must be to attempt to effect a settlement.

[63] On pages 1033 to 1035 of the text, the authors specifically address the use of the phrase "without privilege". It stated the following:

> ***1. Litigious Disputes in Existence***
>
> **§14.323** A litigious dispute must be in existence or at least contemplated for this privilege to be recognized. It is not necessary that proceedings have commenced.
>
> ***2. Made with Intention of Non-Disclosure: Use of Phrase "Without Prejudice"***
>
> **§14.324** A second condition is that the communication be made with the intention that, should negotiations fail, it would not be disclosed without consent. This intention may be implied from the use of the phrase "without prejudice" at the head

of the correspondence. Justice Sopinka, in *Maracle v. Travellers Indemnity Co. of Canada*, in referring to a letter written "without prejudice", stated:

> The use of this expression is commonly understood to mean that if there is no settlement, the party making the offer is free to assert all its rights, unaffected by anything stated or done in the negotiations.

Although the use of this phrase is not conclusive of the intention, it may constitute some, if not *prima facie*, evidence of it and thus its use is of value. Moreover, in the course of negotiations, if a letter has been written by one party "without prejudice", then an intention to maintain the privilege with respect to the whole of the correspondence of which the letter forms a part may be inferred.

…

3. Purpose of Communication

§14.327 The communication must have been written for the purpose of attempting to effect a settlement. The privilege covers communications to initiate settlement discussions. If the circumstances reveal otherwise, then neither the presence of the words "without prejudice" nor the fact that a dispute existed will avail to confer a privilege. …
(Emphasis added**)**

[64] Therefore the settlement privilege protects only communication that was made during a settlement negotiation or in an attempt to effect a settlement. In *Bertram et al. v. The Queen*, 96 DTC 6034, the Federal Court of Appeal affirmed this Court's refusal to invoke the settlement privilege with respect to information obtained at a meeting that an appellant held with CRA. In denying that appellant's settlement privilege claim, Hugessen J.A. stated at page 6038:

> … in the context of a self-assessing tax system where the taxpayer has an obligation to make full and open disclosure to the taxing authorities and where it is common for taxpayers and their advisers to meet with the latter with a view to attempting to persuade them that no, or no greater, tax is due, I would require much clearer evidence than exists in this record to persuade me that a meeting qualifies as a settlement negotiation so as to shield everything that takes place from subsequent use by either side. …

[65] Similarly, in *Histed v. Law Society of Manitoba*, 2007 MBCA 150, at paragraph 33:

> [33] The fact that the phrase "Strictly Confidential and Without Prejudice" was written at the top of the letter does not attach privilege to the letter if, in fact, the

> letter was not sent as part of a settlement negotiation. The substance of the letter has to be considered. The selection of a case management judge was a procedural issue. While the rules of the Manitoba Court of Queen's Bench do not specifically provide for a case management procedure (with one exception not relevant to these reasons), a practice has developed that it is not uncommon for counsel to request a case management judge to be appointed. I emphasize that the parties here contemplated, as Histed acknowledged during his submissions before the panel, a case management judge who would set dates, give directions, be available to hear interlocutory motions and generally to move an action along. This is quite different than a judge who would conduct a judicial alternative dispute resolution, a practice also common in the Manitoba Court of Queen's Bench. I make no comment on the role of the latter with respect to the issue of settlement privilege. It is sufficient for our purposes to confirm that the facts in this case support the finding that the parties contemplated the role of this judge as one of case management and thus procedural only. Therefore, the purpose of this communication was not an attempt to effect a settlement. As such, the panel held, and I agree, that settlement privilege does not attach to this letter.

[66] Although the Appellant's letter in this appeal was headed with the phrase "Without Prejudice", it was not written in the context of or as part of settlement negotiation. In fact, the letter was written prior to the assessment ever being issued. It was written to provide CRA with an overview of the relevant facts in an attempt to dissuade the CRA from issuing an assessment under section 160 of the *Act*. Therefore this document cannot be protected by settlement privilege and it was therefore properly entered as part of the evidence. However, the contents of this letter did not offer any additional facts that would assist me because the relevant facts were introduced in any event through the testimony of the witnesses.

Conclusion:

[67] In summary, since all four statutory conditions under subsection 160(1) are satisfied, the Appellant is liable for the FMV of the shares that were transferred to her RRSP account on February 28, 2001 in the amount of $28,108.80.

[68] The appeal is therefore dismissed with costs.

Signed at Summerside, Prince Edward Island, this 9th day of September 2009.

"Diane Campbell"

Campbell J.

CITATION:	2009 TCC 434
COURT FILE NO.:	2007-1662(IT)G
STYLE OF CAUSE:	Bonnie Woodland and Her Majesty The Queen
PLACE OF HEARING:	St. John's, Newfoundland
DATE OF HEARING:	March 19, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Diane Campbell
DATE OF JUDGMENT:	September 9, 2009

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