Docket: 2010-637(IT)G

BETWEEN:

EDWARD BAKER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on March 13 and 14, 2014, at Toronto, Ontario.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant:	Jeffrey Radnoff
Counsel for the Respondent:	Donna Tomljanovic
	Adam Gotfried

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2001 taxation year is dismissed in accordance with the attached reasons for judgment, with costs to the Respondent.

Signed at Ottawa, Canada, this 24th day of June 2014.

"Robert J. Hogan"

Hogan J.

Citation: 2014 TCC 204
Date: 20140624
Docket: 2010-637(IT)G

BETWEEN:

EDWARD BAKER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

I. Introduction

[1] This is an appeal by Edward Baker (the "Appellant") in respect of his 2001 taxation year. The Minister of National Revenue (the "Minister") reassessed the Appellant to include $95,000 in the Appellant's income pursuant to subsection 146(9) of the *Income Tax Act* (the "Act"). The reassessment was issued on the basis that the Appellant's registered retirement savings plan (the "RRSP") had purchased shares of Kelso Technologies Inc. ("Kelso") for a consideration greater than their fair market value.

[2] In the Minister's view, subsection 146(9) of the Act is unambiguous. The difference between fair market value and the consideration paid was properly included in the Appellant's income for that year regardless of whether the Appellant was complicit in authorizing the transaction. The Respondent also argues that the evidence allows me to make a factual finding that the Appellant participated in the transaction because it was presented to him as a so-called RRSP strip.

[3] In contrast, the Appellant submits that subsection 146(9) of the Act is an anti-avoidance rule. It does not apply because the Appellant did not intend to avoid tax.

II. Factual Background

[4] The Appellant operated a successful printing business for some 35 years until his retirement in 2004. In 2000, while planning a vacation, the Appellant allegedly unexpectedly met a client who informed him of an investment seminar for Canadian residents in Cancun, Mexico. Shortly before Christmas, the Appellant attended that three-day seminar. The Appellant claims to have skipped most of the seminar's presentations, finding them largely irrelevant to the concerns of Canadian investors. However, he attended a part of the presentation given by Cameron Claridge, who appeared at the seminar as a Canadian speaker. After the presentation, the two discussed RRSP investment strategies. The Appellant then left his contact information with Mr. Claridge.

[5] Shortly after the Appellant's return to Canada, Mr. Claridge contacted the Appellant, advising him of an investment opportunity in Kelso. Kelso is a publicly traded company that manufactures train brake parts among other things. The Appellant conducted some research on Kelso by consulting its website and speaking with Kelso's president and CEO, Stephen Grossman.

[6] Mr. Claridge advised the Appellant to satisfy himself that Kelso was a qualified investment for Canadian income tax purposes by speaking with Bryce Stewart, a lawyer and a director of Kelso. The Appellant did so and subsequently received a letter from Mr. Stewart confirming that Kelso was an "eligible corporation" under the Act. The letter also stated that the fair market value of Kelso's shares had been recently estimated to be $20.00 per share.

[7] The Appellant then set out to purchase 5,000 Class "A" Convertible Voting Preference Shares, Series 1 of Kelso (the "Kelso Securities"). In order to do so, the Appellant opened a self-directed registered retirement savings plan account (the "RRSP Account") with the Pacific Coast Savings Credit Union (the "Credit Union"). By a document dated January 25, 2001, the Appellant directed the transfer of $162,849.27 held in his existing RRSP account with TD Canada Trust to the RRSP Account with the Credit Union. That transfer occurred in March of 2001. By a letter of direction dated April 20, 2001, the Appellant instructed the Credit Union to withdraw a sum of $100,000 from the RRSP Account to pay Mr. Stewart in trust on his behalf, and to accept in exchange delivery of share certificate A-059 in respect of the Kelso Securities. That exchange took place on April 24, 2001.

[8] The RRSP purchased the Kelso Securities for $20.00 per share. It purchased them from Robin Sommerville. Ms. Sommerville had previously purchased the Kelso Securities in a private placement at an issue price of $1.00 per share on

January 25, 2001, three months earlier. That transaction was one of many similar such private placements. Between late 1999 and early 2001, Kelso issued a succession of Class "A" Convertible Voting Preference Shares, Series 1, including the Kelso Securities purchased by the RRSP. Each issuance was made by way of a private placement to Ms. Sommerville for a purchase price of $1.00 per share. The funds were to be used by Kelso either as working capital or for the repayment of loans. The date of issuance and number of shares issued in each private placement were as follows:

Date of Issuance	**Number of Shares Issued**
June 15, 1999	10,680
September 10, 1999	25,500
November 16, 1999	30,000
December 1, 2000	25,000
January 25, 2001	25,000
May 23, 2001	25,000

[9] The Kelso Securities were convertible into units at the rate of one unit for every $0.15 of paid-up capital in the first year after issuance. The shares were subject to mandatory conversion on the fifth anniversary of their issue. The conversion rate escalated by $0.05 on each anniversary date. Each unit consisted of one common share and one non-refundable share purchase warrant. Each share purchase warrant entitled the holder to purchase one additional common share at a price equal to the conversion price of the Kelso Securities at the time of conversion. During April 2001, the common shares of Kelso were trading at between $0.07 and $0.11.

[10] Shortly after the Appellant purchased the Kelso Securities he became suspicious of Mr. Claridge. The Appellant had expected Mr. Claridge to take $20,000 of the $100,000 purchase price as commission. Mr. Claridge failed to explain how he would do so. Also, the Appellant found communication with Mr. Claridge to be increasingly difficult. Mr. Claridge failed to return the Appellant's phone calls or emails. The Appellant became concerned about Mr. Claridge having access to the balance of the funds in his RRSP Account and, as a consequence, he transferred the account balance to RBC Dominion Securities ("RBC") in April of 2003.

III. Issues

[11] This appeal raises two issues. The first is whether the consideration paid by the Appellant's RRSP for the Kelso Securities was greater than fair market value. The second is whether subsection 146(9) of the Act applies so as to increase the Appellant's income by the difference between the consideration paid by the RRSP for the Kelso Securities and their fair market value.

IV. Positions of the Parties

[12] The Appellant invites the Court to adopt Justice Sharlow's concurring reasons in *St. Arnaud v. The Queen*.[1] There, Justice Sharlow held that subsection 146(9) of the Act applies only if a taxpayer intended to avoid tax; it does not cover an innocent overpayment by the RRSP. The Appellant contends that the only issue raised by the Minister is the fair market value of the Kelso Securities. As a result, the Minister bears the burden of establishing the requisite avoidance purpose of the overpayment for the Kelso Securities. The Appellant argues that the Respondent has failed to establish the Appellant's tax avoidance intention and that subsection 146(9) of the Act therefore does not apply in these circumstances.

[13] The Respondent argues that the application of subsection 146(9) of the Act is mechanical. There is no test of intent or of avoidance purpose. The Respondent's position is that subsection 146(9) of the Act requires an in inclusion income in all cases where the fair market value of property acquired by an RRSP is less than the consideration paid in exchange for that property, regardless of whether that difference was intended by the purchaser. The Respondent submits that this is such a case. Consequently, the difference between the consideration paid for the Kelso Securities and their fair market value, which is at minimum $95,000, was properly included in the Appellant's income.

[14] The Respondent further argues that, even if the Court adopts Justice Sharlow's concurring reasons in *St. Arnaud*, the evidence nonetheless supports an inference that the Appellant purchased the Kelso Securities as a means to gain control of the RRSP funds while maintaining the deferral of any income tax payable on those same funds.

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[1] 2013 DTC 5074, 2013 FCA 88.

V. Analysis

[15] Subsection 146(9) of the Act provides that where the trustee of an RRSP purchases property for the trust for more than it is worth, or sells trust property for less than it is worth, the difference must be included in computing the annuitant's income for the year. The relevant provision reads as follows:

> **Where disposition of property by trust**
>
> (9) Where in a taxation year a trust governed by a registered retirement savings plan
>
> (*a*) disposes of property for a consideration less than the fair market value of the property at the time of the disposition, or for no consideration, or
>
> (*b*) acquires property for a consideration greater than the fair market value of the property at the time of the acquisition,
>
> the difference between the fair market value and the consideration, if any, shall be included in computing the income for the taxation year of the annuitant under the plan.

[16] The Respondent argues that the effect of subsection 146(9) of the Act is clear. It requires an in inclusion income in all cases where the fair market value of property acquired by an RRSP is less than the consideration paid in exchange for the property. This is true regardless of the RRSP holder's intent in authorizing the transaction.

[17] The Respondent submits that this Court is not bound by Justice Sharlow's concurring reasons in *St. Arnaud*. There, the appellants were innocent victims of fraud. They had been duped into exchanging their RRSP or registered retirement income fund ("RRIF") funds for worthless shares. The fraudster was ultimately convicted but the appellants' funds were never recovered. The Minister reassessed the appellants, including the consideration paid for those shares in the appellants' income pursuant to either subsection 146.3(4) or subsection 146(9) of the Act. At trial,[2] Justice Bowie dismissed the appeals, concluding at paragraph 30 "that subsection 146(9) is not ambiguous. It applies to transactions such as these where the annuitant is not seeking to avoid tax while removing value from the registered fund, but is simply duped into paying good money for valueless shares."

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[2] 2012 DTC 1029, 2011 TCC 536.

[18] On appeal to the Federal Court of Appeal (the "FCA"), Justices Webb and Trudel overturned Justice Bowie's decision on the basis that the appellants' RRSPs or RRIF had not acquired the shares in question.

[19] Justice Sharlow issued concurring reasons. While agreeing with the majority's reasons, she added that subsection 146(9) of the Act applies only to the extent that a taxpayer was motivated by an intent to avoid tax and does not apply to an innocent overpayment for property. In support of this, Justice Sharlow considered the hypothetical situation of Mary. Mary directed her RRSP to acquire an investment asset at a price which turned out to be an overpayment. Under Justice Sharlow's interpretation of subsection 146(9) of the Act, the Court must consider Mary's motivation. If she intended that the overpayment be made for a tax avoidance purpose then subsection 146(9) of the Act applies. If her overpayment was innocent then it does not.

[20] The Respondent contends, however, that Justice Sharlow's reasons are not the reasons of the majority of the FCA. Indeed, at paragraph 7, Justices Webb and Trudel specifically decline to address the interpretation of subsection 146(9) of the Act.

[21] Furthermore, the Respondent argues that Justice Sharlow's reasons in *St. Arnaud* are not consistent with well-established rules of statutory interpretation, namely, that emphasis is traditionally placed on a textual interpretation of tax statutes on account of their detail and particularity. As authority for that proposition, the Respondent cites *Canada Trustco Mortgage Co. v. Canada*,[3] at paragraph 12, where McLachlin C.J.C. and Major J. quote the following from Hogg and Magee (*Principles of Canadian Income Tax Law*, 2nd ed.,1997):

> It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.
>
> [Emphasis added.]

[22] In addition, the Respondent relies on further guidance from the Supreme Court of Canada (the "SCC') provided in *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*.[4] Justice Lebel noted at paragraph 23:

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[3] [2005] 2 S.C.R. 601, 2005 SCC 54.
[4] [2006] 1 S.C.R. 715, 2006 SCC 20.

> The interpretive approach is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. Reference to the purpose of the provision "cannot be used to create an unexpressed exception to clear language": see P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (5th ed. 2005), at p. 569; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622. Where, as in this case, the provision admits of more than one reasonable interpretation, greater emphasis must be placed on the context, scheme and purpose of the Act. Thus, legislative purpose may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision.
>
> [Emphasis added.]

[23] The Respondent argues that subsection 146(9) of the Act is unambiguous. There are no words such as "knowingly" or "non-arms length" that would suggest that subsection 146(9) applies only to tax avoidance situations. Accordingly, it is not the role of this Court to read in an unexpressed test of intention.

[24] Furthermore, the Respondent submits that a contextual and purposive interpretation supports the above textual interpretation of subsection 146(9) of the Act. The purpose of an RRSP is to encourage Canadians to save for retirement. To that end, an RRSP provides a tax deferral through a tax-sheltered environment. Contributions to the RRSP are immediately deductible by the contributor and the amount contributed is not taxable until it is withdrawn. In other words, RRSPs allow taxpayers to invest before-tax dollars and reinvest their before-tax return on a tax-deferred basis. In addition to a tax deferral, taxpayers receive the benefit of tax savings if they are taxed at a lower marginal rate when funds are withdrawn from the plan, as is often the case after retirement.

[25] However, the tax deferral is not a tax exemption. The Respondent suggests that amounts contributed to an RRSP and the income and gains accrued on these amounts are eventually subject to taxation.

[26] I note that this statement is overly broad. An RRSP can lose money by investing in equity or income-earning securities that fall in value because of credit deterioration or interest rate fluctuations. All taxpayers share in these losses through forgone tax revenue.

[27] In support of the foregoing, the Respondent relies upon the FCA's reasons in *The Queen v. Nunn*.[5] There, the appellant, a victim of fraud, transferred his "locked-in" RRSP funds to a non-qualified investment, which was later lost entirely. In spite of the fact that "Mr. Nunn took reasonable steps to ascertain that the investment was legitimate,"[6] a unanimous panel of the FCA held that the withdrawal was nevertheless taxable under the former subsection 146(10) of the Act. Justice Malone noted at paragraph 22:[7]

> By purchasing the shares in a non-qualified investment, subsection 146(1) was automatically triggered. Undoubtedly, this result is harsh but it would be unfair to exempt a taxpayer from his or her tax obligation on the basis of mistake or fraud: *Vankerk v. Canada*, [2006 DTC 6199] 2006 FCA No. 371 at paragraph 3. Put simply, other Canadian taxpayers should not have to bear the financial burden which arises from unfortunate circumstances such as those that exist here.

[28] The FCA's guidance in *Nunn* was applied by Justice Paris in *Deschamps v. The Queen*.[8] There, the appellant, an unsophisticated investor, in a situation where the facts were "almost identical to those . . . in *Nunn*",[9] purchased shares in a non-qualified investment. Those shares had no value when they were acquired and the consideration given for them exceeded their fair market value by $53,300. Justice Paris, relying upon *Nunn*, held that the taxpayer was required to include that amount in his income pursuant to subsection 146(9) of the Act regardless of the fact that he was the victim of fraud.

[29] Finally, as further authority for a mechanical reading of subsection 146(9) of the Act, the Respondent directs this Court to the trial decision in *St. Arnaud*. At paragraph 28, Justice Bowie opined:[10]

> . . . an overpayment for an asset falls to be taxed under subsection 146(9) whether it is in the nature of an attempted avoidance, through non-arm's length transactions for example, or one that is on the annuitant's part benign, as here, where the amounts in question are the subject of a fraud perpetrated on an innocent annuitant. They are taxed under subsection 146(9) not because the annuitant has done anything wrong, but because they are tax sheltered funds that have left the sheltered environment and so must, under the scheme of the Act, and its specific provisions, be subject to tax. That the scheme of the Act requires the excess over fair market value to be taxed is no less so because it is the fraudster

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[5] 2007 DTC 5111, 2006 FCA 403.
[6] *Ibid*., at para. 21.
[7] *Nunn, supra*.
[8] [2007] 3 C.T.C. 2298, 2007 TCC 194.
[9] *Ibid*., at para. 15.
[10] *Supra* note 2.

> and not the annuitant that receives the tax sheltered amount. When viewed in its context, subsection 146(9) is not at all ambiguous, nor does it lead to any absurdity.

[30] Counsel for the Respondent notes that Justice Bowie's conclusion was not disturbed by the majority's reasons on appeal.

[31] The Appellant's position is that Justice Sharlow's concurring reasons are an alternative *ratio*, which is binding upon this Court. In support of this, the Appellant cites a number of authorities that hold that a lower court is bound by an alternative *ratio* of a higher court: *Bellamy v. Timbers*;[11] *United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp. (c.o.b.Wal-Mart)*;[12] *Paragon Properties Ltd. v. Magna Envestments Ltd.*;[13] *R. v. J. (J.)*;[14] *Chliwniak v. Chliwniak*.[15]

[32] The Appellant further submits that the legislative intent, as reflected by Hansard, clearly indicates that subsection 146(9) of the Act is meant to be an anti-avoidance provision. Specifically, counsel for the Appellant directs this Court to the House of Commons Debates where Mr. Mahoney, Parliamentary Secretary, suggests that "[t]he intent [of subsection 146(9)] is to prevent a trustee using the [RRSP] to confer a benefit on the annuitant or someone named by him and thus perpetuating a tax avoidance."[16]

[33] Hansard evidence can be of limited assistance in determining the purpose of legislation. For instance, in *Rizzo & Rizzo Shoes Ltd. (Re)*,[17] Iacobucci J. held at para. 35:

> Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:
>
> > . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains

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[11] [1914] O.J. No. 59 (QL), 31 O.L.R. 613 at paras. 84-85 (QL).
[12] [2012] S.J. No. 794 (QL), 2012 SKCA 131 at para. 55.
[13] [1972] A.J. No. 124 (QL), 24 D.L.R. (3d) 156 at para. 36 (QL).
[14] [2010] CarswellOnt 5514 (S.C.J.) at para. 10.
[15] [1972] O.J. No. 1255 (QL), [1972] 2 O.R. 64 at paras. 18-20 (QL).
[16] Third Session, 28th Parliament, Volume IX, 1971, at page 9264.
[17] [1998] S.C.J. No. 2 (QL), [1998] 1 S.C.R. 27.

> mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

[34] The reason why limited weight is attached to Hansard evidence was explained by Judge Bowman (as he then was) in *Glaxo Wellcome Inc. v. The Queen*, as follows:[18]

> . . . Pronouncements of politicians consist as a rule of broad generalities and are seldom a reliable guide in interpreting the specific words of a statute. Seldom do speeches of politicians in Parliament provide any real enlightenment except possibly in the broad sense of identifying governmental policy.

[35] On that basis, I cannot take Mr. Mahoney's statement as an unequivocal indication that Parliament intended that the provision apply only when the Court makes a factual finding that the RRSP holder authorized the transaction for an avoidance purpose. It is however worthy of some weight.

[36] In the Appellant's view, Justice Sharlow's reasons in *St. Arnaud* are binding on this Court. Those reasons establish that subsection 146(9) of the Act is an anti-avoidance provision. It applies only if it can be shown that the RRSP overpaid for securities as part of a scheme designed to divert funds directly or indirectly to the annuitant of the plan on a tax-free basis. The Appellant argues that the Canada Revenue Agency ("CRA") auditor confirmed on discovery that the only issue in dispute was the fair market value of the Kelso Securities. Therefore, it falls to the Minister to establish the avoidance purpose of the transaction.

[37] The Appellant refers to the following excerpts from the transcript of Mr. Graschuk's testimony on discovery as confirmation of his understanding of the Respondent's theory of its case:[19]

> **Read-In of the Appellant of the Transcript of Gordon Graschuk Page 19, Questions 81-83:**
>
> Q. Okay. And in this case there wasn't – was the sole issue the value of the shares? Was that the sole issue that made it non-compliant? Was there anything else?
>
> A. There's other issues, but I think from the legislation standpoint that's the only one that really matters.

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[18] [1996] T.C.J. No. 6 (QL), 96 DTC 1159 at p. 1162.

[19] Closing Submissions of the Appellant, pages 5-6.

What happened to that excess amount is interesting. I mean, it's a fascinating story, I'm sure, but it's not relevant. The relevant thing from the provision is did you pay in excess of fair market value?

Q. No, I understand.

A. If the answer is yes you have to −

Q. I just want to know, going into trial, the only issue appears to be that you're describing is the fact that the taxpayer overpaid for these shares. That's the issue that's on the table; is that fair?

MR. GOTFRIED: That's correct.

. . .

Read-In of the Appellant of the Transcript of Gordon Graschuk Pages 29-30, Questions 120-122:

Q. What facts are you replying upon to suggest that – other than the fair market value issue – that the taxpayer in this case was trying to avoid taxes?

MR. GOTFRIED: I'm going to – what's the relevance of that? The Minister hasn't proceeded based on GAAR so –

MR. RADNOFF: That's fine. If you're saying that's not going to be your position at trial, that's fine.

MR. GOTFRIED: No.

MR. RADNOFF: You have to say yes.

MR. GOTFRIED: Yea [*sic*], the Minister does not rely on GAAR.

BY MR. RADNOFF:

Q. And so you don't – you're not relying on the fact that is was an avoidance transaction as well; is that fair?

A. Yes that's fair.

Q. And are you suggesting that there was any tax benefit?

MR. GOTFRIED: We're not proceeding with the GAAR analysis, so there's going to be no tax benefit avoidance transaction. That's not the position of the Minister.

> MR. RADNOFF: Okay. I'm just going through the headings.
>
> MR. GOTFRIED: Yes.
>
> MR. RADNOFF: It's not clear if they're subsumed under GAAR or if they're all distinct issues, so that's why I'm going through.
>
> MR. GOTFRIED: Okay.
>
> MR. RADNOFF: And you say no bona fide purpose. Is that an issue that you'll be advancing at trial?
>
> MR. GOTFRIED: Not in the context of a GAAR analysis.
>
> [Emphasis added.]

[38] It is apparent from the above that Mr. Graschuk understood that he was being asked to confirm that the Minister would not seek to defend its assessment using the general anti-avoidance rule found in section 245 of the Act. I cannot construe these remarks as an admission that the Respondent was prepared to abandon the assumptions in paragraphs 9a) and b) of the Reply to the effect that the Kelso Securities were promoted and marketed for the purposes of an arrangement which would allow investors such as the Appellant to gain control of their RRSP funds offshore while avoiding tax on the withdrawal.

[39] The Appellant's counsel also insists that the Appellant's evidence contradicts these assumptions such that the Minister bears the burden of showing that they are true. For the reasons outlined below, I attach no weight to the Appellant's evidence. Therefore, the assumptions stand. In any event, I believe that the evidence shows, on a balance of probabilities, that the Appellant acted in a complicit manner in giving his approval to the transaction because he was led to believe he would receive a collateral benefit. Therefore, I can decide this appeal without choosing between the two interpretations of subsection 146(9) of the Act presented by the parties.

[40] In making my credibility findings in this case, I find it useful to refer to the following comments in *Springer v. Aird & Berlis LLP*:[20]

> 14 In making credibility and reliability assessments, I find helpful the statement of O'Halloran J.A. in *R. v. Pressley* (1948), 94 C.C.C. 29 (B.C. C.A.):

[20] [2009] O.J. No. 1408 (QL), 96 O.R. (3d) 325.

> The Judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.

15 I also find it helpful, particularly in this case, the statement of Farley J. in *Bank of America Canada v. Mutual Trust Co.* (1998), 18 R.P.R. (3d) 213 at para. 23:

> Frequently in cases judges will be called upon to make findings concerning credibility of witnesses. This usually is a most difficult task absent the most blatant of lying which is tripped up by confession, by self-contradictory evidence, by directly opposite material developed at the relevant time period or by evidence of an extremely reliable nature from third parties. One is always cognizant that people's perceptions of the same event can sincerely differ, that memories fade with time, that witnesses may be innocently confused over minor (and even major) matters as well as the aspect of rationalization, a very human and understandable imperfection. A point that a witness may not be sure of initially becomes eventually a point that the witness is certain about because it fits the theory of his side. Rationalization will also affect some person's views so that a certainty that a fact was "A" evolves into a confirmation that that fact was "not A".

16 In *Olympic Wholesale Co. v. 1084715 Ontario Ltd.* [1997] O.J. No. 5482 at para. 3, Farley J. also made the following statement which I find helpful:

> I would like to review the aspect of assessing credibility and the weighing of evidence, and I do this in a very general way. … The evidence and the way it is given should be taken in context and in a balanced way. No one should expect perfection in testimony and it is often said that evidence which is too consistent may be a sign of it being artificially constructed. I also recognize that there can be an inadvertent rationalization of memory to fit what is afterwards said that must have happened as opposed to actually remembering what did happen. This usually increases over time …

17 Farley J. used the word "rationalization". I take his comments to refer to what is often said to be "reconstruction" of evidence. Reconstruction can be either inadvertent or advertent. In either case, when it occurs, it is something that the trier of fact must consider in weighing evidence.

[Emphasis added.]

[41] I will consider the Appellant's evidence and credibility in this light.

[42] The Appellant testified that, while planning his Cancun vacation, he unexpectedly met a client of his printing business who informed him of a seminar hosted in Cancun on investment strategies for Canadian residents. The Appellant decided to attend the seminar, in the words of counsel for the Respondent, to mix business with pleasure. According to the Appellant, it was only after arriving in Cancun that he discovered that the seminars were mainly of interest to American taxpayers.

[43] According to the Appellant, because the lectures were of little relevance to Canadian residents, he decided to skip most of the presentations, preferring pleasure to business. He provided few details on the actual subject matter of the lectures.

[44] According to the Appellant, he arrived at the tail end of Mr. Claridge's presentation. However, the Appellant did manage to strike up a conversation with him. The Appellant claims he informed Mr. Claridge that he was unhappy with the returns on his RRSP portfolio and was interested in strategies to enhance his returns. This conversation led the Appellant to provide contact information to Mr. Claridge. The Appellant also claims that he talked to a Canadian client of Mr. Claridge who was happy with his investment advice.

[45] In cross-examination it was shown that the Appellant registered for the Cancun seminars as part of a seminar vacation package which cost approximately $8,000. The Appellant omitted this fact in direct examination. It is difficult to imagine that the Appellant did not consult a description of the program before booking his trip. It is improbable that the Appellant did not know the subject matter of the lectures prior to registering for the seminar.

[46] The CRA auditor testified that he learned that the Cancun seminar attended by the Appellant was sponsored by an organization known as the Institute of Global Prosperity ("Global Prosperity"). This organization promotes an aggressive anti-tax philosophy through audio and in-person seminars, the latter typically held in offshore locations. According to the witness, Global Prosperity requires its clients to purchase the audio seminar package as a precondition to attendance at an offshore conference. The cost is approximately $1,500 for six audio disks. The CRA auditor testified that he listened extensively to the audio seminars and prepared a written summary of the highlights of the seminars. His written summary

was presented as part of the Appellant's read-in evidence. On page 1 of his report, he summarizes his findings as follows:[21]

> The gist of the Global Prosperity Level 1 education audio tape set is to convince the listener that income tax legislation in Canada and the U.S.A. is not constitutional (it has never been passed into law) and thus the payment of income tax is voluntary. It encouraged listeners to discard their social insurance or social security numbers, driver's licenses, and government-issued currency, to become detached from all government programs including RRSP's and health care, and to move title to their worldly possessions to offshore trusts. These offshore trusts should not be registered in their own names, but registered to IGP personnel with an agency agreement in place allowing the individual to use the property they purchased. As the only "business" of the trust is to protect the personal assets of the individual, the individual can now claim personal living expenses as business expenses, or so they claim. The tape package insists that the supply of money in Canada and the U.S.A. is controlled by the so-called "international banking-cartel" rather than the Bank or Canada or Federal Reserve.

[47] In light of the above, I believe that the Appellant was well aware of the subject matter of the seminars when he signed up for the seminar, but chose to downplay this fact in order to conceal the reason for the purchase of Kelso Securities by the RRSP.

[48] The Appellant's description of the circumstances surrounding the purchase of the Kelso Securities is also suspect. Apparently, Mr. Claridge recommended the investment because Kelso was on the cusp of developing new brake technology for use in the rail transportation industry. This appealed to the Appellant and prompted him to undertake research on Kelso on the Internet. He claims that he spoke with the CEO of the company on the commercial prospects of the new brake system.

[49] Satisfied with this limited due diligence, the Appellant committed $100,000 to the transaction. The Appellant claims he did not set the price range for the transaction. The Appellant testified that his only instructions to Mr. Claridge were to purchase as many shares as possible, claiming that he left all price negotiations to Mr. Claridge.

[50] The Appellant also acknowledged that he had agreed to pay Mr. Claridge $20,000 for his investment advice and believed that this amount would be paid out of the $100,000 to be used for the share purchase. The Appellant claims that it was unclear how exactly this would be done. At the very least, this admission shows

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[21] Appellant's Transcript Reading Briefs, Tab 2, Appendix D, p. 24.

that the Appellant knew that the RRSP was paying more than fair market value for the shares. The Appellant offered no reasonable explanation as to why he was willing to pay such a high fee to Mr. Claridge.

[51] Assuming that the Appellant carried out Internet research on Kelso, I find it difficult to believe that he would not have found Kelso's financial information, including the reports of its private placement of the Kelso Securities. These securities were identical to those purchased by the Appellant at a price of $20.00 each. I find it equally improbable that the Appellant would have committed a substantial part of his RRSP savings to the purchase of securities of a small public company at an early stage of its development without providing Mr. Claridge with instructions on price.

[52] I note that the Appellant emphasized that his formal education ended after high school. However, I also note that he owned a printing business which he ran for 35 years until his retirement, when he turned the printing business over to his son. He acknowledged that he had 10 employees at that time. It is likely that the Appellant became a fairly astute business person through building and running his own business for many years.

[53] After listening to the Appellant in direct evidence, I was struck by the fact that he did not acknowledge or suggest that he may have been tricked by Mr. Claridge in overpaying for the Kelso Securities. There is also no allegation of fraud or deceit in the Appellant's Notice of Appeal. Moreover, it is notable that he brought no action or made no complaint against either Mr. Claridge or Mr. Stewart, the lawyer who provided him with a comfort letter regarding the eligibility and fair market value of the Kelso Securities. The only grievance that the Appellant alluded to in his examination in chief was that he became unhappy with Mr. Claridge's services because he was not returning his calls following the completion of the transaction.

[54] All of the above undermines the Appellant's credibility and leads me to believe that he was less than forthright in his description of the circumstances leading up to and surrounding the purchase of the Kelso Securities. The conclusion I draw is that the Appellant was complicit in the undertaking to acquire the Kelso Securities at a price greater than fair market value. I infer that this was done because the Appellant was promised by Mr. Claridge that he would gain access to the funds paid for the Kelso Securities minus Mr. Claridge's fee and the actual value of the securities. Something went wrong with the scheme, prompting the

Appellant to move the balance of his RRSP funds to RBC in Toronto. I suspect that someone else made off with the funds.

[55] I agree with the Respondent's assertion that objective standards of business-like behaviour are embedded in the concept of fair market value, which is a term not defined in the Act.

[56] The courts have accepted the following definition of fair market value, cited with approval by Justice Rothstein, at that time a judge of the Federal Court of Appeal:

> . . . 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.[22]

[57] The limited information which the Appellant claims he consulted suggests that he was either wilfully blind or was not at all interested in the price paid for the Kelso Securities because he expected a collateral benefit. It is equally improbable that the Appellant would have left all price negotiations up to Mr. Claridge without providing him with any guidelines with regard thereto At the very least, the evidence shows that the Appellant, and by extension, his RRSP trust, did not act in a manner consistent with the behaviour of an arm's length purchaser.

[58] It is important to note that the Minister will rarely have access to direct evidence that contradicts a taxpayer's declaration of his state of mind in authorizing a transaction. It is equally hard for the Minister to trace funds once they have been moved offshore. The Appellant offered no reasonable explanation as to why he authorized the purchase. In this case, I can rely on the Minister's assumption because the Appellant failed to establish on a *prima facie* basis that the Minister's assumptions are wrong. I can also infer from the overall evidence that Mr. Claridge must have promoted the purchase of the Kelso Securities for the purpose outlined in the Minister's assumptions and that the Appellant approved of this strategy. This inference is consistent with the types of strategies promoted by Global Prosperity through its audio and offshore seminars.

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[22] *A.G. of Canada v. Nash et al.*, 2005 DTC 5696, 2005 FCA 386 at para. 8.

[59] In conclusion, and as to the first issue, the facts demonstrate that the Appellant purchased the Kelso Securities for an amount significantly in excess of fair market value. I find that the Appellant caused the RRSP Account to purchase the Kelso Securities, which collectively had a fair market value of no more than $5,000. Those same Kelso Securities had been purchased three months earlier for an issue price of $1.00 per share. Around the time of that purchase, common shares of Kelso were trading on the open market for between $0.07 and $0.11. Less than a month after the Appellant purchased the Kelso Securities, similar Class "A" Preferred Shares were issued in a private placement for a price of $1.00 per share.

[60] As to the second issue, all of the above demonstrates that the facts of the instant case are very different than those considered by Justice Sharlow in the *St. Arnaud* decision relied on by the Appellant. Indeed, the evidence supports the inference that the Appellant had a collateral tax avoidance purpose in directing the withdrawal of funds from the RRSP Account. I did not find the Appellant credible. His answers appeared scripted and rehearsed. That being so, the Appellant has failed to demolish the Minister's assumption that the Appellant purchased the Kelso Securities as a means to gain control of his RRSP funds while maintaining the deferral of any tax payable on those same funds.

[61] Moreover, the evidence considered as a whole allows me to infer that the Appellant believed he would receive a collateral tax benefit when he authorized the purchase of the Kelso Securities. Therefore, regardless of how I view the application of subsection 146(9) of the Act, the transaction in issue falls squarely within the circumstances in which Justice Sharlow opined that it should apply. Therefore, subsection 146(9) of the Act applies in this case to include in the Appellant's income for his 2001 taxation year the difference of $95,000 between the consideration paid for the Kelso Securities and their fair market value.

VI. Conclusion

[62] For all of these reasons, the appeal is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 24th day of June 2014.

"Robert J. Hogan"

Hogan J.

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