**Date: 20090612**

**Dockets: A-557-07**
**A-556-07**

**Citation: 2009 FCA 188**

**CORAM:** **LÉTOURNEAU J.A.**
**NADON J.A.**
**BLAIS J.A.**

**BETWEEN:**

**A-557-07**

**ROGER ST-FORT**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

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**A-556-07**

**ANTONINE ST-FORT**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Ottawa, Ontario, on June 3, 2009.

Judgment delivered at Ottawa, Ontario, on June 12, 2009.

**REASONS FOR JUDGMENT BY:** **LÉTOURNEAU J.A.**

**CONCURRED IN BY:** **NADON J.A.**
**BLAIS J.A.**

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**A-556-07**

**ANTONINE ST-FORT**

**Appellant**

**and**

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**Respondent**

## REASONS FOR JUDGMENT

**LÉTOURNEAU J.A.**

### Issue

[1] The Court has before it two appeals that have been consolidated for procedural reasons and for hearing by an order of our colleague, Justice Trudel, on February 26, 2008.

[2] The issue that the appeals raise is the correctness of the decision by Justice Archambault of the Tax Court of Canada (judge), in which the judge found that, pursuant to section 160 of the *Income Tax Act*, 1985, c. 1 (5th Supp.) (Act), the appellants were jointly and severally liable to pay a part of their son's tax liability.

[3] This final conclusion by the judge is based on the fact that there was a non-arms' length transfer of property.

[4] In my view, the two appeals must be dismissed for the reasons that follow.

**Relevant legislation**

[5] In addition to sections 160 and 250 of the Act, article 476 of the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25, and articles 1651, 1654, 2781, 2941 and 2944 of the *Civil Code of Québec*, S.Q. 1991, c. 64, must be taken into consideration to resolve the case at bar.

[6] These provisions read as follows:

***Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.)**

| | |
|---|---|
| Tax liability re property transferred not at arm's length | Transfert de biens entre personnes ayant un lien de dépendance |
| **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 | **160.** (1) Lorsqu'une personne a, depuis le 1er mai 1951, transféré des biens, directement ou indirectement, au moyen |

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:

(*d*) the transferee and transferor are jointly and severally liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and

(*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

d'une fiducie ou de toute autre façon à l'une des personnes suivantes :

*a*) son époux ou conjoint de fait ou une personne devenue depuis son époux ou conjoint de fait;

*b*) une personne qui était âgée de moins de 18 ans;

*c*) une personne avec laquelle elle avait un lien de dépendance,

les règles suivantes s'appliquent :

*d*) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement d'une partie de l'impôt de l'auteur du transfert en vertu de la présente partie pour chaque année d'imposition égale à l'excédent de l'impôt pour l'année sur ce que cet impôt aurait été sans l'application des articles 74.1 à 75.1 de la présente loi et de l'article 74 de la *Loi de l'impôt sur le revenu*, chapitre 148 des Statuts revisés du Canada de 1952, à l'égard de tout revenu tiré des biens ainsi transférés ou des biens y substitués ou à l'égard de tout gain tiré de la disposition de tels biens;

*e*) le bénéficiaire et l'auteur du transfert sont solidairement responsables du paiement en vertu de la présente loi d'un montant égal au moins élevé des montants suivants :

(i) l'excédent éventuel de la juste valeur marchande des

given for the property, and

biens au moment du transfert sur la juste valeur marchande à ce moment de la contrepartie donnée pour le bien,

Arm's length

**251.** (1) For the purposes of this Act,

(*a*) related persons shall be deemed not to deal with each other at arm's length;

[…]

Lien de dépendance

**251.** (1) Pour l'application de la présente loi :

*a*) des personnes liées sont réputées avoir entre elles un lien de dépendance;

[…]

Definition of "related persons"

(2) For the purpose of this Act, "related persons", or persons related to each other, are

(*a*) individuals connected by blood relationship, marriage or common-law partnership or adoption;

[Emphasis added.]

Définition de « personnes liées »

(2) Pour l'application de la présente loi, sont des « personnes liées » ou des personnes liées entre elles :

*a*) des particuliers unis par les liens du sang, du mariage, de l'union de fait ou de l'adoption;

[Nous soulignons.]

## *Code of Civil Procedure,* R.S.Q., c. C-25

**476.** A party may renounce rights arising from a judgment rendered in his favour, by filing in the office of the court a total or partial renunciation signed by him or by his special attorney. A total renunciation accepted by the opposite party places the case in the position it was in immediately before the judgment.

**476.** Une partie peut renoncer aux droits qui lui résultent d'un jugement rendu en sa faveur, en produisant au greffe un désistement total ou partiel, signé d'elle-même ou de son fondé de procuration spéciale. Le désistement total accepté par la partie adverse a pour effet de remettre la cause dans l'état où elle était immédiatement avant le jugement.

***Civil Code of Québec*, S.Q. 1991, c. 64**

**1651.** A person who pays in the place of a debtor may be subrogated to the rights of the creditor.

He does not have more rights than the subrogating creditor.

**1651.** La personne qui paie à la place du débiteur peut être subrogée dans les droits du créancier.

Elle n'a pas plus de droits que le subrogeant.

**1654.** Subrogation may be made by the creditor only at the same time as he receives payment. It takes effect without the consent of the debtor, notwithstanding any stipulation to the contrary.

**1654.** La subrogation consentie par le créancier doit l'être en même temps qu'il reçoit le paiement. Elle s'opère sans le consentement du débiteur, malgré toute stipulation contraire.

**2781.** Where the default has not been remedied or the payment has not been made in the time allotted for surrender, the creditor takes the property in payment by the effect of the judgment of surrender, or of a deed voluntarily made by the person against whom the hypothecary right is exercised, and accepted by the creditor, if neither the subsequent creditors nor the debtor have required him to proceed with the sale.

The judgment of surrender or the deed voluntarily made and accepted constitutes the creditor's title of ownership.

**2781.** Lorsqu'il n'a pas été remédié au défaut ou que le paiement n'a pas été fait dans le délai imparti pour délaisser, le créancier prend le bien en paiement par l'effet du jugement en délaissement, ou par un acte volontairement consenti par celui contre qui le droit hypothécaire est exercé, et accepté par le créancier, si les créanciers subséquents ou le débiteur n'ont pas exigé qu'il procède à la vente.

Le jugement en délaissement ou l'acte volontairement consenti et accepté constitue le titre de propriété du créancier.

**2941.** Publication of rights allows them to be set up against third persons, establishes their rank and, where the law so provides, gives them effect.

**2941.** La publicité des droits les rend opposables aux tiers, établit leur rang et, lorsque la loi le prévoit, leur donne effet.

Entre les parties, les droits

| | |
|---|---|
| Rights produce their effects between the parties even before publication, unless the law expressly provides otherwise. | produisent leurs effets, encore qu'ils ne soient pas publiés, sauf disposition expresse de la loi. |
| **2944.** Registration of a right in the register of personal and movable real rights or the land register carries, in respect of all persons, simple presumption of the existence of that right. | **2944.** L'inscription d'un droit sur le registre des droits personnels et réels mobiliers ou sur le registre foncier emporte, à l'égard de tous, présomption simple de l'existence de ce droit. |

**Factual background to the transfer and these proceedings**

[7] On June 2, 1992, the appellants' son, René St-Fort, and his spouse acquired a house in Chelsea, Quebec. The purchase price was $250,000. A $50,000 down payment was made to the seller. The balance of the purchase price was financed through two hypothecs. The first-ranking hypothec amounted to $150,000 and was granted by the National Bank of Canada (Bank). The second-ranking hypothec, held by the Bank of Hong Kong, was for $50,000. Since the second-ranking hypothec was settled, no further mention will be made of it in these reasons.

[8] In December of that same year, René St-Fort's spouse assigned him her share in the immovable by notarial act duly registered at the Gatineau registry office: see tab 10 of the Appellants' Record.

[9] Beginning in April 1996, René St-Fort ceased making the monthly principal and interest repayments to the Bank.

[10] On September 18, 1996, the Bank asserted its rights as creditor. The Bank served René St-Fort and his spouse with a prior notice of the exercise of a hypothecary right under article 2757 of the *Civil Code of Québec*: *ibid*. at tab 11.

[11] When the debtors did not respond to the notice, the Bank filed a motion for forced surrender and for taking in payment in the Superior Court: *ibid*. The motion, based on article 795 of the *Code of Civil Procedure*, was filed on December 13, 1996.

[12] By judgment dated January 10, 1997, the Superior Court, District of Hull, ordered the debtors to voluntarily surrender the immovable, failing which the Bank would be placed in possession of the immovable by means of a writ of possession: *ibid*. at tab 12.

[13] The judgement also declared the Bank the sole owner of the immovable as of the registration of the notice, mentioned above, given on September 27, 1996. This judgment in favour of the Bank is not registered in the land register: *ibid*. at tab 18, at index of immovables.

[14] On January 31, 1997, following discussions with the Bank and its counsel, the appellants registered a $130,000 hypothec on the immovable in favour of the Caisse Populaire St-Jean Bosco in Hull: *ibid*. at tab 13.

[15] Subsequently, more specifically on February 13, 1997, the Bank renounced the judgment in its favour dated January 10, 1997: *ibid*. at tab 14.

[16] Following this renunciation, the Bank subrogated the appellants to all of its rights in relation to the hypothecary remedies available to it as a result of René St-Fort's failure to pay his hypothecary debt to the Bank. The subrogation was made by notarial act dated April 1, 1997, on payment of $142,016.52: *ibid.* at tab 15. The notarial act was published on April 7, 1997, in the Gatineau registration division: *ibid*.

[17] Still in the same Superior Court file, the Bank and the appellants, represented by the same counsel, filed an appearance for a continuance of suit on May 27, 1997. In the appearance, the Bank was identified as the original applicant and the appellants as applicants in the continuance of suit: *ibid*. at tab 16.

[18] The case having been given new life, the appearance for a continuance of suit was followed by a notice indicating that the motion for forced surrender and for taking in payment, which had resulted in the January 10, 1997, judgment that had been renounced, would be re-filed in the Superior Court for determination on June 23, 1997: *ibid*.

[19] On June 27, 1997, the Superior Court delivered a new judgment in the file, ordering that the immovable be surrendered and granting the possession thereof to the appellants. Furthermore, the Court declared that the appellants took the immovable in payment and are the sole owners thereof, retroactive to the registration of the notice of intent on September 27, 1996.

[20] René St-Fort never surrendered the immovable, which he has occupied since its purchase in June 1992. On April 7, 1997, the immovable's fair market value was $220,000. René St-Fort's liability to the Minister of National Revenue amounted to $365,238.69.

[21] On November 15, 2001, the Minister of National Revenue issued the appellants an assessment of $77,983.48, representing the difference between the fair market value of the house, namely $220,000, and the amount they paid in consideration for the subrogation to the Bank's rights, namely $142,016.52. The assessment was based on subsection 160(1) of the Act.

[22] The appellants appealed this assessment to the Tax Court of Canada. The judgment and reasons were delivered orally from the bench on November 5, 2007, but the reasons for judgment delivered at that time were later "amended for greater clarity and precision" on January 21, 2008. The finding was that the appeals should be dismissed. This prompted the appellants' application for the Tax Court of Canada's decision to be overturned.

**Analysis of the judge's decision and the parties' submissions**

(a) Existence of a non-arm's length relationship

[23] The bond of filiation between the tax debtor, René St-Fort, and the appellants meets the definition of "related persons", thus triggering the presumption of non-arm's length dealing at section 251 of the Act. The appellants raise no objection in that respect. Rather, they submit that

they acquired the immovable from the Bank, not from their son, such that there was no transfer between related persons within the meaning of the Act.

[24] The appellants are self-represented. With respect, I believe they are mistaken as to the legal effect of the various transactions that led to their ownership of the immovable, or that they are guided by a misapprehension of the consequences of those transactions.

(b) Validity of the Bank's renunciation

[25] The appellants are challenging the judge's conclusions that under article 476 of the *Code of Civil Procedure*, the Bank could renounce the rights conferred upon it by the January 10, 1997, judgment, that the renunciation of that judgment was valid and that this renunciation had the effect of placing the case in the position it was in before the January 10, 1997, judgment: see paragraph 11 of the judge's reasons for decision. According to the appellants, the renunciation is not valid because the Bank did not sign it. Moreover, it cannot have the effect that the judge ruled it had because René St-Fort and his spouse never accepted the Bank's total renunciation.

[26] In my opinion, there is no question that the Bank made a total and valid renunciation of the January 10, 1997, judgment. It is clear that the renunciation, signed by the attorneys representing the Bank, [TRANSLATION] "is, in fact and in law, a true renunciation of the judgment" since the Bank [TRANSLATION] "waived the benefit that would result therefrom": see paragraph 21 of Justice Dalphond's reasons for judgment in *Vernet v. Forage expert Québec Inc.*, J.E. 2007-1095 (C.A.Q.).

[27] The Bank's subsequent actions confirm beyond a shadow of a doubt the validity of the mandate it gave its attorneys to prepare a renunciation and file it in the record. I agree with Justice Dalphond that [TRANSLATION] "there is no call for us to go any further and attempt to interfere in the relationship between lawyer and client": *ibid*., see also *Assurance-vie Desjardins Inc v. Succession de Richard Proulx*, [1995] R.D.J. 479 (C.A.Q.).

[28] This brings me to the matter of determining whether the Bank's two debtors, René St-Fort and his spouse, accepted the renunciation.

(c) Acceptance of the renunciation by the Bank's debtors

[29] The appellants submit that the renunciation cannot be set up against their son, René St-Fort, because he did not sign it. Under article 476 of the *Code of Civil Procedure*, the opposing party need not sign a renunciation; it need only accept it. A signature may be the best evidence of acceptance; however, it is not the only means by which that fact may be established. Acceptance may also be proven from the parties' conduct, including that of the opposing party.

[30] In *Vernet*, above, Justice Dalphond inferred acceptance of the judgment from the agreement as to the conduct of the proceedings signed by the parties to continue the suit: see paragraphs 10 and 21 of his reasons for decision, where he concludes that it is [TRANSLATION] "clear that the opposing parties accepted this total renunciation".

[31] In the case at hand, there is no evidence that the hypothecary debtors objected to the Bank's total renunciation of the January 10, 1997, judgment. To the contrary, in fact, the following evidence in the record leads to the conclusion that the hypothecary debtors accepted it.

[32] First of all, the two debtors were respondents in the renunciation document: see Appellants' Record at tab14. They were also respondents in the appearance filed in the Superior Court in connection with the continuance of suit: *ibid*. at tab 16. As well, they were respondents in the continuance of the motion for forced surrender and for taking in payment re-filed in the Superior Court owing to the renunciation of the January 10, 1997, judgment: *ibid*. Last, the two debtors had the status of respondents in the June 27, 1997, judgment delivered following the renunciation and the continuance of suit: *ibid*. at tab 17.

[33] In my understanding, it is significant that throughout this series of events beginning with the renunciation document, at no time did the debtors oppose, in any way whatsoever, any of the proceedings subsequent and giving effect to the renunciation. In the circumstances, it is certainly not unreasonable, let alone erroneous, to conclude that the two hypothecary debtors accepted the renunciation.

[34] Regardless, according to the Court of Appeal of Québec's interpretation of article 476 of the *Code of Civil Procedure*, [TRANSLATION] "renunciation is essentially a unilateral act". And the beneficiary of a judgment may renounce it unilaterally, without the other party's involvement, if the judgement does not, in and of itself, benefit that other party (*2632-8419 Québec Inc. v. 3170578*

*Canada Inc.*, J.E. 97-1817, paragraphs 6 to 10; *118372 Canada inc. v. Groupe Tecnum inc.*, 2007 QCCS 4283; *Caisse populaire Desjardins Saint-Jérôme (reprise d'instance) v. 3099-1947 Québec inc. (reprise d'instance de)*, [2002] J.Q. No. 5467).

[35] In this case, the January 10, 1997, judgment, which was the subject of the renunciation, did not benefit the two hypothecary creditors in any way. It could therefore be renounced unilaterally.

(d) Appellants' capacity to invoke the invalidity of the revocation

[36] Although it is not necessary to decide this question to resolve the dispute, it is certainly appropriate to seriously question the appellants' capacity to challenge the validity of a renunciation of a judgment in proceedings to which they were not parties when, furthermore, they benefitted from the renunciation and accepted it at all times.

[37] In retrospect, it would probably have been preferable for the appellants to proceed differently than in the manner in which they agreed to acquire the immovable.

(e) Legal effect of the renunciation

[38] As provided by article 476 of the *Code of Civil Procedure*, total renunciation places the case in the position it was in immediately before the judgment. That explains the appearance filed in connection with the continuance of suit, the filing for a rehearing of the motion for forced surrender

and for taking in payment and the judgment dated June 27, 1997, granting the appellants (who were the applicants in the continuance of suit) ownership of the immovable.

(f) Legal effect of the subrogation of the appellants to the hypothecary creditor's rights

[39] As already mentioned, the appellants submit that they acquired the immovable from the Bank, not their son. However, the evidence affords no legal basis for this submission.

[40] The appellants acquired the immovable by way of a taking in payment, as was made possible by the subrogation document dated April 1, 1997. Pursuant to that document, the appellants acquired the Bank's claims against the hypothecary debtors and, more specifically, its right to exercise [TRANSLATION] "the hypothecary remedies of taking in payment constituted on December 13, 1996, under file No. 550 05 004282961 of the Superior Court, District of Hull": see subrogation document, Appellants' Record at page 92. They do not have more rights than the subrogating creditor: see art. 1651, *Civil Code of Québec*. In the case at bar, the subrogating creditors were entitled to take, in payment, the immovable in respect of which the hypothecary debtors were in default: *ibid*. art. 2781.

[41] The appellants' taking in payment was confirmed by the June 27, 1997, judgment with effect as regards the appellants' ownership of the immovable retroactive to September 27, 1996, at which time the appellants' son had possession and ownership of the immovable. Therefore, legally, the immovable was not transferred from the Bank to the appellants, as could have been the case had

it been sold by the Bank, but by a taking in payment, authorized by the Superior Court, from René St-Fort, then-hypothecary debtor to the Bank and tax debtor to the Minister of National Revenue.

**Conclusion**

[42] In conclusion, I believe that the judge made no error in finding that the conditions for applying section 160 of the Act were met and, accordingly, in dismissing the appellants' appeals.

[43] For these reasons, I would dismiss the appeals, but with a single set of costs payable by the appellants in equal shares. A copy of these reasons and another original judgment to this effect will be placed in file A-556-07.

"Gilles Létourneau"
J.A.

"I agree.
M. Nadon J.A."

"I agree.
Pierre Blais J.A."

Certified true translation
Sarah Burns

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

| | |
|---|---|
| Docket: | A-557-07 |

**Appeal from a decision by the Honourable Justice Archambault of the Tax Court of Canada dated November 5, 1997, 2008TCC23.**

| | |
|---|---|
| STYLE OF CAUSE: | ROGER ST-FORT v. HER MAJESTY THE QUEEN |
| PLACE OF HEARING: | Ottawa, Ontario |
| DATE OF HEARING: | June 3, 2009 |
| REASONS FOR JUDGMENT: | LÉTOURNEAU J.A. |
| CONCURRED IN BY: | NADON J.A.<br>BLAIS J.A. |
| DATED: | June 12, 2009 |

**APPEARANCES:**

| | |
|---|---|
| Roger St-Fort | FOR THE APPELLANT |
| Marie-Ève Aubry<br>Catherine Letellier de St-Just | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| John H. Sims, Q.C.<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

| | |
|---|---|
| Docket: | A-556-07 |

**Appeal from a decision of the Honourable Justice Archambault of the Tax Court of Canada dated November 5, 2007, 2008TCC23.**

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| PLACE OF HEARING: | Ottawa, Ontario |
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**SOLICITORS OF RECORD:**

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| John H. Sims, Q.C.<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |