Docket: 2015-3607(IT)G

BETWEEN:

MARIA CSAK,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on September 11 and 12, 2023 at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellant:	John Buote
Counsel for the Respondent:	Meaghan Mahadeo

JUDGMENT

UPON hearing the evidence and submissions of counsel for the Appellant and counsel for the Respondent;

IN ACCORDANCE with the attached Reasons for Judgment, the appeal from the assessment made under section 160 of the *Income Tax Act* (Canada) by notice dated August 14, 2012 (the "Assessment") is allowed with costs to the Appellant, and the Assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the reassessments of the 1988 and 1989 taxation years of Charles Csak by notices dated April 21, 1994 were statute-barred.

The parties shall have 60 days from the date of this judgment to agree on costs. If no agreement is reached, the Appellant shall have a further 30 days to submit written submissions on costs. The Respondent shall have a further 30 days to provide

written submissions in response to the Appellant's submissions. The written submissions of each party are not to exceed 10 pages.

Signed at Ottawa, Canada, this 18th day of January 2024.

"J.R. Owen"

Owen J.

Citation: 2024 TCC 9
Date: 20240118
Docket: 2015-3607(IT)G

BETWEEN:

MARIA CSAK,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Owen J.

I. Introduction

[1] Maria Csak (the "Appellant") appeals an assessment in the amount of $1,200,000 made by the Minister of National Revenue (the "Minister") under section 160 of the *Income Tax Act*[1] (the "ITA") by notice dated August 14, 2012 (the "Assessment").

[2] The basis of the Assessment is that the Appellant's deceased spouse, Charles Csak ("CC"), transferred a property to the Appellant having a fair market value of $1,200,000 at a time when CC's liability under the ITA for his 1988 through 1991 taxation years totalled $536,625 plus accrued interest.[2] The Appellant married CC in October 1992, the transfer of property occurred on January 8, 1993 and CC passed away on March 9, 2002.

II. The Facts

[1] R.S.C. 1985, c.1 (5th Supp.).
[2] CC also had liability under the Ontario *Income Tax Act*, R.S.O. 1990, c. I.2 (the "OITA") of $289,333.60 plus accrued interest. This Court has no jurisdiction over provincial income tax assessments. However, by virtue of subsections 1(3) and (6), section 14, and Part IV of the OITA, the result under the OITA will follow the result under the ITA.

A. The Minister's Assumptions of Fact

[3] In determining the Appellant's liability pursuant to subsection 160(1) of the ITA, the Minister made the following assumptions of fact:

> a) On January 8, 1993, Charles Csak transferred [a property located at 7286 Tenth Line, Mississauga, Ontario (the "Property")] [3] to the Appellant;
>
> b) The Appellant and Charles Csak were married as at [January 8, 1993];
>
> c) No consideration passed from the Appellant to Charles Csak in connection with the transfer of the Property as the transfer was for "natural love and affection";
>
> d) The fair market value of the Property as at [January 8, 1993] was $1,200,000;
>
> e) Charles Csak died on or about March 9, 2002;
>
> f) After the death of Charles Csak, the Appellant was executrix and/or trustee of his estate;
>
> g) As at August 14, 2012, the Estate of the Late Charles Csak's unpaid tax liability under the [*Income Tax Act*], *Income Tax Act* (Ontario), including interest, in respect of taxation years prior to [January 8, 1993], was as follows;[4]

Taxation Year	1998	1999	1990	1991	Total
Tax liability and interest	$938,264	$3,899,677	$14,433	$24,450	$4,876,824

> **The Underlying Assessments**
>
> h) Charles Csak was reassessed for the 1988, 1989, 1990 taxation years on April 21, 1994; and reassessed for the 1991 taxation year on August 15, 1994 (the "Underlying Assessments");
>
> i) The Underlying Assessments concerned partnership losses claimed by Charles Csak which were disallowed by the Minister;

[3] The PASF, which is described in section C of this judgment, states the address of the Property as 7286 10th Line, R.R. #2 Streetsville, Ontario. There is, however, no dispute as to the identity of the Property.
[4] The parties agree that the references in the chart to 1998 and 1999 should be to 1988 and 1989.

j) In 1996, Charles Csak, along with other persons involved in the same partnership(s), filed an appeal in the Tax Court of Canada from the Underlying Assessments;

k) The Appellant as executrix and/or trustee of Charles Csak's estate pursued and directed the appeal to the Tax Court of Canada following his death;

l) [Withdrawn by counsel for the Respondent at the hearing of the appeal];

m) The Appellant was a beneficiary of the Estate of the Late Charles Csak;

n) On July 13, 2006, Chief Justice Bowman of [*sic*] Tax Court of Canada issued judgment dismissing the Estate of the Late Charles Csak's appeal of the Underlying Assessments;

o) The tax liability of the Estate of the Late Charles Csak of $4,876,825 remains outstanding;

The Waivers

p) Charles Csak executed a waiver of the normal reassessment period for the 1988 taxation year on September 10, 1992, which was mailed to the Minister on September 11, 1992, and received on September 14, 1992; and

q) Charles Csak executed a waiver of the normal reassessment period for the 1989 taxation year on May 27, 1993, which was mailed to the Minister on May 27, 1993, and received on May 31, 1993.[5]

B. Facts Admitted in the Pleadings

[4] In paragraph 1 of the Amended Reply, the Respondent admits the facts stated in paragraphs 14 and 15 of the Notice of Appeal, which state:

14. Charles was originally assessed for the 1988 to 1991 tax years on the following dates:

(a) September 20, 1989 (Re: 1988).

(b) May 30, 1990 (Re: 1989).

(c) November 8, 1991 (Re: 1990).

[5] Paragraphs 11 a) through q) of the Amended Reply.

(d) October 9, 1992 (Re: 1991).

15. The CRA reassessed Charles for the years 1988 to 1991 on the following dates (collectively, the **"Underlying Transferor Reassessments"**):

(a) April 21, 1994 (Re: 1988) (the **"1988 Transferor Reassessment"**).

(b) April 21, 1994 (Re: 1989) (the **"1989 Transferor Reassessment"**).

(c) April 21, 1994 (Re: 1990) (the **"1990 Transferor Reassessment"**).

(d) August 15, 1994 (Re: 1991) (the **"1991 Transferor Reassessment"**).

[5] In paragraph 3 of the Amended Reply, the Respondent admits that CC's 1988 and 1989 taxation years were reassessed by the 1988 Transferor Reassessment and the 1989 Transferor Reassessment after the normal reassessment period for those taxation years. I will refer to the 1988 Transferor Reassessment and the 1989 Transferor Reassessment, collectively, as the "Disputed CC Reassessments".

C. The Partial Agreed Statement of Facts

[6] The parties submitted a partial agreed statement of facts (the "PASF") together with the documents referred to in the PASF (the "Joint Book"). A copy of the PASF is attached to these reasons as Appendix A.

[7] The parties agree that the fair market value of the Property at the time of the transfer of the Property on January 8, 1993 was $950,000. The parties also agree that the normal reassessment periods for CC's 1988 and 1989 taxation years expired on September 20, 1992 and May 30, 1993, respectively.

D. The Evidence of the Witnesses

[8] The Appellant testified on her own behalf.

[9] The Respondent called two witnesses:

A. Mr. Azharul Hassan, currently a team leader in revenue collections at the Canada Revenue Agency (the "CRA") and formerly a collections officer at the CRA; and

B. Mr. John Hussey, currently the Assistant Director of Administration for the Greater Toronto Area at the CRA.

[10] I found all of the witnesses to be credible.

[11] The Appellant testified that she disagreed with the assumptions of fact stated in paragraphs 11(c), (k) and (m) of the Amended Reply.

[12] With respect to paragraph 11(c) of the Amended Reply, the Appellant testified that she had given consideration for the Property consisting of her agreement to marry CC and her agreement to care for CC. The Appellant described her agreement to marry CC as the more serious consideration for her.

[13] Regarding the agreement to marry, the Appellant explained that she had planned to marry CC in 1988 or 1989, but that CC had married another woman (the "Former CC Spouse") in July 1989 without the Appellant's knowledge.

[14] The Former CC Spouse left CC after a couple of days and moved to Europe. This turn of events soured the Appellant's relationship with CC for a few months, but the relationship resumed in late 1989.

[15] CC obtained a divorce from the Former CC Spouse around 1991. However, the Appellant had lingering concerns that CC might "double cross" her again and that the Former CC Spouse would return and make a claim over CC's home (i.e., the Property). The Appellant advised CC that she would not marry him unless he transferred his home to her.

[16] The Appellant and CC were married in October 1992 and the Property was transferred to the Appellant on January 8, 1993. In cross-examination, the Appellant stated that she and CC had not entered into a written agreement regarding the Property other than the documents required to transfer the Property from CC to the Appellant.

[17] Regarding the agreement to care for CC, the Appellant testified that CC, who was close to 80 years old when they married, had several serious ailments and that caring for CC was a 24/7 undertaking.

[18] In cross-examination, the Appellant conceded that she had continued to work during her marriage to CC—noting that she had flexible work hours—and that she

had no education or training relevant to the personal care of an individual. The Appellant had the following exchange with counsel for the Respondent:

> MS. MAHADEO: Okay. So what I understand from you, and you can just answer yes or no, is that it was only after the fact when you looked back on all of what you had done that you realized how much time and energy you had put into the caregiving services that you provided. Is that accurate?
>
> MS. CSAK: Yes, because you don't know what the future can bring, yeah.[6]

[19] Counsel for the Respondent took the Appellant through a copy of an Affidavit of Residence and Value of Consideration (the "Affidavit") and a Transfer/Deed of Land (the "Deed") respecting the Property, both of which are included in tab 3 of the Joint Book.

[20] The Appellant conceded that she had signed the Affidavit, that it stated in section 4 that the total consideration for the Property was nil and that it stated in section 7 that:

> This is a transfer for natural love and affection from husband to wife and there is no consideration therefore no land transfer tax is exigible.

[21] The Appellant identified the signatures in sections 8 and 9 of the Deed as those of CC and herself, respectively.

[22] With respect to paragraph 11(m) of the Amended Reply, the Appellant testified in chief that she had received nothing from the estate of CC. In cross-examination, the Appellant acknowledged that she was the executrix and a beneficiary of CC's estate but reiterated that she had received nothing from CC's estate.

[23] The Appellant also acknowledged that she had a duty to act in the best interests of the estate, stating that she had tried to do that by, among other things, paying $382,000 to the CRA.

[24] With respect to paragraph 11(k) of the Amended Reply, the Appellant had the following exchange with her counsel:

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[6] Lines 26 to 28 of page 68 and lines 1 to 5 of page 69 of the Transcript of the Hearing on September 11, 2023.

> MR. BUOTE: … Do you agree that you pursued and directed the appeal to the Tax Court of Canada following Charlie's death?
>
> MS. CSAK: Absolutely not. I only signed the cheque and I didn't understand the case and I left everything for lawyers.[7]

[25] In cross-examination, the Appellant had the following exchange with counsel for the Respondent:

> MS. MAHADEO: And you were aware of the tax appeal before Charlie passed away.
>
> MS. CSAK: Not -- not really.
>
> MS. MAHADEO: No.
>
> MS. CSAK: Not really. I only knew something was -- something is going on, but then only said don't worry, everything -- we only ask it was why we are even need a lawyer, the first one. And that one only said don't worry, everything was prepared by law and only once did -- after the meeting we ask this -- this lawyer why we are here. There was something wrong prepare it? And the lawyer said, "Don't worry. We'll be straightening up". That's it.
>
> And that only said, "Don't worry. Everything was prepared by law".
>
> This what we knew it. There was -- it was last year before he was alive. This what we already knew it. But we even didn't understand what's going on.[8]

[26] When counsel asked about the meeting mentioned in this exchange, the Appellant stated:

> There was a few people because I know that was some parts of this, you know. There was a list of the names of the part of this, you know. And he was one of the name.
>
> Charlie or me, we didn't know this -- these people. We didn't know who is who. Only we knew the name and there was like (inaudible) defence lawyer and there was very briefly. And after the meeting, we only ask why we are here, why we need a lawyer.[9]

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[7] Lines 4 to 9 of page 30 of the Transcript of the Hearing on September 11, 2023.
[8] Lines 17 to 28 of page 80 and lines 1 to 7 of page 81 of the Transcript of the Hearing on September 11, 2023.
[9] Lines 23 to 28 of page 81 and lines 1 to 4 of page 82 of the Transcript of the Hearing on September 11, 2023.

[27] The Appellant testified that after CC passed away, she would deliver cheques to an accountant who was an appellant in the same group appeal. The accountant told her that the lawyer could not meet with all the members of the group, and the Appellant testified that she did not meet with the lawyer or receive updates from the lawyer at any time.

[28] Counsel for the Appellant acknowledged that the Appellant had been subject to written examination for discovery in CC's appeal and that CC had not raised the statute-barred issue in his appeal. The Appellant then had the following exchange with counsel for the Respondent:

> MS. MAHADEO: You also did not raise the validity of the underlying assessments in Charlie's tax appeal; correct?
>
> MS. CSAK: I was not involved anything. I just make the cheque. I don't understand the whole ---[10]

[29] With respect to the waivers for CC's 1988 and 1989 taxation years (collectively, the "Waivers" and, individually, the "1988 Waiver" and the "1989 Waiver"), the Appellant testified that she was 80% certain that the signature on the 1988 Waiver was not CC's signature and that she was 80% certain that the signature on the 1989 Waiver was CC's signature. The Appellant stated that she had witnessed CC signing cheques quite often over the years.

[30] The Appellant made two comments regarding the handwritten address on the 1988 Waiver. First, CC came to Canada from Hungary when he was in his fifties and he did not have a sufficient command of the English language to handwrite his address. Second, the person who made the handwritten correction crossed out CC's correct address and added the wrong address. In contrast, CC's address on the 1989 Waiver is typed and is correct.

[31] The copies of the Waivers submitted by the Appellant[11] each had a stamp stating "DISCLOSED PURSUANT TO THE PA".

[32] The Appellant did not know who prepared the Waivers. The copy of the 1988 Waiver submitted by the Appellant was not stamped by Revenue Canada.[12] The copy of the 1989 Waiver submitted by the Appellant has a stamp in the area reserved

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[10] Lines 22 to 27 of page 98 of the Transcript of the Hearing on September 11, 2023.
[11] Exhibits A-1 and A-2.
[12] Exhibit A-1. At the time, the CRA was known as Revenue Canada.

for departmental use stating that it was delivered by hand and was received by the Revenue Canada mailroom on May 31, 1993.[13]

[33] The Respondent submitted a copy of the 1988 Waiver together with a copy of a letter from Barry Witkin, C.A., C.B.V., of BDO Dunwoody Ward Mallette addressed to Mr. Derek Potopsingh at the Mississauga District Office of Revenue Canada.[14] The copy of the 1988 Waiver included with exhibit R-1 is identical to the copy included in exhibit A-1 except that it does not have the *Privacy Act* stamp. The Respondent did not submit a copy of the 1989 Waiver without the *Privacy Act* stamp but instead relied on exhibit A-2.

[34] The letter included in exhibit R-1 is dated September 11, 1992 and has a stamp stating that it was received by Revenue Canada Taxation in Mississauga on September 14, 1992. The letter does not have any indication of an enclosure with the letter (i.e., there is no "Encl." or "Enc." under the signature line; only the initials ":ag"). The letter states:

> **Re: Charles Csak & Howard Deverett**
>
> At the request of John Campbell of Miller Thomson, I have arranged for the waivers for the above named clients to be signed so that the discussion with Mr. Campbell and yourself regarding the matter of Claridge Holdings # 1 can continue. I trust this is what you require.
>
> If you have any questions concerning the above, please contact the writer.
>
> Please note the change of address of each client.

[35] Mr. Hassan testified that he found the letter and the 1988 Waiver in CC's physical file when, as a collections officer, he was assigned the file in 2019. In cross-examination, Mr. Hassan acknowledged that there was no indication on exhibit R-1 that the letter and the waiver had been stapled together.

[36] Counsel for the Respondent took Mr. Hassan to exhibit A-2, which is a copy of the 1989 Waiver with a *Privacy Act* stamp. Mr. Hassan then had the following exchange with counsel for the Respondent:

> MS. MAHADEO: Have you seen this document before?

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[13] Exhibit A-2.
[14] Exhibit R-1.

> MR. HASSAN: I believe I did.
>
> MS. MAHADEO: And where do you believe you saw this document?
>
> MR. HASSAN: It would also have been in the physical document.
>
> …
>
> MS. MAHADEO: And you said you believe you saw this in the file. So the -- was the waiver in the file when you assumed carriage of it?
>
> MR. HASSAN: This waiver?
>
> MS. MAHADEO: Yes.
>
> MR. HASSAN: I believe so.[15]

[37] With respect to the Revenue Canada "received" stamp on the letter, Mr. Hussey testified that it was CRA mailroom policy to stamp only the first page of a multi-page document. In cross-examination, Mr. Hussey was asked why, given the importance of the date of a waiver, the CRA would not stamp a waiver when it is accompanied by a letter. Mr. Hussey responded:

> MR. HUSSEY: I didn't write the policy, but my speculation would be that the people who work for me in the mail room are not tax auditors. They wouldn't know if the first page was more important than the last page, so I'm assuming that's why our policy says to stamp the first page.
>
> And again, we could have a -- we could have a document this thick.
>
> We receive 1,000 pieces of mail a day. We don't have time to go through it. So stamp the first one, move on to the next one.
>
> Again, primarily I think it's because the guys wouldn't know if -- what that waiver is.[16]

[38] With respect to the 1989 Waiver, in cross-examination, Mr. Hussey testified that if the 1989 Waiver had been mailed to Revenue Canada through Canada Post,

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[15] Lines 18 to 24 of page 113 and lines 3 to 8 of page 114 of the Transcript of the Hearing on September 11, 2023.
[16] Lines 5 to 17 of page 135 of the Transcript of the Hearing on September 11, 2023.

then it "should not" have ended up with a delivered-by-hand stamp.[17] Mr. Hussey also confirmed that the CRA's mailroom practices were consistent across Canada.

E. Judicial Notice of Facts That Are a Matter of Public Record

[39] The judgment and reasons for judgment of Bowman C.J. in CC's appeal were issued on July 12, 2006 under the citation *Makuz v. R.*[18] The style of cause names 16 appellants including CC, but does not name the estate of CC. The Court file numbers indicate that the appeals of the 16 appellants (collectively, the "Group") were filed in 1996 and 1997. The Court file number for CC's appeal indicates that it was filed in 1996, which the Minister assumes as a fact.

[40] In paragraph 4 of his reasons, Bowman C.J. describes the issue in the appeals by the Group (the "Group Appeals") as follows:

> The issue in all of the appeals is the same for all of the appellants. It is whether a loss in a partnership, in which the appellants claimed to have an interest, is deductible by the appellants in computing their income in the years 1988, 1989, 1990 and 1991. …

[41] In paragraphs 6 and 7 of his reasons, Bowman C.J. states:

> The facts are complicated and they include a multiplicity of transactions. A number of corporations and three partnerships are involved. …
>
> …
>
> In a nutshell, here is the problem. Partnership A had a fiscal period ending December 31, 1987. Partnership B had a fiscal period ending March 31, 1988. Partnership B acquired a partnership interest in Partnership A on December 31, 1987. Partnership A sustained a loss before the end of its fiscal period that ended on December 31, 1987. Therefore, Partnership B's share of that loss should enter into the computation of its income or loss for the period ending March 31, 1988. The appellants' position is that they acquired partnership interests in Partnership B before March 31, 1988. Therefore they claimed their proportionate share of the loss of Partnership B.

[17] Lines 23 to 26 of page 131 of the Transcript of the Hearing on September 11, 2023. The assumption of fact in paragraph 11 q) of the Amended Reply states that the 1989 Waiver was mailed to the Minister.
[18] *Makuz v. R.*, 2006 TCC 263 ("*Makuz*").

[42] I recognize that Bowman C.J.'s statements are hearsay if entered for their truth. However, I am referring to them solely as an indication of Bowman C.J.'s impressions regarding the Group Appeals.

[43] Bowman C.J.'s reasons comprise 76 paragraphs, and attached to the reasons as schedules A and B are a 33-paragraph agreement of certain facts and 15 slides describing the relevant transactions.

III. The Submissions of the Parties

A. The Appellant

[44] The Appellant submits that she has a right to challenge the reassessments of CC's 1988 through 1991 taxation years on which the Appellant's liability under section 160 is based: *Joanne M. Gaucher v. Her Majesty the Queen*, 2000 D.T.C. 6678 (FCA) ("*Gaucher*") at paragraphs 7 and 9.

[45] The Respondent has conceded that the Disputed CC Reassessments were issued by the Minister after the expiration of the normal reassessment period for CC's 1988 and 1989 taxation years. The issue is whether, for each of those taxation years, the condition in subparagraph 152(4)(a)(ii) was satisfied prior to the expiry of the normal reassessment period for the year.

[46] The 1988 Waiver did not have a date stamp, and there is no evidence to establish that the letter included in exhibit R-1 was ever attached to the 1988 Waiver or included in an envelope with the 1988 Waiver.

[47] The evidence of the Appellant is that the signature on the 1988 Waiver was not CC's signature, that the handwriting on the 1988 Waiver was not CC's handwriting and that the address for CC that was handwritten on the 1988 Waiver was not CC's address. The Appellant opined that CC would not sign the 1988 Waiver with the wrong address.[19]

[48] The Minister initially assessed CC's 1989 taxation year on May 30, 1990. The stamp on the 1989 Waiver states that it was delivered by hand to Revenue Canada

[19] Counsel for the Respondent objected to this statement of opinion when given by the Appellant, and I upheld the objection. I note, however, that the "opinion" is a factual inference that the Court is entitled to draw from the totality of the evidence, if the evidence supports that inference.

on May 31, 1993. This date is after the three-year normal reassessment period fixed by paragraph 152(3.1)(b) for CC's 1989 taxation year.

[49] Section 26 of the *Interpretation Act*[20] extends the time for "the doing of a thing". There is no time limit for filing a waiver and therefore no requirement to extend the time for filing a waiver. Consequently, section 26 of the *Interpretation Act* has no application to the filing of the 1989 Waiver.

[50] In this case, the only "thing" that required extension is the period in which the Minister could reassess CC's 1989 taxation year. However, the Minister did not reassess CC's 1989 taxation year until April 21, 1994, so an extension of the deadline to reassess to May 31, 1993 was of no consequence.

[51] With respect to consideration, the issue is not whether there was an enforceable contract between CC and the Appellant. The issue is whether consideration was given by the Appellant to CC for the Property. The evidence is that there was a *quid pro quo*—CC transferred the Property to the Appellant in exchange for the Appellant agreeing to marry CC and to care for CC.

[52] Finally, the parties agree that on September 19, 2003, the Appellant, as executrix of CC's estate, paid $382,377 on account of CC's tax liability for his 1988 taxation year.[21] The Appellant submits that there is no evidence that this payment reduced the balance owing for CC's 1988 taxation year. The Appellant asks the Court to direct that the payment be applied to reduce CC's balance owing for his 1988 taxation year.

B. The Respondent

[53] The Respondent submits that the Appellant did not provide any consideration to CC in exchange for the transfer of the Property to her. The Appellant confirmed that she did not provide to CC, at the time of the transfer of the Property, money paid or to be paid, mortgages assumed or given back to CC, property transferred in exchange for the Property, or other valuable consideration subject to land transfer tax.

[54] The Appellant's evidence was that she did not enter into a written agreement with CC regarding care services. The Appellant had no training as a nurse or

[20] R.S.C. 1985, c. l-21.
[21] Paragraphs 111 and 112 of the Respondent's Written Representations.

professional support worker. The Appellant did not agree to care for CC for a specified amount of time and did not identify the value of the services that she provided. The Appellant's testimony regarding care services was given based on hindsight rather than an agreement at the time of the transfer. The Appellant acknowledged that caring for CC was much more onerous than she had anticipated.

[55] The case law does not support the conclusion that domestic services constitute consideration for the purposes of subsection 160(1): *Macleod v. R.*, 2012 TCC 379 at paragraphs 33 to 37 and *Raphael v. R.*, [2000] 4 C.T.C. 2620.

[56] The case law holds that the onus falls on the Appellant to prove that the transfer of the Property was made pursuant to a genuine contractual arrangement: *Konyi v. R.*, 2017 TCC 175 ("*Konyi*") at paragraph 19. This requires the Appellant to establish all the essential terms of a contract, including specificity as to the consideration to be paid and the terms of payment: *Konyi* at paragraph 20 and *Madsen v. R.*, 2005 TCC 110 at paragraph 28. The relevant time for determining the consideration is at the time that the Property is transferred: *Hardtke v. R.*, 2015 TCC 135 at paragraph 33, affirmed 2016 FCA 138.

[57] The principle in *Gaucher* does not apply to the Appellant. *Gaucher* contemplates a circumstance in which the taxpayer has no ability or right to challenge the validity of the underlying assessment. The Appellant was the executrix of CC's estate and therefore was a party to the litigation respecting the underlying reassessments and had the right to challenge the underlying reassessments.

[58] The Appellant is precluded from challenging the Disputed CC Reassessments by the doctrines of *res judicata* and abuse of process. The doctrine of *res judicata* has two commonly recognized branches: cause of action estoppel and issue estoppel.

[59] In this case, the correctness of the Disputed CC Reassessments are has been decided. The parties to this appeal and to CC's appeal are the same or are in privity with one another. That is, either the Appellant was a party to CC's appeal by virtue of being the executrix of CC's estate, or the Appellant was in privity with CC's estate by virtue of that role. With respect to privity, counsel for the Respondent cites *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853, *Ethel Annabelle Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at paragraph 60 and *Stallan v. Palleson*, 2015 BCSC 1463 ("*Stallan*") at paragraph 30.

[60] In the alternative, the doctrine of abuse of process applies to preclude the Appellant's challenge of the Disputed CC Reassessments. Given the Appellant's level of participation in the litigation of CC's appeal, including being the person legally controlling the proceedings on behalf of CC's estate, participating in discoveries as the estate's nominee in examination for discoveries, making litigation decisions, and receiving updates from the lead appellant, the principles of finality, consistency, and administration of justice support a conclusion that it is an abuse of process for the Appellant to challenge the Disputed CC Reassessments on the basis that they are statute-barred, when she failed to do so in the course of CC's appeal.

[61] In the further alternative, the Disputed CC Reassessments are valid because CC filed waivers in respect of the normal reassessment periods for his 1988 and 1989 taxation years.

[62] The Appellant did not allege in her notice of appeal or at discovery that she disputed the authenticity of the signature in the 1988 Waiver; therefore, she is precluded from doing so at the hearing of this appeal. The Appellant failed to call the author of the letter in the CRA's physical file, and the evidence of the Appellant alone is not sufficient to find that CC did not sign the 1988 Waiver.

[63] The evidence establishes that the 1988 Waiver was filed on September 14, 1992 and that the 1989 Waiver was filed on May 31, 1993. Because May 30, 1993 was a Sunday, the deadline for filing the 1989 Waiver was extended to May 31, 1993 by section 26 of the *Interpretation Act*.

[64] Under paragraph 160(1)(e), the Assessment properly included interest accrued on the liability of CC under the ITA to August 14, 2012: *1455257 Ontario Inc. v. R.*, 2021 FCA 142 at paragraphs 44 to 50.

[65] There is no dispute that a payment on account of CC's tax liability of $382,377 was made on or about September 19, 2003. Pursuant to section 224.1, this payment was applied by the Minister to reduce CC's liability under the ITA for his 1988 taxation year.

[66] However, subsection 160(3) does not apply to reduce the Appellant's liability for two reasons. First, the Appellant was not liable under section 160 at the time of the payment because she had not been assessed under section 160 at that time. Second, the payment was not on account of the Appellant's liability under section 160.

IV. Analysis

A. Overview of Subsection 160(1)

[67] The version of subsection 160(1) in force at the time of the Assessment stated:

> (1) **Tax liability re property transferred not at arm's length** — 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:
>
> (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 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 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 (including, for greater certainty, an amount that the transferor is liable to pay under this section, regardless of whether the Minister has made an assessment under subsection (2) for that amount) in or in respect of the taxation year in which the property was transferred or any preceding taxation year,
>
> but nothing in this subsection limits the liability of the transferor under any other provision of this Act or of the transferee for the interest that the

> transferee is liable to pay under this Act on an assessment in respect of the amount that the transferee is liable to pay because of this subsection.[22]

[68] In *Eyeball Networks Inc. v. R.*,[23] Noël C.J. summarizes the application and the purpose of subsection 160(1) as follows:

> Subsection 160(1) provides that when a person transfers property to a non-arm's length person, the transferee and transferor are jointly and severally liable to pay any amount that the transferor was liable to pay under the Act for the taxation year in which the transfer occurred and any preceding years. Under paragraph 160(1)(*e*), the transferee's liability is limited to the excess of the fair market value of the property transferred over the fair market value of the consideration given for the property. ...
>
> ...
>
> As affirmed by this Court, the purpose of subsection 160(1) is to protect the tax authorities against any vulnerability that may result from a transfer of property between non-arm's length persons for a consideration that is less than the fair market value of the transferred property. ...[24]

[69] I would add to this that it is also important to consider the comments of Rothstein J. in *Canada v. McLarty*, 2008 SCC 26 at paragraph 75:

> The Minister has numerous basis for challenging the deductions taken by a taxpayer. He may rely on sham or the general anti-avoidance rule to name just two. He did not do so in this case. In reassessment cases, **the role of the court is solely to adjudicate disputes between the Minister and the taxpayer. <u>It is not a protector of government revenue</u>**. **The court must decide <u>only</u> whether the Minister, on the basis on which he chooses to assess, is right or wrong**.
>
> [Emphasis and double emphasis added.]

[70] Accordingly, whether or not the Minister is otherwise able to collect the tax that the Minister says is owed by CC is not the issue. The issue is whether the assessment against the Appellant under subsection 160(1) is right or wrong.

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[22] Amendments to paragraphs 160(1)(d) and (e) that came into force on June 26, 2013 are not relevant to this appeal. The amendments to paragraph 160(1)(d) replaced "severally" with "severally, or solidarily," and replaced "therefor" with "for it". The amendment to paragraph 160(1)(e) replaced "severally" with "severally, or solidarily,".
[23] 2021 FCA 17 ("*Eyeball Networks*").
[24] *Eyeball Networks* at paragraphs 2 and 44. Noël C.J. cites paragraph 60 of *Canada v. 9101-2310 Québec Inc*., 2013 FCA 241.

[71] Subsection 160(1) can be divided into two parts. The first part, which comprises the text before the mid-amble (i.e., before the words "the following rules apply"), identifies the conditions that must be satisfied for the subsection to apply. The second part, which comprises the text after the mid-amble, describes the rules that apply when the conditions in the first part are satisfied.

[72] On January 8, 1993, CC transferred the Property to the Appellant (the "Transfer"), who at the time of the Transfer was the spouse of CC. The Appellant accepts that the conditions stated in the first part of subsection 160(1) have been met.

[73] The Appellant raises two defences relevant to the application of the second part of subsection 160(1) to the Appellant.

[74] The first defence is that the Appellant paid consideration for the transfer of the Property in the form of an agreement to marry CC and an agreement to care for CC. The Appellant says that these agreements were a *quid pro quo* for the transfer of the Property.

[75] The second defence is that the Disputed CC Reassessments were statute-barred, and that CC had no liability under those reassessments for the purposes of determining the amount specified in subparagraph 160(1)(e)(ii) in respect of CC.

B. The Consideration Given by the Appellant for the Property

[76] The value of consideration for a transfer of property is determined at the time of the transfer. At paragraph 52 of *Eyeball Networks*, Noël C.J. states:

> ... a transfer of property takes place instantaneously both at civil and common law. The precise and clearly identifiable time when a transfer takes place under both legal systems is the notion that Parliament seized on in providing both that the value of the property is determined "at the time it was transferred" **and the value of the consideration given is determined "at that time"**. …
>
> [Emphasis added.]

[77] The Appellant acknowledges that she did not have an agreement in writing with CC that addressed consideration for the transfer of the Property. In Ontario, subsection 1(1) of the *Statute of Frauds*[25] states:

> **1** (1) Every estate or interest of freehold and every uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments shall be made or created by a writing signed by the parties making or creating the same, or their agents thereunto lawfully authorized in writing, and, if not so made or created, has the force and effect of an estate at will only, and shall not be deemed or taken to have any other or greater force or effect.

[78] The only pieces of evidence in writing relating to the transfer of the Property from CC to the Appellant are the Deed and the Affidavit, copies of which are at tab 3 of the Joint Book.

[79] The Deed does not address the consideration for the transfer of the Property.

[80] The Appellant testified that she signed the Affidavit. The Affidavit states that the Appellant paid nil consideration for the Property, and that the Transfer was for natural love and affection from husband to wife. The Appellant did not dispute the accuracy of the information stated in the Affidavit.

[81] On the basis of the documentary evidence and the testimony of the Appellant in cross-examination regarding the Affidavit, I find that the Appellant gave no consideration for the Property. However, to be complete, I will address the specific consideration identified by the Appellant.

[82] With respect to the agreement to marry, the Transfer occurred after the Appellant and CC were married. There is no evidence of a legally binding agreement between CC and the Appellant identifying marriage as consideration given by the Appellant for the Property, and there is no evidence of the fair market value of such a promise. A promise to marry that had already been fulfilled by the Appellant at the time of the Transfer cannot be consideration given by the Appellant for the Property at the time of the Transfer.

[83] With respect to the agreement to care for CC, the Appellant's testimony indicates that it was only with hindsight that the Appellant ascertained the level of work involved in caring for CC. The Appellant continued to work outside the home after marrying CC and had no special training qualifying her to care for CC in a

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[25] R.S.O. 1990, c. S.19. See, also, section 3 of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34.

manner beyond the level of care that might be expected of any spouse. Further, there is no evidence of a legally binding agreement identifying future care of CC as consideration for the Property, and there is no evidence regarding the value of such future care.

[84] I therefore conclude that the two promises identified by the Appellant were not consideration given by the Appellant for the Property at the time of the Transfer.

C. The Disputed CC Reassessments

(1) The Application of the *Gaucher* Principle

[85] In *Gaucher*, the Minister assessed the appellant under section 160. Rothstein J.A. (as he then was) described the background as follows:

> The appellant's former husband was assessed for approximately $350,000 of tax. The assessment was confirmed by the Tax Court of Canada. Shortly before the Tax Court confirmed the assessment, the appellant's former husband transferred a residence to her. A few months later, the former husband declared bankruptcy.[26]

[86] The spouse challenged the assessment of her former husband on the ground that it was issued after the expiry of the normal reassessment period. The Tax Court judge denied the appellant's appeal. Rothstein J.A. overturned that decision, stating:

> I am of the respectful view that the Tax Court Judge was in error in coming to this conclusion. **It is a basic rule of natural justice that**, barring a statutory provision to the contrary, a person who is not a party to litigation cannot be bound by a judgment between other parties. The appellant was not a party to the reassessment proceedings between the Minister and her former husband. **Those proceedings did not purport to impose any liability on her**. **While she may have been a witness in those proceedings, she was not a party**, and hence could not in those proceedings raise defences to her former husband's assessment.
>
> When the Minister issues a derivative assessment under subsection 160(1), a special statutory provision is invoked entitling the Minister to seek payment from a second person for the tax assessed against the primary tax payer. **That second person must have a full right of defence to challenge**

[26] *Gaucher* at paragraph 2.

> **the assessment made against her**, including an attack on the primary assessment **on which the second person's assessment is based**.[27]
>
> [Emphasis and double emphasis added.]

[87] More recently, in *Canada v. 594710 British Columbia Ltd.*, 2018 FCA 166 ("*594710*"), the Federal Court of Appeal confirmed the principle stated in *Gaucher* as follows:

> Holdco appealed the section 160 assessment to the Tax Court on several grounds, one of which was to deny that Partnerco had a tax liability. In an appeal of a section 160 assessment, **Holdco is entitled to challenge the assessment issued to Partnerco on any grounds that would have been open to Partnerco if it had appealed directly** (*Gaucher v. R.*, 2000 D.T.C. 6678, [2001] 1 C.T.C. 125 (Fed. C.A.)).[28]
>
> [Emphasis added.]

[88] The Respondent submits that the approach taken in *Gaucher* rests on the fact that the Appellant in that case was not a party to the underlying proceedings. The Respondent submits that the Appellant here was a party to CC's appeal in her capacity of executrix of CC's estate.

[89] I do not agree with the Respondent's characterization of the Appellant's role in CC's appeal. The Appellant was not a party to CC's appeal and the estate of CC is not listed in the style of cause of Bowman C.J.'s judgment and reasons.

[90] Even if the estate of CC was a *de facto* party to CC's appeal by virtue of CC's death, the Appellant's role *vis-à-vis* CC's appeal was in her capacity as the personal representative of CC's estate.[29] To the extent that the Appellant had an interest in CC's appeal, it was in that representative capacity. Adopting Rothstein J.A.'s observation in paragraph 6 of *Gaucher*, CC's appeal did not purport to impose liability on the Appellant even after she became the executrix of CC's estate.

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[27] *Gaucher* at paragraphs 6 and 7.
[28] 594710 at paragraph 5.
[29] D.W.M. Waters, M.R. Gillen & L.D. Smith, *Waters' Law of Trusts in Canada*, 5th ed. (Thomson Reuters Canada, 2021) ("Waters") at pages 48 to 50.

[91] As executrix of CC's estate, the Appellant owed a duty to the creditors and beneficiaries of CC's estate. Waters summarizes the task of the personal representative of a deceased individual:

> The task of the personal representative of the deceased is to gather in the assets of the deceased, to discharge funeral and testamentary expenses and debts, and to distribute the remaining assets among the persons entitled.[30]

[92] The Appellant testified that she did her best to fulfil her duty as executrix. I have no reason to question that statement.

[93] CC's appeal was one of 16 appeals by the Group that were heard by Bowman C.J. at the same time on common evidence. The Group was represented by a lawyer, although it appears that the original lawyer was replaced prior to the hearing of the Group Appeals.[31]

[94] Bowman C.J. stated in paragraph 6 of his reasons in *Makuz* that the "facts are complicated and they include a multiplicity of transactions." Bowman C.J. clearly did not view the subject matter of the Group Appeals as simple and straightforward.

[95] The Appellant testified that she and CC attended one meeting at which the lawyer for the Group was present but they did not understand the nature of CC's appeal or the need for a lawyer. On the basis of the Appellant's testimony as a whole and Bowman C.J.'s description of the subject matter of the Group Appeals, I find this to be quite plausible, if not highly likely.

[96] The Appellant testified that, following CC's death, she gave cheques to another appellant in the Group, but she did not understand the nature of the appeal. I can identify no reason why the Appellant's understanding of CC's appeal would improve because she was named executrix of CC's estate. The Group was still represented by a lawyer, who it is reasonable to assume was directing the strategy employed in the Group Appeals.

[97] The fact that the Appellant was subject to written discovery in CC's appeal is of no consequence. Presumably, this occurred because CC had passed away. There is no reason to believe that the Appellant had any material knowledge of the facts of CC's appeal given that CC's participation in the tax shelter commenced prior to

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[30] Waters at page 48, paragraph II. A. 1.

[31] The lawyer identified in the letter included in exhibit R-1 is different from the lawyer named in paragraph 3 of *Makuz*.

March 31, 1988 and the Appellant and CC were not married until October 1992. In any event, being subject to discovery as the personal representative of CC's estate does not make the Appellant a party to CC's appeal.

[98] Waivers were filed with Revenue Canada for CC's 1988 and 1989 taxation years. The letter submitted by the Respondent with the 1988 Waiver[32] states that signatures on the waiver for CC and one other individual were obtained at the request of a lawyer named in the letter so that discussions could continue regarding the subject matter of the Group Appeals. Consequently, the Group's lawyer must have been aware of the statute-barred issue for CC's 1988 taxation year.

[99] Although there is no similar evidence in respect of the 1989 Waiver, the Appellant's evidence regarding CC's and the Appellant's minimal involvement in the Group Appeals suggests that any actions regarding a waiver for 1989 were instigated by the lawyer for the Group and that it is unlikely that either CC or the Appellant understood the nature of the issue.

[100] The case law indicates that any statute-barred issue had to be raised in CC's notice of appeal; otherwise, the Respondent was not required to prove the existence of a valid waiver.[33] According to the court file numbers of the Group Appeals, the notices of appeal for the members of the Group were filed in 1996 and 1997. The Minister assumes as a fact that CC's appeal was filed in 1996, which was approximately six years prior to his death on March 9, 2002.[34]

[101] The Respondent's proposition that the Appellant became responsible for raising a statute-barred issue following CC's death solely because she was the executrix of CC's estate is simply not tenable. Indeed, it is entirely unclear to me how the Appellant could be expected to identify the statute-barred issue for CC's 1988 and 1989 taxation years given that the issue arose from the expiry of the normal reassessment periods for CC's 1988 and 1989 taxation years in 1992 and 1993 and given that CC's appeal was filed some six years prior to his death.

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[32] Exhibit R-1.

[33] *Naguib v. R.*, 2004 FCA 40, *R. v. Last*, 2014 FCA 129 at paragraph 54 and *Dicosmo v. R.*, 2017 FCA 60 at paragraph 7. These cases stand for the principle that the Minister must be made aware of a statute-barred issue in the notice of appeal.

[34] Paragraph 11 j) of the Amended Reply.

(2) *Res Judicata* and Abuse of Process

[102] The Respondent further submits that the doctrines of *res judicata* and abuse of process preclude the Appellant from raising the argument that the Disputed CC Reassessments were statute-barred. With respect to *res judicata*, the Respondent relies on issue estoppel, which is an aspect of the doctrine of *res judicata*. The abuse of process and *res judicata* doctrines share the same concerns and underlying principles. However, the abuse of process doctrine is more flexible.[35]

[103] Rothstein J.A.'s statement in *Gaucher*, which indicates that the Appellant's right to challenge the Disputed CC Reassessments is "a basic rule of natural justice", suggests that this line of attack by the Respondent is misguided. Nevertheless, I will address the Respondent's position.

[104] The Respondent submits that the three requirements for a finding of issue estoppel and abuse of process have been satisfied.

[105] The first requirement identified by the Respondent is that the issue must be the same as the one decided in the prior decision. In *CIBC*, Hogan J. observes:

> Typically, when a party pleads issue estoppel, the first requirement is the most difficult to satisfy. To satisfy the first requirement, it is not sufficient that the question was incidental in the previous proceeding. As *Angle* instructs us, "[t]he question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at in the earlier proceedings."[36]
>
> [Footnotes omitted. Emphasis added in the original.]

[106] The issue raised by the Appellant in this appeal is that the Disputed CC Reassessments were statute-barred and that therefore, the amounts of the Disputed CC Reassessments do not contribute to the amount determined under subparagraph 160(1)(e)(ii). The issue decided in *Makuz* was that the reassessments appealed by the Group were correct. These issues are not the same.

[107] Whether a reassessment is statute-barred and whether a reassessment is correct are two separate issues. The former issue must be decided in favour of the

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[35] The doctrines of *res judicata* and abuse of process are clearly, succinctly, and accurately described by Hogan J. in *Canadian Imperial Bank of Commerce v. R.*, 2022 TCC 26 ("*CIBC*") at paragraphs 9 to 32, affirmed 2023 FCA 195.
[36] *CIBC* at paragraph 23.

Minister before the latter issue comes into play. This is because a reassessment that is statute-barred is null and void[37] and therefore the determination of whether such a reassessment is correct does not arise.

[108] The difference between the two issues is highlighted by the two distinct burdens of proof. A statute-barred issue in respect of which the Minister asserts that a reassessment is not null and void places a burden of proof on the Minister[38] while a correctness issue places a burden of proof on the taxpayer. The Minister must meet her burden of proof; otherwise, there is no reassessment giving rise to the correctness issue.

[109] In this appeal, the Minister's burden of proof focuses on whether the Minister could issue valid reassessments for CC's 1988 and 1989 taxation years after the expiration of the normal reassessment periods for those years on the basis that CC had filed valid waivers for those years. I will return to the validity of the Waivers below.

[110] The third requirement identified by the Respondent is that the parties to both proceedings must be the same or their privies. In *Stallan*, the Supreme Court of British Columbia stated the following, at paragraph 30 of that decision:

> For the purposes of the doctrine of *res judicata*, another person is a "privy" of a party to the lawsuit when there is a sufficient degree of common interest and identification between them which makes it just that the outcome should be binding over both parties. …

[111] For the reasons already stated, the parties in this appeal are not the same as the parties in CC's appeal. Moreover, the Appellant was not a privy of CC in respect of CC's income tax appeal because the Appellant had no personal interest in the subject matter of CC's income tax appeal even though she was the executrix of CC's estate and a beneficiary of CC's estate.[39]

[112] An income tax appeal relates to a particular taxpayer and to the liability of that taxpayer under the ITA for one or more taxation years. The subject matter of

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[37] *R. v. 984274 Alberta Inc*., 2020 FCA 125 at paragraph 55.

[38] Counsel for the Respondent conceded in her written argument that the burden of proof regarding the statute-barred issue in this appeal falls on the Minister. I note that if the Minister takes the position that she is precluded from reassessing a taxation year, the burden of proof would fall on the taxpayer to establish the existence of a valid and timely waiver: *Mitchell v. Canada*, 2002 FCA 407 ("*Mitchell*") and *Reyes v. R.*, 2023 TCC 31.

[39] See, generally, Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis Canada, 2022) at paragraphs 19.136 to 19.145, particularly paragraph 19.137.

CC's income tax appeal cannot be equated with the subject matter of, for example, a lawsuit by CC regarding the ownership of a property. It is only in the case of a lawsuit over property that the Appellant, as heir of CC, might be said to have an interest in the subject matter of the lawsuit.

[113] The fact that a favourable result in CC's income tax appeal would have left more assets available to the Appellant in her capacity as heir of CC is an indirect consequence of the outcome of CC's income tax appeal. This indirect consequence does not establish that the Appellant had a sufficient degree of common interest in the subject matter of CC's income tax appeal to constitute her a privy of CC in respect of that appeal.

[114] I conclude, therefore, that the first and third requirements identified by the Respondent have not been satisfied.

[115] This finding is not unfair to the Respondent. The Respondent has been fully notified of the statute-barred issue in this appeal and has presented evidence to address that issue. The Minister is not prejudiced by the assertion by the Appellant that the Disputed CC Reassessments are statute-barred, but the Appellant would be prejudiced if she could not raise that issue in this appeal.

[116] I recognize that the effluxion of time may have impacted the ability of the Minister to meet her burden of proof regarding the Waivers. However, this results from the fact that the Minister assessed the Appellant under section 160 nearly 20 years after the Transfer and the expiration of the applicable normal reassessment periods, and not from any action or inaction by the Appellant.

[117] On the basis of the foregoing, the principles of *res judicata* and abuse of process do not apply to preclude the Appellant from raising the statute-barred issue in respect of the Disputed CC Reassessments.

(3) The Validity of the Waivers

(a) The 1988 Waiver

[118] The Appellant submits that the 1988 Waiver was not signed by CC. The Respondent takes exception to the Appellant's evidence that the signature on the 1988 Waiver may not be that of CC.

[119] The signature on the 1988 Waiver no doubt has a certain firmness that is not present in the signatures on the Deed and the 1989 Waiver. However, I am unable to conclude that the signature on the 1988 Waiver is not that of CC. The letters in all three signatures and the appearance and flow of those letters are sufficiently similar to preclude such a finding. Consequently, even if I permitted the Appellant's evidence on the signature, I would find that CC signed the 1988 Waiver.

[120] I accept the Appellant's testimony that CC could not write in the English language and recognize that it is odd indeed that the 1988 Waiver has a handwritten address for CC that is wrong. However, this anomaly does not in and of itself invalidate the 1988 Waiver.

[121] This leaves the question of when the 1988 Waiver was filed with the Minister. The text of the letter included in exhibit R-1 does not address the filing of the 1988 Waiver. The main paragraph of the letter states:

> At the request of John Campbell of Miller Thomson, **I have arranged for the waivers for the above named clients <u>to be signed</u>** so that the discussion with Mr. Campbell and yourself regarding the matter of Claridge Holdings # 1 can continue. **I trust this is what you require**.
>
> [Emphasis and double emphasis added.]

[122] The text of the letter states only that the author has arranged for waivers to be signed but does not say anything about waivers being enclosed with the letter. As a result, the statement "I trust this is what you require" is at best ambiguous regarding whether the 1988 Waiver accompanied the letter.

[123] Mr. Hassan testified that in 2019, he found the letter and the 1988 Waiver in CC's physical file. Mr. Hassan acknowledged that there was no indication that the letter and the 1988 Waiver had been stapled together. Also, the letter itself shows no indication of an enclosure (i.e., there is no "Encl." or "Enc." under the signature line, only the initials ":ag").

[124] Mr. Hussey testified that the practice of the CRA mailroom is to stamp the first page of a multi-page document. However, in the absence of evidence that the 1988 Waiver was attached to or enclosed with the letter, there is no factual basis on which to conclude that the letter and the 1988 Waiver were a multi-page document.

[125] Mr. Hassan's testimony that in 2019, the letter and the 1988 Waiver were in the same physical file is not evidence that the letter and the 1988 Waiver were a

single multi-page document, nor is it evidence that the letter and the 1988 Waiver were received at the same time. Documents in a physical file may be placed in that file at any time.

[126] The inference that counsel for the Respondent is asking me to draw from Mr. Hassan's and Mr. Hussey's evidence is circular. The inference is that because the letter and the 1988 Waiver were in the same physical file in 2019 and because only the letter was stamped, the 1988 Waiver must have been attached to or enclosed with the letter. This inference in turn would explain why only the letter was stamped by the mailroom personnel. I decline to draw this inference because there is insufficient evidence to support the inference and, therefore, the inference is mere speculation.

[127] The absence of a "received" stamp on the 1988 Waiver is particularly troubling given that the waiver form has a box labelled "For Departmental Use Only" and that, on the basis of the 1989 Waiver, Revenue Canada mailroom employees were aware of this box and were aware that the "received" stamp should be placed in that box.

[128] Mr. Hussey speculated that the reason for the mailroom policy of stamping the first page of a multi-page document was that the mailroom employees are not auditors and are not qualified to identify a waiver. However, the 1988 Waiver form states in large bold caps:

WAIVER IN RESPECT OF THE
NORMAL REASSESSMENT PERIOD

[129] A waiver impacts a very material right of a taxpayer to the benefit of the Minister.[40] The waiver form is clearly identified as a waiver of the normal reassessment period and includes a box for a "received" stamp. If the Minister has chosen to rely on a mailroom policy that reduces the evidential value of a waiver form received by the Minister, the consequences of that decision fall on the Minister rather than the Appellant.

[130] On the basis of the foregoing, I find that there is insufficient evidence to determine the date on which the 1988 Waiver was received by the Minister.

[40] See, generally, A. Christina Tari, "Waivering", in Report of Proceedings of the Fifty-Fourth Tax Conference, 2002 Conference Report (Toronto: Canadian Tax Foundation, 2003) 13:1-11.

Consequently, with respect to the 1988 Waiver, the Minister has failed to meet her burden of proof under subparagraph 152(4)(a)(ii) on a balance of probabilities.

[131] Consequently, I find that the 1988 Transferor Reassessment was statute-barred and that the amount of that reassessment is not included in the amount determined under paragraph 160(1)(e).

(b) The 1989 Waiver

[132] There is no dispute that the 1989 Waiver was received by the Minister on the date specified by the Revenue Canada mailroom stamp on that waiver. The Appellant submits that the Revenue Canada stamp on the 1989 Waiver indicates that that waiver was filed on May 31, 1993, which is the day after the normal reassessment period for CC's 1989 taxation year expired.

[133] Mr. Hussey testified that if the 1989 Waiver had been mailed to Revenue Canada, it "should not" have had a stamp saying that it was hand-delivered.[41]

[134] On the basis of the stamp on the 1989 Waiver and Mr. Hussey's testimony, I find that the 1989 Waiver was delivered by hand to Revenue Canada and was received by Revenue Canada on May 31, 1993, which is not within the normal reassessment period for CC's 1989 taxation year.

[135] The Respondent submits that the rule in section 26 of the *Interpretation Act* extended the deadline for filing the 1989 Waiver from May 30, 1993 to May 31, 1993. Consequently, the 1989 Waiver permits the Minister to reassess CC's 1989 taxation year beyond the normal reassessment period for that year.

[136] Subparagraph 152(4)(a)(ii) allows the Minister to reassess a taxation year beyond the normal reassessment period if the taxpayer has filed a waiver. Subparagraph 152(4)(a)(ii) states:

> 152 (4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional

[41] I note that this evidence contradicts the assumption of fact in paragraph 11 q) of the Amended Reply.

> assessment may be made after the taxpayer's normal reassessment period in respect of the year **only if**
>
> (a) the taxpayer or person filing the return
>
> ...
>
> (ii) **has filed with the Minister** a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;
>
> [Emphasis added.]

[137] The question raised by the Respondent's position is whether section 26 of the *Interpretation Act* has the effect of deeming the 1989 Waiver to have been filed within the normal reassessment period for CC's 1989 taxation year when the waiver was actually filed after the expiration of that normal reassessment period.

[138] Section 26 of the *Interpretation Act* states:

> Where the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday.[42]

[139] Section 26 of the *Interpretation Act* is one of several rules in that statute to be applied when interpreting an Act of Parliament (including the *Interpretation Act*).[43] Section 12 of the *Interpretation Act* states:

> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation **as best ensures the attainment of its objects**.
>
> [Emphasis added.]

[140] In *Lubana v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1348, Prothonotary Lafrenière described the purpose of section 26 of the *Interpretation Act* as follows, at paragraph 6 of that decision:

> … The purpose of section 26 of the *Interpretation Act* is to relieve a party from being in default under the Rules when unable to take a step or to do a thing on the last day of fixed period which falls on a holiday and to deem

[42] Sunday is a holiday under the definition of "holiday" in subsection 35(1) of the *Interpretation Act*.
[43] Definition of "Act" in subsection 2(1) and subsections 3(1) and (2) of the *Interpretation Act*.

> such step taken or such thing done on the next practicable date to be performed timeously. …

[141] Counsel for the Appellant submits that there is no time limit for the filing of a waiver and that therefore, section 26 of the *Interpretation Act* does not apply to the filing of the 1989 Waiver. Counsel notes that the limitation period fixed by the normal reassessment period relates to the doing of a thing by the Minister (i.e., making a reassessment), not to the doing of a thing by the taxpayer.

[142] Neither counsel cited a case that addresses the application of section 26 of the *Interpretation Act* to the filing of a waiver and I have been unable to find such a case. Consequently, the impact of section 26 of the *Interpretation Act* on the application of subparagraph 152(4)(a)(ii) raises a novel question of statutory interpretation.

[143] In paragraph 25 of *R. v. Breault*, 2023 SCC 9, the Supreme Court of Canada summarizes the proper approach to statutory interpretation as follows:

> Every statutory interpretation exercise involves reading the words of a provision "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; see also *R. v. J.D.*, 2022 SCC 15, at para. 21).

[144] In paragraphs 41 and 61 of *Canada v. Loblaw Financial Holdings Inc.*, 2021 SCC 51, the Supreme Court of Canada elaborates on this approach in the income tax context:

> This narrow question of statutory interpretation requires us to draw upon the well-established framework that "statutory interpretation entails discerning legislative intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute's scheme and objects" (*Michel v. Graydon*, 2020 SCC 24, at para. 21). Where the rubber hits the road is in determining the relative weight to be afforded to the text, context and purpose. Where the words of a statute are "precise and unequivocal", their ordinary meaning will play a dominant role (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). In the taxation context, a "unified textual, contextual and purposive" approach continues to apply (*Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 22, quoting *Canada Trustco*, at para. 47). In applying this unified approach,

> however, the particularity and detail of many tax provisions along with the *Duke of Westminster* principle (that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable) lead us to focus carefully on the text and context in assessing the broader purpose of the scheme (*Placer Dome*, at para. 21; *Canada Trustco*, at para. 11). ...
>
> ...
>
> I again reiterate that if taxpayers are to act with any degree of certainty, then full effect should be given to Parliament's precise and unequivocal words. …

[145] Subparagraph 152(4)(a)(ii) extends the normal reassessment period for CC's 1989 taxation year "only if [CC] has filed with the Minister a waiver in prescribed form within the normal reassessment period for [CC] in respect of" CC's 1989 taxation year. The words "only if" emphasize that the words that follow stipulate a mandatory condition or requirement.

[146] When one reads the words of subparagraph 152(4)(a)(ii) in their entire context and in their grammatical and ordinary sense, the subparagraph identifies an event that must have occurred for a waiver to be effective: the taxpayer "has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year".

[147] Subparagraph 152(4)(a)(ii) does not state a time limit for a taxpayer to file a waiver. Rather, subparagraph 152(4)(a)(ii) states that for the Minister to reassess a taxation year of a taxpayer after the normal reassessment period, the taxpayer must have filed a waiver prior to the expiry of that normal reassessment period. A taxpayer has three or four years[44] after an initial assessment or notification that no tax is payable to file a waiver that satisfies the condition in subparagraph 152(4)(a)(ii).

[148] In *Mitchell*, the Federal Court of Canada – Appeal Division observed:

> … A waiver is a privilege which a taxpayer has, and, if sent, Revenue Canada cannot ignore it.[45]

[149] A taxpayer that chooses not to file a waiver does not lose a right, such as the right to object to or appeal from an assessment. Rather, the taxpayer chooses not to

[44] See subsection 152(3.1).
[45] *Mitchell* at paragraph 40.

give the Minister a right under subparagraph 152(4)(2)(a)(ii) to reassess the taxpayer beyond the normal reassessment period.

[150] The filing of a waiver might in theory benefit a taxpayer that wishes the Minister to reassess what would otherwise be a statute-barred taxation year of the taxpayer.[46]

[151] However, the filing of a waiver by a taxpayer does not compel the Minister to reassess the taxation year of the taxpayer to which the waiver applies. In *Imperial Oil Limited and Inco Limited v. R.*, 2003 TCC 46,[47] Bowman A.C.J. (as he then was) stated at paragraph 38:

> Counsel for the respondent argues that there is no way a taxpayer can protect itself from errors in its own returns other than, perhaps, relying upon the Minister's leniency in accepting amended returns and assessing so as to permit the taxpayer to object if the Minister refuses to give effect to the amended return. **There is no mechanism whereby the Minister can be compelled to accept an amended return or to act upon it if he chooses not to**. I do not share counsel's faith in the Minister's magnanimity in voluntarily accommodating a taxpayer's requests to amend its returns. **A taxpayer's legal right to compel reassessments lies in the objection and appeal process**.
>
> [Emphasis added.]

[152] Consequently, by filing a waiver, the taxpayer does not preserve a right of the taxpayer that would cease to exist but for the filing of the waiver. The taxpayer preserves indefinitely[48] the right of the Minister to reassess the taxation year of the taxpayer covered by the waiver.

[153] The application of section 26 of the *Interpretation Act* to the filing of the 1989 Waiver would not relieve CC of a default under the ITA. Rather, the only effect would be to relieve the Minister of compliance with a statutory limitation period.

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[46] See, for example, *R. v. Canadian Marconi Company*, [1992] 1 F.C. 655 (FCC – AD).

[47] Affirmed 2003 FCA 289. See, also, *Armstrong v. Canada*, 2006 FCA 119 at paragraph 8 and *St. Benedict Catholic Secondary School Trust v. R.*, 2022 FCA 125 at paragraph 32.

[48] Subject to revocation of the waiver by the taxpayer, which takes effect six months after the notice of revocation in prescribed form is filed: subsection 152(4.1).

[154] In *Markevich v. Canada*, 2003 SCC 9, the Supreme Court of Canada identified the important purpose of limitation periods as follows, at paragraph 17 of that decision:

> … Limitation periods, on the other hand, are meant to promote certainty, avoid stale evidence, encourage diligence, and bring repose: see *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at p. 29, *per* La Forest J. …

[155] The Respondent is relying on a rule the purpose of which is to relieve a person faced with a deadline to do something–such as object to or appeal from an assessment–from breaching that deadline because the deadline falls on a holiday.

[156] A taxpayer filing a waiver is not facing a deadline that would preclude the taxpayer from doing anything. A waiver is valid "only if" it is filed within the normal reassessment period. The deadline relates solely to the validity of the waiver itself, not to the doing of something by the person filing the waiver.

[157] In my view, it would be inconsistent with the text, context and purpose of section 26 of the *Interpretation Act* and of subparagraph 152(4)(a)(ii) to apply section 26 to deem a waiver to have been filed within the normal reassessment period when the benefit of the rule accrues solely to the Minister–a person who has done nothing–and the taxpayer is deprived of an important right under the ITA.

[158] On the basis of the foregoing, I find nothing in the text, context, and purpose of subparagraph 152(4)(a)(ii) or section 26 of the *Interpretation Act* that would justify the application of the latter provision to extend indefinitely the normal reassessment period of the 1989 taxation year of CC.

[159] Consequently, I find that the 1989 Transferor Reassessment was statute-barred and that the amount of that reassessment is not included in the amount determined under subparagraph 160(1)(e)(ii).

D. The Payment of $382,377

[160] The parties agree that the estate of CC paid $382,377 to the CRA on or about September 19, 2003. The Respondent says that the Minister applied this payment to reduce CC's liability under the ITA for his 1988 taxation year. The Appellant submits that there is no evidence to support this and requests that the Court direct that the payment reduce the amount owed by CC for his 1988 taxation year.

[161] Given my conclusion that the Disputed CC Reassessments are statute-barred, the application of the payment to reduce CC's liability for his 1988 taxation year is moot. In any event, the proper application of the payment to reduce a tax debt of CC is a collection matter that is outside this Court's jurisdiction.[49]

V. Conclusion

[162] For the foregoing reasons, the appeal from the Assessment is allowed with costs to the Appellant, and the Assessment is referred back to the Minister for reconsideration and reassessment on the basis that the reassessments of the 1988 and 1989 taxation years of CC by notices dated April 21, 1994 were statute-barred.

[163] The parties shall have 60 days from the date of this judgment to agree on costs. If no agreement is reached, the Appellant shall have a further 30 days to submit written submissions on costs. The Respondent shall have a further 30 days to provide written submissions in response to the Appellant's submissions. The written submissions of each party are not to exceed 10 pages.

Signed at Ottawa, Canada, this 18th day of January 2024.

"J.R. Owen"

Owen J.

[49] *Alciné v. R.*, 2010 FCA 325 and *Beaudry v. R.*, 2013 FC 547 at paragraph 23.

APPENDIX A

2015-3607(IT)G

TAX COURT OF CANADA

BETWEEN:

MARIA CSAK,

Appellant,

and

HIS MAJESTY THE KING

Respondent.

Partial Agreed Statement of Facts

The parties to this proceeding admit, for the purpose of this appeal and any appeal therefrom, the truth of the facts referred to in this Partial Agreed Statement of Facts (**PASF**) and the authenticity of the documents in the Joint Book of Documents (**JBOD**).

The parties agree that this PASF does not preclude either party from calling evidence to supplement the admitted facts or to establish other facts not set out herein, provided that such evidence does not contradict the admitted facts.

The Property Transfer

1. On January 8, 1993, the late Charles Csak (**"Spouse"**) transferred to the appellant a property located at 7286 10th Line, R.R. #2 Streetsville, Ontario (**Property**).[1]

[1] Parcel Register at Tab 2 JBOD; Deed of Transfer at Tab 3 of JBOD.

2. At the time of the Property was transferred to the appellant, the fair market value of the Property was $950,000.00 CAD.

3. At the time the Property was transferred to the appellant, the appellant was married to the Spouse.

The Underlying Assessment and Tax Appeal of the Spouse

4. The Minister of National Revenue ("**Minister**") originally assessed the Spouse's 1988, 1989, 1990 and 1991 taxation years on the following dates:

Taxation Year	Assessment Date
1988	September 20, 1989
1989	May 30, 1990
1990	November 8, 1991
1991	October 9, 1992

5. By notices of reassessment dated April 21, 1994, Minister reassessed the Spouse in respect of his 1988, 1989 and 1990 taxation years.

6. By notice of reassessment dated August 15, 1994, the Minister reassessed the Spouse's 1991 taxation year (collectively with the reassessments of the 1988, 1989 and 1990 taxation years, the "**underlying reassessments**").

7. The particulars of the underlying reassessments were:

Taxation Year	1988	1989	1990	1991	Total
Provincial Tax	$70,366.40	$216,322.10	$845.10	$1,800.00	**$289,333.60**
Federal Tax	$131,029.20	$400,586.20	$1,674.30	$3,335.40	**$536,625.00**
Total Tax	$201,395.60	$616,908.30	$2,519.40	$5,135.40	**$825,958.70**
Arrears Interest to date of underlying reassessment	$155,639.00	$334,745.65	$685.16	$1,289.65	**$492,123.41**

Other adjustments	$461.56	$101.62	$314.96	--	$878.14
TOTAL	$357,496.16	$951,755.57	$3,519.52	$6,189.00	$1,318,960.25

8. The underlying reassessments relate to disallowed partnership losses allocated to the partners (which included the Spouse), of a partnership known as Claridge Holdings No. 1 ("**partnership**").

9. The Spouse appealed the underlying reassessments to the Tax Court of Canada by notice of appeal dated October 28, 1996, Court file no. 96-3944 ("**underlying appeal**").

10. The underlying appeal was part of a group of appeals involving other taxpayers involved in the partnership.

11. The Spouse did not allege or raise as an issue in the underlying appeal that the underlying reassessments of the 1988 and 1989 taxation years were statute-barred.

12. The Spouse died on or about March 9, 2002.

13. The appellant was the Executrix and Trustee of the Spouse's estate ("**Estate**").

14. The underlying appeal was dismissed by the Tax Court of Canada on July 13, 2006.

The reassessment of the appellant

15. By notice dated August 14, 2012, the Minister reassessed the appellant under section 160 of the *Income Tax Act* in the amount of $1,200,000.00 in respect of the Spouse's transfer of the Property to the appellant ("**reassessment**").[2]

[2] Notice of Assessment/Reassessment, Tab 1, JBOD.

16. Subject to any finding the Court may make in respect of whether the Spouse's 1988 and 1989 taxation years were statute-barred at the time of the reassessment, the Spouse's tax liability at the time of the reassessment on August 14, 2012 was $4,876.824.14, broken down as follows:

Taxation Year	1988	1989	1990	1991
Reassessment Date	April 21, 1994	April 21, 1994	April 21, 1994	August 15, 1994
Balance as of August 14, 2012, including interest	$938,264.06	$3,899,676.72	$14,433.42	$24,449.94

17. The appellant objected to the reassessment by notice of objection dated November 7, 2012.

18. By notice of confirmation dated May 6, 2015, the Minister confirmed the reassessment.

DATED at the City of Toronto, in the Province of Ontario, this 8 day of September, 2023.

John Buote

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DATED at the City of Ottawa, in the Province of Ontario, this 8th day of September, 2023.

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CITATION:	2024 TCC 9
COURT FILE NO.:	2015-3607(IT)G
STYLE OF CAUSE:	MARIA CSAK v HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	September 11 and 12, 2023
REASONS FOR JUDGMENT BY:	The Honourable Justice John R. Owen
DATE OF JUDGMENT:	January 18, 2024

APPEARANCES:

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Counsel for the Respondent:	Meaghan Mahadeo

COUNSEL OF RECORD:

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