

Docket: 2010-3374(IT)G

BETWEEN:

9028-0157 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of
Denis Lajeunesse (2010-3382(IT)G),
on May 6, 7 and 8, 2013, at Montreal, Quebec.

Before: The Honourable Justice Johanne D' Auray

Appearances:

Counsel for the Appellant: Marc-André Paquin
Counsel for the Respondent: Anne-Marie Desgens

JUDGMENT

The appeal of 9028-0157 Québec Inc. is allowed on the basis that the Minister of National Revenue should not have included in computing the income of 9028-0157 Québec Inc. an amount of \$20,000 as business income for the 2005 taxation year. The penalties imposed with regard to the amounts of \$20,000 and \$90,105 for 2005, an amount of \$109,828 for 2006 and an amount of \$71,032 for 2007 are deleted. In all other respects, the assessments with regard to 9028-0157 Québec Inc. remain unchanged.

Costs are awarded to the respondent.

Signed at Montreal, Quebec, this 28th day of February 2014.

“Johanne D’ Auray”

D’ Auray J.

Translation certified true
on this 10th day of December 2014.

Erich Klein, Revisor

Docket: 2010-3382(IT)G

BETWEEN:

DENIS LAJEUNESSE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of
9028-0157 Québec Inc. (2010-3374(IT)G),
on May 6, 7 and 8, 2013, at Montreal, Quebec.

Before: The Honourable Justice Johanne D' Auray

Appearances:

Counsel for the Appellant: Marc-André Paquin
Counsel for the Respondent: Anne-Marie Desgens

JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2005 and 2006 is dismissed.

Costs are awarded to the respondent.

Signed at Montreal, Quebec, this 28th day of February 2014.

“Johanne D’ Auray”

D’ Auray J.

Translation certified true
on this 10th day of December 2014.

Erich Klein, Revisor

Citation: 2014 TCC 61
Date: 20140228
Docket: 2010-3374(IT)G

BETWEEN:

9028-0157 QUÉBEC INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Docket: 2010-3382(IT)G

BETWEEN:

DENIS LAJEUNESSE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

D' Auray J.

INTRODUCTION

[1] In these appeals, this Court ordered on October 5, 2011, that the appeal of Denis Lajeunesse (Mr. Lajeunesse) be consolidated with the appeals filed by 9028-0157 Québec Inc. (9028) and Luc Lavoie. On May 4, 2013, Mr. Lavoie filed a

discontinuance with this Court. Consequently, the appeals of Mr. Lajeunesse and 9028 proceeded on common evidence.

ASSESSMENTS OF 9028

[2] The appellant 9028 challenges the reassessments made by the Minister of National Revenue (Minister) for the 2005, 2006 and 2007 taxation years. The Minister added to the income of 9028 the amounts of \$130,365 for 2005, \$614,828 for 2006 and \$71,032 for 2007 as unreported income pursuant to subsection 9(1) of the *Income Tax Act* (the Act). The Minister argues that the [TRANSLATION] “unexplained” deposits to the personal bank accounts of the shareholders must be included in computing the income of 9028, because these amounts came from 9028:

Shareholder	2005	2006	2007
Denis Lajeunesse	\$20,260	\$481,000	
Serge Lajeunesse		\$24,000	
Luc Lavoie	\$90,105	\$109,828	\$71,032
Alain Martel	\$20,000		
Total	\$130,365	\$614,828	\$71,032

[3] Penalties were also imposed on 9028 pursuant to subsection 163(2) of the Act.

ASSESSMENTS OF MR. LAJEUNESSE

[4] Mr. Lajeunesse challenges the assessments made by the Minister for the 2005 and 2006 taxation years. In computing the income of Mr. Lajeunesse, the Minister added \$495,260 for 2005 and \$6,000 for 2006 as benefits conferred on shareholders, under subsection 15(1) of the Act.

[5] The amount of \$495,260 in 2005 represents two [TRANSLATION] “unexplained” deposits of \$10,000 and \$10,260 to the personal bank account of Mr. Lajeunesse and two investments of \$195,000 and \$280,000, all with CIBC.

[6] Penalties were also imposed on Mr. Lajeunesse under subsection 163(2) of the Act.

ISSUES

9028

[7] Did the Minister rightly include \$130,365, \$614,828 and \$71,032 in the income of 9028 as unreported income for the 2005, 2006 and 2007 taxation years respectively? Further, was the Minister right in imposing penalties under subsection 163(2) of the Act?

Mr. Lajeunesse

[8] Did the Minister rightly include in the income of Mr. Lajeunesse \$495,260 and \$6,000 as benefits conferred on shareholders, under subsection 15(1) of the Act, for the 2005 and 2006 taxation years respectively? Further, was the Minister tight in imposing penalties under subsection 163(2) of the Act?

BURDEN OF PROOF

[9] In tax matters, the burden of proof is on the taxpayer. The taxpayer must refute the Minister's assumptions of fact. Thus, 9028 must prove that the Minister improperly included in computing its income its shareholders' personal deposits. As for Mr. Lajeunesse, he must prove that the [TRANSLATION] "unexplained" deposits to his personal bank account did not come from 9028.

[10] However, the Minister has the burden of proof with respect to the penalties imposed under subsection 163(2) of the Act. The Minister must show that 9028 and Mr. Lajeunesse knowingly, or under circumstances amounting to gross negligence, made a false statement or omission in their 2005 and 2006 income tax returns, and that 9028 did so in its 2007 return.

THE EVIDENCE

[11] During the years at issue, namely 2005, 2006 and 2007, 9028 operated under the trade name Gufort Électrique as an electrical contractor. The appellant 9028 was incorporated in late 1995 or in 1996.

[12] At the time, the shareholders of 9028 were Mr. Lajeunesse, Serge Lajeunesse, Alain Martel and Luc Lavoie.

[13] Mr. Lajeunesse was the majority shareholder and president of 9028. He has a bachelor's degree in real estate. Serge Lajeunesse is Mr. Lajeunesse's brother. He is an electrician and is responsible for the residential component of 9028. Mr. Martel is also an electrician and is responsible for the commercial component of 9028. Mr. Lavoie is the accountant and comptroller of 9028.

[14] The sales (S) and retained earnings (RE) of 9028 were as follows:

As at October 31, S \$5,109,322 2005	RE \$817,099
As at October 31, S \$6,664,533 2006	RE \$924,636
As at October 31, S \$9,150,972 2007	RE \$1,102,881

[15] Mr. Lajeunesse is heavily involved in 9028 and devotes almost all of his time to it. He is always looking for new projects. Among other things, he is present on the work sites and is responsible for preparing specifications for projects, managing the projects, purchasing the materials necessary for the projects and verifying project-related invoices. His objective is clear: to operate 9028 so that it will be profitable and continue to prosper.

[16] At the hearing, Mr. Lajeunesse was described as hardworking, thrifty and careful with his money. He invests his money prudently and spends wisely. His conduct is the same when it comes to 9028; he is as thrifty and careful with 9028's money as he is with his own.

[17] Mr. Lajeunesse did not know Mr. Lavoie when he hired him in 1995 as 9028's accountant and comptroller. He was recommended by a contractor for whom Mr. Lavoie did accounting work. According to Mr. Lajeunesse, he is so busy with his work that he does not have time to deal with the internal paperwork of 9028, so he relies on Mr. Lavoie for the accounting aspect of 9028.

[18] Mr. Lavoie's duties with 9028 consist in preparing statements of account for clients, collecting on those accounts, paying suppliers, paying accounts such as corporate credit cards, preparing the payroll, verifying bank accounts and performing bank reconciliations. Essentially, Mr. Lavoie is responsible for performing all accounting duties and for submitting the financial statements of 9028 to be finalized by the external accountant, Mr. Fournier.

[19] Mr. Fournier is a chartered accountant; he deals primarily with Mr. Lavoie and meets with Mr. Lajeunesse once a year for the signing of the financial statements. The information in the financial statements is provided by Mr. Lavoie.

[20] Mr. Lajeunesse indicated that he relies on Mr. Lavoie and Mr. Fournier to perform all the accounting work for 9028. He does not review the financial statements of 9028 prepared by Mr. Fournier. Mr. Lajeunesse signs 9028's financial statements where Mr. Fournier tells him to sign. Furthermore, he does not review 9028's income tax returns before signing them.

[21] As for Mr. Lavoie, he stated that while he is in charge of accounting and administration with 9028, he is required to report to Mr. Lajeunesse. For instance, every morning Mr. Lajeunesse tells him the priorities for the day. Moreover, all cheques for 9028 are signed by Mr. Lajeunesse, including paycheques and cheques in payment of suppliers. According to Mr. Lavoie, while he has authority to sign cheques, Mr. Lajeunesse insists on signing all cheques for 9028.

[22] In their testimony, Mr. Lajeunesse, Serge Lajeunesse and Mr. Martel indicated that during the years at issue it was difficult to obtain clear answers from Mr. Lavoie. Mr. Lavoie was evasive when he answered shareholders' questions or else said he was snowed under, that they should trust him and that everything was under control. When the shareholders asked to see the statements of account, Mr. Lavoie refused and again told them to trust him. The shareholders noticed unopened envelopes containing credit card statements on top of a pile of paperwork by Mr. Lavoie's computer.

[23] Mr. Lavoie left 9028 on October 8, 2007, without giving notice to either Mr. Lajeunesse or the other shareholders. Mr. Lavoie was suffering from depression and was hospitalized.

[24] The Canada Revenue Agency (CRA) turned up at 9028's place of business on October 9, 2007, for the purposes of an audit. Neither Mr. Lajeunesse nor the other shareholders had been advised by Mr. Lavoie that the CRA had begun an audit and that an auditor would be appearing at 9028's place of business on October 9, 2007.

[25] In light of that audit, Mr. Lajeunesse hired a tax lawyer, Mr. Paradis,¹ and a chartered accountant, Ms. Payeur, to deal with the CRA with regard to the audit. According to Mr. Lajeunesse, a number of accounting irregularities were observed. It was noticed that Mr. Lavoie had cashed cheques for \$75,000 to \$100,000 received from clients of 9028. It was also noted that Mr. Lavoie used 9028's credit card to pay approximately \$19,000 in personal expenses. Again according to Mr. Lajeunesse, Mr. Lavoie also gave himself a bonus of \$225,000.

[26] At the hearing, Mr. Lavoie admitted to having cashed cheques made to the order of 9028 whose amounts totalled approximately \$75,000 and to having paid personal expenses with the credit card of 9028. The ties between Mr. Lavoie and the other shareholders have been severed and Mr. Lavoie has not been an employee of 9028 since October 2007. No legal action has been taken by the shareholders of 9028 against Mr. Lavoie.

[27] Mr. Fournier was not rehired by Mr. Lajeunesse as 9028's external accountant either. Mr. Lajeunesse is of the view that Mr. Fournier should have been aware of the accounting irregularities.

[28] Ms. Piché of the CRA testified for the respondent. She is a CPA-CGA and has been working for the CRA since 2001. The files were assigned to her in light of the modest income reported by the shareholders as compared to the sales of 9028. In addition, Ms. Piché noticed high interest income in the personal bank account of Mr. Lajeunesse for the 2005 taxation year when he had not reported interest income in his prior income tax returns.

[29] Ms. Piché therefore undertook an analysis using the deposit method for each shareholder of 9028. She asked each shareholder to provide explanations as to the source of the deposits. The Minister's assessments against 9028 represent deposits, which, according to Ms. Piché, were not justified by the shareholders, that is, the [TRANSLATION] "unexplained" deposits.

[30] In March 2010, Mr. Paradis, as counsel for 9028, Mr. Lajeunesse, Serge Lajeunesse and Alain Martel filed written submissions with the CRA regarding the penalties imposed on his clients under subsection 163(2) of the Act. Although the submissions differed for each shareholder, Mr. Paradis argued that Mr. Lajeunesse,

¹ Mr. Paradis acted as counsel for the shareholders: Mr. Lajeunesse, Serge Lajeunesse, Alain Martel, and Luc Lavoie. At the litigation stage, the files were transferred to Mr. Paquin, who did not act for Mr. Lavoie because of conflicting positions.

Serge Lajeunesse and Mr. Martel relied entirely on the accountants—Mr. Lavoie and Mr. Fournier—to adequately report their income and the income of 9028. Thus, they should not be penalized under subsection 163(2), especially since they have no training or experience in accounting. Mr. Paradis does not dispute that the [TRANSLATION] “unexplained” deposits must be included in his clients’ income. Rather, he argues that the penalties should be deleted. In that regard, on March 4, 2010, Mr. Paradis, as counsel for Mr. Lajeunesse, wrote the following to the CRA:

[TRANSLATION]

Moreover, the taxpayer had intended to file voluntary returns. However, his new representatives told him that while his intended course was highly commendable, it would be in vain as a tax audit had already been initiated. You will understand my client’s discomfort.

LEGISLATION

[31] The appellant 9028 received an assessment under subsection 9(1) of the Act, that is, an assessment in respect of the taxpayer’s income for a taxation year from a business.

[32] The shareholders of 9028 received an assessment under subsection 15(1) of the Act for benefits conferred on shareholders, that is to say, an assessment based on the value of the benefit conferred by 9028 on each of its shareholders.

[33] The Minister imposed penalties on 9028 and on the shareholders under subsection 163(2) of the Act, which provides that every person who, knowingly, or under circumstances amounting to gross negligence, has made a false statement or omission in an income tax return is liable to a penalty of the greater of \$100 and 50% of the tax payable on the unreported amounts.

Submissions of and evidence applicable to Mr. Lajeunesse

[34] The deposits at issue for Mr. Lajeunesse for the 2005 taxation year are the following:

a deposit of \$10,260 on October 21, 2005;

a deposit of \$10,000 on October 26, 2005;

a certificate of deposit of \$195,000 dated November 16, 2005;

a certificate of deposit of \$280,000 dated December 7, 2005.

[35] The deposit at issue for Mr. Lajeunesse for the 2006 taxation year is the following:

a deposit of \$6,000 on February 28, 2006.

[36] Mr. Lajeunesse submits that the amounts deposited to his personal bank accounts are not from 9028. He explains that the amounts deposited to his accounts come from cash he had accumulated over time.

[37] According to Mr. Lajeunesse, a portion of his cash was derived from real estate transactions that he conducted alone or with other individuals between 1983 and 1988. However, the evidence shows that of six properties owned by Mr. Lajeunesse during those years, three were repossessed by financial institutions. Mr. Lajeunesse argues that, despite the repossession of those properties by the financial institutions, he increased his cash holdings through the amounts obtained by refinancing. He explained that he used a portion of those amounts to renovate the properties and kept the remainder in cash. Since he did not trust financial institutions, he kept those cash amounts at his home. He did not deem it appropriate to inform the trustee responsible for his bankruptcy that he had cash in his possession at the time of his assignment in bankruptcy in 1997.

[38] Mr. Lajeunesse says that his cash also came from a convenience store that he operated for about a year and a half. In that regard, he admitted that he did not report all the income from the convenience store and that he did not report either the \$20,000 in cash he received on the sale of the convenience store.

[39] As for the capital gains on the properties he sold, he does not recall whether he reported capital gains on those properties.

[40] As for the certificate of deposit of \$195,000 dated November 16, 2005, it was a gift from Ms. Gaboury, whom Mr. Lajeunesse refers to as his second mother, as he spent part of his youth with the Gaboury family. It was in 2002 or 2003 that Ms. Gaboury, who had cancer at the time, gave Mr. Lajeunesse an envelope containing cash so that he would keep an eye on her son, who had alcohol and gambling problems. Mr. Lajeunesse does not recall the exact amount he received from Ms. Gaboury. Ms. Gaboury died the year after she gave Mr. Lajeunesse the

envelope with the cash. At the hearing, Mr. Lajeunesse indicated that he received between \$150,000 and \$195,000 from Ms. Gaboury.

[41] Depending on the amount he received from Ms. Gaboury (between \$150,000 and \$195,000), the \$195,000 certificate of deposit consists of the amount or a portion of the amount given by Ms. Gaboury and a portion of the cash held by Mr. Lajeunesse.

[42] As for the other certificate of deposit, of \$280,000, dated December 7, 2005, Mr. Lajeunesse explained that the \$280,000 came from Yves Bélanger, a promoter for Prescon. Prescon sells condominiums in Laval, specifically the Martingal project. Mr. Lajeunesse explained that Prescon had to sell a certain number of condominiums for bank financing purposes. Mr. Bélanger asked him to purchase a condominium so as to increase sales in the Martingal project. To that end, Mr. Bélanger gave Mr. Lajeunesse \$280,000 in cash so that he could purchase a condominium in the Martingal project. Mr. Lajeunesse and Mr. Bélanger agreed that Mr. Lajeunesse would repay that amount to Mr. Bélanger in the following months. Mr. Lajeunesse indicated that he signed an acknowledgement of indebtedness to Mr. Bélanger. In a matter of months, Prescon made an assignment in bankruptcy. Mr. Lajeunesse became \$280,000 richer because Mr. Bélanger never attempted to recover the amount from Mr. Lajeunesse.

[43] As for the deposits of \$10,260 on October 21, 2005, \$10,000 on October 26, 2005, and \$6,000 on February 28, 2006, they came out of the cash accumulated by Mr. Lajeunesse since 1983 through the refinancing and sale of properties.

[44] Thus, Mr. Lajeunesse argues that the evidence adduced during the hearing showed that the so-called [TRANSLATION] “unexplained” deposits for his 2005 and 2006 taxation years did not come from 9028.

ANALYSIS - MR. LAJEUNESSE

[45] Subsection 15(1) of the Act taxes a shareholder of a corporation who has a benefit conferred on him by that corporation. In *Chopp v. R.*, [1998] 1 C.T.C. 407, 98 D.T.C. 6014, Justice Denault upheld the interpretation of subsection 15(1) of the Act given by Judge Mogan of this Court, i.e., that a benefit may be conferred without any knowledge the part of the shareholder if the circumstances are such that the shareholder ought to have known that a benefit was conferred and did nothing to reverse the benefit:

In allowing the taxpayer's appeal, Mogan, J.T.C.C. interpreted subsection 15(1) as follows:

I think a benefit may be conferred within the meaning of subsection 15(1) without any intent or actual knowledge on the part of the shareholder or the corporation if the circumstances are such that the shareholder or corporation ought to have known that a benefit was conferred and did nothing to reverse the benefit if it was not intended. I am thinking of relative amounts. . . . Shareholders should not be encouraged to see how close they can sail to the wind under subsection 15(1) and then plead relief on the basis of no proven intent or knowledge.

...

As to Judge Mogan's interpretation of subsection 15(1) of the *Income Tax Act*, we find no reason to intervene. . . .

[Emphasis added.]

[46] In light of the evidence, I am of the view that Mr. Lajeunesse ought to have known that a benefit was conferred on him by 9028.

[47] At the hearing, Mr. Lajeunesse put forward hypotheses without, however, supporting them with adequate evidence. He therefore failed to refute the Minister's assumptions of fact with respect to the benefit conferred.

[48] For instance, Mr. Lajeunesse argues that he accumulated cash through the sale of the properties, but on the evidence submitted I cannot ascertain the profit made by him on the sales. My analysis of the properties that were not repossessed by the financial institutions and with regard to which I have documentary evidence does not show any substantial accumulation of cash.²

[49] I am unable to determine whether the refinancing of the properties generated cash and, if it did, what monetary value may be assigned to the refinancing. I have no evidence, either documentary or testimonial, as to the monetary value of the refinancing.

² A loss of \$13,500 was incurred on the sale of the immovable at 2521 to 2525 Bellechasse Street. The sale of the immovable located at 4530 Gouin Street generated a profit of \$44,000. That profit had to be shared among the three owners. However, Mr. Lajeunesse indicated that he did not pay the two other owners, Ms. St-Laurent and Ms. Chrétien, their share of the profit.

[50] Mr. Lajeunesse indicated that he keeps at his home \$100,000 to \$200,000 in cash. However, during her testimony, his former common-law spouse, Ms. St-Laurent, gave the following answer regarding Mr. Lajeunesse's cash holdings:

[TRANSLATION]

Mr. Paquin

Q. Explain to the Court what you saw.

A. Well, you mean the money?

Q. Yes.

A. Yes. There was a small safe and there was cash in it. I don't know; there was \$2,000, \$3,000; I don't know. He always had money in that safe.

[51] Moreover, the versions regarding the [TRANSLATION] "unexplained" deposits changed at the various stages of the case. In March 2010, Mr. Paradis pointed out to the CRA that since Mr. Lajeunesse had no training in accounting, he relied on the internal and external accountants for the amounts he reported in his income tax returns for the 2005 and 2006 taxation years. He also submitted that his client did not fail to report income under circumstances amounting to gross negligence. Mr. Paradis implicitly admitted that his client, Mr. Lajeunesse, failed to include amounts in computing his income, albeit not under circumstances justifying the application of the penalties under subsection 163(2) of the Act. Moreover, Mr. Paradis wrote that his client would have made a voluntary disclosure had voluntary disclosure not proven impossible as the audit was already in progress.

[52] In his Notice of Appeal filed with this Court in October 2010, the fault of the accountant is Mr. Lajeunesse's main argument.

[53] During the examination for discovery on November 24, 2011, the representations made by Mr. Paradis seem to have been abandoned. Mr. Lajeunesse argued rather that the [TRANSLATION] "unexplained" deposits came from cash accumulated over the years from the sale and refinancing of various properties he owned from 1982 to 1988, and this notwithstanding the fact that he made an assignment in bankruptcy in 1997.

[54] Furthermore, the evidence given on the examination for discovery was that Ms. Gaboury had given him a [TRANSLATION] "little more than \$100,000" so that Mr. Lajeunesse could look after her son. The amount received from Ms. Gaboury increased to \$150,000 and possibly \$195,000 during the hearing. It is not very often that this type of gift occurs in a person's life; I find it hard to believe that a person

would not be able to remember the amount of a gift, especially when it is a substantial amount.

[55] Moreover, no evidence was introduced to corroborate Mr. Lajeunesse's version regarding the gift he allegedly received from Ms. Gaboury. None of Ms. Gaboury's six children testified to corroborate Mr. Lajeunesse's testimony. No evidence of the deposit of that amount in the bank was provided by Mr. Lajeunesse.

[56] Mr. Lajeunesse argues that the certificate of deposit of \$195,000 (which includes Ms. Gaboury's gift) was reinvested a number of times with CIBC, but no document was entered into evidence in that regard. In addition, leaving aside 2006, the year for which the auditor, Ms. Piché, noticed a high interest amount in the personal bank account of Mr. Lajeunesse, interest income had never been reported by him in his previous income tax returns.

[57] I am not persuaded by the testimony of Mr. Lajeunesse. There are many flaws in his testimony.

[58] Nor I am persuaded by the version of the facts presented by Mr. Lajeunesse regarding the \$280,000 certificate of deposit. I find it hard to believe that Mr. Lajeunesse received \$280,000 from Mr. Bélanger to purchase a condominium in the Martingal project and that, following Prescon's bankruptcy, Mr. Bélanger never attempted to recover that amount.

[59] Furthermore, Mr. Lajeunesse did not adduce any evidence establishing the purchase of a condominium in the Martingal project. For instance, no offer to purchase was filed in evidence, nor was a copy of the cheque that Mr. Lajeunesse purportedly made out to Prescon for the purchase of the condominium. The acknowledgement of indebtedness that Mr. Lajeunesse said he signed in favour of Mr. Bélanger was not filed in evidence either. Mr. Lajeunesse said he did not keep a copy of that document. Moreover, Mr. Bélanger did not testify at the hearing to corroborate Mr. Lajeunesse's version.

[60] The evidence shows that 9028 worked on the Martingal condominium project. The appellant 9028 registered a legal hypothec as security for payment for the work. The evidence also shows that 9028 removed the legal hypothec. While this assumption was not admitted by Mr. Lajeunesse, it is reasonable to assume, as alleged by the respondent, that the amount given to Mr. Lajeunesse by Mr. Bélanger was in payment for the work performed by 9028 on the Martingal condominium project prior to the impending bankruptcy of Prescon.

[61] Accordingly, in light of the evidence, the amounts of \$195,000 and \$280,000 were rightly included in Mr. Lajeunesse's income as benefits conferred on a shareholder. As for the amounts of \$10,260 and \$10,000 for the 2005 taxation year and \$6,000 for the 2006 taxation year, I am of the view that these amounts are also from 9028. The available documentary evidence shows low profits on the sale of properties from 1983 to 1988 and, as I mentioned above, I have no evidence, not even oral, regarding the amounts pertaining to the refinancing.

ANALYSIS – 9028

Other shareholders (Serge Lajeunesse, Alain Martel and Luc Lavoie)

[62] The other shareholders of 9028 also received assessments under subsection 15(1) of the Act with respect to the [TRANSLATION] “unexplained” deposits to their personal bank accounts. They did not appeal their assessments. However, the deposits of these shareholders were added to the income of 9028 and penalties under subsection 163(2) of the Act were assessed against 9028 on those amounts. Thus, I must consider whether these deposits are to be included in computing the income of 9028.

Alain Martel

[63] Alain Martel received an assessment for \$20,000 in 2005 and he paid the amount owing. According to his testimony, the deposit came from logging activities involving payment under the table. On February 27, 2009, Mr. Paradis indicated on behalf of Mr. Martel, in his written submissions to the CRA, that the \$20,000 came from logging activities.

[64] I believe the testimony of Mr. Martel. There was no contradiction between his testimony, the version he provided to the CRA and what Mr. Paradis alleged in his submissions to the CRA. Thus, the amount of \$20,000 did not come from 9028 and should be deducted from the income of 9028 for the 2005 taxation year.

Serge Lajeunesse

[65] As for Serge Lajeunesse, he received an assessment in 2006 for an amount of \$24,000. According to the representations made by Mr. Paradis to the CRA on February 27, 2009, [TRANSLATION] “his client, Serge Lajeunesse, had no knowledge

that the income was not reported by the company and the company's comptroller never told him that the amount was taxable".

[66] There is nevertheless inconsistency as to the source of the amount in question. Serge Lajeunesse first indicated to the auditor, Ms. Piché, that it was a loan from a third party. Then, Mr. Paradis raised the matter of the fault of the accountant. At the hearing, Serge Lajeunesse indicated that the \$24,000 came from [TRANSLATION] "odd jobs". Following his assignment in bankruptcy in 2009-2010, Serge Lajeunesse was not required to repay that amount.

[67] With three different versions, I find it difficult not to question the testimony of Serge Lajeunesse. Thus, he did not discharge his burden of proof. I am of the view that the amount of \$24,000 came from 9028.

Luc Lavoie

[68] During his testimony, Mr. Lavoie admitted that a portion of the [TRANSLATION] "unexplained" deposits to his personal bank account came from cheques made to the order of 9028 which he cashed. Mr. Lavoie estimates the value of the cheques cashed that he diverted to himself at between \$75,000 and \$100,000.

[69] He also admitted to having used the corporate credit card of 9028 to pay some of his personal expenses by transferring amounts from his personal account to the credit card of 9028. According to the testimony of Mr. Lajeunesse, the amount was \$19,000.

[70] It is clear that the misappropriated funds came from 9028; thus, these amounts were correctly included in computing the income of 9028. Mr. Lavoie discontinued his appeal and therefore the assessments issued against him under subsection 15(1) are upheld.

[71] I note that, in assessing 9028, the Minister added as [TRANSLATION] "unexplained" deposits amounts greater than those admitted by Mr. Lavoie during his testimony. The following amounts, namely: \$90,105 in 2005, \$109,828 in 2006 and \$71,032 in 2007, were added to the income of 9028 as business income. According to the respondent, the [TRANSLATION] "unexplained" deposits to the bank accounts of Mr. Lavoie come from 9028.

[72] On that point, no evidence was presented by counsel for 9028 showing that a portion of the deposits to the personal bank accounts of Mr. Lavoie did not come

from 9028. The burden was on 9028 to prove that a portion of the [TRANSLATION] “unexplained” deposits did not come from 9028. In light of the absence of evidence, I must accept the facts assumed by the Minister in the Reply to the Notice of Appeal, more specifically in paragraph 14(d) thereof.

PENALTIES UNDER SUBSECTION 163(2)

[73] The onus is on the respondent to prove, in order to establish the validity of the penalties imposed under subsection 163(2) of the Act, that Mr. Lajeunesse and 9028 knowingly, or under circumstances amounting to gross negligence, made a false statement or omission in their income tax returns.

[74] The Federal Court, Trial Division in *Venne v. R.*, [1984] C.T.C. 223, 84 DTC 6247, ruled on the notion of gross negligence:

34 (4) Imposition of penalties - As noted earlier, in order for the defendant to levy penalties under subsection 163(2) of the *Income Tax Act* it is necessary that the taxpayer have "knowingly, or under circumstances amounting to gross negligence . . . participated in, assented to or acquiesced in the making of" a false statement in a return, etc. . . .

...

37. . . . “Gross negligence” must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.

[75] Since the decision in *Villeneuve v. R.*, 2004 FCA 20, it is established that gross negligence includes wilful blindness:

[6] With respect, I think the judge failed to consider the concept of gross negligence that may result from the wrongdoer's wilful blindness. Even a wrongful intent, which often takes the form of knowledge of one or more of the ingredients of the alleged act, may be established through proof of wilful blindness. In such cases the wrongdoer, while he may not have actual knowledge of the alleged ingredient, will be deemed to have that knowledge.

[76] The Federal Court of Appeal stated in *Lacroix v. R.*, 2008 FCA 241, that the Minister has discharged his burden of proof under subsection 163(2) of the Act when the taxpayer has earned income that he has not reported and for which he has not been able to provide an explanation:

[32] . . . There may be circumstances where the Minister would be able to show direct evidence of the taxpayer's state of mind at the time the tax return was filed. However, in the vast majority of cases, the Minister will be limited to undermining the taxpayer's credibility by either adducing evidence or cross-examining the taxpayer. Insofar as the Tax Court of Canada is satisfied that the taxpayer earned unreported income and did not provide a credible explanation for the discrepancy between his or her reported income and his or her net worth, the Minister has discharged the burden of proof on him within the meaning of subparagraph 152(4)(a)(i) and subsection 162(3).

[77] At the hearing, Mr. Paquin, for Mr. Lajeunesse and 9028, limited his argument regarding the penalties to the following:

[TRANSLATION]

So, on the issue of penalties, while it is my view that we have succeeded in reversing the burden of proof as regards the respondent's assumptions, I humbly submit that the respondent has certainly not discharged her burden of proof with respect to penalties.

[78] However, at the hearing, the testimony of Mr. Lajeunesse, Serge Lajeunesse and Alain Martel was all to the same effect. According to them, if errors occurred in computing their income or the income of 9028, the responsibility for that lay with the accountants, particularly 9028's internal accountant, Mr. Lavoie. Thus, the Minister could not impose penalties on 9028 and Mr. Lajeunesse, as Mr. Lavoie was responsible for the omissions. They did not have any training in accounting and relied entirely on their internal accountant, Mr. Lavoie.

Penalties - Mr. Lajeunesse

Fault of the accountant

[79] The Federal Court of Appeal has stated that when a taxpayer shows that an error has occurred through the fault of the taxpayer's accountant, the Minister must in turn show that the taxpayer is responsible for the accountant's gross negligence.³

[80] The respondent contends that the fault of the accountant does not come into play in the present appeal. She argues that the only breaches of the accountant's duty

³ *R. v. Columbia Enterprises Ltd.*, [1983] C.T.C. 204 (FCA); *Findlay v. R.*, [2000] 3 C.T.C. 152 (FCA); *Gagnon v. R.*, 2005 TCC 311; *DeCosta, supra*; *Jackson v. R.*, [2008] 5 C.T.C. 2286 (TCC); *Brochu v R.*, [2011] 4 C.T.C. 2001(TCC); *Udell v. MNR*, [1970] Ex. C.R. 176, [1969] C.T.C. 704, 70 DTC 6019.

that were adduced in evidence during the hearing are that Mr. Lavoie was evasive when answering the questions of the three shareholders, that he refused to show the statements of account to the shareholders and that he did not open the envelopes containing the credit card statements.

[81] The respondent therefore argues that there is no nexus between Mr. Lajeunesse's unreported income and the breaches by the accountant, Mr. Lavoie.

[82] The respondent also argues that the funds of 9028 misappropriated by Mr. Lavoie have no connection with the deposits added to Mr. Lajeunesse's income.

[83] Furthermore, the respondent argues that it is difficult to attribute fault to Mr. Lavoie in light of the testimony of Mr. Lajeunesse, as Mr. Lajeunesse admitted that he himself deposited the amounts at issue to his personal bank account. Mr. Lajeunesse also indicated that he did his own income tax returns most of the time, although he could not recall whether it was he who had done them for the years at issue.

[84] I agree with the respondent that the fault of the accountant does not come into play in the present appeal. There is no nexus between Mr. Lajeunesse's unreported income for the 2005 and 2006 taxation years and the fault committed by the accountant, Mr. Lavoie.

Gross negligence - Mr. Lajeunesse

[85] First of all, the respondent argues that the discrepancies between the reported income and the income determined in the assessments are substantial.

[86] Mr. Lajeunesse reported total income of \$35,526 for the 2005 taxation year and total income of \$57,438 for the 2006 taxation year. Mr. Lajeunesse's unreported income represents 1386% of his total reported income for 2005 and 11% of his total reported income for 2006.

[87] Moreover, the respondent submits that it is difficult to understand how a man as thrifty and prudent as Mr. Lajeunesse could be so negligent and nonchalant with respect to the reporting of his income.

[88] The respondent also submits that Mr. Lajeunesse's conduct clearly reflects an indifference with respect to taxation statutes. In that regard, the respondent notes that

during his testimony Mr. Lajeunesse indicated that if he did not receive T4 or T5 slips he simply did not report the income.

[89] The respondent further argues that, as Mr. Lajeunesse himself deposited the money to his personal bank accounts, he can hardly claim that he did not know where those amounts came from. He stated moreover that he had become “clean-cut” since the hiring of a new accountant, Ms. Payeur, for 9028. He indicated, however, that he did not report all of his income in the 1980s.

[90] I am of the view that the respondent showed that Mr. Lajeunesse had a reckless attitude with regard to his tax obligations.

[91] In my view, Mr. Lajeunesse knew that he had not reported all of his income for the 2005 and 2006 taxation years. I am of the view that his behaviour with regard to his tax obligations is tantamount to intentional acting or indifference as to whether the law is complied with or not.

[92] Furthermore, the appellant’s argument that he cannot be held responsible for a false statement or omission because he did not have any training in accounting is not a valid argument against a penalty for gross negligence. That the appellant lacked the interest and time, owing to his extra heavy workload, to properly complete his income tax returns does not in any way relieve him from his duty to report all of his income.

[93] Thus, the Minister rightly imposed on Mr. Lajeunesse penalties under subsection 163(2) for the 2005 and 2006 taxation years.

Penalties - 9028

[94] As I mentioned earlier, the penalty assessed against 9028 with respect to the [TRANSLATION] “unexplained” deposit of Alain Martel will have to be deleted, since I have found that the \$20,000 did not come from 9028.

[95] I am also of the view that the penalty should be deleted with respect to the [TRANSLATION] “unexplained” deposits of Mr. Lavoie added to the income of 9028.

[96] In a similar case, *Vachon v. R.*, 2013 TCC 330, Mr. Vachon had been the victim of a swindle perpetrated by his accountant. In his reasons for judgment, Justice Tardif wrote the following regarding the behaviour of Mr. Vachon, at paragraphs 77 et seq.:

77 In this case, the appellant was very experienced, very educated and had the specific abilities to assess human resources skills. He should have been able to put into practice his own expertise, which would have quickly allowed him to discover the fraud and the significant and crude abuse perpetrated by his accountant. Despite this reality, there is no doubt that the appellant did not want to avoid his tax burden for the benefit of Mr. Simard.

78 Penalties imply gross negligence, wilful default, wilful blindness, etc. The basis for imposing a penalty is closer to a criminal law concept.

79 Criminal law is a field with very specific rules. First of all, in tax matters, the burden of proof is on the respondent, not the taxpayer who is being assessed the penalty.

80 In tax law, the degree of proof required is the balance of probabilities, whereas in criminal law, it is much more stringent; there must be proof beyond a reasonable doubt.

81 In tax law, there is no requirement for proof beyond a reasonable doubt at all; there must, however, be a likelihood that the person being assessed has committed a fault to the degree that it could be considered gross negligence and not a fault resulting from a lack of vigilance.

82 In criminal law, unless the mandator is complicit or is associated implicitly or explicitly with the facts and behaviour attributed to the mandatary, or benefits from the scheme, the mandator cannot be responsible for the criminal responsibility resulting from the mandatary's facts and behaviour, which benefited the mandatary to the detriment of his or her mandator.

83 In this case, it seems clear to me that there is no such complicity. The appellant's negligence and carelessness are not sufficient to lead to a conclusion that there was wilful blindness; in fact, it would be unreasonable to accept that a person would voluntarily or involuntarily accept that amounts paid for his or her tax debts would benefit someone else.

[97] I am of the view that in this appeal, just like the appellant in *Vachon*, the mandator, 9028, was not complicit in or associated with, either implicitly or explicitly, the acts and behaviour attributed to the mandatary, Mr. Lavoie. The mandator, 9028, cannot be required to bear responsibility flowing from the acts and behaviour of the mandatary, who benefited to the detriment of his mandator. Just as in *Vachon*, it is true that Mr. Lajeunesse, as president of 9028, could have been more vigilant. That said, it is difficult for a person to detect that he or she is being defrauded by his or her employees and by shareholders.

[98] The evidence shows that 9028 learned that it had been the victim of misappropriation only after it hired the new accountant, Ms. Payeur, in 2007. Thus, in my view, it cannot be held that there was gross negligence on the part of 9028 with respect to the amounts that were diverted to the accountant, Mr. Lavoie.

[99] The evidence is not precise as to the quantum of the amounts misappropriated by Mr. Lavoie. The figures put forward are from \$75,000 to \$100,000 with respect to the cheques cashed, and approximately \$19,000 for personal expenses paid through the corporate credit card. Mr. Lajeunesse referred to a bonus of \$225,000. These amounts cover the amount of the [TRANSLATION] “unexplained” deposits of Mr. Lavoie.

[100] Thus, I am of the view that the penalty must be deleted with respect to the [TRANSLATION] “unexplained” deposits of Mr. Lavoie added to 9028’s income as business income under subsection 9(1) of the Act.

[101] As for the [TRANSLATION] “unexplained” deposits added to the income of Mr. Lajeunesse and his brother, Serge Lajeunesse, I am of the view that these individuals were aware that the funds came from 9028. Accordingly, 9028 committed gross negligence in failing to include those amounts in its income under subsection 9(1) of the Act; the Minister was fully justified in imposing the penalty with respect to those amounts under subsection 163(2) of the Act.

CONCLUSION

[102] The appeal of Mr. Lajeunesse is dismissed.

[103] The appeal of 9028 is allowed on the basis that the Minister should not have included in computing the income of 9028 an amount of \$20,000 as business income for the 2005 taxation year. The penalties imposed with regard to the amounts of \$20,000 and \$90,105 for 2005, an amount of \$109,828 for 2006 and an amount of \$71,032 for 2007 are deleted. In all other respects, the assessments with regard to 9028 remain unchanged.

[104] Costs are awarded to the respondent.

Signed at Montreal, Quebec, this 28th day of February 2014.

“Johanne D’ Auray”

D’ Auray J.

Translation certified true
on this 10th day of December 2014.

Erich Klein, Revisor

CITATION: 2014 TCC 61

COURT FILE NO.: 2010-3374(IT)G
2010-3382(IT)G

STYLE OF CAUSE: 9028-0157 QUÉBEC INC. v. HER
MAJESTY THE QUEEN
DENIS LAJEUNESSE v. HER MAJESTY
THE QUEEN

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: May 6, 7 and 8, 2013

REASONS FOR JUDGMENT BY: The Honourable Justice Johanne D'Auray

DATE OF JUDGMENT: February 28, 2014

APPEARANCES:

Counsel for the appellants: Marc-André Paquin
Counsel for the respondent: Anne-Marie Desgens

COUNSEL OF RECORD:

For the appellants:

Name: Marc-André Paquin

Firm: Jurifisc avocats et fiscalistes Inc.
Laval, Quebec

For the respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada