

Docket: 2020-1115(IT)G

BETWEEN:

MÉLANIE DUBÉ,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 23, 2023, at Montréal, Quebec

Before: The Honourable Justice Jean Marc Gagnon

Appearances:

Counsel for the appellant: Louis-Denis Laberge

Counsel for the respondent: Christian Lemay

JUDGMENT

The appeal from the reassessment made on March 15, 2018, pursuant to the *Income Tax Act* in respect of the appellant's 2014 taxation year is dismissed, without costs.

Signed at Ottawa, Canada, this 18th day of October 2023.

“J.M. Gagnon”

Gagnon J.

Translation certified true
on this 14th day of November 2025
Margarita Gorbounova, Senior Jurilinguist

Citation: 2023 TCC 148
Date: 20231018
Docket: 2020-1115(IT)G

BETWEEN:

MÉLANIE DUBÉ,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Gagnon J.

I. Background

[1] The appellant is appealing from a reassessment made under the *Income Tax Act*, RSC 1985, c 1 (5th Supp), as amended (**ITA**), for the 2014 taxation year, in which the Minister of National Revenue (**Minister**) included an amount of \$157,725 as a capital gain from the disposition of the appellant's immovable property, which was not her "principal residence". The Minister also added the penalty under subsection 163(2) of the ITA to the notice of reassessment sent to the appellant.

[2] On September 4, 2014, by notarial deed, the appellant disposed of a vacant lot (described as not having a building), known and designated as the lot bearing number 5 548 410 of the cadastre of Quebec, registration division of Chambly (**Lot 410**). The notarized contract between the arm's length parties refers to an act of sale made pursuant to a pre-contract entered into by the same parties on May 25, 2014.

[3] Although the appellant and the respondent do not agree on the date of purchase of Lot 410, a capital gain resulted from the sale. The appellant did not report the capital gain in her tax return for her 2014 taxation year on the ground that it is a non-taxable gain resulting from the disposition of her principal residence for the purposes of the Act.

II. Facts

[4] The Court accepts the following sequence of facts from the evidence presented at the hearing, including the partial agreed statement of facts admitted by the parties, relating primarily to the history of the lots:

a. The appellant, her common-law partner since about 2002, and their daughter sold their home in 2011 with an occupancy date in June 2012.

b. During the period beginning in July 2012 and ending in December 2014, the appellant, her common-law partner, and their daughter lived in a leased house located at 1530 Bourbeau Street, Saint-Bruno-de-Montarville, Quebec (**House**). The House is currently located on the lot bearing number 5 111 256 of the cadastre of Quebec, registration division of Chambly (**Lot 256**). Although the lease apparently began in early July 2012, no documentation relating to the lease was filed in evidence, and the Court has no documents outlining the terms and conditions or the duration of the lease, the designation of the parties or the size of the land adjacent to the leased house.

c. At all relevant times, the House was built and initially located on the lot bearing number 2 418 655 of the cadastre of Quebec, registration division of Chambly (**Lot 655**).

d. For a few weeks in June 2012, before the family moved into the House in July 2012, they temporarily lived in a trailer that they own, which was parked on Lot 655 beside the House's car garage.

e. On November 14, 2012, the appellant's spouse, Danny Trottier, and Richard Bourbeau (as the sellers' authorized representative) signed a document in each other's presence (**Document 1**). This one-page document confirms that Mr. Bourbeau received \$28,000 from Mr. Trottier as a down payment on Mr. Trottier's purchase of a vacant lot to be created and to bear number 5 111 255 of the cadastre of Quebec, registration division of Chambly (**Lot 255**). Document 1 also confirms the balance to be paid in consideration for the transfer of the titles of ownership for Lot 255 to Mr. Trottier, who is identified as the buyer.

f. On December 10, 2012, Lot 655 was divided into two lots: Lot 255 and Lot 256, on which the House is located. The total area of Lot 655 is less than half a hectare.

g. On March 4, 2013, Mr. Bourbeau became the sole owner of Lots 255 and 256.

h. On April 4, 2013, Mr. Trottier paid a second deposit on the purchase of Lot 255 in the amount of \$10,000 (**Document 2**). This document, signed by Mr. Trottier and Mr. Bourbeau, is to the same effect as Document 1. Document 2 also confirms the balance to be paid in consideration for the transfer of the titles of ownership for Lot 255 to Mr. Trottier, who is identified as the buyer. Although Mr. Bourbeau had been the sole

owner of Lot 255 since March 4, 2013, he still signed Document 2 as authorized representative of the sellers.

i. On April 8, 2014, a third document was signed by Mr. Trottier and Mr. Bourbeau (**Document 3**). Document 3 is described as a promise of sale/purchase entered into by the same two parties, and its purpose was the acquisition of Lot 256 by Mr. Trottier, who is identified as the buyer.

j. On April 11, 2014, despite Documents 1 and 2, the appellant alone acquired Lot 255, a vacant lot, from Mr. Bourbeau through a notarial act. On the same day (April 11, 2014), the appellant listed for sale a lot to be created from the division of Lot 255 into two lots of equal size.

k. On May 25, 2014, the appellant accepted a promise of purchase for the lot to be created. On August 22, 2014, the appellant divided Lot 255 into two lots of equal size: Lot 410 and the lot bearing number 5 548 411 of the cadastre of Quebec, registration division of Chambly (**Lot 411**). Lot 410, the farthest away from Lot 256, was transferred by the appellant to the promisor buyers by notarial act on September 4, 2014. The appellant retained Lot 411 adjacent to Lot 256.

l. Notwithstanding Document 3, on December 19, 2014, the appellant and her common-law partner, Mr. Trottier, acquired Lot 256 from Mr. Bourbeau through a notarial act. The notarial act refers to a pre-contract and appendices dated November 14 and 18, 2014. The pre-contract and appendices are not in evidence.

[5] The respondent relied on the following assumptions of fact to assess the tax payable by the appellant for her 2014 taxation year:

[TRANSLATION]

Capital gain for Lot 5 548 410

(a) On September 4, 2014, the appellant disposed of the vacant lot designated as lot bearing number 5 548 410 of the cadastre of Quebec, registration division of Chambly, for the price of \$294,000. [admitted]

(b) The price paid by the appellant on April 11, 2014, for the purchase of the land corresponding to Lot 5 548 410 was \$135,000. [denied]

(c) The appellant did not report a capital gain from the disposition of Lot 5 548 410. [admitted]

(d) The Minister calculated the appellant's taxable capital gain as follows: [admitted]

Proceeds of disposition	\$294,000
Adjusted cost base	
Acquisition cost	(\$135,000)
Transfer tax	(\$1,275)
Capital gain	\$157,725
Taxable capital gain (50%)	\$78,863

Circumstances surrounding the acquisition and disposition of Lot 5 548 410

(e) During the period beginning in July 2012 and ending on December 18, 2014, the appellant rented the house located on the lot bearing number 5 111 256 of the cadastre of Quebec, registration division of Chambly, with the address of 1530 Bourbeau Street, Saint-Bruno. [admitted]

(f) On April 11, 2014, the appellant purchased Lot 5 111 255, which was adjacent to the house she was renting. [admitted]

(g) The price paid by the appellant to acquire Lot 5 111 255 was \$270,000. [denied]

(h) On the day of the acquisition, the appellant listed a portion of Lot 5 111 255. [admitted]

(i) On May 25, 2014, the appellant entered into an agreement for the sale of half of Lot 5 111 255. [admitted]

(j) In accordance with the agreement entered into on May 25, 2014, Lot 5 111 255 was divided into two equal parts, creating lots bearing numbers 5 548 410 and 5 548 411 of the cadastre of Quebec, registration division of Chambly. [admitted]

(k) The surface area of Lot 5 548 410 represents half the surface area of Lot 5 111 255. [admitted]

(l) The appellant acquired Lot 5 548 410 with the intention of reselling it immediately. [denied]

(m) At the time of the sale of Lot 5 548 410, it was a vacant wooded lot, containing no buildings, no garage and no paved entrance. [denied]

(n) At the time of the sale of this lot, the appellant did not own the residence in which she lived. [denied]

(o) It was not until December 18, 2014, that the appellant purchased Lot 5 111 256 on which the residence she lived in was located. [denied]

(p) The appellant thus disposed of Lot 5 548 410 prior to acquiring the residence located on Lot 5 111 256. [denied]

(q) On March 23, 2017, following an audit initiated by the Agence du Revenu du Québec on February 17, 2017, the appellant designated Lots 5 111 255 and 5 111 256 as having been her principal residence since 2012. [admitted]

III. Positions of the parties

[6] The appellant is of the opinion that the capital gain on the sale of Lot 410 did not have to be reported. This was a partial disposition of the appellant's principal residence as defined for the purposes of the ITA. The Documents confirm that the appellant has, among other things, a right of first refusal on Lot 255 and Lot 256, thereby making clear the appellant's intention to use Lot 410, Lot 411, and Lot 256 for personal purposes, not to make a profit. Since July 2012, the appellant has used Lot 410, Lot 411, and Lot 256. It was always the intention of the appellant and her common-law partner to use Lot 410 and Lot 411 for personal purposes. On April 11, 2014, Lot 410, Lot 411, and Lot 256 were the appellant's principal residence.

[7] The appellant submits that she owned Lot 256 at the time of the sale of Lot 410 because of the legal effects created by article 1710 of the *Civil Code of Québec*, CQLR c CCQ-1991 (CCQ), in respect of Document 3.

[8] Alternatively, the appellant submits that she, in fact, has beneficial ownership of Lot 256 pursuant to subsection 248(3) of the ITA because she has actually had a right of use and habitation in respect of Lot 256 since April 8, 2014, the date of Document 3.

[9] Alternatively, if the appellant did not have a right of use and habitation, she has held a leasehold interest in Lot 256 for the purposes of section 54 of the ITA.

[10] The appellant submits that she has beneficial ownership of Lot 410 and Lot 411 under a right of use arising from the November 14, 2012, promise of purchase found in Document 1.

[11] As a result, the exemption from being taxed on the capital gain from the sale of a principal residence for the purposes of the ITA applies in this case. There is no need to apply the penalty under subsection 163(2) of the ITA, which the respondent

failed to establish. If the principal residence capital gain exemption were not to apply, the penalty would not apply because it is at most an error in the legal classification, not wilful default or neglect amounting to gross negligence.

[12] The amounts of the capital gain and the taxable capital gain under appeal as determined by the respondent are not disputed by the appellant as the appellant withdrew her alternative ground at the hearing.

[13] The respondent submits that Lot 410 was not and had never been part of the appellant's principal residence as defined in section 54 of the ITA. Accordingly, the appellant cannot benefit from the principal residence exemption set out in subsection 40(2) of the ITA in respect of Lot 410. The respondent does not raise any other conditions or reasons to dismiss the appeal.

[14] In addition, the respondent is of the view that the appellant knowingly or in circumstances amounting to gross negligence misrepresented her income in her 2014 tax return and that the Minister was justified in imposing a penalty in accordance with subsection 163(2) of the ITA.

[15] As a reminder, the burden of proof in tax matters generally rests with the appellant. The appellant has the burden of demolishing the assumptions of fact that the Minister relied on in making the assessment, and proving, on the balance of probabilities, the facts that support her position that the assessment is incorrect.¹ This is the burden that the appellant must bear in this appeal, and she must demonstrate, on the balance of probabilities, that the reassessment is incorrect as regards the lack of disposition of a principal residence for the purposes of the ITA. With respect to maintaining the penalty under subsection 163(2) of the ITA, the respondent has the burden of establishing the facts in support of the penalty.

IV. Analysis

¹ The burden of proof in tax appeals has been discussed recently in several decisions of the Federal Court of Appeal and the Tax Court of Canada. In *Sarmadi v The Queen*, 2017 FCA 131 (*Sarmadi*), Webb J.A. revisited the burden of proof in tax matters, but his colleagues, Stratas J.A. and Woods J.A., disagreed with him and preferred not to make a definitive ruling on the matter. In *Eisbrenner v The Queen*, 2020 FCA 93 (*Eisbrenner*), Webb J.A., writing for the Federal Court of Appeal, reiterated the same line of arguments put forward in *Sarmadi* in relation to the burden of proof. The application for leave to appeal from the Federal Court of Appeal decision was dismissed on January 14, 2021. Since *Eisbrenner*, Webb J.A.'s position on the burden of proof in tax matters has been affirmed or reiterated in several Federal Court of Appeal decisions: *Kufsky v Canada*, 2022 FCA 66, *Chibani v Canada*, 2021 FCA 196, *European Staffing Inc v Canada (National Revenue)*, 2020 FCA 219, and *Van der Steen v Canada*, 2020 FCA 168. The key decisions of the Tax Court of Canada dealing with this recent issue are Owen J.'s decisions in *Morrison v R*, 2018 TCC 220 and *Damis Properties Inc v R*, 2021 TCC 24.

Section 54 of the ITA

[16] The definition of principal residence in paragraph 54(b) of the ITA, as applicable to the taxation years in question, is contained in the main relevant provision for the purposes of this appeal:

54. principal residence of a taxpayer for a taxation year means a particular property that is a housing unit, a leasehold interest in a housing unit or a share of the capital stock of a co-operative housing corporation acquired for the sole purpose of acquiring the right to inhabit a housing unit owned by the corporation and that is owned, whether jointly with another person or otherwise, in the year by the taxpayer, if

(a) where the taxpayer is an individual other than a personal trust, the housing unit was ordinarily inhabited in the year by the taxpayer, by the taxpayer's spouse or common-law partner or former spouse or common-law partner or by a child of the taxpayer,

(a.1) where the taxpayer is a personal trust, the housing unit was ordinarily inhabited in the calendar year ending in the year by a specified beneficiary of the trust for the year, by the spouse or common-law partner or former spouse or common-law partner of such a beneficiary or by a child of such a beneficiary, or

(b) where the taxpayer is a personal trust or an individual other than a trust, the taxpayer

(i) elected under subsection 45(2) that relates to the change in use of the particular property in the year or a preceding taxation year, other than an election rescinded under subsection 45(2) in the taxpayer's return of income for the year or a preceding taxation year, or

(ii) elected under subsection 45(3) that relates to a change in use of the particular property in a subsequent taxation year,

except that, subject to section 54.1, a particular property shall be considered not to be a taxpayer's principal residence for a taxation year

(c) where the taxpayer is an individual other than a personal trust, unless the particular property was designated by the taxpayer in prescribed form and manner to be the taxpayer's principal residence for the year and no other property has been designated for the purposes of this definition for the year

(i) where the year is before 1982, by the taxpayer, or

(ii) where the year is after 1981,

(A) by the taxpayer,

(B) by a person who was throughout the year the taxpayer's spouse or common-law partner (other than a spouse or common-law partner who was throughout the year living apart from, and was separated under a judicial separation or written separation agreement from, the taxpayer),

(C) by a person who was the taxpayer's child (other than a child who was at any time in the year a married person, a person who is in a common-law partnership or 18 years of age or older), or

(D) where the taxpayer was not at any time in the year a married person, a person who is in a common-law partnership or 18 years of age or older, by a person who was the taxpayer's

(I) mother or father, or

(II) brother or sister, where that brother or sister was not at any time in the year a married person, a person who is in a common-law partnership or 18 years of age or older,

(c.1) where the taxpayer is a personal trust, unless

(i) the particular property was designated by the trust in prescribed form and manner to be the taxpayer's principal residence for the year,

(ii) the trust specifies in the designation each individual (in this definition referred to as a "specified beneficiary" of the trust for the year) who, in the calendar year ending in the year,

(A) is beneficially interested in the trust, and

(B) except where the trust is entitled to designate it for the year solely because of paragraph (b), ordinarily inhabited the housing unit or has a spouse or common-law partner, former spouse or common-law partner or child who ordinarily inhabited the housing unit,

(iii) no corporation (other than a registered charity) or partnership is beneficially interested in the trust at any time in the year,

(iv) no other property has been designated for the purpose of this definition for the calendar year ending in the year by any specified beneficiary of the trust for the year, by a person who was throughout that calendar year such a beneficiary's spouse or common-law partner (other than a spouse or common-law partner who was throughout that calendar year living apart from, and was separated pursuant to a judicial separation or written separation agreement from, the beneficiary),

by a person who was such a beneficiary's child (other than a child who was during that calendar year a married person or a person who is in a common-law partnership or a person 18 years or over) or, where such a beneficiary was not during that calendar year a married person or a person who is in a common-law partnership or a person 18 years or over, by a person who was such a beneficiary's

(A) mother or father, or

(B) brother or sister, where that brother or sister was not during that calendar year a married person or a person who is in a common-law partnership or a person 18 years or over, or

(d) because of paragraph (b), if solely because of that paragraph the property would, but for this paragraph, have been a principal residence of the taxpayer for 4 or more preceding taxation years,

and, for the purpose of this definition,

(e) the principal residence of a taxpayer for a taxation year shall be deemed to include, except where the particular property consists of a share of the capital stock of a co-operative housing corporation, the land subjacent to the housing unit and such portion of any immediately contiguous land as can reasonably be regarded as contributing to the use and enjoyment of the housing unit as a residence, except that where the total area of the subjacent land and of that portion exceeds 1/2 hectare, the excess shall be deemed not to have contributed to the use and enjoyment of the housing unit as a residence unless the taxpayer establishes that it was necessary to such use and enjoyment, and

(f) a particular property designated under paragraph (c.1) by a trust for a year shall be deemed to be property designated for the purposes of this definition by each specified beneficiary of the trust for the calendar year ending in the year, and (*résidence principale*)

[17] Other legislative provisions raised at the hearing will be discussed below.

Evidence presented at the hearing

[18] The main testimony in support of the appellant's position is that of Mr. Trottier, the appellant's common-law partner. Mr. Trottier testified at length primarily to explain the circumstances surrounding the family's arrival in the Bourbeau Street neighbourhood of St-Bruno-de-Montarville, Quebec; the different acquisition scenarios considered; the financial issues; the positions of the parties involved; and, finally, what the parties apparently agreed on. The Court will return to Mr. Trottier's testimony later on.

[19] The appellant also testified. However, her testimony was much more succinct. Although this is her appeal, and it is primarily related to the facts and juridical acts that may be attributable to her, which justify or support the tax treatment to which the appellant claims to have personally been subjected, the Court heard very few facts in the appellant's testimony-in-chief. After she confirmed that she had been living at 1530 Bourbeau Street since June 2012, the only thing confirmed by the appellant was her description of the Bourbeau Street project as follows:

[TRANSLATION]

In June 2012. So, we, we looked for a house. Finally, we found that lot, which was in a neighbourhood that we wanted. So, the plan was to build the house on, on, on, the, the lot. In the meantime, we lived at 1530, and we used our lot to store the trailer, and we had a play structure for the kids, which was on the lot. So, we took care of the land, and we lived next door, at 1530.

Also, we, we started taking steps to set up the house, to find a contractor, the plans for the house, and all of that, during that, during that period.

...It is certainly a complex situation, but basically, it's, it's simple. We wanted to live in this, in—we wanted to have—because [inaudible]. We wanted to live on, on that street, have the house and then have a house there. And that's why we realized that it's not—well, it's a [inaudible]. But we realized that it was not easy to secure financing to build the house. So, when we realized that we could buy the, the house, at 1530, where we lived—we loved it, that house, and at the same time, I didn't want to have no home [inaudible].

[20] The Court did not learn any more from the appellant regarding the project, the acts, the agreements, the terms and conditions reached, the discussions with the sellers or the buyers, or the reasons for the actions taken and the decisions made. For example, the appellant did not discuss the lease for the House from any angle, nor did she confirm or even mention giving a mandate or power of attorney to her common-law partner. From this situation, the Court infers that the appellant's level of personal involvement in managing and carrying out this project as a whole was limited.

[21] In cross-examination, the questions the respondent asked the appellant focused primarily on the preparation of the tax return for her 2014 taxation year, and specifically whether an accountant's services had been used to validate the tax treatment associated with the sale of Lot 410.

[22] Furthermore, the Court gathers from its cross-examination that the acquisition of Lot 255 was in part to make it possible to acquire Lot 256 in order to ultimately live in the House as the owner. They were unable to carry out the original project, which was to fund the construction of a house on Lot 255. The sale of Lot 410 also helped fund the acquisition of Lot 255.

[23] Mr. Trottier testified that, at the beginning of this project, his intention was to buy and renovate the House. He stated that they had a lease to rent the House as of July 2012. He confirmed that this was a lease.

[24] Early in his testimony, he was presented with exhibits A-5 and A-8. These one-page exhibits are Document 1 and Document 2, which were signed by Mr. Trottier, as purchaser, and Mr. Richard Bourbeau, as authorized representative of the sellers, on November 14, 2012, and April 4, 2013, respectively. In short, they confirm that a deposit was paid by Mr. Trottier to Mr. Bourbeau for the sale of Lot 255, which was to be created. The agreements also confirm the balance payable in consideration for the transfer of the ownership title for Lot 255 to Mr. Trottier and confirm a right of first refusal on the sale to a third party of any remaining portion of the original lot on which the House is located, that is, the portion of Lot 655 that would become Lot 256 when Lot 255 was created. For the purposes of this appeal, and although this raises a *prima facie* ambiguity, it is sufficient to point out that, under certain conditions, this right of first refusal would belong to Mr. Trottier, his spouse, a member of his family or any other corporate entity related to Mr. Trottier at the same prices and conditions. These agreements have two signatures: those of Mr. Bourbeau, the authorized representative of the sellers, and of Mr. Trottier, the purchaser.

[25] The respondent then raised an objection and asked that the authenticity of the production of the Documents be established because these Documents were private writings. In response to this request, counsel for the appellant asked the witness to confirm his own signature and to describe the circumstances surrounding the preparation and signing of the Documents. Mr. Trottier confirmed that he met with Mr. Bourbeau at his home (I assume at the House) in person when the parties signed the Documents. Mr. Trottier had prepared a first draft, and both parties discussed, made agreed-upon changes to, and signed the Documents in each other's presence. The same document template was used every time these same two individuals signed a document in private writing. The Court understands that this explanation applies to Document 1 and Document 2 under objection and Document 3 (Exhibit A-12), which was later presented to the witness and introduced below. The Court understands that Mr. Trottier's testimony confirms that he met and had discussions

and exchanges with Mr. Bourbeau regarding the lots under appeal on a number of occasions, including when the notarial acts were signed.

[26] The witness then explained that he was granted a right of first refusal because his offer on Lot 256 was not accepted. Mr. Trottier was facing financial challenges to acquire the original Lot 655.

[27] Mr. Trottier then referred to Exhibit A-8 and spoke in the first person. This is not very surprising because, after all, he is the sole signing purchaser, and his explanations were made without reference to the appellant in any specific way. The appellant, in her testimony, did not express any interest in these exhibits either. Accordingly, the Court concludes that exhibits A-5 and A-8 relate only to a deposit for Lot 255 made by Mr. Trottier for his benefit.

[28] The witness then moved on to Exhibit A-12. Exhibit A-12 is Document 3, which is dated April 8, 2014, and bears the signatures of Mr. Bourbeau as the authorized representative of the sellers (although as of that date he had apparently become the sole owner) and of Mr. Trottier as the purchaser. No mention is made of the appellant, directly or indirectly.

[29] Unlike exhibits A-5 and A-8 related to Lot 255, Document 3 confirms that this is a promise to sell or purchase Lot 256. It is not about Lot 255. This time The one-page document (with appendices) does not simply confirm a deposit on the subsequent acquisition of the titles to Lot 256 by Mr. Trottier. Rather, the document shows a promise of sale and purchase and financial terms and conditions to complete the acquisition of Lot 256 from Mr. Bourbeau by Mr. Trottier, as well as the right of the purchaser, Mr. Trottier, to act as owner as of April 8, 2014.

[30] Mr. Trottier's testimony does not shed light on the lease for the House. The Court has no details regarding the parties to the lease, the terms and conditions, the size of the leased premises, the scope, the duration, etc.

[31] In cross-examination, he confirmed that the appellant felt it was a pity that her name did not appear on any immovable property. He confirmed that he never owned Lot 255. He also confirmed that exhibits A-5, A-8, and A-12 had not been submitted for the audit. He implied that the lease was to last until the construction project on Lot 255 was completed. He also confirmed that the first refusal clause was never exercised. He also did not file in evidence any mandate or power of attorney authorizing him to act on behalf of the appellant.

[32] The appellant did not call any other witnesses in support of her position. The Court notes in particular the absence of Mr. Bourbeau. He clearly played a central role in the relationship created between himself and the appellant, but mainly her common-law partner, in connection with the lots discussed at the hearing.

[33] The respondent ultimately did not call any witnesses and simply cross-examined the two witnesses for the appellant.

Respondent's objection to exhibits A-5, A-8, and A-12

[34] As noted above, during Mr. Trottier's testimony, the respondent raised an objection when the appellant filed exhibits A-5, A-8, and A-12. He requested that the appellant establish the authenticity of the production of Document 1, Document 2, and Document 3, as these Documents are private writings.

[35] Although the impact of filing exhibits A-5, A-8, and A-12 on the outcome of the appeal was mitigated by the appellant's absence from the Documents, the Court would like to rule on the admissibility of the exhibits.

[36] Section 40 of the *Canada Evidence Act*, RSC 1985, c C-5, provides that, in all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken, subject to this Act and other Acts of Parliament, apply to those proceedings.²

[37] The provisions of Title Two of Book Seven of the CCQ concern means of proof; articles 2826 *et seq* set out the rules of admissibility in evidence of private writings:

PRIVATE WRITINGS

2826. A private writing is a writing setting forth a juridical act and bearing the signature of the parties; it is not subject to any other formality.

2827. A signature is the affixing by a person, to a writing, of his name or a mark distinctive to him which he regularly uses to signify his consent.

2828. A person who invokes a private writing has the burden of proving it.

...

² *Canada (National Revenue) v Hardy*, 2018 FCA 103.

2829. A private writing makes proof, with respect to the persons against whom it is proved, of the juridical act which it sets forth and of the statements of the parties directly relating to the act.

2830. A private writing does not make proof of its date against third persons but that date may be established against them, by any means.

However, acts executed in the ordinary course of business of an enterprise are presumed to have been made on the date they bear.

[38] Counsel for the appellant contends that the document speaks for itself and does not see what more he could do. Mr. Trottier was present when Mr. Bourbeau signed the document. He basically argues that the document is a signed private writing and that the rules of evidence allow for the filing of a private writing. He believes he has discharged his burden. If this was an issue, there were other ways to raise it before the hearing. In any event, he planned to file the originals of exhibits A-5, A-8, and A-12, but, in the end, that is not going to happen.

[39] These provisions are succinct. The doctrine referring to the provisions and the courts' teachings is therefore useful in establishing the scope of the test that would enable the Court to accept the filing in evidence of the act relied on by one party and seeking to oppose the other party. The issue is therefore whether the appellant, in presenting these exhibits through testimonial evidence, has met her burden of proof for the purposes of the provisions cited.

[40] Under article 2857 of the CCQ, evidence that the signatures on the document are authentic and have not been altered since they were affixed³ may be produced by any means: admission by the opposing party, testimony of those who signed the document, of persons who saw them sign the document, of persons who recognize their signatures, of a handwriting expert, etc.⁴ In addition, recognizing the signature may be explicit or implicit. It is explicit when a witness competent to do so positively identifies the signature, for example, the person who signed the document or any other person able to authenticate it, such as the one who signed the document as a witness or the opposing party familiar with the signature.⁵

[41] The respondent failed to successfully challenge the explanations provided by Mr. Trottier to establish the circumstances surrounding the signatures on exhibits A-

³ Léo Ducharme, *Précis de la preuve*, 6th ed (Montréal: Wilson & Lafleur, 2005) No 382; Jean-Claude Royer & Sophie Lavallée, *La preuve civile*, 4th ed (Cowansville: Éditions Yvon Blais, 2008) No 357.

⁴ Claude Marseille, *Les objections à la preuve en droit civil* (Montréal: LexisNexis, 2015) No 39-7.

⁵ *Collection de droit 2023*, École du Barreau du Québec, Vol 2, Preuve et procédure, La preuve devant le tribunal civil, Les qualités et les moyens de preuve, 2023/24, at 251.

5, A-8, and A-12 and referred to in paragraph 25 above. The Reply to the Amended Notice of Appeal also does not contain any specific facts challenging the authenticity of the signatures on the exhibits. The respondent concedes that this situation is not as settled as in the decision he filed in *9191-2022 Québec inc c Agence du Revenu du Québec*, 2020 QCCQ 1902 (*9191-2022 Québec inc*). He did not appreciate that the Documents were sprung on him. However, he acknowledged that they were on the list of documents that was produced.

[42] Mr. Trottier testified that he knew and met with Mr. Bourbeau. The two men had more frequent contact between 2012 and 2014, and it even intensified at certain points. Mr. Trottier's testimony regarding when the Documents filed as exhibits A-5, A-8, and A-12 were signed in the presence of Mr. Bourbeau is acceptable and of sufficient probative value in the Court's opinion.

[43] This situation differs from that in the case presented by the respondent in *9191-2022 Québec inc*. Unlike *9191-2022 Québec inc*, it is plausible that Mr. Trottier can confirm Mr. Bourbeau's signature. In the Court's view, the evidence supports that this signature was affixed in the presence of Mr. Trottier in the context of several meetings or discussions between the two men. Notarial acts involving the parties have also been added to the list of meetings.

[44] The authenticity of Mr. Bourbeau's signature has been established. The Court is prepared to admit in evidence the filing of exhibits A-5, A-8, and A-12.

The relevance of exhibits A-5, A-8, and A-12 to the resolution of the appeal

[45] First, the Court has gathered from the testimony of the appellant's two witnesses very little information on the proper weight to be given to the lease on the House that may exist between the parties. No information was provided to describe the role of a lease for a certain period preceding the appellant's purchase of the House in undivided co-ownership. The Court does not have the essential details that would make it possible to link the appellant to a lease, the extent of the right of habitation, and the scope that the lease enabled the appellant to rely on in connection with the appeal. There was also no evidence to support that a lease was terminated in consideration for payment to the lessee by the lessor. Consequently, the usefulness of the lease in support of the appellant's position is limited. The lease was not disposed of; rather, this was a sale and transfer of the right of ownership to Lot 410, held by the appellant.

[46] More specifically, with regard to the Documents in exhibits A-5, A-8, and A-12, the Court cannot make a finding favourable to the appellant for the purposes of this appeal. The Court is seeking to learn about the position the appellant was in during the years relevant to this dispute. Although the Documents in exhibits A-5, A-8, and A-12 can be proof of the facts they contain, this is not the appeal of the appellant's common-law partner. The appeal concerns only the appellant and the reporting of a capital gain in respect of the disposition of Lot 410. The rights and obligations of the appellant's common-law partner are not the appellant's rights and obligations. Furthermore, the evidence does not support, on the balance of probabilities, that Mr. Trottier acted legally on behalf of the appellant or that he was able to bind the appellant to contractual agreements. Neither the appellant nor Mr. Trottier were able to satisfy the Court in this regard. In the Court's view, the only conclusion that can be drawn from the evidence is that the appellant had no rights in respect of Document 1, Document 2, and Document 3.

[47] The existence of a shared project between common-law partners, both of whom have stated in the notarial acts that they are single and have never been married or joined in a civil union, does not create rights for both partners when one of them makes an undertaking on his or her own behalf. There was no evidence to establish on a balance of probabilities a legal relationship between the appellant and the Documents in exhibits A-5, A-8, and A-12. The evidence on the record is insufficient to allow the Court to connect the appellant to a sale or a promise to purchase or sell Lot 255 or Lot 256 under the terms of the three exhibits, and no evidence was provided to satisfy the Court that the appellant had mandated her common-law partner, Mr. Trottier, to act on her behalf. The appellant's right of first refusal set out in exhibits A-5 and A-8, which was never exercised, is not equivalent to a sale, transfer of ownership or promise to purchase that may be reviewed under article 1710 of the CCQ.⁶

[48] In particular, the fact that the appellant did not sign and was not a party to the three Documents, the lack of compelling and insightful testimony from the appellant and her common-law partner regarding the appellant's rights in the Documents, and the lack of evidence that could legally bind the appellant to the Documents are all factors that leave the Court little choice but to consider that they have limited impact on establishing or supporting the appellant's position in the appeal. In light of exhibits A-5 and A-8 and the evidence on the record, the Court cannot attribute a

⁶ In summary, a first refusal agreement in itself creates only personal obligations and is not binding on third persons. A contract entered into in breach of a first refusal agreement that was not complied with allows the aggrieved beneficiary to consider a claim for damages. In this context, the parties remain free to sell and purchase. See Denys-Claude Lamontagne, *Droit de la vente*, 4th ed. (Montréal: Yvon Blais, 2019), Nos 61–62.

right of ownership to Lot 255 to the appellant prior to the signing of the notarial act dated April 11, 2014, confirming her right of ownership to Lot 255. The fact that a pre-contract was not mentioned in the notarized contract also supports this conclusion.

[49] Regarding whether the appellant can be connected to Exhibit A-12 dated April 8, 2014, with respect to Lot 256, the fact that the appellant's name does not appear in Document 3, that the appellant is not a party to Document 3, that the appellant did not address or state in her testimony that she could have rightfully benefitted from the consequences that may have resulted from Document 3, and that the sellers did not testify are all elements that compel the Court to exclude the appellant from any rights that may arise from Document 3. Mr. Trottier's testimony also did not allow the Court to accept, on the balance of probabilities, that the appellant held any rights under Document 3. Based on the evidence on the record, all the Court has to associate the appellant with a right of ownership to Lot 256 is the notarial act dated December 19, 2014. No documents from before this date, or even the pre-contract and its appendices dated November 14 and 18, 2014, mentioned in the notarial act, were filed as evidence that could connect the appellant.

[50] The following provisions of the CCQ regarding the effects of contracts, and more specifically, the effects of contracts with respect to third persons, are relevant:⁷

§ 2. — Effects of contracts with respect to third persons

I. — General provisions

1440. A contract has effect only between the contracting parties; it does not affect third persons, except where provided by law.

1441. Upon the death of one of the parties, the rights and obligations arising from a contract pass to his heirs, if the nature of the contract permits it.

1442. The rights of the parties to a contract pass to their successors by particular title if the rights are accessory to the property which passes to them or are closely related to it.

II. — Promise for another

⁷ In order to apply the ITA in the province of Quebec, the Court must refer to the rules, principles, and concepts in force in Quebec when dealing with property and civil rights, if necessary and unless otherwise provided in the ITA. In this respect, see *Interpretation Act*, RSC 1985, c I-21. See also *Canada v 9101-2310 Québec Inc*, 2013 FCA 241.

1443. No person may bind anyone but himself and his heirs by a contract made in his own name, but he may promise in his own name that a third person will undertake to perform an obligation, and in that case he is liable for injury to the other contracting party if the third person does not undertake to perform the obligation as promised.

III. — Stipulation for another

1444. A person may, in a contract, stipulate for the benefit of a third person.

The stipulation gives the third person beneficiary the right to exact performance of the promised obligation directly from the promisor.

1445. A third person beneficiary need not exist nor be determinate when the stipulation is made; he need only be determinable at that time and exist when the promisor is to perform the obligation for his benefit.

1446. The stipulation may be revoked as long as the third person beneficiary has not advised the stipulator or the promisor of his will to accept it.

1447. Only the stipulator may revoke a stipulation; neither his heirs nor his creditors may do so.

If the promisor has an interest in maintaining the stipulation, however, the stipulator may not revoke it without his consent.

1448. Revocation of the stipulation has effect as soon as it is made known to the promisor; if it is made by will, however, it has effect upon the opening of the succession.

Where a new beneficiary is not designated, revocation benefits the stipulator or his heirs.

1449. A third person beneficiary or his heirs may validly accept the stipulation, even after the death of the stipulator or promisor.

1450. A promisor may set up against the third person beneficiary such defenses as he could have set up against the stipulator.

[51] One problem with the decisions the appellant presented in support of a promise of sale that is equivalent to a sale in her oral argument is that those decisions do not address an issue that arises in this case. In those decisions, the parties acting as seller and purchaser are the ones who signed the documents submitted in evidence. In those cases, it is not claimed that the rights of the parties to the contract belong to a person who was not named. The situation here is quite different, and, on

a balance of probabilities, the evidence does not support the conclusion that the appellant can appropriate rights to argue that a promise of sale equivalent to a sale was made in her favour.

[52] Given the lack of evidence establishing on its face the appellant's legal interest in the Documents in exhibits A-5, A-8, and A-12, the appellant's connection to the Documents is insufficient to justify potentially applying articles 1710 *et seq* of the CCQ and to establish the admissibility of the documents as a promise of sale equivalent to a sale in favour of the appellant.

Principal residence for purposes of the ITA

[53] For the purposes of this appeal, if the appellant wants Lot 410 to be considered her principal residence as defined in section 54 of the ITA, for a taxation year, the following criteria must be met:

1. Lot 410 must be (i) a *housing unit* or (ii) a leasehold interest in a housing unit (preamble to the definition);
2. the appellant must own Lot 410 alone or otherwise in the taxation year (preamble to the definition);
3. the appellant, her common-law partner or daughter inhabited the *housing unit* during the year (paragraph (a) of the definition); and
4. the appellant designated the *housing unit* in prescribed form and manner to be her principal residence for the year, and the appellant or any of the persons named in the ITA for that purpose did not designate another property as her principal residence for the year (paragraph (c) of the definition).

[54] In addition to the conditions listed at paragraph 53 above for what can constitute a principal residence, paragraph (e) of the definition adds, for the purposes of this appeal, that a taxpayer's *principal residence* is deemed to include the land subjacent to the housing unit and such portion of any immediately contiguous land as can reasonably be regarded as contributing to the use and enjoyment of the housing unit as a *residence*. It must therefore be underlined that, in paragraph (e), Parliament deems the land to be included in the *principal residence* and does not deem the *housing unit* to include the land referred to in paragraph (e).

[55] It should also be noted that a housing unit must exist as described in the preamble and paragraphs (a) *et seq* of the definition before the effects of paragraph (e) can be measured. In other words, paragraph (e) of the definition cannot

on its own define a principal residence for the purposes of the ITA. An eligible housing unit must first be recognized for the purposes of the definition.

[56] In addition, the Court notes that the concept of leasehold interest is not included in paragraph (e). This absence appears justified because the disposition of a leasehold interest means an assignment of a mix of rights that make up a leasehold interest. Accordingly, the disposition of a leasehold interest does not represent the disposition of rights other than those conferred by the leasehold interest itself. Therefore, it would not be desirable for the disposition of rights in a leasehold interest to include anything else.

[57] In this context, since the property to be designated as a principal residence in this case is a vacant lot (Lot 410), when can the appellant be considered to have acquired ownership of the property designated as a principal residence to which Lot 410 could be linked? To this end, the reasons set out above show that the potential acquisition of a right, including a right of ownership, by the appellant's common-law partner is not determinative for finding out the tax treatment of the appellant.

[58] The preamble to the definition of principal residence refers to a property that is a housing unit or a leasehold interest in the housing unit. There is not enough evidence to support the existence of a leasehold interest in the appellant's case. The Court is not satisfied that the appellant, who was unmarried at all times relevant to the appeal, acquired a leasehold interest. No evidence was submitted to conclude that there was an interest in a lease. Clearly, the appellant lived in the House. However, the testimony heard in support of the appellant's position did not provide sufficient details to satisfy the Court, on the balance of probabilities, that the appellant had an interest in a lease. The Court saw no documents that could support the fact that the appellant had an interest in a lease. For some unknown reason, the appellant chose not to submit in evidence the lease that was apparently entered into by the parties. The few references made to the lease in the testimony in support of the appellant's position were evasive. The appellant did not use the word lease in her testimony, and no lessor testified.

[59] When the appellant acquired Lot 255, and although the appellant did not make this argument, the notarial act contains no reference to it, and the evidence is completely silent on this matter, the potential presence of a conventional car garage

on this lot is not in itself sufficient for it to be a housing unit for the purposes of the definition of principal residence.⁸

[60] In addition, while the Court is unable to recognize a lease in the appellant's name the terms and conditions of which would allow the appellant to have a distinct real right to the House as a principal residence, such a property could itself have been a principal residence when the appellant acquired Lot 255. And Lot 255 (divided into two lots: Lot 410 and Lot 411) would then depend on the existence of a housing unit to qualify as the appellant's principal residence. However, the housing unit could not be the House because it was already linked to the real right related to the lease, and Lot 255 could not be part of these rights in view of the lessor's assignment and the appellant's acquisition of the ownership right to Lot 255. The House could not be used for designating both the real right arising from the lease and Lot 255 itself for the purposes of a principal residence. As a piece of land, lot 255 (and indirectly, Lot 410 and Lot 411) must be able to be associated with a housing unit, which in this case did not exist. As noted earlier in these reasons, paragraph (e) of the definition of principal residence deems the land subjacent and some land immediately contiguous to the housing unit to be part of the principal residence to the extent that it exists.

[61] Therefore, considering that Lot 410 is a vacant lot and that there was no real right arising from a lease, the only way for the appellant to acquire property as her principal residence for the purposes of the preamble of the definition was to have a housing unit consisting of an ownership right to the House. Was this the case?

[62] Given the evidence on the court record, two documents can be considered for the purposes of this determination: Exhibit A-12 and Exhibit I-3.

- *Exhibit A-12: contract between Mr. Bourbeau and Mr. Trottier concerning Lot 256*

[63] Document 3, which is one page long and dated April 8, 2014, refers to a promise of sale and purchase for the immovable located at 1530 Bourbeau Street, Saint-Bruno-de-Montarville, Quebec, which includes all of Lot 256. The document is untitled, and the first paragraphs of the document do not state the name of the purchaser. The word purchaser is used to describe the purchaser further down, specifically, to present the terms of payment of the purchase price for the property and the possibility for the purchaser to act as the rightful owner of the property on

⁸ *Flanagan v MNR*, 89 DTC 615 (TCC), *Rebus v The Queen*, 2002 CanLII 842 (TCC).

the same date. The document is signed by Mr. Bourbeau, as the authorized representative of the sellers, and Mr. Trottier, as the purchaser. As noted above, the appellant has no rights associated with Document 3.

[64] In these circumstances, the Court cannot recognize the appellant's rights in Document 3, which is Exhibit A-12.

- Exhibit I-3: notarized contract dated December 19, 2014, concerning Lot 256

[65] The notarized contract dated December 19, 2014, is for the sale of Lot 256 with a building erected on it and located at 1530 Bourbeau Street, Saint-Bruno-de-Montarville. The appellant appears on the notarial act as an undivided co-purchaser at 50%. The act confirms that the purchasers (the appellant and Mr. Trottier) became owners of the immovable as of December 19, 2014, with immediate possession and immediate physical occupation. The act makes no reference to Document 3 (Exhibit A-12) dated April 8, 2014, although it is stated that the sale is made in carrying out the pre-contract and its appendices dated November 14 and 18, 2014, and confirms the agreements contained therein. The pre-contract and appendices were not filed in evidence.

[66] In this context, given the lack of a legal relationship binding the appellant prior to the date of the notarial act, the Court concludes that the appellant acquired a housing unit for the purposes of the preamble to the definition of principal residence in the ITA on December 19, 2014.

[67] On the basis of reading paragraph (e) of the definition of principal residence, the verb tense is significant with respect to the order in which the taxpayer acquires the housing unit and the land immediately contiguous to the housing unit. In other words, the ownership of the housing unit by the taxpayer must precede or coincide with the desire to designate the land immediately contiguous to the housing unit as a principal residence.

[68] In the present case, Lot 410 was acquired by the appellant on April 11, 2014, and disposed of on or before September 4, 2014, in favour of third persons.

[69] Lot 410, which the appellant is trying to designate as a principal residence, was acquired and disposed of in the same taxation year that the appellant acquired the housing unit to which she claims paragraph (e) applies to make Lot 410 a part of the principal residence. It is difficult to argue that acquiring the housing unit

constitutes the appellant's principal residence and that the principal residence includes immediately contiguous land that can reasonably be regarded as contributing to the use and enjoyment of the housing unit as a residence, but which was already no longer the appellant's property when the housing unit was acquired. The Court does not believe this. The wording of the definition of principal residence for the purposes of the Act does not have this scope.

[70] In light of the foregoing, the evidence on the record does not allow the Court to conclude that, on the balance of probabilities, the appellant met her burden of proof and made it possible to vacate the reassessment under appeal. In the Court's view, the required evidence unfortunately remains insufficient.

V. Penalty under subsection 163(2) of the ITA

[71] The portion of subsection 163(2) relevant to this appeal and subsection 163(3) of the ITA read as follows:

False statements or omissions

(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of \$100 and 50% of the total of

...

Burden of proof in respect of penalties

(3) Where, in an appeal under this Act, a penalty assessed by the Minister under this section or section 163.2 is in issue, the burden of establishing the facts justifying the assessment of the penalty is on the Minister.

[72] The penalty under subsection 163(2) of the ITA was applied by the Minister in this case because no capital gain was reported in computing the appellant's income from the disposition of Lot 410.

[73] Subsection 163(2) of the ITA authorizes the Minister to impose a penalty on taxpayers who knowingly or under circumstances amounting to gross negligence make a false statement or omission in their tax return. Pursuant to subsection 163(3)

of the ITA, the burden of establishing the facts justifying the assessment of the penalty is on the Minister.

[74] Although the penalty may be commonly referred to as the gross negligence penalty, it can be imposed either because of a taxpayer's gross negligence in making a false statement or omission or because such a statement or omission was made by the taxpayer knowingly.

[75] The Federal Court of Appeal stated the following in *Wynter*,⁹ and affirmed in *Paletta*.¹⁰

When Parliament uses alternative terms, it is assumed that it intended them to have different meanings. Put otherwise, Parliament does not repeat itself: see Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law Inc., 2016), at 43. Section 163 allows the imposition of penalties where the taxpayer has knowledge or in circumstances amounting to gross negligence. The section is not conjunctive, and presumptively, these two terms differ in their meaning and content.

Basis for “circumstances amounting to gross negligence”

[76] The definition of the principle of gross negligence was originally established in *Venne*,¹¹ and later affirmed by the Supreme Court of Canada in *Guindon*:¹²

The Minister states in her factum that “culpable conduct” in s. 163.2 of the *ITA* “was not intended to be different from the gross negligence standard in s. 163(2)”: para. 79. The Federal Court in *Venne v. The Queen*, [1984] C.T.C. 223 (T.D.), in the context of a s. 163(2) penalty, explained that “an indifference as to whether the law is complied with” is more than simple carelessness or negligence; it involves “a high degree of negligence tantamount to intentional acting”: p. 234. It is akin to burying one's head in the sand: *Sirois (L.C.) v. Canada*, 1995 CarswellNat 555 (WL Can.) (T.C.C.), at para. 13; *Keller v. Canada*, 1995 CarswellNat 569 (WL Can.) (T.C.C.). The Tax Court in *Sidhu v. R.*, 2004 TCC 174, [2004] 2 C.T.C. 3167, explaining the decision in *Venne*, elaborated on expressions “tantamount to intentional conduct” and “shows an indifference as to whether this Act is complied with”:

Actions “tantamount” to intentional actions are actions from which an imputed intention can be found such as actions demonstrating “an indifference as to whether the law is complied with or not”. . . . The

⁹ *Wynter v Canada*, 2017 FCA 195 (*Wynter*).

¹⁰ *Canada v Paletta*, 2022 FCA 86 (*Paletta*).

¹¹ *Venne v Canada*, 1984 CanLII 5717 (*Venne*).

¹² *Guindon v Canada*, 2015 SCC 41 (*Guindon*).

burden here is not to prove, beyond a reasonable doubt, *mens rea* to evade taxes. The burden is to prove on a balance of probability such an indifference to appropriate and reasonable diligence in a self-assessing system as belies or offends common sense. [para. 23]

[77] Considering that the gross negligence penalty is intended to sanction serious misconduct that goes beyond ordinary carelessness or lack of due diligence,¹³ the issue is whether the conduct of the taxpayer:

... is such a marked departure from what would be expected that it constitutes a high degree of negligence sufficient to be characterized as a marked departure from the standards, practices, and due diligence expected of a responsible taxpayer. The cautionary words of the Supreme Court of Canada in *Guindon*, at paragraph 61, are equally applicable here; these penalties “are meant to capture serious conduct, not ordinary negligence or simple mistakes.”¹⁴

[78] The Court may take all relevant factors into consideration in determining whether a taxpayer was grossly negligent. These may include the magnitude of the omission in relation to the income declared, the opportunity the taxpayer had to detect the error, the taxpayer’s education and apparent intelligence, and the taxpayer’s genuine effort to comply.¹⁵

[79] A taxpayer’s general business and tax knowledge is relevant in determining whether an offence was committed with the required degree of negligence. This subjectivity was noted by Strayer J. in *Venne*:

I should note here, as it is relevant to the whole question of the application of penalties under sub-section 163(2), that there seems to be a certain element of subjectivity recognized in the case law with respect to assessing the knowledge or gross negligence of a taxpayer with respect to misstatements in his returns ... The taxpayer here is a man with a grade five education, working and paying taxes in a language which is not his first language nor that in which he was educated, a man who is more at ease in a garage than in an office. Not only do these factors militate against a finding that the misstatements in his returns were made knowingly by him, but also his entire course of conduct is not consistent with that of a person who had deliberately set out to conceal large amounts of taxable income.¹⁶

¹³ *Xia v The Queen*, 2019 TCC 30.

¹⁴ *Wynter* at para 21.

¹⁵ *Gray v The Queen*, 2016 TCC 54 (*Gray*); *DeCosta v The Queen*, 2005 TCC 545; *Bhatti v The Queen*, 2013 TCC 143; *McLeod v The Queen*, 2013 TCC 228.

¹⁶ *Venne*, *supra*, footnote 8.

Basis for “knowingly”

[80] The word “knowingly” requires the Minister to prove that the taxpayer had subjective knowledge of the fact that he or she made a false statement or omission in a tax return:¹⁷

As also suggested in *Wynter*, the subjective knowledge of the Appellant may be proven by evidence establishing on a balance of probabilities that the Appellant was wilfully blind as to whether the statements in the Return and the Request were false. This is a helpful clarification of the point that wilful blindness is used to attribute subjective knowledge to the Appellant and that wilful blindness and gross negligence are different legal concepts.

[81] The “knowingly” standard may include actual or attributed knowledge. Since the taxpayer is unlikely to admit that he or she had actual knowledge of an error in a tax return, the standard frequently discussed is whether the taxpayer was wilfully blind or ought to have known that the tax return was incorrect.

[82] Wilful blindness is used to “attribute subjective knowledge” to the taxpayer and is distinct from gross negligence.¹⁸ The Minister may prove the subjective knowledge by establishing that the taxpayer was deliberately or wilfully blind as to whether the statements in the tax return were false.¹⁹

[83] Miller J. in *Torres*²⁰ outlined the governance principles of wilful blindness for the purposes of subsection 163(2) of the ITA:

Based on this jurisprudence and the evidence that I have heard in the six Appeals before me, I draw the following principles

- a) Knowledge of a false statement can be imputed by wilful blindness.
- b) The concept of wilful blindness can be applied to gross negligence penalties pursuant to subsection 163(2) of the Act and it is appropriate to do so in the cases before me.
- c) In determining wilful blindness, consideration must be given to the education and experience of the taxpayer.

¹⁷ *Peck v The Queen*, 2018 TCC 52 citing *Wynter*.

¹⁸ *Ibid*.

¹⁹ *Ibid*.

²⁰ *Torres v The Queen*, 2013 TCC 380 (*Torres*).

- d) To find wilful blindness there must be a need or a suspicion for an inquiry.
- e) Circumstances that would indicate a need for an inquiry prior to filing, or flashing red lights as I called it in the *Bhatti* decision, include the following:
- i) the magnitude of the advantage or omission;
 - ii) the blatantness of the false statement and how readily detectable it is;
 - iii) the lack of acknowledgment by the tax preparer who prepared the return in the return itself;
 - iv) unusual requests made by the tax preparer;
 - v) the tax preparer being previously unknown to the taxpayer;
 - vi) incomprehensible explanations by the tax preparer;
 - vii) whether others engaged the tax preparer or warned against doing so, or the taxpayer himself or herself expresses concern about telling others.
- f) The final requirement for wilful blindness is that the taxpayer makes no inquiry of the tax preparer to understand the return, nor makes any inquiry of a third party, nor the CRA itself.

[84] Although relying on a third party may reverse the imposition of a “gross negligence penalty” if the taxpayer honestly, but wrongly, believed that the third party was correct, the taxpayer cannot avoid the penalty under subsection 163(2) of the ITA if he or she simply blindly trusted the third party without taking steps to review and verify the tax return for possible errors.²¹ This is especially true if there was something unusual or suspicious about filing the tax return that would have led a reasonable taxpayer to get more information.

Due diligence defence

[85] Taxpayers can rely on a due diligence defence with respect to the penalty under section 163 of the ITA. Once the Minister has proven that a penalty applies, the taxpayer is subject to that penalty unless the taxpayer can prove that he or she exercised due diligence.

[86] The onus is on the taxpayer to establish the defence on a balance of probabilities. The onus remains on the taxpayer to prove that the taxpayer exercised

²¹ See *Gray and Torres*.

due diligence, regardless of the Minister's burden of establishing the facts in support of the penalty or the taxpayer's burden of demolishing the Minister's assumptions of fact.²²

[87] The due diligence defence test was discussed in *École Polytechnique*,²³ and followed by the Federal Court of Appeal in *Résidences Majeau*.²⁴ The test, as stated in *École Polytechnique*, is as follows:

The due diligence defence allows a person to avoid the imposition of a penalty if he or she presents evidence that he or she was not negligent. It involves considering whether the person believed on reasonable grounds in a non-existent state of facts which, if it had existed, would have made his or her act or omission innocent, or whether he or she took all reasonable precautions to avoid the event leading to imposition of the penalty. See *The Queen v. Sault Ste-Marie*, 1978 CanLII 11 (SCC), [1978] 2 S.C.R. 1299; *The Queen v. Chapin*, 1979 CanLII 33 (SCC), [1979] 2 S.C.R. 121. In other words, due diligence excuses either a reasonable error of fact, or the taking of reasonable precautions to comply with the Act.

[88] Note that good faith is insufficient to establish a due diligence defence.²⁵ The taxpayer must have had an objectively reasonable (but erroneous) belief about a set of facts that, had they existed, would have made the act or omission inconsequential, or have taken all reasonable precautions to avoid the event that had led to the penalty.

- *Mistaken belief/error of fact*

[89] A reasonable error of fact for the purposes of the test has both a subjective and an objective component. The subjective component is met if the taxpayer establishes that he or she was mistaken about a factual situation that, if it had existed, would have made the act or omission inconsequential. The objective component is met if the error was such that a reasonable person in the same circumstances would have made the same error.²⁶

[90] The taxpayer's error must be an error of fact, not an error of law.²⁷ This distinction is often at issue in appeals before this Court. An objectively reasonable

²² *Galachiuk v The Queen*, 2014 TCC 188 (*Galachiuk*) and *Symonds v Canada*, 2011 TCC 274.

²³ *Corporation de l'école polytechnique v Canada*, 2004 FCA 127 (*École Polytechnique*).

²⁴ *Les Résidences Majeau v Canada*, 2010 FCA 28 (*Résidences Majeau*).

²⁵ See *École Polytechnique*.

²⁶ *Ibid.*

²⁷ There are two exceptions to the error of law. For the purposes of this case, it is important to refer to one of them only (i.e., the officially induced error of law): the taxpayer's error may be an officially induced error of law when the taxpayer adopted a legal position, consulted an appropriate official, obtained reasonable advice, and relied on that advice in his or her actions. See *R v Jorgensen*, [1995] 4 SCR 55 and *École Polytechnique*.

error of fact is an error that a reasonable person would have made in the same circumstances.²⁸ For example, in *Mignault*,²⁹ Webb J. held that a taxpayer's lack of understanding of the consequences of withdrawing funds from a Registered Retirement Savings Plan (**RRSP**) could not be used to support a due diligence defence because it was an error of law rather than an error of fact. Webb J. explained that, in the context of withdrawing from an RRSP, the error of fact would have to be an error with respect to whether the taxpayer received the amounts withdrawn from the RRSP. In *Mignault*, the taxpayer clearly did not make such an error of fact because he knew he had received a cheque for the amounts cashed.³⁰

- Reasonable precautions

[91] A taxpayer could also exercise due diligence if he or she proves that he or she took all reasonable precautions to avoid the act or omission that had led to the penalty being imposed; for example, reasonable precautions may include obtaining advice from a tax professional, making sincere efforts to retrieve missing information slips, or contacting the Canada Revenue Agency to inquire about the steps to be taken in the circumstances. Each situation is a specific case based on applicable facts.

This case

[92] The conditions set out above may lead to the imposition of the penalty under subsection 163(2) of the ITA under one of the two tests. One of them is determining whether the appellant knowingly made a false statement or omission in her 2014 tax return. If this test is met, there is no need to apply the other test.

[93] The appellant is a documentation technician. She has been Mr. Trottier's common-law partner since about 2000 or 2001.

[94] During her examination-in-chief, the appellant admitted that she had always dealt with an accountant when preparing her tax returns. However, in cross-examination, when the appellant was asked to clarify whether the accountant had been consulted regarding how the sale of Lot 410 should be characterized, the appellant replied that she had given all the documents to the accountant and that the accountant had not asked for anything more. The respondent then asked the appellant

²⁸ See *Résidences Majeau*.

²⁹ *Mignault v The Queen*, 2011 TCC 500 (*Mignault*).

³⁰ In *Polubiec v The Queen*, 2019 TCC 146, the taxpayer could not rely on the due diligence defence because the error he had made with respect to whether the amounts he had withdrawn from his RRSP were taxable was (a) an error of law and (b) an error that a reasonable person would have made in the circumstances. The taxpayer failed to prove that he had exercised due diligence through an error of fact, both subjectively and objectively.

whether she had asked the accountant what to do with the sale of Lot 410, and she answered as follows:

[TRANSLATION]

Well, as I think... as we thought it was part of our house, of, of our property, we did not, we did not ask the accountant, but he did not ask us for, for documents either.

[95] The Court concludes from the evidence on the record that the appellant knew she had acquired Lot 410 and disposed of it only a few months later in the 2014 taxation year, and that she voluntarily did not report a capital gain from the disposition of Lot 410 in her 2014 tax return because she and her common-law partner were of the opinion that this was a sale of a portion of their principal residence.

[96] The appellant clearly had actual knowledge of the facts in support of the act of sale in respect of Lot 255, Lots 410 and 411, and Lot 256, and of the situation surrounding the use of the House.

[97] Furthermore, considering that the Court gathers from the appellant's testimony that she did not, strictly speaking, consult or involve the accountant to get his opinion with respect to reporting a capital gain in her tax return, the Court is of the view that the appellant was wilfully blind and deliberately chose to keep to her understanding of the applicable tax treatment. She could have easily discussed the matter with the accountant, especially since this would not have been a one-time consultation because the accountant was already taking care of preparing the appellant's tax returns. The amount of the capital gain realized from the sale of Lot 410 being significant and the specific, almost unique one-time situation where the appellant realized a significant capital gain, particularly in proportion to her other lower income (a capital gain of \$157,725 (\$78,863 taxable) versus a total reported income from other sources of \$33,826), all militate in favour of wilful blindness. The appellant made that choice.

[98] The appellant's capital gain from the sale of Lot 410 was not included in the computing her income for the 2014 taxation year.

[99] In light of the above, the evidence supports that a false statement or omission was knowingly made in the tax return that the appellant filed for her 2014 taxation year.

[100] The onus was on the appellant to prove on a balance of probabilities that she had exercised due diligence.

[101] In light of the above, has the appellant established that she had an objectively reasonable (but erroneous) belief about a set of facts that, had it existed, would have rendered the act or omission inconsequential or did she take all reasonable precautions to avoid the event that had led to the penalty?

[102] Unfortunately, the Court does not believe that the evidence established, on a balance of probabilities, that the appellant was mistaken about a factual situation. The appellant was aware of the situation surrounding her acquisition and quick sale of Lot 410. The issue of determining whether the lot was a principal residence was not necessarily a run-of-the-mill issue in this case, and the Court is of the view that a reasonable person in the circumstances would have sought advice from a qualified advisor. Although the appellant and her counsel may have suggested in their argument that this was a simple matter, given the factual context and the numerous allegations raised by the appellant in support of her position, the Court is of the view that the situation easily justified a consultation with a qualified advisor. The appellant herself addressed the grey area of the designation issue in her argument.

[103] Furthermore, the appellant's error was an error of law. The designation she used for tax purposes unfortunately turned out to be incorrect.

[104] The evidence also does not show that the appellant took reasonable precautions. The fact that she had questions and then decided that she had disposed of a portion of her principal residence, without consulting anyone, is insufficient to establish that she took all reasonable precautions to avoid the act or omission that resulted in the penalty being imposed. The accountant was deliberately not consulted or involved.

[105] Unfortunately, the evidence does not enable the Court to intervene in the appellant's favour, and the Court is precluded from relying on the rules of fairness.

[106] As the conditions necessary for the penalty are met and the due diligence defence has not been established, the penalty must be confirmed.

VI. Conclusion

[107] In light of the foregoing, the appeal from the appellant's reassessment for the 2014 taxation year dated March 15, 2018, is dismissed without costs, and the penalty under subsection 163(2) ITA is maintained.

Signed at Ottawa, Canada, this 18th day of October 2023.

“J.M. Gagnon”

Gagnon J.

Translation certified true
on this 14th day of November 2025.

Margarita Gorbounova, Senior Jurilinguist

CITATION: 2023 TCC 148
COURT FILE NO.: 2020-1115(IT)G
STYLE OF CAUSE: MÉLANIE DUBÉ AND HIS MAJESTY
THE KING
PLACE OF HEARING: Montréal, Quebec
DATE OF HEARING: February 23, 2023
REASONS FOR JUDGMENT BY: The Honourable Justice Jean Marc Gagnon
DATE OF JUDGMENT: October 18, 2023.

APPEARANCES:

Counsel for the Appellant: Louis-Denis Laberge
Counsel for the Respondent: Christian Lemay

COUNSEL OF RECORD:

For the Appellant:

Name: Louis-Denis Laberge
Firm: Bernard & Brassard
2265 Fernand-Lafontaine Boulevard,
Suite 300
Longueuil, Quebec
Canada J4G 2R8

For the Respondent: Shalene Curtis-Micallef
Deputy Attorney General of Canada
Ottawa, Canada