

Judgments of the Tax Court of Canada

Touchette vs. The King

Database – Court(s) : Judgments of the Tax Court of Canada

Date : 2025-12-22

Neutral reference : 2025 CCI 195

Case number : 2019-108(IT)G, 2019-115(IT)G

Judges and Taxing Officers : Jean Marc Gagnon

Topics : Income Tax Act

Case :2019-108(IT)G

BETWEEN :

DANIEL TOUCHETTE,

appellant,

And

HIS MAJESTY THE KING,

respondent.

Appeal heard on March 8 and 9, 2023 in Sherbrooke, Quebec, under common evidence of the appeal filed by the corporation 9134-3822 Québec inc. (2019-115(IT)G), followed by written submissions dated March 24, 2023, June 16 and 29, 2023

In front :The Honourable Judge Jean Marc Gagnon

Appearances :

Appellant's lawyer:

Mr. Maxime
Chouinard

Respondent's lawyer:

Ms. Anne
Poirier

JUDGEMENT

In accordance with the reasons for judgment attached, the appeals concerning the reassessments established under the *Income Tax Act* for the 2010 and 2011 taxation years are allowed, without costs, and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment, taking into account the following decisions:

a. Tax year 2010

The penalties imposed under subsection 163(2) of the *Income Tax Act* are cancelled and the following corrections are made:

Correction	Notice of new assessment on appeal	Court Decision
Inclusion - Undeclared income	\$108,504	\$54,328
Shareholder benefit – 15 LIR	\$88,433	\$60,051

b. Tax year 2011

The penalties imposed under subsection 163(2) of the *Income Tax Act* are cancelled and the following corrections are made:

Correction	Notice of new assessment on appeal	Court Decision
Shareholder benefit – 15 LIR	\$53,206	\$15,968

Signed this ^{Day} 22dDecember2025.

“JM Gagnon”

Judge Gagnon

File: 2019-115(IT)G

BETWEEN :

9134-3822 QUÉBEC INC.,

appellant,

And

HIS MAJESTY THE KING,

The penalties imposed under subsection 163(2) of the *Income Tax Act* are cancelled and the following corrections are made:

Correction	Notice of new assessment on appeal	Court Decision
Expenses rejected	(\$46,703)	(\$15,968)
Inclusion of the input tax credit	\$6,503	\$0

c. Tax year ending March 31, 2013

The amount of non-capital losses claimed by the appellant for the 2013 taxation year arising from the appellant's net loss and taxable income for its 2012 taxation year is revised to match the appellant's net loss and taxable income resulting from the corrections made to the 2012 taxation year by this judgment.

Signed this 22nd day of December 2025.

“JM Gagnon”

Judge Gagnon

Reference :2025 CCI 195

Date :20251222

File: 2019-108(IT)G

BETWEEN :

DANIEL TOUCHETTE,

appellant,

And

HIS MAJESTY THE KING,

respondent;

File: 2019-115(IT)G

BETWEEN :

9134-3822 QUÉBEC INC.,

appellant,

And

HIS MAJESTY THE KING,

respondent.

REASONS FOR THE JUDGMENT

Judge Gagnon

I. Preamble

[1] Mr. Daniel Touchette and the corporation 9134-3822 Québec Inc. (appellant and appellant respectively, and collectively the appellants) are proceeding by way of general procedure with common evidence in respect of five appeals in total relating to the 2010 and 2011 taxation years in the case of Mr. Touchette, and 2011, 2012 and 2013 in the case of the corporation (9134). Each appeal relates to a separate notice of reassessment (reassessment or reassessments) issued by the Minister of National Revenue (Minister).

[2] The appeals target several aspects of the new assessments: unreported income, disallowed expenses from multiple suppliers, inclusion in the income calculation of input tax credits, shareholder benefit and penalties for gross negligence in accordance with subsection 163(2) of the *Income Tax Act* ^[1] .

[3] At all relevant times, Mr. Touchette, land surveyor, is the sole shareholder and director of 9134. 9134 has been operating in the real estate sector since its incorporation. 9134 qualifies as a Canadian-controlled private company for the purposes of the Act.

[4] During the years under appeal, two projects were involved. 9134 operated, in partnership with the corporation 2849-8541 Québec Inc. (2849), a joint venture called Le Faubourg de la Renaissance (the Joint Venture). The issued shares of 2849's share capital were wholly owned by Mr. Michel Leclerc, a construction contractor. During the years in litigation, the Joint Venture carried out a real estate project involving, among other things, the acquisition and sale of lots, the execution of street infrastructure work, and the construction of apartment buildings. For their part, Mr. Touchette and Mr. Leclerc personally carried out, jointly, an adjacent real estate project similar to the project undertaken by the Joint Venture, including the construction of a private street (the Private Street).

II. Factual Context

[5] Messrs. Touchette and Leclerc are business partners. In 2008-2009, they decided to operate, through joint-stock companies, the Joint Venture in undivided ownership for the purpose of carrying out a real estate project located in the territory of the municipality of Granby which consists of acquiring a lot of land , obtaining the required provincial, regulatory and municipal authorizations, carrying out the subdivision, carrying out the street infrastructure and disposing of these lots in favour of construction contractors in particular.

[6] The Joint Venture ultimately achieves these results except with respect to the lots held in joint ownership by 9134 and 2849 designated under numbers 4 250 243 and 4 250 252 of the Quebec land registry (Lot 243 and Lot 252 respectively).

[7] On a date to be confirmed, the partners of the Joint Venture will transfer their interests in Lots 243 and 252 to the two sole shareholders. The transfer to Messrs. Touchette and Leclerc will be made jointly and in equal shares. Messrs. Touchette and Leclerc will personally pursue a real estate project adjacent to the Joint Venture's real estate project, which involves Lots 243 and 252 and the lot designated as Lot 253 (4,250,253) in the Quebec land registry, recently acquired jointly and in equal shares by them to constitute the real estate project they are undertaking personally.

[8] The purchase prices of Lot 243 and Lot 252 paid by Mr. Touchette amount to \$58,695 for Lot 243 and \$45,150 for Lot 252.

[9] The execution of the real estate project on a personal basis and its proximity to the project undertaken by the Joint Venture imply shared interests, related-party transactions, and the incurring of similar expenses with the same suppliers. These transactions lead to a review by the Canada Revenue Agency (CRA).

[10] The Minister issued notices of reassessment against Mr. Touchette for his 2010 and 2011 taxation years. Following the objections filed, the final adjustments to the reassessments against Mr. Touchette, which are under appeal in this case, are summarized as follows:

Mr. Touchette	2010	2011
Shareholder benefit (15(1) ITA) in connection with the sale of Lot 243 and Lot 252 by 9134	\$108,504	
Shareholder benefit (15(1) ITA) in connection with expenses incurred by 9134 for the benefit of Mr. Touchette in connection with the construction of the Private Street	\$88,433	\$53,206
Amount subject to the penalty under subsection 163(2) of the ITA	\$196,937	\$53,206

[11] The new assessments concerning 9134 on appeal in this case reflect, following the objections, the following final changes to the taxation years ending March 31, 2011, 2012 and 2013 of the corporation:

9134	March 31, 2011	March 31, 2012	March 31, 2013
Additional income resulting from the increase in the sale price during the transfer of Lots 243 and 252	\$108,504		
Disallowed expenses incurred as a shareholder benefit (15(1) ITA) in connection with the development of Private Street by 9234	(\$79,878)	(\$53,206)	
Inclusion of input credits on rejected expenditures (12(1)x) LIR)	\$10,066		
Amount subject to the penalty under subsection 163(2) of the ITA	\$198,448	\$53,206	
Carryforward of a loss of \$47,162 incurred during the fiscal year ending March 31, 2012			\$47,162

III. Issues in Dispute

[12] The following statement of the issues in dispute is relatively detailed considering the number of items in dispute and changes that have been made as a result of the hearing.

[13] Mr. Touchette raises the following questions in his notice of appeal:

- i. Did 9134 confer on Mr. Touchette a taxable shareholder benefit within the meaning of subsection 15(1) of the Income Tax Act totaling \$207,510, revised to \$196,937 at the notice of objection in the 2010 taxation year and \$53,206 in the 2011 taxation year?
- ii. Has the respondent met his burden of proof allowing the imposition of the penalty for gross negligence for the purposes of subsection 163(2) of the Income Tax Act?

[14] 9134 refers to the following questions in its notice of appeal:

- i. Is the fair market value of Lots 243 and 252 used by the CRA during the transfer by 9134 in favour of Mr Touchette justified?
- ii. Are expenses related to infrastructure and mechanical equipment deductible from taxable income of 9134?
- iii. Has the respondent met his burden of proof allowing the imposition of the penalty for gross negligence for the purposes of subsection 163(2) of the Income Tax Act?

[15] The parties agreed to summarize for the benefit of the Court the amount and nature of the adjustments that remain in dispute following the hearing of the appeals. By letter dated March 24, 2023, the parties submitted the following submissions to the Court:

A. Undeclared income

[16] The respondent admits that the fair market value of Lots 243 and 252 at the time of the transaction is that determined by appraiser Lise Fortin. Consequently, the undeclared income affecting the two appellants is revised as follows:

Batch	Date	Product disposal	JVM ARC	JVM admitted by the respondent
243	January 14, 2010	\$58,695	\$116,000	\$74,500
252	April 14, 2010	\$45,150	\$204,854	\$138,000
	Total	\$103,845	\$320,854	\$212,500
	Gap		\$217,009	\$108,655
	Undeclared income		\$108,504	\$54,328

[17] Considering the elements of paragraph 16, the unreported income of 9134 related to the disposition of Lot 243 and Lot 252 is revised from \$108,504 to \$54,328 for the year ending March 31, 2011.

[18] At the same time, the amount of the shareholder benefit for the purposes of subsection 15(1) of the Income Tax Act of Mr. Touchette related to the acquisition of Lot 243 and Lot 252 for the year 2010 is revised from \$108,504 to \$54,328.

[19] The penalty imposed under subsection 163(3) of the Income Tax Act on this adjustment is cancelled. The Court understands from the parties' letter that the adjustment applies to both appellants.

B. Rejected expenses

[20] The respondent's position in support of the refusal of the 9134 expenses is essentially based on the personal nature of the expenses attributable to Mr. Touchette.

[21] The infrastructure and rejected Excavator 320 expenses of 9134 for the year ending March 31, 2011, remain unchanged. These expenses amount to \$79,878, to which is added \$10,066 as an input tax credit to be included in the 9134 revenue pursuant to paragraph 12(1)(x) of the Income Tax Act. Note that the appellants no longer contest the \$425 of infrastructure expenses billed and maintained by the respondent for the 9134 year ending March 31, 2011.

[22] For Mr. Touchette's 2010 taxation year, this expenditure amounts to \$78,346 for infrastructure and Excavator 320 expenses under subsection 15(1) ITA and increased by \$10,087 as consumption taxes under subsection 15(1.3) ITA.

[23] The disallowed infrastructure expenditure of 9134 for the year ending March 31, 2012 is reduced to take account of the three invoices admitted at the hearing:

Invoice date	Issuer	Amount (participation of 9134 only) (excluding tax)
March 1, 2011	City of Granby	\$26,788.50
June 23, 2011	Allaire and Gince Enterprises Inc.	\$1,157.50
December 31, 2011	GO Paving	\$797.50
		\$28,743

[24] For the 1991/34 fiscal year ending March 31, 2012, the disallowed infrastructure expenditure is therefore reduced from \$39,658 to \$10,915 (a difference of \$28,743), to which must be added the \$7,045 expenditure for the Excavator 320, and \$2,501 as an input tax credit to be included in the 1991/34 income pursuant to paragraph 12(1)(x) of the Income Tax Act. It should be noted that the appellants no longer contest, in connection with the 1991/34 fiscal year ending March 31, 2012, (i) \$7,015 of invoiced infrastructure expenditures maintained by the respondent, and (ii) \$932 of invoiced expenditures related to the Excavator 320, also maintained by the respondent.

[25] For Mr. Touchette's 2011 taxation year, the shareholder benefit amounts to \$17,960 for infrastructure expenses and the Excavator 320 under subsection 15(1) ITA and increased by \$2,501 as consumption taxes under subsection 15(1.3) ITA.

[26] Following the admissions to the hearing, the disputed adjustment existing between the parties of the disallowed expenses of 9134 for each of the years ending March 31, 2011 and 2012 is as follows:

9134	Year as of March 31, 2011	Year as of March 31, 2012
Infrastructure Expenditure	\$69,690 (-\$425*)	\$10,915 (- \$7,015*)
Expenses related to the 320 Shovel		
Essence	\$6,145	\$1,093 (-\$435*)

9134	Year as of March 31, 2011	Year as of March 31, 2012
Interview	\$324	\$4,266 (-\$356*)
Insurance	\$692	\$970 (- \$81*)
Caterpillar Interests	\$1,332	\$716 (- \$60*)
Taxes – Transfer tax	\$1,695	
Totally contested	\$77,921	\$10,013
Input tax credit referred to in paragraph 12(1)(x) ITA	\$10,066	\$2,501**

* : Amount not disputed.

** : Amount revised following the revision of the amount of rejected infrastructure expenditures.

[27] The penalty under subsection 163(2) of the Income Tax Act imposed by the respondent on the disallowed expenses of \$9,134 is maintained for both 2011 and 2012 on \$89,944 and \$20,461 respectively. These two amounts reflect the expenses described above and are increased by \$10,066 and \$2,501 respectively for input tax credit claimed on disallowed expenses and included under paragraph 12(1)(x) of the Income Tax Act.

[28] The penalty imposed by the respondent under subsection 163(2) of the Income Tax Act for Mr. Touchette's 2010 taxation year remains in effect in relation to the shareholder benefit from the total disallowed expenses of \$88,433 as set out above. The penalty imposed by the respondent under subsection 163(2) for Mr. Touchette's 2011 taxation year remains in effect in relation to the revised shareholder benefit from the disallowed expenses of \$20,461, comprised of \$17,960 under subsection 15(1) of the Income Tax Act and \$2,501 under subsection 15(1.3).

C. Questions to be decided by the Court

[29] The Court is therefore seized of the following points concerning the two appellants:

- a. Transfer Date and Market Value of Lots 243 and 252: Determine the transfer date of the lots from 9134 to Mr. Touchette and the value of the lots on that date. The appellants are of the opinion that the transfers of ownership occurred prior to the signing of the notarial deeds, which is the respondent's position. The appellants' transfer date of ownership may explain a lower fair value on the date of the transfers.
- b. Disallowed expenses: Determine whether the disallowed infrastructure and Excavator 320 expenses were incurred by 9134 for Mr. Touchette's personal benefit. Has the respondent established the validity of the penalty under subsection 163(2) of the Income Tax Act?
- c. Input tax credit claimed for disallowed expenses: The appellants objected to the respondent's treatment regarding the application of subparagraph 12(1)(x)(ii) of the Income Tax Act and subsection 248(16) of the Income Tax Act. The Court notes that

this issue was not raised in the notice of appeal or the response. However, the respondent did not object to it.

IV. Analysis

A. Date of transfer of ownership and market value of Lot 243 and Lot 252

[30] The transfer date of Lots 243 and 252 is important in determining when the extent of the tax consequences of the transfer will be determined for the parties involved. The implications are essentially related to determining the market value of Lots 243 and 252 on the date of transfer of ownership of Lots 9134 to the appellant. This determination affects the deemed proceeds of disposition of Lots 9134 and the value of any benefit conferred on the appellant.

[31] Mr. Touchette is the appellants' sole witness regarding the date of personal acquisition of Lots 243 and 252 by himself and his partner, Mr. Leclerc. This situation therefore precludes any possibility of corroboration under the circumstances.

[32] The parties did not question the technical provisions of the Act involved in this debate. The Court therefore does not propose to revisit them. Rather, the facts presented at the hearing are central to the determination of market value.

[33] The appellant is a land surveyor by profession. He is the director and sole shareholder of 9134.

[34] On December 17, 2004, 9134 and 2849 purchased in equal shares a large vacant lot in Granby which would become the Joint Venture project.

[35] The appellants cite a date in July 2009 for the acquisition of Lot 243 and Lot 252. Mr. Touchette emphasizes that he acted as owner of Lot 243 and Lot 252 concurrently at the time when he and Mr. Leclerc proceeded with the purchase of the neighbouring Lot 253.

[36] The respondent relies instead on the dates when the transfer of Lot 243 and Lot 252 was crystallized in the notarial deed relating to each of the lots: January 14, 2010 for Lot 243 and April 16, 2010 for Lot 252.

[37] The Court is therefore faced with relatively different positions. The appellants' position is essentially based on factual evidence which results in contradicting the authentic acts, namely the notarial deeds recorded by the instrumenting notary to confirm the deeds of transfer of Lot 243 and Lot 252. The Court must then assess the probative value of the written document and the testimony to decide which reflects the true intention of the parties to the deed^[2] .

[38] According to Mr. Touchette, Lots 243 and 252, which were originally part of the Joint Venture, do not attract interest from buyers because of the significant earthworks required to raise them to street level and make them buildable^[3] .

[39] Mr. Touchette testifies that in April 2009, as the signing of the 2009 Protocol was imminent, the owners of Lot 253, located south of Lots 243 and 252, offered to sell the lot to Mr. Touchette and Mr. Leclerc^[4]. Mr. Touchette states that they then examined the business opportunity and subsequently decided to proceed with a second residential development project further south, requiring the construction of the private road due to the enclave of Lot 253. This second project would, however, be operated on a personal basis, and not through corporations. During August 2009, Lot 253 was finally acquired by the two individuals in equal shares^[5]. It is in this context that, to complete this development project in their own name, each acquires jointly 50% of Lots 243 and Lot 252 held by 9134 and 2849^[6].

[40] According to Mr. Touchette, the joint acquisition of Lots 243 and 252 took place in July 2009, concurrently with the purchase of Lot 253, since he has allegedly acted as the owner of both Lots 243 and 252 since then^[7]. Indeed, the steps to construct an apartment building on Lot 243 reportedly began in July 2009, and construction itself in August of the same year. Construction on Lot 252 reportedly began around March-late spring 2010^[8]. Building permits were allegedly issued by the City of Granby on August 6, 2009, for Lot 243, and on February 5, 2010, for Lot 252^[9].

[41] Mr. Touchette's testimony, in particular, does not confirm to whom or to which entity the City of Granby's building permits were issued. The examination is also silent on whether the City of Granby was notified of the transfers of ownership of Lots 243 and 252 before they were formalized by notarial deed. The Court notes that the permits are not in evidence, although the witness refers to them to explain the sequence of events.

[42] Under cross-examination, Mr. Touchette stated that no written promise to purchase was made between him and 9134 regarding the sale of Lot 243 and Lot 252 before the signing of the sales contracts before a notary on January 14, 2010 and April 16, 2010. It was only a verbal agreement^[10].

[43] The appellants are of the view that their position does not warrant a plea of forgery since they are not challenging a statement of fact that the public officer was mandated to ascertain^[11]. The Court is not persuaded by this position as stated. The judgment of the Superior Court of Quebec in Gaudreau^[12], among others, sets out the following position regarding pleas of forgery:

[16] Legal doctrine and jurisprudence teach us a number of principles regarding the conditions necessary to give rise to a claim of forgery. These were well summarized by the Honourable Pierre Boudreault in the case of St Stanislas de Kostka (Municipal Corporation of the Village of) v. Dumouchel [[1988] RJQ 2860], he writes:

"There are two types of forgery, each of which can lead to a claim of forgery: material forgery and intellectual forgery. The first results from a material change, a physical

alteration made to a notarial act. The second affects the very substance of the act. It is the faulty translation or erroneous recording by the notary of the expressed will of the parties."

A challenge to a document's authenticity is warranted, whether for material or intellectual forgery, when a notary has incorrectly recorded, by mistake or inadvertence, what they were authorized to record as a public officer empowered to authenticate certain documents. The error must originate with the notary; the forgery must stem from the notary's own act, because if they correctly recorded what they received and observed, and what the parties presented to them, there is no forgery. If the parties (or one of them) misled the notary, a challenge to the document's authenticity is not the appropriate procedure. Thus, any statement or fact that the notary is not authorized to record, and whose sincerity or truth is called into question, will be challenged through procedures other than a challenge to the document's authenticity, which calls into question the public officer's integrity. This distinction is important, particularly with regard to the rules of evidence.

In short, it is only when the veracity and sincerity of the testimony of the public officer in the document he drafts is called into question that there is grounds for registering a false document [op. cit. pp. 2862 and 2863]".

[17] These principles were not modified by the coming into force of the Civil Code of Québec in 1994, since article 2821 CCQ reproduces the text of article 1211 CCBC

[18] A notarial act is an authentic instrument. The Civil Code and the Notaries Act [CQLR, c. N-3] set out the facts that the notary is mandated to record:

- the date and place of the legal act
- the identity of the parties;
- reading the document; and
- the signing of the document by the parties and, where applicable, by the witnesses.

[19] Certainly, the notary must reproduce the will of the parties. However, any statement of a declaration or fact that the notary is not mandated to record, the sincerity or truth of which is called into question, must be challenged by procedures other than a forgery claim [Denis Ferland and Benoît Emery, Précis de procédure civile du Québec, vol. 1, 4th edition, Les Éditions Yvon Blais, art. 223, no. 5. Jean Claude Royer, La preuve civile, 3rd edition, Les Éditions Yvon Blais, pp. 182 and 183.]

[44] The Quebec Court of Appeal, in the appeal filed by 9065, adds:

[10] Intellectual forgery affects the substance of an act. Mr. ^{Henri} Kélada explains the distinction between this and material forgery:

Material forgery results from a material change, a physical alteration of a notarial act. Intellectual forgery affects the very substance of the act. It consists of a faulty translation or an erroneous recording by the notary of the will expressed by the parties. [Henri Kélada, Les incidents, 2nd ed., Cowansville, Éditions Yvon Blais, 2003, pp. 53 and 54.]

[11] To prove intellectual property fraud, strong, clear, and precise evidence must be presented [*Gaudreau v. Latreille* , 2007 QCCS 160, para. 24, citing *Joanisse v. Liberty* , [1974] CA 512,

513]. In this matter, however, the burden of proof remains that required by article 2804 of the *Civil Code of Québec*, namely the balance of probabilities. The state of the law is summarized as follows by Professor Léo Ducharme [Léo Ducharme, *Précis de la preuve*, 6th ed., 2005, Wilson et Lafleur, Montreal, p. 121, para. 294]:

294. Because testimonial evidence is freely admissible in a forgery claim and the burden of proof is no more demanding than in any other civil case, it should not be inferred that proving forgery in a notarial act presents no difficulty. Case law holds that it is not sufficient for the claimant to assert that the notary committed forgery for their claim to be upheld. It requires that their testimony be corroborated. This means that to rebut the presumption of truth attached to the notary's statements about the facts they were tasked with recording, "very strong, very clear, and very precise evidence" is required.

[12] This passage is cited with approval by our Court in the recent case of *Caisse populaire de St-Lambert (Caisse Desjardins Charles-Lemoyne) v. Gestion et placement Bru-Gen inc.* [2008 QCCA 237, para. 7.]

[13] In this case, the respondent's evidence rests primarily on witness testimony. The judge heard not only the parties, but also the notary, Handfield, who drafted the deed. The latter was categorical. He received instructions from Mr. André Grétry, the respondent's representative, who asked him to add a right of first refusal clause to the deed [A reciprocal right of first refusal clause, according to Mr. Grétry, that is, one that applies to both the appellant's property on one side of the street and the respondent's property on the other.] and not an option to purchase. However, he was unfamiliar with this type of clause and sought a template. Having found none, he used as a model a clause that had been included in a contract concerning a farm. In his view, it was, and still is, a clause containing a right of first refusal and nothing more.

[14] The judge concluded that the testimonies of Mr. Grétry and Mr. Handfield were further confirmed by that of Mr. Daniel Hamelin, representing the appellant.

[45] The current situation is similar to that described by the Court of Appeal, where the notary public found that the parties' intent had been misrepresented. In the present case, the notary public inserted the following paragraphs into the authentic instruments, namely the notarial contracts of Lot 243 (January 14, 2010) and Lot 252 (April 16, 2010):

POSSESSION

The purchaser becomes the owner of the property from this day forward, with immediate possession.

...

DECLARATION RELATING TO THE PRELIMINARY CONTRACT

The parties agree that the only legal relationship between them is established by this contract, which cancels all previous agreements.

[46] The Court also notes that the services of the same notary public were retained by the appellants and their partners for other contracts or real estate matters. In the case of the acquisition of Lot 253 by Messrs. Touchette and Leclerc in July 2009, the notary public inserted

the following paragraphs in the authentic instrument of the notarial contract for Lot 253, under the items presented in paragraph 45:

POSSESSION

The purchaser becomes the owner of the building from this day forward, with immediate possession and occupancy.

...

DECLARATION RELATING TO THE PRELIMINARY CONTRACT

~~The parties agree that the only legal relationship between them is established by this contract, which cancels all previous agreements. This sale is made pursuant to the preliminary agreement signed by the seller on April 25, 2009, and accepted by the buyer on April 27, 2009. Unless otherwise stipulated, the parties confirm the terms contained therein but not reproduced herein.~~

(annotations added)

[47] Considering these rules regarding forgery, it appears uncertain whether the appellants are entitled to present a position contrary to that expressed in the notarial contracts of Lots 243 and 252 without proceeding with a forgery claim. A forgery claim is not required if the notary has correctly reflected the intention of the parties and there is no error on his part. If the parties to the notarial deed misled the notary, a forgery claim is also not the correct procedure. However, in both cases, although for different reasons, the appellants' challenge to the notarial contract is all the more difficult based solely on the testimony of Mr. Touchette.

[48] The appellants submit that the presumption provided for in article 1710 of the Civil Code of Québec applies in this case. The oral promise of sale allegedly made in July 2009 between 9134 and Mr. Touchette with respect to Lots 243 and 252^[13], concurrently with Mr. Touchette's purchase of an undivided share of Lot 253 by notarial deed in July 2009, was accompanied by delivery and actual possession, since Mr. Touchette acted as the true owner of the lots^[14]. Thus, according to the appellants, the said promise of sale is equivalent to a sale.

[49] The appellants' position is contingent upon and rests solely on the testimony of Mr. Touchette, who legally acquires an undivided share not exceeding 50% in the two lots and who holds 100% of the issued shares of the share capital of the co-transferor 9134 and none of the share capital of 2849. The other undivided 50% share of the lots is acquired by Mr. Leclerc, who holds all the shares of the share capital of the other co-transferor 2849.

[50] That being said, with or without the forgery charge, the Court is not convinced that the evidence presented is sufficient to establish that Mr. Touchette became the owner of Lots 243 and 252 in July 2009. Evidence concerning work on Lots 243 and 252 has been cited. But above all, the concurrent circumstances surrounding the acquisition of Lot 253 by Messrs. Touchette and Leclerc have been presented to support the acquisition of Lots 243 and 252 at the same time.

[51] The owners of Lot 253 approached the appellants in April 2009 to sell the lot. The owner also owns Lot 254, which is adjacent to Lot 253 and landlocked^[15]. Messrs. Touchette and Leclerc decided to purchase it personally and signed a promise to purchase in April 2009. The transaction effecting the transfer of ownership was notarized on July 22, 2009, again before the same notary for Mr. Touchette, Mr. Daviau^[16]. Although a promise to purchase Lot 253 was signed earlier, the Court acknowledges the transfer of ownership in July 2009 and the mention of a preliminary contract entered into in April 2009, but no record of any transaction before the notary, Mr. Daviau, was signed concerning Lots 243 and 252. The sole reason for this absence would be the schedule of the appellants' usual notary. Two notarial deeds on two different dates, and in many respects very similar in content, suggest either deliberate decisions or indifference regarding the date of transfer to be finalized.

[52] Mr. Touchette testifies that only a verbal agreement was reached to acquire Lots 243 and 252 from the owning corporations. Unfortunately, this situation cannot be followed up to support a transfer of ownership of Lots 243 and 252 in July 2009.

[53] Mr. Touchette's testimony was unconvincing, and no other testimony corroborated it. Co-owner Mr. Leclerc did not testify, nor did any officer or administrator of Lot 2849. In this context, the Court is in a difficult position to determine the probative value of a single, uncorroborated testimony, the author of which cannot act alone given the joint ownership with Mr. Leclerc. Two notarial deeds were executed between the two purchasers and the two transferors, and each of these deeds expresses the will of each party to the notarial contract, particularly regarding taking possession as owner and the clear intention of the parties expressed in the deed regarding the absence of any legal situation existing prior to the signing of the notarial deeds concerning Lots 243 and 252.

[54] Moreover, the notary who executed the deeds was not new to dealing with purchasers, and the authentic instrument that is the notarial contract relating to the acquisition of Lot 253 clearly demonstrates that when special circumstances exist with respect to any kind of preliminary contract, the parties disclose the situation. The appellants were also familiar with written promises to purchase, given their experience in the real estate sector. No promise was signed for Lots 243 and 252. Nor is there one in the notarial contracts for Lots 243 and 252.

[55] In this context, where only Mr. Touchette's testimonial evidence is on file, the Court is of the opinion that the probative value of the notarial deeds has not been successfully challenged, and that the true intention of the parties to the notarial acts, for the purpose of establishing the acquisition dates of Lots 243 and 252, remains reflected in the deeds. Consequently, the Court accepts the acquisition dates of Lots 243 and 252, January 14, 2010, and April 16, 2010, respectively, as reflecting the true intention of the parties.

[56] The burden of proof in the circumstances could not rest solely on Mr. Touchette's shoulders. Notwithstanding the position Mr. Touchette presented in his testimony, his role and

legal position, particularly with respect to his rights in the Joint Venture, are insufficient to overturn the intent expressed in the notarial contracts by all the parties involved. In the Court's opinion, the evidence is insufficient.

[57] The market value for the purposes hereof is therefore that as of 14 January 2010 for Lot 243 and of 16 April 2010 for Lot 252.

[58] For the purpose of establishing these market values, the evidence includes the testimony of Ms. Fortin and Mr. Touchette and the filing by the appellants of the amended appraisal reports prepared by Ms. Fortin, a certified appraiser, in connection with Lot 243 and Lot 252.

[59] Furthermore, the respondent now admits the market values of Lots 243 and 252 contained in Ms. Fortin's amended appraisal reports. Some of the appeals will be allowed, if not in part to follow up on this admission.

[60] Ms. Fortin has been a certified appraiser for over 10 years but has been in the field of appraisal for 12-13 years. She focuses her practice on the appraisal of all types of land for residential use, insurable value, reserve fund, market value and retroactive value.

[61] In March 2014, Ms. Fortin accepted two mandates, each consisting of submitting a retroactive market value assessment of each of Lots 243 and 252, dated January 15, 2010, and April 16, 2010, respectively. For each lot, an amended appraisal report was filed as evidence.

[62] Ms. Fortin's main examination was relatively short. Her testimony did not provide much detail on the exact nature of the mandates obtained from Mr. Touchette or on the backfilling work that might have concerned Lot 243. Lot 243 was raised primarily to explain the discrepancies with the value determined by the CRA appraiser.

[63] Little information was provided regarding Lot 243 other than to confirm the market value it identified and the reasons for its discrepancy with the report initially prepared by the CRA. No other elements were addressed^[17] .

[64] Regarding Lot 252 and in response to what she could say about the amended evaluation report filed as evidence, Ms. Fortin stated that she had based her statement on the following comment^[18] :

I based my assessment on the total area that could be built on at that time, which was a possibility to build on – on the date the assessment was made, which was possible tomorrow morning to build on it on a normal market within the time period requested in July 2009.

I used comparable properties in the same area and over the same time periods. But there were no restrictions on dedicating a portion of that plot to the street. If construction were to begin tomorrow morning, there would be no restrictions.

[65] Ms. Fortin was then questioned about what might explain why the appellants sold Lot 252 for less than Lot 243, even though Lot 252 was larger. Ms. Fortin suggested this might be due to the greater complexity of the construction on that lot. In this regard, the appellants' lawyer asked her to comment on photographs taken in March 2014 of a retaining wall and structures on Lot 252. These photographs were essentially the only source for answering the questions^[19]. Ms. Fortin confirmed that mechanical grading work had been completed. She confirmed that she had not assessed the cost of this work as part of her mandate. Her testimony did not clarify when the work had been done or what its cost had been. She confirms that her mandate for retroactive evaluation was not to proceed with the evaluation of the work which consisted of creating a low wall.

[66] On the other hand, it confirms that the assessment of Lot 252 is based on the total area that could have been built on the lot at that time on the assessment date requested in a normal contract within the time period requested in July 2009^[20]. This response therefore suggests that Lot 252, although potentially having a slope, would not have prevented any construction on the entire lot.

[67] The main interrogation did not reveal any further information about the values or circumstances that may have existed in July 2009^[21].

[68] Under cross-examination, it was confirmed that the two reports filed as evidence by the appellants are amended assessment reports of previous reports, including those for Lot 243, which refer to the same assessment date. She specifies that she received the mandate in March 2014.

[69] Ms. Fortin specifies that her mandate is to assess Lots 243 and 254 retroactively (January 15, 2010, and April 16, 2010, respectively) on the basis that they are buildable. Cross-examination establishes that Lot 243 is indeed already in this position, since a building appears to be under construction there in September 2009, while the retroactive assessment date is January 15, 2010. Although, evidently, the Court notes evasive answers^[22]. Ultimately, Ms. Fortin confirmed that Lot 243 in January 2010 was a buildable lot^[23].

[70] She confirms that she had topographic maps to determine what the lots might have looked like in 2010, but these maps were not included in the amended assessment reports filed as evidence. When questioned about the maps in January 2010 for Lot 243, Ms. Fortin was unable to establish whether the lot required backfill work as of the date of the retroactive assessment^[24].

[71] Interestingly, the respondent asks Ms. Fortin to explain why she included the reference in point 2.4 on page 6 of the amended assessment report for Lot 243 (reproduced in paragraph (c) of section 76) concerning the identification of the assessed properties, given that Lot 243 was

buildable under the assumption. This information is particularly important for Lot 252, since the same reference is made there.

[72] After some discussion, Ms. Fortin replied , "Because we always include a reservation for that," and added, when asked to clarify whether this was automatic on all reports, "It is automatic ." Ms. Fortin stated that this requirement stemmed from the Code of Ethics of Chartered Appraisers of Quebec.

[73] With respect to Lot 252, the cross-examination of Ms. Fortin confirms that the retroactive assessment date is April 16, 2010, and that the site visit was on March 15, 2014, as was the case for Lot 243. Ms. Fortin confirms that she did not visit Lot 252 nor take any steps to ascertain its condition, but according to the topographic maps consulted, the lot was not buildable^[25] . She specifies that she has no knowledge of the backfilling work (including its potential costs and completion date) and that she did not need to inquire about it because the deduction for the work would be determined by another expert assessment^[26] . Mr. Touchette reportedly offered only verbal explanations, without presenting any documents^[27] .

[74] It also specifies that the retroactive assessment dates are those used by the CRA and therefore there was a comparative aspect that the appellants wanted to introduce with its assessment reports. On this point, the Court notes that the earlier transfer of ownership dates in July 2009 put forward by the appellants at the hearing were not used by the appellants with the CRA and were not the subject of separate assessment reports at that time.

[75] This information significantly impacts the scope of the statement, since it does not, based on the witness's responses, provide significant probative value regarding the importance of backfilling in the evaluation of a lot, nor whether backfilling is necessary^[28] . A simple explanation could be that the determination of a lot's market value depends on the lot's condition at the time of the evaluation.

[76] The amended appraisal reports on file confirm a retroactive market value of \$74,500 for Lot 243 and \$138,000 for Lot 252. Having been prepared in June 2015, the Court notes the following passages under different sections of the two reports, which clarify the scope of the reports and the factors considered for the appraisals filed as evidence:

a. Cover letter:

- i. The appraiser visited and inspected the premises and considered the various elements that contribute to the value;
- ii. The confirmed value is described as the market value of the subject lands;
- iii. The purpose of the valuation is to estimate the market value for tax purposes;

- iv. The analyses, opinions and conclusions of the reports are restricted only by the assumptions and reservations that the evaluator was asked to formulate, and the reader is referred to the section of the reports listing the reservations and basic assumptions;
- v. the reports are prepared in accordance with the regulations and professional practice standards of the Order of Chartered Appraisers and/or the Appraisal Institute of Canada;
- vi. The information contained in the reports was obtained from the municipality, the assessor's personal inspection of the property and neighbourhood, and a review of information from comparable sales available in the area.

b. Basic reservations and assumptions:

- i. the reports are prepared at the request of Mr Touchette for the sole purpose specified in point a;
- ii. The evaluation date appearing in the reports is the date on which the evaluator assessed the market conditions;
- iii. there are no other charges, encroachments, restrictions, leases, contracts than those mentioned in the reports;
- iv. no topographic survey of the building has been carried out and the reports do not constitute a guarantee in surveying matters, and the photographs, sketches, drawings, diagrams appearing in the reports are only illustration and not necessarily a reflection of reality;
- v. The market data considered are generally reliable, and where necessary the evaluator has provided further investigation by deploying reasonable verification efforts.

c. Introduction:

- i. The value sought only considers real estate assets (land) excluding backfill costs, excavation costs and development costs considering a bulk valuation of undeveloped land.

d. Property Description

- i. Plot 243 has an area of 15,022 sq ft, a flat surface and a rectangular shape. A roundabout reduces the plot by 4,411 sq ft (sic).

[77] The Court notes that Ms. Fortin was not asked to comment on the notes beginning on pages 15 and 16 of the amended appraisal reports for Lots 243 and 252, respectively. The final correlations indicated therein confirm the appraiser's market value of \$74,500 for Lot 243 and \$138,000 for Lot 252^[29]. They also indicate that the owner might disagree if certain cost assumptions were considered. Although this position of the owner is set out, the Court notes that the appraiser's market values for the lots under review remain the same.

[78] After hearing Mr. Touchette's principal examination, the Court notes that Mr. Touchette acknowledges that he is not a certified appraiser^[30] and that, consequently, his appraisals are

based on his knowledge of the real estate market and building construction. He describes his valuation analyses as home assessments.

[79] Mr. Touchette reiterates the analysis he presented to the CRA-Verification Division on September 18, 2014. His representations constitute Appendix E of the representations that his tax advisors sent to the CRA-Appeals Division on January 29, 2016. His representations present, in particular, a market value based on comparables that he presents and reduces this value by the cost of backfilling necessary to reflect the true market value as of the notarial deeds dated January 14, 2010 and April 16, 2010.

[80] Mr. Touchette refers to a supplier but does not attach any documents from that supplier; the supplier does not testify; the technical experts cited do not testify; the testimony and explanations regarding the actual costs incurred (as opposed to estimates) and the work periods are unclear; his testimony is not corroborated. At one point, Mr. Touchette indicates that the value issue with Lot 243 was the proximity of the construction to the roundabout on the lot. The value issue with Lot 252 would be the volume of fill required to successfully complete construction without a pumping station^[31].

[81] Mr. Touchette sets the market value of Lot 243 at \$93,600 (\$93,000 from comparable properties for an area of 1,275 square meters and \$600 from another comparable property for an additional area of 120 square meters). There is no explanation to justify the use of different comparable properties, the first of which is valued at nearly \$73 per square meter and the second at \$5 per square meter.

[82] Regarding the cost of backfilling, Mr. Touchette's explanations indicate a total amount of \$380,000 for the two lots. His testimony does not clearly establish the amount allocated to each lot. The representations of Mr. Touchette's tax advisors mention an allocation of the backfilling cost between the two lots in their economic analysis, but no reference was made to this during the hearing.

[83] Consequently, Mr. Touchette's testimony does not establish a definitive market value for Lot 243 as of the date of the retroactive appraisal, other than to indicate that the cost of backfilling must reduce the value of the lots. Since Mr. Touchette also added that the value he ultimately estimated is very close to the valuation agreed upon by the two professionals^[32], the Court is of the opinion that the evidence does not support a credible and sufficiently convincing demonstration to establish, on the balance of probabilities, a market value lower than the value established in his appraiser's amended appraisal report.

[84] The economic analysis contained in the tax advisors' submissions assigns a negative value to both lots. The Court is of the opinion that this is at best an economic valuation and that an economic valuation is not indicative of market value. Even the appellants did not acknowledge a negative market value when filing their income tax returns, nor did the amended valuation reports on file. In particular, the actual cost paid by the appellants for the backfilling of Lot 252

is indicated in the submissions as being practically nil for the appellants. Such a situation demonstrates that market value does not equate to an economic valuation.

[85] For Lot 252, again using the representations he had submitted to the CRA for verification in September 2014, Mr. Touchette sets the market value of Lot 252 at \$100,662 (the same approach as for Lot 243 is used: \$93,000 from comparable properties for an area of 1,275 square metres and \$7,662 from another comparable property for an additional area of 1,532 square metres). In this case as well, there is no explanation to justify the use of different comparable properties, the first of which is valued at nearly \$73 per square metre and the second at \$5 per square metre.

[86] The explanations for the cost of backfilling for Lot 252 are essentially the same as those given for Lot 243. The Court is unable to draw a different conclusion for Lot 252 than the conclusion reached in relation to Lot 243.

[87] Consequently, Mr. Touchette's testimony does not establish a definitive market value for Lot 252 as of the date of the retroactive assessment, other than to indicate that the cost of backfilling must reduce the value of the lots. The Court is not satisfied that the evidence supports a credible and sufficiently convincing demonstration to establish, on the balance of probabilities, that different market values existed for Lots 243 and 252 on the assessment dates. The Court is of the opinion that the arguments presented at the hearing and during pleadings are insufficient to meet the burden of proof required to disregard the reports and adopt the market values used by the appellants in filing their income tax returns. Unfortunately for the appellants, the Court is not convinced that a value other than that in the reports was established before the Court. The appellants may well believe that the market values were fundamentally different from those in the reports. However, the Court is not satisfied that such a determination has been established before the Court and meets the burden of proof with which the appellants faced.

[88] The Court also remains perplexed by Mr. Touchette's insistence on producing market value appraisal reports dated from the CRA's appraisal reports, which correspond to the dates of the notarial deeds of transfer of ownership now accepted by this Court, and on claiming that, at the same time, the market value obtained from his own appraiser was too high, and that these reports are in fact based on an erroneous factual situation. The Court understands that the objective was to challenge the higher market values accepted by the CRA. However, the Court fails to explain how, in the circumstances, probative value can be given to the fact that these market values in the reports are incorrect based solely on the uncorroborated testimony of Mr. Touchette, the appellant in this case, and given the absence of details and evidence of a lower market value, including costs related to the work, in the record. A legitimate question would be to understand what could motivate the appellants to respond to the tax authorities' assessments with valuations that are allegedly incorrect when an even lower value would be more appropriate. No satisfactory answer was provided at the hearing.

[89] In view of the foregoing, the Court is of the opinion that the evidence does not support a credible and sufficiently convincing demonstration to establish, on the balance of probabilities, a

market value lower than the value established in the amended appraisal report of its certified appraiser.

B. Expenses rejected at 9134

[90] The appellants are of the view that the invoices issued before November 29, 2011 represent legitimate business expenses incurred by 9134 in the performance of its obligations as a developer under Protocol 2009. 9134 was to deliver lots, including Lot 243 and Lot 252, which would be serviced by public utility services^[33] .

[91] For invoices issued after November 29, 2011, the appellants admit that these were personal expenses incurred during work carried out on the Private Street in accordance with Protocol 2011 signed on the same date.

[92] The respondent submits that the appellants have not met their burden of proof in rebutting the Minister's presumptions regarding the denial of expenses. Mr. Touchette's explanations are too brief and imprecise, rendering them insufficient^[34] . It appears difficult to distinguish between personal and business invoices^[35] . However, this is an accounting exercise that the taxpayers should have completed beforehand^[36] .

[93] Paragraphs 20 to 28 above set out the expenses which remain in dispute, and the treatment of expenses for which appeals will be allowed, if not inter alia to reflect the admissions of the parties.

[94] Mr. Touchette is the only witness presented by the appellants to support the deductibility of the disallowed expenses.

[95] On June 11, 2009, 9134 signed a Municipal Works Agreement as a developer with the City of Granby (Protocol 2009)^[37] , which obligates 9134 to carry out, at its own expense, all municipal works for the construction of drinking water, sewer, and road infrastructure on certain streets and lots, so that the land to be sold as part of the residential development project would be served by public utilities^[38] . Lots 243 and 252 are included among the lots to be served by said works.

[96] Mr. Touchette testified that the infrastructure work could not begin until the 2009 Protocol was signed^[39] . According to him, it was “always like that. Always, always, always” when it came to such an agreement with a municipality^[40] . Only certain preparatory work, such as surveying or clearing the road, could be carried out before the signing of the 2009 Protocol.

[97] As part of the personal project undertaken by Messrs. Touchette and Leclerc, another Municipal Works Agreement (Protocol 2011)^[41] was concluded on November 29, 2011,

between the City of Granby and 9134 for the construction of the private road between Lots 243 and 252^[42], all in order to build buildings on Lot 253 and the subdivided southern portion of Lot 252. The Court notes that Lot 253 is a landlocked lot.

[98] Unlike the 2009 Protocol, which concerned public streets, the 2011 Protocol only requires the developer to carry out, at its own expense, all municipal street infrastructure work^[43], which corresponds to the pipes for drinking water and sewage services^[44]. Thus, the roadworks on the Private Street were not part of the developer's obligations under the 2011 Protocol.

[99] Mr. Touchette testifies once again that only preparatory work can be done on the private street prior to the signing of the 2011 Protocol^[45].

[100] Mr. Touchette mentions that the services of the company Bertrand Ostiguy inc. were retained to carry out the "municipal street infrastructure work" on the private street, as required by Protocol 2011. Bertrand Ostiguy inc. billed 9134 for its services rendered during the months of November and December 2012. On December 2, 2014^[46], 9134 "re-billed" Mr. Touchette for the infrastructure work related to Protocol 2011^[47].

[101] During cross-examination, Mr. Touchette stated that this "re-invoicing" did not occur solely as a result of the tax audit, as he had intended to do it anyway^[48]. In her testimony, Ms. Caroline Beaudry, a CRA auditor, indicated that she had mentioned to Mr. Touchette that this might not have been the correct way to proceed^[49].

[102] For all the expenses in dispute in these appeals, Mr. Touchette testifies that all invoices dated before November 29, 2011, the date of signature of the 2011 Protocol, are invoices relating to services retained by 9134 in the performance of its obligations as promoter under the 2009 Protocol^[50]. As such, they would be invoices^[51] incurred by 9134 to earn business income and should be deductible^[51].

[103] However, all invoices issued after November 29, 2011, were for services related to Protocol 2011 and should, according to Mr. Touchette, be subject to adjustments^[52]. It should be noted, however, that the appellants admitted that some invoices issued before that date were for personal expenses. These were mainly for engineering services related to plans and specifications and for surveying^[53].

[104] Mr. Touchette's cross-examination casts some doubt on the reliability of this rather simplistic explanation. Indeed, the reality is that it sometimes seems difficult to distinguish between invoices duly issued in the name of 9134 in accordance with Protocol 2009 and

invoices issued for work on the private street under Protocol 2011 or on land personally owned by the two individuals.

(1) Infrastructure expenditure

[105] The 9134 taxation years ending with its fiscal years of March 31, 2011 and March 31, 2012 are subject to disallowed infrastructure expenditures in the amounts of \$69,690 and \$10,915 respectively. Following the tabs in the Respondent's File Book where the disputed invoices are located^[54], the appellants' dispute of these expenditures is estimated at \$69,265 as of March 31, 2011 and \$3,900 as of March 31, 2012^[55].

[106] For the financial years ending on March 31, 2011 and March 31, 2012 of 9134, invoices may be grouped.

(a) *Michel Leclerc Construction – Machinery Rental*

[107] The only invoice from Construction Michel Leclerc, Mr. Touchette's partner in the Joint Venture, was issued on October 8, 2010, for \$40,000. The amount claimed is not negligible, and the only description to justify the claim is the following: Machinery rental – flat rate.

[108] Mr. Touchette's questioning regarding this invoice was limited to confirming that, in his opinion, the invoice related to Protocol 2009. He provided no details to contextualize the invoice or describe the services rendered and their purpose. No further questions were put to Mr. Touchette.

[109] During cross-examination, the respondent's counsel asked Mr. Touchette what the matter was about. His answer was vague and referred to a possibility. Mr. Touchette did not have a specific recollection. He suggested that Construction Michel Leclerc had a bulldozer, a mechanical shovel, so that could explain the bill. He was asked which properties benefited from the machinery. His answer was general. The entire project benefited. He spoke of very uneven terrain, a lot of rock, many stumps to remove, and a lot of work to be done. Renting the machinery allowed them to achieve a good result.^[56]

[110] The only explanation provided during direct examination was to link the invoice to Protocol 2009. The date on the invoice suggests this connection. However, the existence of a relationship of dependency between the contracting parties, and the explanations offered during cross-examination, leave the Court perplexed. The explanations are general. Lots are generally sold to third parties who undertake the construction of the buildings; the appellants are directly involved in the development of two lots. Construction on Lot 252 began in the spring of 2010, while Lot 252 was acquired in April 2010. The work required on Lot 252 was discussed at length. It appears that all of these circumstances, and particularly the period of spring and summer 2010, warranted more specific explanations from Mr. Touchette. The Court notes, among other things, that the Excavator 320 was not mentioned. The Court does not fault Mr.

Touchette's testimony. His knowledge and memory are not infallible. However, he did not appear to be the person best placed to explain the circumstances and reasons for this invoice. The proximity of the work undertaken on Lot 254 and the lack of detail unfortunately cast doubt on the total amount of the invoice.

[111] There also appears to have been work carried out under Protocol 2009 concurrently with work on the lots in question and on the private street covered by Protocol 2011^[57] . This increases the difficulty when it comes to distinguishing between personal invoices and those of 9134, particularly for sand trips and compactor hours^[58] .

[112] Having considered i) the evidence on file, ii) Mr. Touchette's sole testimony relating to the single invoice from Construction Michel Leclerc and the generality of the explanations which persist after his cross-examination, iii) the succinct description of the services rendered, iv) the considerations surrounding in particular the ownership of Lot 252 and v) all the development activities of the Joint Venture and the integrated project, the Court is of the opinion that the evidence on file does not support a credible and sufficiently convincing demonstration to establish, on the balance of probabilities, that the services rendered by Construction Michel Leclerc were incurred within the framework of the Joint Venture.

[113] In this context, the Court is not prepared to grant the expense.

(b) *Bertrand Ostiguy Inc. – Sand transport and compactor hours, pipes*

[114] Most of Bertrand Ostiguy Inc.'s invoices relate to trips for sand or stone and compactor hours. Occasionally, they mention pipes and machinery operating time. These were the invoices most frequently discussed during the hearing.

[115] Although simplistic, Mr. Touchette's explanation regarding the invoice dates does not appear unreasonable, especially considering his testimony concerning the need to conclude a Protocol with the City of Granby before beginning the work. Thus, it would only have been from November 29, 2011, that work could have been undertaken on the private street in accordance with the 2011 Protocol.

[116] However, Mr. Touchette's cross-examination demonstrates that this explanation is insufficient, since it does not clarify whether the invoiced work took place on Lots 243 and 252 or on the lots sold to third parties by 9134^[59] , in a context where these two sets of work overlap. It is difficult to determine when the backfilling, particularly on Lot 252, related to the integrated project was carried out^[60] .

[117] On the one hand, it does not seem obvious to me that the backfilling work on the personally owned lots and certain basic work on the Private Street only began after the signing of the 2011 Protocol. The granting of a building permit in April 2010 for the landlocked lot which would have required access makes it possible to doubt this.

[118] Furthermore, the Court is of the opinion that the dates of transfer of ownership of Lots 243 and 252 must also be considered in determining to whom the expenses could reasonably belong, given the lack of evidence on file to the contrary. The dates of transfer of ownership of Lots 243 and 252 retained by the Court are January 14, 2010, and April 16, 2010, respectively. The Court also notes that the evidence supports the claim that fill work was carried out primarily on Lot 252.

[119] Thus, the work beginning in spring 2010 includes Lot 252 and part of the development south of the integrated project^[61]. The integrated project includes Lot 243, Lot 252, the private street, and the development of Lot 253. But although a protocol is required before a project can actually begin, the evidence is unclear as to where the services were rendered. The Court also notes that none of the building permits that could explain the date or period of the work have been filed as evidence. Unfortunately, too much doubt remains.

[120] Moreover, a building permit appears to have been issued on April 17, 2010 for Lot 4,801,717, which is a subdivision to the east of the former Lot 253, personally purchased by the individuals. This is a landlocked lot. To build on this lot, there must have been some backfilling and work carried out on the private road and Lots 243 and 252^[62].

[121] Having considered i) the evidence on file, ii) the sole testimony of Mr. Touchette relating to the invoices in question from Bertrand Ostiguy Inc. and the divergent or uncertain elements that persist after his cross-examination, iii) the succinct description of the services rendered appearing on the invoices, iv) the other considerations surrounding in particular the ownership of Lot 243 and Lot 252 and the activities that may have been carried out within the framework of the integrated project, and v) all of the development activities of the Joint Venture, the Court is of the opinion that the evidence on file does not support a credible and sufficiently convincing demonstration to establish, on the balance of probabilities, that a specific part or all of the expenses were incurred within the framework of the Joint Venture's undertaking.

[122] In this context, the Court is not prepared to grant the expense.

(c) *Sani-Eco Inc. – Demolition and Transport*

[123] The invoice from the supplier Sani-Eco Inc.^[63] is dated July 5, 2011, and the description of the services rendered to the Court is relatively brief, referring to demolition work—Michel Leclerc garage—and processing of construction materials by the ton. During his direct examination, Mr. Touchette simply confirmed that the invoice was related to Protocol 2009^[64]. No further details were requested or provided. However, counsel for the respondent returned to this invoice to obtain more information.

[124] Mr. Touchette indicated that there must be something to demolish. He then referred to the presence of waste on the lots, including tires, old sheds, garages, and added washers, dryers,

mattresses, and scrap from old buildings^[65]. The reason for the reference to Construction Michel Leclerc was that Construction Michel Leclerc assumed responsibility for waste disposal. Mr. Touchette was unable to confirm which lot(s) were involved.

[125] It was not possible to identify on which lot the demolition work took place. The Court is of the opinion that Mr. Touchette has not reasonably succeeded in explaining the reason for using the word "demolition," and serious doubt remains as to the reference to "JOB: Demolition - Garage Michel Leclerc ." The Court is not convinced by Mr. Touchette's explanations regarding the description used by the supplier. Serious doubt exists. The Court is of the opinion that a credible and sufficiently convincing demonstration, on the balance of probabilities, of an expense incurred in the course of the business operated by the Joint Venture has not been established.

(d) *Hydro-Québec*

[126] Mr. Touchette attempted to link the Hydro-Québec invoice^[66] to one of the Protocols, but without success^[67]. This failure confirms the lack of legitimacy of the expenditure to the Joint Venture. In fact, the Court is of the opinion that Mr. Touchette's hesitations further supported the theory that the expenditure was attributable to the integrated project personally undertaken by the two partners. The location of Saint-Charles Street South and the possibility that it involved a vehicle that travelled west of the plan^[68] reinforces the link with the integrated project of Messrs. Touchette and Leclerc. The Court is of the opinion that a credible and sufficiently convincing demonstration, on the balance of probabilities, of an expenditure incurred within the framework of the business operated by the Joint Venture has not been established.

(e) *9034-3948 Quebec inc. (Les Entreprises Choinière)*

[127] These are two invoices for sand deliveries^[69]. Mr. Touchette merely states that since the dates precede November 29, 2011, these are expenses incurred by the Joint Venture under Protocol 2009^[70]. No questions are asked during cross-examination regarding these invoices.

[128] The lack of cross-examination regarding these invoices weighs heavily in establishing the deductibility of these expenses in the context of the Joint Venture's activities. The Court is not prepared to disregard Mr. Touchette's testimony concerning these invoices, although the explanations offered are limited. The appellants' position is not without merit, and the absence of cross-examination helps to maintain this explanation. Given the appellants' sole unchallenged position supporting the deductibility of the invoices, the Court accepts the explanation and is of the opinion that the credible and sufficiently convincing demonstration, on the balance of probabilities, of the expenses incurred in the course of the business operated by the Joint Venture has been established. The Court therefore allows the expense of the two invoices from Les Entreprises Choinière to be deducted in the Joint Venture.

(f) *Wolseley Canada Inc. and Groupe Gaston Côté*

[129] These are eight invoices for pipes ^[71]. They were issued in October 2010, except for one which dates from June 2011.

[130] Mr. Touchette's sole explanation is that, since the invoice dates predate November 29, 2011, these are expenses incurred under Protocol 2009. No questions are raised during cross-examination regarding these invoices. The Court is unable to challenge the deductibility of the invoices based on the evidence submitted to support the expenses.

[131] Considering a situation similar to that with Les Entreprises Choinière, the Court adopts the same position as in the case of the Les Entreprises Choinière invoices. Consequently, given the appellants' sole and uncontested position supporting the deductibility of the invoices, the Court accepts the explanation and is of the opinion that the credible and sufficiently convincing demonstration, on the balance of probabilities, of the expenses incurred in the course of the business operated by the Joint Venture has been established. Therefore, the Court accepts the deductibility of the expenses in the Joint Venture for the eight invoices of Wolseley Canada Inc. and Groupe Gaston Côté.

(g) *Teknika HBA inc./Les Services exp inc.*

[132] These are four invoices for professional fees from the same engineering firm retained for the preparation of plans and specifications relating to the various projects in Faubourg de la Renaissance, rue de Bretagne, and Place de Bretagne. Four invoices were in dispute, but the two invoices issued in 2011 were admitted in full by the appellants:

Invoice date	Amount	Qualification during Mr. Touchette's testimony
February 19, 2010	\$3,457.50	Protocol 2009, but it cannot definitively rule out the possibility that there is a proportion attributable to Protocol 2011 ^[72]
September 29, 2010	\$2,935.00	Protocol 2009 ^[73]
May 18, 2011	\$3,397.50	Protocol 2011 ^[74] (admission)
June 30, 2011	\$3,621.50	Protocol 2011 ^[75] (admission)

[133] All invoices bear the title "Faubourg Integrated Project – Plans & Estimates" . Mr. Touchette places more importance on the periods billed for the work than on the information that may have been entered on the invoices, particularly the one referring to "Faubourg Integrated Project" .

[134] Mr. Touchette is unable to be very precise about the information he can glean from the invoices. He cites the time spent, the engineers who would certainly be better placed to answer,

and the exact work that was invoiced. He emphasizes the fact that the work falls between two protocols.

[135] During Mr. Touchette's cross-examination, the respondent's counsel questioned him about the handwritten annotations of "Place de Bretagne" on the first two invoices. He admitted that he distinguished the two Protocols based solely on the invoice date and that he answered to the best of his knowledge, but could not guarantee that an invoice was exclusively for a single Protocol [76] . Although he provided explanations about the meaning of Place de Bretagne and which sector or development this expression referred to, he indicated that Place de Bretagne could have been used for different purposes, but concluded by stating that "then obviously, the section to the south, Place Bretagne, Rue Bretagne or Projet intégré, these are all names that have been used [77] . " Later, he added that Place Bretagne had begun to be used by people, that it could be a reference to the entire sector, and he concluded that it was the whole sector [78] .

[136] Mr. Touchette's responses regarding the reference to Place de Bretagne are in fact evasive. They suggest a very broad and indiscriminate use of the term. Considering all of Mr. Touchette's responses on this subject and the Court's assessment of his testimony on this same issue, the Court is more inclined to associate Place de Bretagne with the personal project, especially since Mr. Touchette described this project as an integrated project. The words "integrated project" also appear on the invoices.

[137] The Court notes that Mr. Touchette does not mention in his explanations, in support of his claim that the invoice relates to Protocol 2009, that Protocol 2009 had been signed for more than eight months when the first invoice was issued, and that the engineers' work, as indicated during his direct examination regarding the development stages leading to the signing of a protocol, includes significant work prior to the eventual signing of the protocol with the municipality. It is therefore not unreasonable to associate the engineers' involvement with the preparation of the forthcoming Protocol 2011, rather than assuming that their work must be related to Protocol 2009, signed eight months earlier, and for which the engineers' work was completed even earlier.

[138] The Court considers that Mr. Touchette provided insufficient details to allow for the acceptance of a credible and sufficiently convincing demonstration, on the balance of probabilities, of the expenses incurred in the course of the business operated by the Joint Venture. Consequently, the four invoices from Teknika HBA – Les Services exp inc. are associated with Protocol 2011 and are not deductible.

(h) Professional fees (surveying and notary)

[139] These are nine invoices for professional fees from Mr. Touchette and three invoices for professional fees from Mr. Daviau , notary. The appellants admitted that some of the invoices

from "Daniel Touchette, land surveyor" were personal expenses. The same is true of two of the three invoices from the notary^[79]. The following invoices remain in dispute:

Invoice date	Supplier	Amount	Explanations given by Mr. Touchette
April 27, 2010 ^[80]	Touch	\$1,500	Protocol 2009 due to the date
September 8, 2011 ^[81]	Touch	\$650	Protocol 2009, since it is related to Rue de Provence ^[82]
August 12, 2011 ^[83]	Touch	\$1,360	Protocol 2009, since services related to the lots sold to Marc Breton ^[84]
September 8, 2011 ^[85]	Touch	\$485	Protocol 2009, since it is related to Rue de Provence ^[86]
November 3, 2011 ^[87]	Touch	\$1,066	\$1,066 for the 2009 Protocol. Admission that \$533 is personal ^[88]
September 27, 2010	Notary	\$2,105	Easement for the installation of power lines in the project ^[89]

[140] No questions were put to Mr. Touchette during cross-examination regarding these invoices. The Court is unable to challenge the deductibility of the invoices based on the evidence submitted to support the expenses.

[141] Considering a situation similar to that with Les Entreprises Choinière above, the Court adopts the same position as in the case of the Les Entreprises Choinière invoices. Consequently, given the appellants' sole uncontested position supporting the deductibility of the invoices, the Court accepts the explanation and is of the opinion that the credible and sufficiently convincing demonstration, on the balance of probabilities, of the expenses incurred in the course of the business operated by the Joint Venture has been established. Therefore, the expense incurred in the Joint Venture for the six invoices of Mr. Touchette and Notary Daviau is deductible.

(i) *Other invoices*

[142] **City of Granby.** Mr. Touchette states that the City of Granby's invoice of December 15, 2010^[90] for \$13,884.75 is not covered by either Protocol 2009 or Protocol 2011. He specifies that this expense relates to a real estate project of 9134 and 2849 that precedes the project carried out by the Joint Venture and the integrated project^[91]. No questions on this subject are put to Mr. Touchette during cross-examination. Given the appellants' sole uncontested position supporting the deductibility of the invoice, the Court accepts the explanation and is of the opinion that the credible and sufficiently convincing demonstration, on the balance of probabilities, of the expenses incurred in the course of the business operated by the Joint Venture has been established and that, consequently, the expense is allowed.

[143] **Tax adjustment, 401 Paradis Street.** This is an invoice for \$3,064 addressed by 9134 to 9134 and 2849, dated July 13, 2010^[92]. The brief description refers to a tax adjustment for Paradis Street and an advance payment that was allegedly made. No testimony was given regarding this invoice. The only indirect reference to this invoice occurred when the parties agreed on Mr. Touchette's testimony concerning Tabs 24 to 28 inclusive of the Respondent's Document Book^[93]. This invoice is not included in Tab 29 of the Respondent's Document Book. There is reason to believe that this invoice was inserted in error^[94]. In the absence of testimony regarding this invoice, and the lack of supporting information, the Court is of the opinion that the appellants have not established credible and sufficiently convincing evidence, on the balance of probabilities, of the expenses incurred in the course of the business operated by the Joint Venture. The respondent's position regarding the non-deductibility of the expense is therefore upheld.

(2) Expenses related to the Shovel 320

[144] The expenses claimed in connection with the Excavator 320 relate to fuel, insurance, travel, maintenance, and bodywork of the machinery^[95]. These expenses are also noted in the parties' letter dated March 24, 2023, and reiterated in paragraph 26 above^[96]. The Court notes that the invoices recorded under the Excavator 320 have not been specifically discussed. However, the appellants' presumption classifying the invoices under one of the two protocols based on the invoice date applies to the invoices listed in Tabs 24 to 28 inclusive of the Respondent's Document Book^[97].

[145] Mr. Touchette mentions that 9134 and 2849 purchased the 320 excavator specifically to carry out work on the land "in all of [their] projects"^[98]. The 320 excavator was often used by the operators themselves. He adds that he did a lot of work with the excavator throughout the project.

[146] When asked if he could establish a difference between 2009 and 2011, Mr. Touchette specified that after the 2011 Protocol, an invoice from Bertrand Ostiguy mentioned having used the 320 excavator. Bertrand Ostiguy allegedly used the excavator because "...it was there at the bottom, so they could use it..."^[99]. After concluding his answer, which now places the work in relation to the 2011 Protocol, Mr. Touchette then mentions the names of those who operated the excavator. Mr. Touchette then confirms that Construction Michel Leclerc could occasionally operate the 320 excavator^[100].

[147] However, following cross-examination by the respondent's counsel regarding whether the excavator was used on Lots 243 and 252, the Private Street, or any of the lots in the integrated project, Mr. Touchette confirmed that Bertrand Ostiguy had used the excavator for the integrated project's infrastructure. He maintained, however, that the 320 excavator had never been used by

him or Construction Michel Leclerc for grading or backfilling Lots 243 and 252 or any other personally owned lot^[101]. He specified that Construction Michel Leclerc (which is building the buildings in the integrated project) has other equipment at its disposal. Only employees of Bertrand Ostiguy Inc. would have used it for the work on the Private Street.

[148] During cross-examination regarding the same exchange, Mr. Touchette confirmed that Bertrand Ostiguy had used the 320 excavator during the private street infrastructure work in 2009 and added that this excavator was used to prepare all the lots they were to sell throughout the project^[102]. The following response seems to indicate that the entire project could be a reference to the public street and the public project^[103]. As for the fill used on Lot 252 from the transported soil brought in from outside, the contractors who unloaded the soil onto the lot were responsible for spreading and pushing it. Thus, Messrs. Touchette and Leclerc did not use the 320 excavator.

[149] The only explanation provided by Mr. Touchette remains that all invoices prior to November 22, 2011, relate to Protocol 2009 and should be admitted. Two gasoline invoices dated December 2011 were admitted by the appellants and therefore not contested^[104]. Also, the appellants admit a 1/12 allocation for the expenses of the Excavator 320 incurred after November 29, 2011^[105].

[150] The Court finds the appellants' position unconvincing. The claim that the Excavator 320 was used "in all projects," but excluding Lots 243 and 252 and other personally owned lots, is not convincing. The Court is of the opinion that all of Mr. Touchette's responses regarding the use of the Excavator 320, and the nuances put forward regarding the methods used between the public street phase and the integrated project phase, do not allow the Court to draw a conclusion in favour of the appellants with respect to all the invoices related to the use of the Excavator 320. The invoices relating to the Excavator 320 are very vague and do not allow for a distinction to be made between work on the public street and work on the private street, especially with regard to Lots 243 and 252^[106]. The appellants have failed to establish or draw a line between the amounts of expenditure that could justify different treatment.

[151] Mr. Touchette's explanation that the Excavator 320, which was essentially present on the site, was never used by Messrs. Touchette and Leclerc personally on Lots 243 and 252, or on the private road or other lots, is insufficient to convince the Court. The respondent's presumptions have not been refuted, and the Court is also not satisfied that the appellants have established credible and sufficiently convincing evidence, on the balance of probabilities, of the deductibility of the expenses related to the Excavator 320. The answers of the sole witness heard on this matter lack precision and are in too many respects ambiguous or incomplete. This is insufficient to convince the Court. Among other things, the Court is of the opinion that making the Excavator 320 available to suppliers does not preclude the possibility that the situation served personal interests. The Court is of the opinion that Mr. Touchette's explanations support,

or at least do not preclude, the scenario in which the use of the Excavator 320, regardless of its operator, ultimately served the appellant's interests. In these circumstances, the operator is secondary. This conclusion emerges from Mr. Touchette's explanations when questioned on this matter during cross-examination. The evidence does not support any other conclusion in this regard.

[152] It is not in doubt that the Excavator 320 was acquired and used in the appellants' business activities. The main issue concerns the approach taken by the appellants to justify all of the expenses, which failed to convince the Court that they had met their burden of proof.

[153] Thus, having considered i) the evidence filed, ii) Mr. Touchette's sole testimony relating to the invoices concerning the Excavator 320 and the divergent or uncertain elements that persist after his cross-examination, iii) the succinct description of the services rendered appearing on the invoices, iv) the other considerations surrounding in particular the ownership of Lot 243 and Lot 252 and v) all the development activities of the Joint Venture and the integrated project, the Court is of the opinion that the evidence on file is insufficient to establish credible and sufficiently convincing proof, on the balance of probabilities, that the entirety, or even a batch of invoices, related to the Excavator 320 was incurred within the framework of the Joint Venture's business.

C. Paragraph 12(1)(x) and subsection 248(16) ITA

[154] The appellants are of the opinion that the respondent is not correctly relying on subsection 248(16) of the ITA. According to them, the purpose of subsection 248(16) is to avoid a mismatch between the claim for an input tax credit (ITC) and the taxpayer's subsequent deduction under paragraph 20(1)(h) of the ITA.

[155] They are of the opinion that, according to the first paragraph and the first subparagraph of subsection 248(16) of the ITA, it must be determined that the amount in question must have been both deducted under the Act and claimed under Part IX of the *Excise Tax Act* ^[107] .

[156] The appellants summarize the application of subsection 248(16) of the Income Tax Act in three conditions:

- a. The amount must have been deducted under the Act (this condition would be in the first paragraph of the provision);
- b. The amount must have been claimed as an ITC (this condition would be in paragraph a) of the provision);
- c. The amount must have been received or credited (this condition would be in paragraph a) of the provision).

[157] They further state that they only claimed ITCs under the ETA, and that the conditions for applying subsection 248(16) of the ITA are not met. Finally, the respondent should have made the ITC adjustments under the ETA. Subsection 248(16) of the ITA does not authorize the respondent to make ITC adjustments.

[158] Although the appellants confirm that subsection 248(16) of the ITA is not a subsection provision, the subsection provision in question, namely paragraph 12(1)(x) of the ITA, is not directly challenged by the appellants.

[159] The respondent's representations dated June 16, 2023, are brief regarding the inclusion in the calculation of income of \$9,134 of the input tax credits claimed on the disallowed expenses. He first confirms that the amounts referred to in paragraph 12(1)(x) of the Income Tax Act were revised following the hearing. They were reduced from \$10,066 to \$9,805 for the taxation year ending March 31, 2011, and from \$6,503 to \$2,266 for the taxation year ending March 31, 2012. Adjustments were also made for Mr. Touchette for the purposes of subsection 15(1.3) of the Income Tax Act.

[160] The respondent is of the view that subsection 248(16) of the Income Tax Act deems an amount claimed as an input tax credit to be an amount of government assistance. This presumption applies for the purposes of all provisions of the Act.

[161] The respondent specifies that this amount must be added to 9134's income pursuant to subparagraph 12(1)(x)(ii) of the Income Tax Act. He adds that if 9134 were to repay the ITC received, the appellant could, under subsection 248(18) of the Income Tax Act, obtain a deduction in computing income pursuant to paragraph 20(1)(hh) of the Income Tax Act.

[162] The respondent adds that without providing any evidence of how 9134 dealt with the ITC claim on expenses denied subsequent to the audit, including a possible ITC refund made, it is difficult to change the CRA's handling at this level.

[163] Finally, the respondent is of the view that the processing complies with the provisions of the "Act" (the Court assumes a reference to the Income Tax Act), that the disallowed expenses were personal expenses, and that 9134 could not claim the input tax credit (ITC) related to the disallowed expenses. The appellants were required to provide proof of reimbursement of ITCs received without entitlement. In the absence of such proof, the CRA was permitted to add these amounts to the income of 9134 and Mr. Touchette.

[164] Subparagraph 12(1)(x)(ii) of the Income Tax Act is the respondent's only reference to the subsection provision at issue. He made no representation on the application of paragraph 12(1)(x).

[165] The Court's position on this issue is based on the premise that (i) the appellants have not disputed having made ITC claims in respect of the denied expenses and having received ITC

claimed, and (ii) no evidence has been presented confirming a CRA adjustment in accordance with the provisions of the ETA of ITC claimed by 9134.

[166] The dynamics at play here primarily involve the interaction between paragraphs 12(1)(x) and 20(1)(hh) of the ITA, and subsections 248(16), (16.1), (18) and (18.1) of the ITA. That said, these provisions are not equally relevant for the purpose of resolving the issue in this case.

[167] The Court is not prepared to reach the same conclusions as the appellants with respect to subsection 248(16) of the Income Tax Act, its conditions of application and its scope. The preamble to the subsection appears to be the most decisive wording in light of the comments made by the parties with respect to the subsection.

[168] The Court also makes a similar observation regarding the respondent's succinct position on paragraph 12(1)(x) of the ITA. The application of paragraph 12(1)(x) requires more than a simple reading of subparagraph 12(1)(x)(ii).

[169] The Court wishes to clarify that for the purposes of this analysis, it is only considering the context of the Goods and Services Tax (GST). The same reasoning also applies under the Quebec Sales Tax Act and the Input Tax Rebate Act.

[170] The Court is of the view that paragraph 12(1)(x) of the Income Tax Act plays a central role in the treatment the CRA applied to the appellants. That paragraph is the determining provision in this case, and subsection 248(16) of the Income Tax Act introduces only a presumption, although one necessary for the purposes of applying that paragraph. For this reason, the Court is more inclined to examine the mechanism of paragraph 12(1)(x) to determine whether the treatment applied by the CRA is justified in the circumstances.

[171] With regard to subsection 248(16) of the Income Tax Act, the Court finds its preamble to be sufficiently clear as to its scope and effects. Considering the circumstances of the present case, 9134 must have filed an input tax credit (ITC) claim in respect of the GST applicable to a good or service ^[108]. In such a case, the amount claimed by 9134 is deemed for the purposes of the Act to be an amount of government assistance received for the good or service, as the case may be. The ITC claim is not denied by 9134. The subsection does not add any amount to the calculation of 9134's income, and the question of whether it should have such a scope does not arise. The preamble makes no reference to any circumstance in which the tax treatment of the amount of expenses claimed for the purposes of the Act is addressed.

[172] With regard to paragraph 12(1)(x) of the ITA, the Court retains the following passages for the purposes of this case:

(x) an amount (excluding a prescribed amount) received by the taxpayer during the year while earning income from a business or property:

...

(ii) either from a government , municipality or other administration,

if it is reasonable to consider the amount as a receipt :

...

(iv) either as a reimbursement, contribution or compensation or as assistance , in the form of a bonus, grant, conditional repayment loan, tax deduction or compensation, or in any other form, in respect of , as the case may be:

(HAS) ...

(B) of an expenditure incurred or made ,

insofar as the amount , as the case may be:

...

(vi) subject to subsections 127(11.1), (11.5) or (11.6), does not reduce, for the purposes of an assessment made under this Act, or which may be made , the cost or capital cost of the property or the amount of the expenditure ,

...

(our emphasis)

[173] A doctrinal work presents the objective of paragraph 12(1)(x) of the ITA as follows^[109] :

The purpose of paragraph 12(1)(x) is to bring into income all amounts received by a taxpayer in the course of earning income from a business or property as an inducement to do something or as a refund, reimbursement, contribution, allowance or other assistance in respect of an amount included in, or deducted as, the cost of property or an outlay or expense, except to the extent that such amounts have already been included in income, deducted in computing any balance of undeducted outlays or expenses, reduced the cost (or capital cost) of a related property or the amount of a related outlay or expense, or been subject to an election under subsection 13(7.4) or 53(2.1) to reduce the capital cost or cost of the property or under subsection 12(2.2) to reduce the amount of the outlay or expense.

...

Applicable after 1990, subsection 248(16) provides that an amount claimed by a taxpayer as a goods and services tax (GST) input tax credit or a rebate in respect of a property or service is deemed to be assistance from a government. However, such credit would normally not be included in income under paragraph 12(1)(x) as it would reduce the cost or capital cost of the property or the amount of the related expenditure or expenditure pool (subpara 12(1)(x)(v)).

[174] The federal budget tabled on April 16, 2024, introduced amendments to the Act, including to paragraph 12(1)(x) of the Income Tax Act, to add subparagraph 12(1)(x)(ix) of the Income Tax Act^[110] . An information document published by the Department of Finance regarding the amendment introduces paragraph 12(1)(x) by highlighting that if a taxpayer receives government assistance to earn income from a business or property, the amount of that

assistance may reduce the amount of a related expense, or the cost or capital cost of a related property, or it may be included in the taxpayer's income^[111] .

[175] The explanatory notes to paragraph 12(1)(x) of the amended 2024 Income Tax Act were published in May 2024 and state at the outset:

According to paragraph 12(1)(x), certain incentive payments, reimbursements, contributions, allowances and amounts of assistance that a taxpayer receives while earning income from a business or property are to be included in his income "to the extent that" they have not otherwise been included in his income or applied to reduce the cost of a property or the amount of an expense incurred or made .

(our emphasis)

[176] Thus, paragraph 12(1)(x) of the ITA appears to be able to determine the tax treatment applicable to an amount of assistance received from a government.

[177] First, the application of paragraph 12(1)(x) of the ITA requires that an amount of assistance from a government be received, and subsection 248(16) of the ITA sets out this presumption in part for the purposes of the Act^[112] . The receipt of the assistance amount is not part of the presumption. However, the receipt of the assistance amount in the case of ITCs is not called into question.

[178] Next, this amount received as assistance may be paid in any form. Also, the amount received in any form as assistance must be paid in respect of an expenditure incurred or made^[113] . And finally, paragraph 12(1)(x) of the Income Tax Act can only apply if paragraphs (v) to (ix) of the Income Tax Act are met. In the present case, the only paragraphs that may not be met are paragraphs (v) and (vi). The Court does not consider it necessary to address the other paragraphs.

[179] The Court reiterates that the presumption in subsection 248(16) of the Income Tax Act requires that an amount be claimed as an input tax credit (ITC) in respect of the GST. Therefore, for the purposes of paragraph 12(1)(x) of the Income Tax Act, the only scenarios that can be considered in this case are those where an amount of government assistance (namely, the ITC) has been received by 9134 in respect of an expenditure incurred or made. The Court considers that, at this stage, the conditions for the application of paragraph 12(1)(x) are met. One final step must be taken, namely, whether subparagraphs 12(1)(x)(v) and (vi) are met.^[114]

[180] This final step in the present case therefore consists of determining whether or not 9134 claimed GST on the expense in calculating its income for the purposes of the Act. The auditor's worksheets on 9134's file confirm that GST does not appear to have been claimed on the

expense.^[115] The Court's understanding is that the GST was instead claimed as an input tax credit.

[181] If the GST had been included in calculating the expenses claimed by 9134 for the purposes of Part I of the Income Tax Act, paragraph 12(1)(x) of the Income Tax Act would have applied. In such a case, subparagraph 12(1)(x)(vi) would have been met since the input tax credit did not reduce the amount of the expense. And only a refund of the input tax credit could have allowed a deduction to offset the effect of paragraph 12(1)(x)^[116].

[182] In this case, the absence of a GST claim as an expense precludes subparagraph 12(1)(x)(vi) of the Income Tax Act^[117]. The total amount of the input tax credit (ITC) received in consideration of the GST reduced the amount of the expense for the purposes of calculating Part I of the Income Tax Act revenue. Since the ITC amount is essentially a refund of the applicable GST, the assessment made under the Act deals with an expense whose amount has been reduced by the amount of the ITC. Having been deducted, no portion of the government assistance amount in this case meets the requirements of subparagraph 12(1)(x)(vi). Accordingly, paragraph 12(1)(x) does not apply to any portion of the government assistance received by 9134.

[183] Such treatment is not only consistent with the purpose of the provision as set out above in the explanatory notes and doctrine, but also reflects the treatment of the GST/ITC mechanism under the ETA. The Act intervenes to the extent that GST/ITC is deducted and an ITC (regardless of eligibility) is claimed. In such a context, the inclusion of government assistance is addressed in paragraph 12(1)(x) of the ITA.

[184] Some decisions of this Court have dealt with the foregoing^[118]. In *Blais*, the taxpayer had included the ITC received in the calculation of income and claimed the ITC as an expense for the purposes of the Act. Justice Jorré notes the following:

[37] The amount of GST and QST in question, \$2,425.68, represents input tax credits (ITCs) refunded by the tax authorities.[37] The respondent argues that this amount should be excluded from revenue. Although businesses generally calculate revenue and expenses excluding GST and QST, this is not mandatory. Paragraph 12(1)(x) of the *Income Tax Act* requires the inclusion of the GST refund, unless the taxpayer elects to reduce expenses by the amount of refundable GST and QST.[38]

[38] In the present case, the appellants have not made that election and wish, on the one hand, to include the input tax credits and, on the other hand, to deduct the amount of GST and QST paid that forms part of their deductible expenses. The amount of \$2,425.68 must be included in income.

...

[41] There is no dispute that the current expenses included \$3,033.99 in GST and QST. Since the appellants did not elect to reduce their expenses under paragraph 12(1)(x) and subsection 12(2.2) of the *ITA*, the amount of GST and QST paid on the otherwise deductible expenses is deductible.

First, the GST and QST of \$2,154.02 must be added to the amount of \$14,336.24 that the Minister recognized for the expenses.[39] Then, the amount of GST and QST paid on any other deductible expenses must be included. (footnotes omitted)

[185] In the Gauthier decision, the taxpayer had deducted the GST as an expense without otherwise claiming an input tax credit. Justice Woods, then a member of this Court, noted the following regarding the treatment of GST under paragraph 12(1)(x) of the Income Tax Act:

[25] In calculating income for the 1999 taxation year, the Minister denied a deduction of \$1,980 representing the amount of Goods and Services Tax (GST) paid on business supplies. The reasons for the denial were set out in written submissions by Crown counsel, received after the hearing. The submissions are somewhat difficult to understand. The Crown argues that the taxpayer was granted input tax credits for the GST paid, and that input tax credits must be included in income under subsection 248(16) and paragraph 12(1)(x). However, the Crown does not say that the input tax credits should be included in income. Rather, it says that this is a point that somehow justifies the denial of the GST paid deduction. I disagree. The Crown does not dispute that the GST was paid as a business expense; therefore, I see no reason to deny the deduction.

[26] With respect to input tax credits, subsection 248(16) provides that input tax credits deducted by a taxpayer must be included in computing income as assistance received from a government referred to in paragraph 12(1)(x). Here is an excerpt from subsection 248(16):

...

[27] I have not received any evidence that Mr. Gauthier deducted the input tax credits. Therefore, there is nothing to support my conclusion that the input tax credits must be included in income under subsection 248(16) and paragraph 12(1)(x).

[186] In Mann, it was Justice Bowman, then Associate Chief Justice of this Court, who concluded that if the Minister disapproves of the right to an input tax credit (ITC), then the taxpayer must be entitled to deduct the GST in computing net income. Conversely, if the ITC is not disapproved, then the GST cannot be deducted as an expense.

[8] For 1996, the Minister denied \$776.94 in interest expenses. He should have denied \$240 instead. He denied the appellants \$97.96 in GST expenses on the grounds that they had claimed input tax credits but had not included those credits in their income. This is problematic because, in my opinion, the assessments are inconsistent, in that the Minister did not allow the appellants to claim the input tax credits on that amount. This amount should therefore not have been denied in calculating income.

[9] However, as I propose to allow the appeal in respect of GST taking into account that the appellants are entitled to input tax credits in the amount of a little over \$5,000, I believe that this refusal should be upheld.

...

[11] For 1997, the Minister disallowed \$49.69 in expenses. This disallowance related to the GST that had been paid and the input tax credits claimed on that amount, which had not been included in revenue. For the same reasons given for the 1996 appeal, this disallowance must stand, since I will allow the appeal in respect of GST.

[187] The Court is of the opinion that these decisions are consistent with the statements made above.

[188] The Audit Division's position relies on the presumption in subsection 248(16) of the Income Tax Act^[119]. From this presumption, the auditor infers that the government assistance must be added to the income of 9134 under subparagraph 12(1)(x)(ii) of the Income Tax Act. She then notes that if this assistance were to be repaid, a deduction under paragraph 20(1)(hh) of the Income Tax Act would be available.

[189] This position applies only to disallowed expenses for which the ITC was claimed^[120]. In other words, although all expenses could have been treated the same way under 9134 for the purposes of the Act and the ETA, the treatment applied by the CRA for the purposes of the Act would apply only to disallowed expenses. On this basis, the Court understands that this can only apply for the purposes of Part I of the Act. And the Court questions this basis. Subsection 248(16) of the ITA, while applicable since the facts are established, creates only a presumption. This presumption is then useful in examining paragraph 12(1)(x) of the ITA. However, drawing a conclusion based solely on subparagraph 12(1)(x)(ii) without further explanation is incomplete. Other equally important considerations in the paragraph must be analyzed. And these other considerations may prove fatal to the application of paragraph 12(1)(x).

[190] Initially, the audit's position makes no mention of the treatment applied for the purposes of the ETA. Government assistance is granted in accordance with the provisions of the ETA. Only one conclusion seems to explain the audit's reasoning. This inclusion of government assistance in the calculation of income of 9134 for the purposes of Part I of the Act would be based on a conclusion that the claimed ITC would not be valid due to the personal nature of the disallowed expenses. This position appears to be based on a decision that falls outside the audit's jurisdiction. Such a decision must result from the exercise of the powers conferred on the Minister under the ETA.

[191] Secondly, the calculation of business or property income under Part I of the Income Tax Act (ITA) is not affected by the treatment of the GST. Since the amount of the expense is reduced by the amount of GST, the tax and its collection by the registrant are excluded from the income calculation. Should the entitlement to the input tax credit (ITC) be subject to review by the Canada Revenue Agency (CRA), the ITA contains a comprehensive regime enabling the Minister and the CRA to act accordingly and allowing those affected by such measures to assert their rights.^[121] In such a case, it is not for the CRA to draw conclusions for the purposes of applying the Act regarding a registrant's eligibility for the ITC, as no provision of the Act addresses the entitlement to the ITC or the collection measures related to it. The jurisdiction of the authorities in this regard and the applicable legislative measures are set out in the LTA. The appeals and assessments referred to in this case are strictly subject to the provisions of the Act.

[192] In view of the foregoing, the Court is of the opinion that the appeals relating to the adjustments made by the respondent with respect to input tax credits and the application of paragraph 12(1)(x) and subsection 15(1.3) of the ITA should be allowed.

D. Penalties under subsection 163(2) of the ITA

[193] The Court notes from the parties' letter dated March 24, 2023, that the penalties under subsection 163(2) of the Income Tax Act are withdrawn with respect to the unreported income relating to Lot 243 and Lot 252. However, the penalties are maintained by the respondent with respect to the disallowed expenses related to infrastructure, the Excavator 320, and the input tax credits for both the appellant and the appellant.

[194] The tables in Schedule I present a summary of the Court's treatment of disallowed expenses for the 1913 taxation years ending March 31, 2011 and 2012. Excluding the above-determined non-inclusion of the ITC amount in calculating 19134 income under paragraph 12(1)(x) of the Income Tax Act, the amounts of \$18,295 and \$1,992 of the disallowed expenses for March 31, 2011 and 2012 respectively are reversed. Therefore, there is no need to discuss the application of the penalty with respect to the ITC amount. Only the disallowed expenses remain to be addressed.

[195] The disallowed expenses now represent approximately 77% and 88% for the taxation year ending March 31, 2011 and 2012, respectively, of the amount disallowed on which the respondent maintained its decision to impose the penalty. The amounts involved are now approximately \$60,000 instead of \$78,000 for 2011 and \$16,000 instead of \$18,000 for 2012.

[196] The relevant wording of subsection 163(2) of the ITA for the purposes hereof and subsection (3) reads as follows:

False statements or omissions

(2) Every person who knowingly or in circumstances amounting to gross negligence makes, participates in, consents to or acquiesces in, a false statement or omission in any return, form, certificate, statement or response (referred to in this section as a "return") completed, filed or submitted, as the case may be, for a taxation year for the purposes of this Act, is liable to a penalty equal to, but not less than, \$100, 50% of the total of the following amounts:

[...]

Burden of proof regarding penalties

(3) In any appeal made under this Act in respect of a penalty imposed by the Minister under this section or section 163.2, the Minister has the burden of establishing the facts that justify the imposition of the penalty.

[197] Subsection 163(2) of the Income Tax Act authorizes the Minister to impose a penalty on taxpayers who knowingly or in circumstances amounting to gross negligence make a false

statement or omission in their income tax return. And subsection 163(3) places the burden of proof on the Minister to establish the facts justifying the imposition of the penalty.

[198] Although the penalty may commonly be referred to as a "penalty for gross negligence" , it may be imposed because of gross negligence on the part of the taxpayer or because of a deliberate act, in either case leading to a false statement or omission in the income tax return.

[199] In Wynter case^[122] , and confirmed in Paletta case^[123] , the Federal Court of Appeals states:

When the legislature uses different terms, it is presumed to have intended different meanings for those terms. In other words, the legislature does not repeat itself: see Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law Inc., 2016), at page 43. Section 163 permits the imposition of penalties in cases where the taxpayer has knowledge of the facts or in circumstances amounting to gross negligence. The section is not conjunctive, and these two terms are presumed to have different meanings and implications.

(1) Basis of circumstances amounting to gross negligence

[200] The principle of gross negligence was initially established in the Venne case^[124] , and later confirmed by the Supreme Court of Canada in Guindon^[125] :

In her brief, the Minister argues that the "culpable conduct" referred to in section 163.2 of the ITA "is not intended to differ from gross negligence and the standard attached thereto in subsection 163(2)" (para. 79). In *Venne v. Canada (Minister of National Revenue — MNR)*, 1984 CanLII 5717 (FC), [1984] ACF No. 314 (QL) (1st Ins.), a case concerning the penalty provided for in subsection 163(2), the Federal Court explains that "indifference to compliance with the Act" is not understood to mean mere inattention or negligence; it requires "a substantial degree of negligence amounting to deliberate action" (p. 11). This is essentially akin to burying one's head in the sand (*Sirois (LC) v. Canada*, 1995 CarswellNat 1974 (WL Can.) (TCC), para. 13; *Keller v. Canada*, 1995 CarswellNat 569 (WL Can.) (TCC)). In *Sidhu v. The Queen*, 2004 TCC 174, the Tax Court of Canada, in explaining its decision in *Venne*, elaborated on the expressions "amounts to intentional conduct" and "shows indifference to compliance with this Act":

Actions that "correspond" to intentional actions are those for which an intention can be presumed, such as actions that demonstrate "indifference to compliance with the law." [...] The burden of proof is not to prove beyond a reasonable doubt the guilty intent to evade tax payment, but to prove on a balance of probabilities such indifference to proper and reasonable diligence in the context of a self-assessment system that contradicts and insults common sense . [s. 23 (CanLII)]

(our emphasis)

[201] Considering that the penalty for gross negligence is intended to penalize serious misconduct that goes beyond reasonable diligence or ordinary inattention^[126], the question is to determine, as reported in Wynter, whether the taxpayer's conduct deviates:

[...] so markedly from the conduct that one would reasonably expect that it amounts to a high degree of negligence that can be characterized as a marked departure from the standards, practices, and due diligence expected of a responsible taxpayer. The cautionary statement made by the Supreme Court in *Guindon*, at paragraph 61, applies equally well in this case: these penalties “are intended to punish serious conduct, not ordinary negligence or simple error.” [para. 21]

[202] The Court may consider any relevant factor in determining whether a taxpayer has been grossly negligent. These may include, among other things, the extent of the omission in relation to the income reported, the taxpayer's ability to discover the error, the taxpayer's level of education and apparent intelligence, and the taxpayer's sincere effort to comply with the law.
[127]

[203] A taxpayer's general knowledge of business and tax matters is relevant in determining whether an offence has been committed with the required degree of negligence^[128].

(2) Foundation establishing knowingly (knowingly)

[204] To prove knowledge, the Minister must prove that the taxpayer had subjective knowledge of the fact that he was making a false statement or omission in his income tax return^[129]:

As also indicated in the Wynter decision, the appellant's subjective knowledge can be proven by evidence establishing, on a balance of probabilities, that the appellant willfully ignored the truthfulness of the statements in the income tax return and the application. This is a useful clarification regarding the fact that willful ignorance can impute subjective knowledge to the appellant and that willful ignorance and gross negligence are distinct legal concepts.

(our emphasis)

[205] Willful blindness (willful ignorance) is used to "attribute subjective knowledge" to the taxpayer and is therefore distinct from gross negligence^[130].

[206] The standard of knowledge can include either actual knowledge or imputed knowledge. Since it is unlikely that the taxpayer would admit that they had actual knowledge of an inaccuracy in their tax return, the frequently debated standard is whether the taxpayer was willfully blind or should have known that the tax return was incorrect.

[207] In the Torres case^[131], the Court briefly sets out the governance principles, for the purposes of subsection 163(2) of the Income Tax Act, of willful blindness (willful ignorance):

[65] In view of this case law and the evidence presented to me in the six appeals before me, I draw the following conclusions:

- a) Knowledge of a false statement can be deduced from willful blindness.
- (b) The concept of willful blindness can be applied to the penalties for gross negligence provided for in subsection 163(2) of the Act, and it is appropriate to apply this concept in the present case.
- c) To determine whether or not there has been willful blindness, the taxpayer's level of education and experience must be taken into account.
- d) To conclude that there was willful blindness, there must have been a need to seek information, or a suspicion of such a need.
- (e) Factors suggesting the need to gather information before making a statement, or which raise "clear red flags," an expression I used in the *Bhatti* case , include the following:
 - (i) the importance of the advantage or omission;
 - (ii) the blatant nature of the false statement and the ease with which it can be detected;
 - iii) the absence, in the declaration itself, of a certificate from the specialist who drew up the declaration;
 - (iv) unusual requests from the specialist;
 - (v) the fact that the specialist was previously unknown to the taxpayer;
 - vi) the unintelligible explanations of the specialist;
 - vii) whether other people have used the specialist or have warned against him, or whether the taxpayer himself hesitates to open up to others.
- f) The final criterion of willful blindness is the fact that the taxpayer does not inquire with the specialist to understand the income tax return, nor does he inquire at all with a third party, or with the CRA itself.

(3) Defence attributable to due diligence

[208] The taxpayer may raise a due diligence defence with respect to the penalty provided for in section 163 of the Income Tax Act. Once the Minister has established that a penalty applies, the taxpayer is subject to that penalty unless the taxpayer can prove that they exercised due diligence.

[209] The taxpayer bears the burden of proving their defence on a balance of probabilities. The taxpayer always bears the burden of proving that they exercised due diligence, regardless of the Minister's burden of establishing the facts to support the penalty or the taxpayer's burden of rebutting the Minister's presumptions of fact.^[132]

[210] The due diligence defence test was discussed in *École Polytechnique*^[133], and followed by the same Federal Court of Appeal in *Résidences Majeau*^[134]. The test, as set out in *École Polytechnique*, is as follows:

The due diligence defence allows a person to avoid the imposition of a penalty if they prove they were not negligent. It involves considering whether the person reasonably believed in a non-existent state of affairs which, had it existed, would have rendered their act or omission innocent, or whether they took all reasonable precautions to avoid the event that led to the penalty. See *R. v. Sault Ste-Marie*, 1978 CanLII 11 (SCC), [1978] 2 SCR 1299; *R. v. Chapin*, 1979 CanLII 33 (SCC), [1979] 2 SCR 121. In other words, due diligence excuses either a reasonable mistake of fact or the taking of reasonable precautions to comply with the law.

[211] It should be noted that good faith is not sufficient to establish a due diligence defence^[135]. The taxpayer must either have had an objectively reasonable (but erroneous) belief about a set of facts which, if they had existed, would have rendered the act or omission inconsequential, or have taken all reasonable precautions to avoid the event that led to the penalty.

(a) *Erroneous belief/error of fact*

[212] A reasonable mistake of fact for the purposes of the test has both a subjective and an objective element. The subjective element is met if the taxpayer establishes that they were mistaken about a factual situation which, if it had existed, would have rendered the act or omission inconsequential. The objective element is met if the mistake was such that a reasonable person in the same circumstances would have made the same mistake.^[136]

[213] The taxpayer's error must be an error of fact and not an error of law^[137]. This distinction is often at issue in proceedings before this Court. An objectively reasonable error of fact is an error that a reasonable person would have made in the same circumstances^[138].

(b) *Reasonable precautions*

[214] A taxpayer can also demonstrate due diligence if they prove they took all reasonable precautions to avoid the act or omission that led to the penalty. For example, reasonable precautions might include obtaining advice from a tax professional, making sincere efforts to retrieve missing information slips, or contacting the CRA to inquire about the appropriate course of action in the circumstances. Each situation is unique and must be assessed based on the specific facts of the case.

(4) **Present case**

[215] Ms. Beaudry, the file auditor, testified regarding her report recommending a penalty in the case of Mr. Touchette and 9134.

[216] The examination for chief testimony, which was quite brief, did not establish the respondent's case and grounds for conviction under subsection 163(2) of the Income Tax Act ^[139] . It essentially reiterated several passages from the reports, including the significant amounts involved, the taxpayer's business and tax knowledge, the responsibility of the functions and affairs of 9134, and the presence of an advisor.

[217] Cross-examination confirmed that there had been no reconciliation of the expenses claimed by 9134, from which the penalties are applied ^[140] . It also confirmed that the accounting records were properly maintained. Finally, Ms. Beaudry confirmed that there had been little communication with taxpayers regarding infrastructure expenses. There was no mention of wrongdoing or misleading accounting entries. The invoices exist and were discussed, although the parties held conflicting positions.

[218] After considering the documentary evidence filed on record, the testimony and representations heard, the Court does not believe that the respondent has presented convincing and sufficient material and testimonial evidence to meet his burden.

[219] First, the Court is not satisfied that the evidence supports indifference to compliance with the law, deliberate action, and intentional conduct to evade legal obligations. The elements that might underlie such indifference have not been established. This is not to deny that the appellants acted carelessly or negligently. The evidence presented is not sufficiently convincing to meet, on the balance of probabilities, the test of gross negligence set out above.

[220] The Court notes that the joint venture's accounting was maintained by the appellants' co-partner, bookkeeping was not an issue, and no reconciliation of accounts was performed with respect to the expenses charged to 9134 ^[141] . The wording of the two reports recommending penalties is essentially the same, and the auditor's review is, on the whole, generalized. Identical references are cited in both reports. Conclusions are drawn without further details being provided. Finally, the reports are worded in such a way that the conclusions are the same, although penalties may have been discussed at the time of writing, both for unreported income and for disallowed expenses and the input tax credit.

[221] The sections of the reports relating to undeclared income and the market value of the lots are more revealing than those concerning the disallowed expenses, since only the expense penalties are upheld. Ms. Beaudry's lead testimony was very brief and did not really shed any further light on the serious misconduct alleged against the appellants.

[222] The Venne decision is very telling, particularly in light of the current situation. This decision remains a landmark in the interpretation and scope of subsection 163(2) of the Income Tax Act. In this case, although the taxpayer had acquired limited formal education, Justice

Strayer was dealing with a situation where income had not been declared for several years. This income represented amounts far exceeding the income declared by the taxpayer.^[142]_____

[223] Justice Strayer agreed with the respondent's position regarding several elements of the unreported income and accepted that the conditions of paragraph 152(4)(a) of the Income Tax Act were met. This did not, however, prevent the decision to set aside the penalties under subsection 163(2) of the Income Tax Act with respect to the unreported income. In his analysis of the penalty related to the unreported income, and after emphasizing the high level of conviction that the respondent must establish and the taxpayer's right to a reasonable doubt^[143] , Justice Strayer referred, among other things, to the following elements:

36 I have come to the conclusion that the defendant has not sufficiently proven that the misstatements were made “knowingly” by the plaintiff in his tax returns for the years in question. I should note here, as it is relevant to the whole question of the application of penalties under subsection 163(2), that there seems to be a certain element of subjectivity recognized in the case law with respect to assessing the knowlege [sic] or gross negligence of a taxpayer with respect to misstatements in his return : see, eg, *Howell v. MNR* , (supra), at 2245 [234]; *Joris v Minister of National Revenue* , [1981] CTC 2596, 81 DTC 470 at 2598 [472]. 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 return 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. He kept what appeared to be quite complete records of sales in his business, then turned these over to his bookkeeper. As far as one can judge from the evidence, all or most of the revenues from the business were deposited in the bank where the moneys could readily be traced . He also lodged all but one or two of the mortgages on which he lent money with banks and trust companies which kept careful records of the income earned from these “escrow mortgages”. It is unlikely that a person planning to conceal income would have handled his affairs in this manner . Further it is hard to believe that he was consciously and effectively supervising his bookkeepers since a number of the errors made in his returns were to his disadvantage, even though more of them were to his advantage. I am therefore not able to conclude that the misstatements in the returns were made “knowingly” by the plaintiff.

37 With respect to the possibility of gross negligence, I have with some difficulty come to the conclusion that this has not been established either. “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. I do not find that high degree of negligence in connection with the misstatements of business income. To be sure, the plaintiff did not exercise the care of a reasonable man and, as I have noted earlier, should have at least reviewed his tax returns before signing them . A reasonable man in doing so, having regard to other information available to him, would have been led to believe that something was friends and would have pursued the matter further with his bookkeeper.

38 With respect to business income, I can more readily recognize that effective surveillance would have been difficult for the plaintiff and would have involved him making and reviewing numerous calculations of revenues, expenditures, assets, and liabilities. In other words the errors

in business income, small in some years but very substantial in others, would not necessarily have "spring out" at a person of the taxpayer's background and abilities . [...]

(our emphasis)

[224] Admittedly, there are some questionable elements in the present case. The magnitude of the disallowed expenses is possibly the most significant factor. However, establishing gross negligence cannot rest solely on this criterion^[144] . Other factors may also be at play, and it is precisely at this level that the respondent's evidence proves problematic. The appellants' income was not audited; only the joint venture's activities were audited. The reports recommending a penalty contain no information regarding the appellants' other income, and therefore the adjustment made in relation to the declared income is not included in the report. Also, several of the questions in the report intended to support evidence of "knowingly" or "gross negligence" are addressed succinctly and shed little light on the taxpayer's conduct or advance conclusions that have not been presented as evidence. The Court is of the opinion that the respondent has failed to establish a credible and sufficiently convincing demonstration, on the balance of probabilities, of gross negligence on the part of the appellants for the purposes of subsection 163(2) of the Income Tax Act.

[225] With respect to subjective knowledge, here too, the Court is unable to reach a conclusion in favour of the respondent. The respondent's evidence did not convince the Court that the appellants acted willfully ignorant or that a deliberate act was orchestrated by them. The bookkeeping is compliant and adequate. The invoices are available. The transactions are accessible and auditable. This is not a situation where evidence or conduct is concealed. In this case as well, although the non-deductibility of expenses was upheld in several instances and some admissions were made by the appellants, this did not generally prevent the appellants from offering an explanation for the treatment claimed in the tax returns. The Court did not accept the appellants' position in these cases. Conversely, the Court held that the respondent had not established, on the balance of probabilities, the appellants' willful ignorance at the time of filing their income tax returns, which is necessary for the purposes of establishing due diligence under subsection 163(2) of the Income Tax Act. This dichotomy does not preclude a finding against upholding the penalties.

[226] In these circumstances, it was incumbent upon the respondent to satisfy its burden of proof. Given that the Court is of the opinion that the evidence was insufficient, it is not required to consider the appellants' due diligence defence.

[227] In light of the foregoing, the respondent's burden of proof under subsection 163(2) of the Income Tax Act has not been met. Accordingly, the penalties under subsection 163(2) do not continue to be imposed with respect to the disallowed expenses.

V. Conclusion

[228] In view of the foregoing, the appellants' appeals against the notices of reassessment are allowed as follows:

A. Daniel Touchette – Tax years 2010 and 2011

(1) Tax year 2010

[229] The appeal is allowed and the appellant's reassessment on appeal for the taxation year ending December 31, 2010 is referred back to the Minister of National Revenue for further review and reassessment based on the reasons set out above and the resulting amounts below.

[230] The penalties imposed under subsection 163(2) of the ITA are cancelled and the following corrections are made:

Correction	Notice of new assessment on appeal	Revised amount admitted	Court Decision
Inclusion - Undeclared income	\$108,504	\$54,328	\$54,328
Shareholder benefit – 15 LIR	\$88,433	\$88,433	\$60,051

(2) Tax year 2011

[231] The appeal is allowed and the appellant's reassessment on appeal for the taxation year ending December 31, 2011 is referred back to the Minister of National Revenue for further review and reassessment based on the reasons set out above and the resulting amounts below.

[232] The penalties imposed under subsection 163(2) of the ITA are cancelled and the following corrections are made:

Correction	Notice of new assessment on appeal	Revised amount admitted	Court Decision
Shareholder benefit – 15 LIR	\$53,206	\$20,461	\$15,968

[233] As regards costs, the success of the appeals is shared, given in particular the admissions and the results upheld on these grounds. Consequently, no costs are awarded.

B. 9134-3822 Québec inc. – Tax years 2011, 2012 and 2013**(1) Tax year 2011**

[234] The appeal is allowed and the appellant's reassessment on appeal for the taxation year ending March 31, 2011 is referred back to the Minister of National Revenue for further review and reassessment based on the reasons set out above and the resulting amounts below.

[235] The penalties imposed under subsection 163(2) of the ITA are cancelled and the following corrections are made:

Correction	Notice of new assessment on appeal	Revised amount admitted	Court Decision
Inclusion - Undeclared income	\$108,504	\$54,328	\$54,328
Deduction denied - Expenses	(\$79,878)	(\$79,878)	(\$61,583)
Inclusion - Input Tax Credit	\$10,066	\$10,066	\$0

(2) Tax year 2012

[236] The appeal is allowed and the appellant's reassessment on appeal for the taxation year ending March 31, 2012 is referred back to the Minister of National Revenue for further review and reassessment based on the reasons set out above and the resulting amounts below.

[237] The penalties imposed under subsection 163(2) of the ITA are cancelled and the following corrections are made:

Correction	Notice of new assessment on appeal	Revised amount admitted	Court Decision
Expenses rejected	(\$46,703)	(\$17,960)	(\$15,968)
Inclusion of the input tax credit	\$6,503	\$2,501	\$0

(3) Tax year 2013

[238] The appeal is allowed and the appellant's reassessment on appeal for the taxation year ending March 31, 2013 is referred back to the Minister of National Revenue for further review and reassessment based on the reasons set out above and the revision of the amount of non-capital losses arising from the appellant's net loss and taxable income revised above for the taxation year ending March 31, 2012.

[239] As regards costs, the success of the appeals is shared, given in particular the admissions and the results upheld on these grounds. Consequently, no costs are awarded.

Signed this 22nd day of December 2025.

“JM Gagnon”

Judge Gagnon

REFERENCE : 2025 CCI 195

COURT CASE NUMBERS: 2019-108(IT)G & 2019-115(IT)G

TITLE OF THE CASE: DANIEL TOUCHETTE AND AL v. HIS MAJESTY THE KING

HEARING LOCATION: Sherbrooke (Quebec)

HEARING DATES: March 8 and 9, 2023

REASONS FOR JUDGMENT BY: The Honourable Judge Jean Marc Gagnon

DATE OF JUDGMENT: December 22, 2025

COMPARISONS:

Appellant's lawyer: Maxime
Mr. Chouinard

Respondent's lawyer: Anne
Ms. Poirier

LAWYER REGISTERED IN THE FILE:

For the caller:

Name : Maxime
Mr. Chouinard

Office: Therrien Couture Jolicoeur SENCRL

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

[1] *Income Tax Act*, RSC 1985, c 1 (5th^{Supp}) [ITA or Act].

[2] Marseille, Claude et al., *Objections to Evidence in Civil Law*, Second Edition, Montreal, LexisNexis Canada Inc., 2022, p 304, para 20-33.

[3] Shorthand notes of March 8, 2023, p. 158 at line 26 to p. 159 at line 3; and p. 159 at lines 10 to 20.

[4] Mr. Michel Leclerc is the administrator and sole shareholder of company 2849, which is the second partner in the joint venture.

[5] The Court notes that the notarial deed confirming the transfer of ownership of Lot 253 is dated July 22, 2009. The Court also notes that the notarial deed contains the same clause as the notarial deeds for Lots 243 and 252 regarding the date on which the purchasers become owners of the property, namely the date of the notarial deed, which will occur on January 14, 2010, and April 16, 2010, respectively. However, the clause concerning the existence or absence of a preliminary agreement in the notarial deed for Lot 253 reveals that a preliminary agreement exists. This differs from the notarial deeds for Lots 243 and 252, where the same notary notes that the parties agree that the only legal relationship between them is established by the notarial deed itself, which cancels all previous agreements.

[6] However, as raised by the respondent in his additional written submissions, there is an inconsistency between the date of July 2009 mentioned by the appellants at the hearing and the date of August 2009 mentioned in the Notices of Appeal, para. 10.

[7] Shorthand notes of March 8, 2023, p. 169 at line 28; and p. 170 at lines 1 to 24.

[8] *Ibid*, p 185 at lines 9 to 13.

[9] Respondent's document book (I-1), Tab 6, pp 1-2.

[10] Shorthand notes of March 9, 2023, p. 62, lines 4 to 19.

[11] *Civil Code of Québec*, CQLR c CCQ-1991, art 2821 [CCQ].

[12] *Gaudreau v Latreille*, 2007 QCCS 160 (CanLII) [Gaudreau], cited in particular in *9065-3627 Québec inc. v HA Grétry inc.*, 2011 QCCA 1871 (CanLII) [9065].

[13] In August 2009, according to the Notices of Appeal, at para. 10.

[14] In particular by starting the construction of buildings before the conclusion of the deeds of sale before a notary.

[15] Appellants' Book of Evidence (A-1), tab 9, p. 65.

[16] *Ibid*, tab 12.

[17] The issue of the necessary backfill work was not addressed. Mr. Touchette testified that construction work on Lot 243 began in August 2009. The market value he established is therefore not called into question in this respect, and the appellants have not put forward a contrary position.

[18] Shorthand notes March 9, 2023, p. 53 at lines 22-28; and p. 54 at lines 1-9.

[19] Shorthand notes of March 8, 2023, p. 56 at lines 14-19.

[20] *Ibid*, p. 53 at lines 25-28; and p. 54 at lines 1-8. The date of July 2009 creates rather confusion since the Court notes that the amended evaluation reports in the Court's file refer to evaluation dates in January and April 2010 for Lot 243 and Lot 252 respectively.

[21] In this regard, the cross-examination of Ms. Fortin revealed that the reference made during the principal examination in July 2009 may have been an error on her part, since the amended appraisal reports on the Court record refer to appraisal dates in January and April 2010. Counsel for the respondent subsequently summarized the situation by referring to an error, without Ms. Fortin correcting it. Ms. Fortin finally acknowledged that the amended report was also for an appraisal on January 15, 2010. It is therefore likely that this is also the case for the amended report filed as evidence for Lot 252 and appraised on April 16, 2010.

[22] Shorthand notes of March 8, 2023, p. 69 et seq.

[23] *Ibid*, p 70 and p 71.

[24] *Ibid*, p. 61 et seq.

[25] *Ibid*, p 76 at lines 5-8. However, the topographic maps consulted are not attached to the amended assessment report.

[26] *Ibid*, p 76 at lines 25-28; and p 77 at lines 1-2.

[27] The Court is of the opinion that the discussions it had with Mr. Touchette concerning the timing, costs, and payer of the backfilling work on Lot 252 were inconclusive. Ms. Fortin's testimony in this regard is not admitted.

[28] The Court finds that, to a certain extent, the valuation work is based on the state and conditions of the lot being valued. This may appear reasonable at first glance.

[29] The final correlations (pp. 14 and 15 of Report 243 and p. 16 of Report 252) indicate that, according to the owner, (i) development costs, (ii) the building context in relation to the lots, (iii) the shape and topography, and (iv) the excess land not buildable in 2010 (the latter being raised for Lot 253 only) could impact the lot values. Notwithstanding the owner's comment, the final note in the correlation of Report 243 reaffirms the market value of Lot 243 based on a usable area of 10,441 sq. ft. (4,581 sq. ft. used by the street roundabout), based on information obtained from the owner regarding the condition of the land in 2010 and its current condition in 2014. There is no indication that the owner's comments affect the assessor's market value of Lot 243. Notwithstanding the owner's comment, the final note in the correlation report reconfirms the market value of Lot 252 at \$138,000 based on the information obtained regarding the building and the condition of the land. There is no indication that the owner's comments affect the market value of Lot 252 as determined by the appraiser.

[30] See especially pp.171, 173 and 178 of the stenographic notes of 8 March 2023.

[31] Shorthand notes of March 8, 2023, pp.159-160.

[32] *Ibid*, p. 174.

[33] Shorthand notes of March 9, 2023, p. 204 at lines 11 to 17.

[34] *Ibid*, p 244 at lines 8 to 15.

[35] *Ibid*, p 248 at lines 8 to 14.

[36] *Ibid*, p 237 at lines 6 to 12; and p 243 at lines 14 to 25.

[37] Appellants' Book of Documents (A-1), Tab 8.

[38] Appellants' Book of Documents (A-1), Tab 8, p. 4.

[39] Shorthand notes of March 8, 2023, p. 122 at lines 19 to 28; and p. 123 at lines 1 to 11.

[40] *Ibid*, p. 123, line 11.

[41] Appellants' Book of Documents (A-1), Tab 13.

[42] Shorthand notes of March 8, 2023, p. 168 at lines 15 to 22.

[43] Appellants' Book of Documents (A-1), Tab 13, p. 3.

[44] Shorthand notes of March 8, 2023, p. 188 at lines 21 to 28; and p. 189 at lines 1 to 5.

[45] *Ibid*, p 190 at lines 24 to 28; and p 191 at lines 1 to 5.

[46] Appellants' Book of Documents (A-1), Tab 20, p. 1.

[47] Shorthand notes of March 8, 2023, p. 190 at lines 20 to 26; and p. 191 at lines 17 to 21. These expenses would not be in dispute in this case: Shorthand notes of March 9, 2023, p. 260 at lines 3 to 28; and p. 261 at lines 1 to 9.

[48] Shorthand notes of March 8, 2023, p. 299 at lines 14 to 28; and p. 300 at lines 1 to 14.

[49] Shorthand notes of March 9, 2023, p. 102 at lines 23 to 26.

[50] Shorthand notes of March 8, 2023, p 195 at lines 13 to 21, p 221 at lines 24 to 28 and p 222 at lines 8-9.

[51] *Ibid*, p 200 at lines 19- to 25.

[52] *Ibid*, p 196 at lines 21 to 26; and from p 200 at line 26 to p 201 at line 2.

[53] See the parties' letter of 24 March 2023 addressed to the Registry of this Court, at p. 4.

[54] Tab 21 (Bound, invoices for infrastructure 2011), Tab 22 (Bound, invoices for infrastructure 2012), Tab 23 (Bound, invoices for infrastructure 2012-2), Tab 24 (Bound, invoices for fuel costs 2011), Tab 25 (Bound, invoices for fuel costs 2012), Tab 26 (Bound, invoices for excavator maintenance and repair costs 2011), Tab 27 (Bound, invoices for excavator maintenance and repair costs 2012) and Tab 28 (Invoice for insurance costs for excavator 2012).

[55] For the 1991 fiscal year ending March 31, 2011, the Court estimates the total infrastructure expenditures in dispute at \$69,690, less three expenditures not contested by the appellants totaling \$850, of which \$425 is attributable to the appellants. For the 1991 fiscal year ending March 31, 2012, the Court estimates the total infrastructure expenditures in dispute at \$10,915, less expenditures not contested by the appellants totaling \$14,030, of which \$7,015 is attributable to the appellants.

[56] Shorthand notes of March 8, 2023, p. 292 at lines 7 to 24.

[57] *Ibid*, p 289 at lines 1 to 25.

[58] *Ibid*, which refers to the Respondent's Document Book (I-1), Tab 21, p. 7.

[59] *Ibid*, p 287 at lines 16 to 28; and p 288 at line 1.

[60] Shorthand notes of March 9, 2023, from p. 232 line 25 to p. 233 line 5. This is also the case for an invoice from Sani-Eco Inc. relating to demolition work.

[61] Shorthand notes of March 8, 2023, pp. 39 and 40.

[62] Respondent's document book (I-1), Tab 6, pp. 3 and 4; Shorthand notes of March 9, 2023, p. 239 at lines 9 to 21. Images taken from "Google Maps" in September 2009 show that the paving work on the public street appears to have already been completed by that date (Exhibits I-3 and I-4).

[63] Respondent's document book, Tab 22, p. 7.

[64] Shorthand notes of March 8, 2023, p. 212 at lines 13 and 14.

[65] *Ibid*, p 295 and p 296.

[66] Respondent's document book, Tab 22, p. 11.

[67] Shorthand notes of March 8, 2023, p. 213 at lines 4 and following. Also in cross-examination: shorthand notes of March 8, 2023, p. 296 at line 5.

[68] Appellants' Book of Documents, Tab 24.

[69] Respondent's document book, Tab 21, invoices on p. 24 (September 15, 2010), p. 45 (November 3, 2010).

[70] Shorthand notes of March 8, 2023, p. 206 at line 28; p. 207 at line 1; p. 210 at lines 12 and 13.

[71] Respondent's document book, Tab 21, pp 29-35; and Tab 22, p 4.

[72] Shorthand notes of March 8, 2023, from p. 203, line 22 to p. 204, line 18.

[73] *Ibid*, p 208 at lines 18 to 28 and p 209 at line 1.

[74] *Ibid*, p 211 at lines 12 to 27.

[75] *Ibid*, p 212 at lines 4 to 11.

[76] *Ibid*, from p. 282, line 10 to p. 284, line 15.

[77] *Ibid*, p. 278, lines 14 and following.

[78] *Ibid*, p. 279, lines 12 and following.

[79] These are the documents on pages 5 and 6, Tab 23. Mr. Touchette attributes these two invoices to Protocol 2011. Shorthand notes of March 8, 2023, p. 216 at lines 19 to 28 and p. 217 at line 1.

[80] Respondent's document book, Tab 21, p. 16.

[81] *Ibid*, Tab 23, p 2.

[82] Shorthand notes of March 8, 2023, p. 216, lines 4 to 6.

[83] Respondent's document book, Tab 23, p. 4.

[84] Shorthand notes of March 8, 2023, p. 216 at lines 15 to 17.

[85] Respondent's document book, Tab 23, p. 8.

[86] Shorthand notes of March 8, 2023, p. 217 at lines 23 to 25.

[87] Respondent's document book, Tab 23, p. 10.

[88] Shorthand notes of March 8, 2023, p. 218 at lines 9 to 18.

[89] *Ibid*, p 217 at lines 2 to 5.

[90] Respondent's document book, Tab 21, p. 46.

[91] Shorthand notes of March 8, 2023, p. 210 at lines 14 to 28.

[92] Respondent's document book, Tab 29.

[93] *Infranote* 97.

[94] This invoice has no connection with the present case, nor was it the subject of any direct testimony. Stenographic notes of March 8, 2023, p. 232, lines 5 to 14.

[95] These invoices are found in Tabs 24, 25, 26, 27 and 28 of the Respondent's Document Book. Tabs 14, 15, 16, 17, 18 and 19 of the Respondent's Document Book contain the auditor's worksheets concerning the disallowed expenses related to the Excavator 320. However, the specific gasoline invoices that constitute the disallowed gasoline amounts for 2011 and 2012 are not listed. See also the stenographic notes of March 8, 2023, p. 221, lines 24 to 28, where Mr. Touchette confirms that the expenses are attributable to one protocol or the other depending on whether the expense was incurred before November 22, 2011, or after November 21, 2011. *See* note 97 below.

[96] The repetition in paragraph 26 also indicates in parentheses the amounts not contested by the appellants.

[97] Mr. Touchette's review of the invoices in Tabs 24 to 28 inclusive of the Respondent's Document Book was interrupted, since the Respondent admits that the invoices found there are filed by the witness Mr. Touchette under Protocol 2009 if the invoice date is before November 22, 2011, and under Protocol 2011 if the invoice date is after November 21, 2011. In particular, see the Shorthand Notes of March 8, 2023, p. 221 at lines 24 to 28 and p. 232 at lines 7 and 8.

[98] Shorthand notes of March 8, 2023, p. 219 at lines 10 to 28; and p. 220 at lines 1 to 11.

[99] *Ibid*, p 221 at lines 12 to 23.

[100] *Ibid*, p 221 at lines 13 to 18.

[101] Stenographic notes of March 9, 2023, from p. 59, line 15 to p. 61, line 24. See, however, the arguments raised on this subject during the opposition: Appellants' Book of Exhibits (A-1), Tab 4, p. 6.

[102] Shorthand notes of March 9, 2023, p. 60, lines 5 to 18.

[103] *Ibid*, p 60 at lines 19 to 28.

[104] Page 4 *in fine* of the joint letter from the parties dated 24 March 2023 and reproduced on page 5.

[105] Page 5 of the joint letter from the parties dated 24 March 2023.

[106] Shorthand notes of March 9, 2023, p. 249 at lines 25 to 28; and p. 250 at lines 1 to 8.

[107] *Excise Tax Act*, RSC 1985, c E-15 [ETA].

[108] This is not a claim for a GST refund, which is subject to separate provisions for the purposes of the ETA, but rather a claim for inputs referred to in sections 169 et seq. of the ETA.

[109] Canada Tax Service, Thomson Reuters Analysis, Thomson Reuters Canada Limited, 2025, 12(1)(x) – Inducement Payments and Reimbursements. Vern Krishna in his book *Fundamentals of Canadian Income Tax*, Volume 1: Personal Tax, 2nd Edition, Thomson Reuters, January 2020 (Chapter 8 Inclusions in Business and Investment Income) adopts the same approach: “For tax purposes, paragraph 12(1)(x) taxes induce receipts, whether from a governmental or private organization, as income. (footnote omitted).

[110] Section 5(3) of Part 1 of Bill C-69 (An Act to implement certain provisions of the Budget tabled in Parliament on April 16, 2024). Assented to June 20, 2024, Chapter 17 of the Statutes of 2024 – An Act to implement certain provisions of the Budget tabled in Parliament on April 16, 2024.

[111] C-69 An Act to implement certain provisions of the budget tabled in Parliament on April 16, 2024, Part 1 – Amendments to the Income Tax Act and related legislation - section 1(k) -Tax treatment of concessional loans deemed to be government assistance.

[112] Subparagraph 12(1)(x)(ii) ITA.

[113] Subparagraph 12(1)(x)(iv) ITA. Division 12(1)(x)(iv)(B) ITA.

[114] Depending on the circumstances surrounding each expenditure, the current situation involves either subparagraph 12(1)(x)(v) or (vi) of the Income Tax Act. However, the Court conducts the analysis by considering each expenditure as potentially falling under subparagraph (vi). Consequently, subparagraph (v) may in fact be considered met because the expenditures are not included in an expense balance or other undeducted amounts. Thus, only subparagraph (vi) constitutes the test.

[115] Respondent's document book, Tab 13 et seq.

[116] Paragraph 20(1)hh) LIR.

[117] Generally, for accounting purposes, the incentive payment can be recognized in two ways: as revenue or as a reduction in recorded expenses. In both cases, the effect is ultimately the same: net revenue is increased by the amount of the incentive payment.

[118] *Blais v The Queen*, 2010 ICC 195 (informal procedure) [Blais], *Gauthier v The Queen*, 2004 ICC 57 (informal procedure) [Gauthier], *Kevin Mann and Barbara Mann v The Queen*, 2003 ICC 63 (informal procedure)

[Mann].

[119] The CRA Appeals Division takes exactly the same position without adding any comment or analysis.

[120] It was not argued that the conclusion reached by the audit that the inclusion of government assistance in the calculation of income of 9134 in accordance with subparagraph 12(1)(x)(ii) of the ITA was also conceivable in a context where the expenditures were permitted.

[121] In particular Section VIII of Part IX LTA.

[122] *Wynter v R*, 2017 FCA 195 [Wynter].

[123] *Canada v Paletta (Succession)*, 2022 FCA 86 [Paletta].

[124] *L Venne v The Queen*, 1984 CanLII 5717 (FC) [Venne].

[125] *Guindon v Canada*, 2015 SCC 41 [Guindon].

[126] *Xiav The Queen*, 2019 ICC 30.

[127] *Gray v The Queen*, 2016 ICC 54 [Gray]; *DeCosta v The Queen*, 2005 ICC 545 [DeCosta]; *Bhatti v The Queen*, 2013 ICC 143; *McLeod v The Queen*, 2013 ICC 228.

[128] This subjectivity was noted by Justice Strayer in the Venne case: “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. »

[129] *Peck v The Queen*, 2018 ICC 52, citing *Wynter*.

[130] *Ibid.* The Minister may confirm this subjective knowledge by establishing that the taxpayer was deliberately or willfully blind as to whether the statements made in the income tax return are accurate or not.

[131] *Torres v La Reine*, 2013 ICC 380 [Torres].

[132] *Galachiuk v The Queen*, 2014 TCC 188 [Galachiuk] and *Symonds v Canada*, 2011 TCC 274.

[133] *Corporation de l'école polytechnique v Canada*, 2004 CAF 127 [École Polytechnique].

[134] *Les Résidences Majeau Inc. v The Queen*, 2010 CAF 28 [Résidences Majeau].

[135] See École Polytechnique.

[136] *Ibid.*

[137] There are two exceptions to the error of law. For the purposes of this case, it is important to refer to only one of them (i.e., the error of law caused by a person in authority): a taxpayer's error may be an error of law caused by a person in authority when it concerns the legal position that the taxpayer considered to be his own, consulted a person in authority who was competent in the matter, obtained reasonable advice, and relied on that advice to perform his actions. See *Rv Jorgensen*, 1995 CanLII 85 (SCC), [1995] 4 SCR 55 and École Polytechnique.

[138] Majeau Residences.

[139] Shorthand notes of 9 March 2023, pp 123 and 124 with regard to penalties.

[140] *Ibid*, p 60 at lines 5 to 18.

[141] The general principle of third-party involvement: *Carlson v R*, 1997 CarswellNat 2359 (TCC), paras 25 and 33 to 36; *Goldhar v The King*, 2023 TCC 30; *Hansen v The Queen*, 2020 TCC 102; *Julian v R*, 2004 TCC 330; *Snowball v R*, 1996 CarswellNat 1309; *Udell v Minister of National Revenue*, 1969 CarswellNat 331; *Kornfeld v MNR*, [1972] CTC 2556 (TRB); *Decore v The Queen*, [1974] CTC 791 (FCA); *Magliaro v MNR*, [1980] CTC 2319 (TRB); *Norrad v MNR*, [1986] 2 CTC 2184 (TCC); *Findlay v R*, [2000] 3 CTC 152 (FCA); *Gagnon v R*, 2005 CarswellNat 1665 (TCC); *Murugesu v R*, [2013] 3 CTC 2052 (TCC); and *Vachon v R*, 2013 CarswellNat 5563 (TCC).

[142] The amounts declared by the taxpayer during the years 1972-75 represented annual amounts in the order of \$9,000 to \$26,000, whereas the undeclared income for the years 1972-77 was estimated by the respondent at \$330,000 and of this sum \$283,000 was admitted by the taxpayer.

[143] Among others, see paragraph 34 of the decision.

[144] DeCosta at para. 11: “To distinguish between ‘ordinary’ fault or negligence and ‘gross’ fault, several factors must be considered. One of these factors is, of course, the significance of the omission in relation to the income reported. There is also the taxpayer’s ability to discover the error, as well as the taxpayer’s level of education and apparent intelligence. There is no single predominant factor. Each factor must be given due weight in the context of the entirety of the evidence.” *Chartrand v The Queen*, 2015 TCC 298 at para. 22: “There is no single predominant factor.” Each factor must be given due weight in the context of the whole of the evidence: see *DeCosta v The Queen*, 2005 ICC 545, at paragraph 11, *Bhatti v The Queen*, 2013 ICC 143, at paragraph 24, and *McLeod v The Queen*, 2013 ICC 228, at paragraph 14. See also, Venne, *De Coutov R*, [2013] 5 CTC 2122 (TCC) (see paras. 19-20), *Bandulav R*, [2014] 1 CTC 2001 (TCC) (para. 44), *Chaloux v R*, (2015) [2016] 4 CTC 2001 (TCC), and *Liuv R*, [2017] 6 CTC 2193 (TCC).