Federal Court of Appeal | Cour d'appel fédérale

Date: 20250610

Dockets: A-276-22
A-54-23
A-55-23

Citation: 2025 FCA 112

[ENGLISH TRANSLATION]

CORAM: **LOCKE J.A.**
LEBLANC J.A.
PAMEL J.A.

Docket: A-276-22

BETWEEN:

MARTIN FOURNIER-GIGUÈRE

Appellant

and

HIS MAJESTY THE KING

Respondent

Docket: A-54-23

AND BETWEEN:

ANTOINE BÉRUBÉ

Appellant

and

HIS MAJESTY THE KING

Respondent

Docket: A-55-23

AND BETWEEN:

PHILIPPE D'AUTEUIL

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Québec, Quebec, on December 9, 2024.

Judgment delivered at Ottawa, Ontario, on June 10, 2025.

REASONS FOR JUDGMENT BY: LEBLANC J.A.

CONCURRED IN BY: LOCKE J.A.
PAMEL J.A.

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REASONS FOR JUDGMENT

LEBLANC J.A.

I. Introduction

[1] These three appeals were heard at the same time in Québec. All three challenge the tax status of net earnings made from poker activities between 2009 and 2011 in the case of the appellant Martin Fournier-Giguère, between 2008 and 2011 in the case of the appellant Antoine Bérubé, and between 2008 and 2012 in the case of the appellant Philippe D'Auteuil.

[2] Through notices of reassessment, the respondent assessed the appellants on the basis that these previously unreported earnings, in the circumstances in which they were made, constituted

business income within the meaning of sections 3 and 9 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) and were therefore taxable.

[3] The appellants challenged these notices of reassessment before the Tax Court of Canada (the TCC), taking the view that the earnings they made from their poker activities in the taxation years at issue did not meet the tests established in the case law for determining the existence of business income within the meaning of the Act and were, alternatively, non-taxable under paragraph 40(2)(f) of the Act because poker, in their view, is a "betting" game within the meaning of that provision.

[4] In three separate judgments—*Fournier Giguère v. The King*, 2022 TCC 132 (Fournier-Giguère Judgment); *D'Auteuil v. The King*, 2023 TCC 3 (D'Auteuil Judgment); and *Bérubé v. The King*, 2023 TCC 12 (Bérubé Judgment)—rendered following a joint hearing, Justice Réal Favreau of the TCC (the Judge) largely dismissed the appeals filed by the appellants, being satisfied that paragraph 40(2)(f) of the Act did not apply in this case and that the appellants' net earnings from their poker activities should be included in the computation of their taxable income as business income.

[5] The appellants are appealing these judgments (collectively the Judgment) before this Court on the ground that the Judge erred in law and made a palpable and overriding error by misapprehending the facts of each case.

[6] For the reasons that follow, I am of the view that the three appeals must fail.

II. Background

[7] The three appellants know each other, and the paths that respectively led them to engage in poker activities overlap. The appellants Mr. Fournier-Giguère and Mr. D'Auteuil met at CEGEP in Rimouski, where they are both from. The two enrolled at Université Laval for the 2006-2007 academic year.

[8] Introduced to the game by his father, Mr. D'Auteuil has been playing poker since 2003, first using fake money and then real money. He did not complete his first semester at Université Laval. He then started playing poker 15 to 25 hours a week. Mr. Fournier-Giguère completed his first semester at university. During that time, he played poker with Mr. D'Auteuil a few evenings a week.

[9] In January 2007, Mr. Fournier-Giguère and Mr. D'Auteuil travelled together on a four-month trip to Europe with a few friends. They played poker there and used their winnings to pay for their travel expenses. When he returned from Europe, Mr. D'Auteuil played poker in the afternoons and evenings in his apartment in Québec. Thanks to his winnings, he says, he spent his free time partying.

[10] In 2008, the two friends visited Australia. This is where the appellant Bérubé entered the picture, travelling with them after meeting them on discussion forums and at parties with friends. His interest in poker dates back to 2006. This trip to Australia was profitable for all three of them thanks to their poker winnings. Upon returning from that trip in June 2008, Mr. Fournier-Giguère

and Mr. D'Auteuil purchased a single-family house together in the Québec region for $525,000, which they paid for in cash. In 2009, Mr. Fournier-Giguère purchased a condominium unit in Florida for US$360,000, also paid for in cash.

[11] There is no real dispute that for the taxation years at issue, poker winnings were the appellants' main source of income, if not their only one.

[12] Between October 2012 and November 2013, the Minister of National Revenue (the Minister) issued the notices of reassessment in dispute, in which she added to the appellants' reported income for those years what she considered to be the earnings they had made in connection with their poker activities. At the same time, she imposed a penalty on each of them under subsection 163(2) of the Act but abandoned that claim at trial before the Judge.

[13] Also, further to a partial consent to judgment reached in all three cases on September 13, 2021, the parties agreed that the earnings attributed to the appellants through the notices of reassessment, insofar as they were considered business income, should be adjusted to take into account business expenses and losses. The three judgments rendered in this case gave effect to these partial consents.

[14] For each appellant, I have reproduced below the earnings thus taxed and the business expenses and losses, shown in parentheses, that were applied to them with the consent of the Minister:

(a) Mr. Fournier-Giguère:

2009: $573,882

2010: $156,855

2011: $747,444 (-$279,830)

(b) Mr. D'Auteuil:

2008: $167,688

2009: $305,661 (-$305,661)

2010: $1,410,320 (-$3,550)

2011: $1,920,558 (-$1,684)

2012: $736,848 (-$215,781)

(c) Mr. Bérubé:

2008: $377,478

2009: $884,323 (-$206,920)

2010: $454,867 (-$48,939)

2011: $231,208 (-$3,367)

[15] It should be noted that Mr. Fournier-Giguère was also reassessed for the 2008 taxation year. That reassessment established his poker earnings for that taxation year at $250,679. However, Mr. Fournier-Giguère's appeal from that notice of reassessment was allowed on the ground that the notice in question had been issued outside the normal reassessment period for that taxation year.

III. The Judgment

[16] The Judge's judgments in the three cases are similarly structured: first, a history of the assessments and appeals from assessments at issue is outlined; this is followed by a description of the issue; then, the positions of the parties and the evidence adduced at trial are detailed, including expert testimony on the issue of the balance of chance and skill in the game of poker; and, finally, the Judge's analysis and conclusions are set out.

[17] The analysis itself, which is rather brief in each case, can be summarized as follows:

(a) There is no doubt that the "no-limit Texas Hold'em" poker played by the three appellants is a game that combines chance and skill.

(b) Whether skill outweighs chance is not relevant in determining whether the appellants were operating a business in the taxation years at issue in each case since poker is not a "betting" game within the meaning of paragraph 40(2)(f) of the Act.

(c) The test used to determine whether or not the appellants were operating a business is not really in dispute, but its application to the facts of each case is.

(d) In the taxation years at issue in each case, poker was "much more than a pleasurable pursuit" for the appellants; it was their livelihood. In that sense, the appellants organized their lives around poker, to which they devoted almost all of their time and from which they derived all or almost all of their income.

(e) That income in the taxation years at issue in each case totalled at least $5,241,025 for Mr. D'Auteuil, $3,219,074 for Mr. Bérubé, and $1,450,000 for Mr. Fournier-Giguère. This demonstrates the appellants' ability to make a steady profit despite it being impossible to foreseeably control the outcome of a poker game.

(f) Despite their "unconventional" lifestyle, the appellants exhibited businesslike behaviour: they played poker to win and, depending on the case, they adapted their strategies according to the levels of the game tables and their opponents' prowess, avoided situations that were too perilous, adopted objective standards of risk management and minimization, and used computer tools to keep statistics on their poker activities and those of their opponents.

[18] The Judge generally concluded that, on a balance of probabilities, each appellant "had the subjective intention to profit by engaging in poker activities and that he was using his expertise and his abilities to earn his living through poker, a game of chance in which skill plays an important role".

[19] Finally, the Judge briefly discussed *Duhamel v. The Queen*, 2022 TCC 66 (*Duhamel*), in which his colleague concluded that the net earnings from that taxpayer's poker activities should not be included in computing his income for the taxation years at issue (2010, 2011 and 2012). The Judge concluded—and I will come back to this later—that the criteria used by his colleague to determine whether the net earnings from Mr. Duhamel's poker activities should be included in the computation of his income as income from a source that is a business were the same as in the present case, but that the application of these criteria to the facts pertaining to Mr. D'Auteuil, Mr. Fournier-Giguère and Mr. Bérubé led to different results.

IV. Issue and standard of review

[20] The main issue in this appeal is whether the Judge made an error justifying this Court's intervention in concluding that the appellants' poker earnings should be included as business income in the computation of their income for the taxation years at issue.

[21] The appellants also submit that the Judge erred in ruling that paragraph 40(2)(f) of the Act did not apply to the facts of these cases.

[22] Both issues must be reviewed on the appellate standard of review developed by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33 (*Housen*). Thus, any questions of law to be resolved are to be reviewed on the correctness standard, while findings of fact or of mixed fact and law—other than those that give rise to an extricable question of law—are subject to the deferential standard of palpable and overriding error.

[23] The appellants also claim that the report from the Minister's expert was inadmissible in evidence and that by not ruling on its admissibility, the Judge had incorrectly applied—or simply ignored—Rule 145 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (the Rules).

[24] I will analyze this issue first before turning to the question of paragraph 40(2)(f) of the Act. I will then address the main issue raised in this appeal.

[25] Finally, I will examine an issue specific to Mr. D'Auteuil, who criticizes the Judge for declining jurisdiction over his appeal from the notice of reassessment for the 2008 taxation year.

V. Analysis

A. *Admissibility of the report from the Minister's expert*

[26] The appellants submit that the reports produced by the Minister's expert were inadmissible because the data underlying these reports—essentially, updates of a report produced by the same expert a few years earlier in an American case—were no longer available and therefore not attached to the reports in question as required by Rule 145, which governs what should be included in an expert report.

[27] The appellants note that this same expert was retained by the Minister in *Duhamel* and that the parts of his report that were based on data that are no longer available were not admitted into evidence.

[28] They criticize the Judge for referring to the evidence presented by this expert without first addressing the issue that led to the inadmissibility of part of his report in *Duhamel*.

[29] This argument cannot succeed because, even assuming that the Judge erred in this regard, this error is not determinative of this appeal (*Roher v. Canada*, 2019 FCA 313 at para. 34, citing *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 33). Indeed, although the Judge referred to it in detail, it appears quite clear that his findings in the three cases are not based on the issue addressed by the Minister's expert, namely whether skill predominates over chance in the game of poker. I note that the Judge determined that this question, although interesting, was not relevant for the purposes of determining whether the appellants' net poker earnings should be included in the computation of their taxable income as income from a source that is a business.

B. *Paragraph 40(2)(f) of the Act*

[30] Paragraph 40(2)(f) is part of a subdivision of the Act concerned with taxable capital gains and allowable capital losses in relation to the rules applicable in computing income. It provides that "a taxpayer's gain or loss from the disposition of (i) a chance to win a prize or bet, or (ii) a right to receive an amount as a prize or as winnings on a bet, in connection with a lottery scheme

or a pool system of betting referred to in section 205 of the *Criminal Code* is nil" (emphasis added).

[31] Section 205 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the *Criminal Code*), which has not been in force since 1985, decriminalized the operation and management of "pool systems of betting"—which were otherwise prohibited—provided that they were operated and managed by the Government of Canada, whether solely or jointly following an agreement with the governments of any one or more provinces. The decriminalization related in particular to "any combination of two or more athletic contests or events", as defined by regulations.

[32] The appellants criticize the Judge for concluding that paragraph 40(2)(f) did not apply without even carrying out any kind of analysis, such as into the meaning of the terms "lottery" and "pool system of betting", which, according to them, encompasses the game of poker when the interpretation of these terms is [TRANSLATION] "adjusted to the current reality" (Memorandum of the Appellants at para. 39 (Mr. Fournier-Giguère); para. 33 (Mr. Bérubé); and para. 47 (Mr. D'Auteuil)).

[33] Even if we accept that the scope of these terms should be [TRANSLATION] "adjusted to the current reality", it would at the very least be surprising to say that the game of poker can reasonably be equated with a "lottery" or "pool system of betting". As the evidence in this case demonstrates, the game of poker can be taught; books have been written about it; websites show players in action and comment on how they play; and software is available to help players

understand their opponents. Of course, no one is disputing the fact that chance plays a role in the outcome of poker games, but no one is disputing the part played by the player's skill, either.

[34] Moreover, in *Duhamel*—on which the appellants largely base their case theory—the TCC held that no expert had persuaded it "that either chance or skill generally prevailed in the outcome of a poker game" (*Duhamel* at para. 170). I note that two of the three experts who testified in these cases were opposing experts in *Duhamel*, including the Minister's expert.

[35] In addition, anyone with even the slightest interest in the game knows that certain major poker tournaments are now televised on sports channels, with experts commentating on the game as it unfolds.

[36] The same cannot be said of lotteries and pool systems of betting. At the very least, the record in this case contains no evidence to that effect.

[37] In any event, the appellants' argument regarding paragraph 40(2)(f) of the Act fails for another reason. As the Minister correctly points out, there is no hard and fast rule against the taxation of gambling income. While lottery winnings have traditionally been treated as "windfalls", and thus of a capital nature (*The Queen v. Rumack*, 92 D.T.C. 6142), as we will see, when certain criteria are met, gambling-related income may be considered business income and, as such, should be included in the computation of the taxable income.

[38] I note in this regard that the Act provides no exemption akin to that set out in paragraph 40(2)(f) for the computation of income or loss from a business. Since Parliament expressly provided for a tax exemption in one case but not in the other, we can assume that it did not intend to extend such an exemption to the computation of business income (*R. v. Wolfe*, 2024 SCC 34 at para. 35). I also note that only sports betting and horse racing have been regulated under section 205 of the *Criminal Code* (*Regulations respecting the Supervision of Pari-Mutuel Betting and the Possession and Use of Drugs at Race Tracks*, C.R.C., c. 441 (27 December 1984), SOR/85-59 (2 January 1985); *Regulations respecting the Organization, Operation and Management of Sports Pool Systems*, P.C. 1984-1356 (18 April 1984), SOR/84-326 (19 April 1984); *Pari-Mutuel Payments Order*, P.C. 1983-846 (24 March 1983); *An Act to provide for government operated pool systems on combinations of athletic contests and events and to amend the Criminal Code and the Income Tax Act*, *Canada Gazette*, vol. 6, no. 21 (29 June 1983); and *Regulations respecting the supervision and operation of pari-mutuel betting at race-courses and the prohibition, restriction and regulation of the possession of drugs and equipment used in the administering of drugs at race-courses*, S.C. 1989, c. 2, s. 1, SOR/91-365 (30 May 1991)).

[39] For these reasons, I see no error of law or palpable and overriding error in finding, as the Judge did, that paragraph 40(2)(f) of the Act does not apply for the purpose of determining whether net poker earnings can be considered not as windfalls but as income from a business. In fact, the appellants cited no authority to support their contention that paragraph 40(2)(f) should apply to poker earnings.

[40] This brings me to the central issue in this appeal.

C. *Did the Judge err in finding that the appellants' net poker earnings in the taxation years at issue should be included in the computation of their taxable income as business income?*

[41] The appellants argue that in finding as he did on this issue, the Judge erred in law by failing to consider all the applicable case law tests for determining whether or not earnings from a taxpayer's poker activities should be included in the computation of taxable income as business income. They also submit that the Judge made palpable and overriding errors in his assessment of the evidence adduced at trial on this issue.

(1) The Judge did not err in law

[42] The appellants are correct to say that even if the application of a legal test to a set of facts is a question of mixed fact and law, enunciating the test in such a way as to alter it is an extricable question of law that is reviewable for correctness (*Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 44; *President's Choice Bank v. Canada*, 2024 FCA 135 at para. 49; *Smith v. Canada*, 2019 FCA 173 at para. 30).

[43] The appellants' position on this is based mainly on two Supreme Court of Canada decisions: *Moldowan v. The Queen*, [1978] 1 S.C.R. 480 (*Moldowan*), and *Stewart v. Canada*, 2002 SCC 46 (*Stewart*). The issue in those cases was the deductibility of losses from an alleged

farming business—namely, the raising of horses for racing (*Moldowan*)—and from the rental of condominium units (*Stewart*).

[44] It is important to start with a review of the tax system that applies in this case. Section 3 of the Act sets out the basic rules for the computation of a taxpayer's income for a taxation year. Included in this computation is "the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada".

[45] According to the Supreme Court, the concept of a "source of income" is "fundamental to the Canadian tax system" (*Stewart* at para. 5). This means that a taxpayer who wishes to deduct losses for a given taxation year in relation to an activity must establish that the activity is a source of income earned inside or outside Canada. To do so, the taxpayer must demonstrate that he or she engaged in the activity with the intention of making a profit and must provide evidence of that intention. For obvious reasons, this evidence cannot be solely subjective; it must also include objective elements (*Stewart* at paras. 5–54; *Moldowan* at 485–486).

[46] In this regard, the Supreme Court reiterated that the concept of a "source of income" "accords with the traditional common law definition of 'business', i.e., 'anything which occupies the time and attention and labour of a man for the purpose of profit'" (*Stewart* at paras. 38 and 51).

[47] Similarly, in order to be taxable, income must be characterized by this intention to make a profit, which aims to distinguish commercial activities from purely personal or recreational activities. A taxpayer's pursuit of profit will be established where the activity in question comprises no personal or recreational element. If, however, it does contain such an element, that should not necessarily lead to the conclusion that the activity in question is not a "source of income" under the Act. Rather, the activity will be considered a "source of income"—in this case, income from a business—if, despite its personal or recreational aspect, it was conducted in a "sufficiently commercial manner" (*Stewart* at para. 52; *Tarascio v. Canada*, 2012 FCA 30 at para. 3 (*Tarascio*)).

[48] In order to determine whether, in such a context, an activity is conducted in a "sufficiently commercial manner" and, therefore, with the intention of making a profit, the case law provides *indicia* of commerciality or "businesslike" behaviour, namely (i) the profit and loss experience in past years; (ii) the taxpayer's training; (iii) the taxpayer's intended course of action; and (iv) the capability of the venture to show a profit (*Stewart* at paras. 52–55; *Moldowan* at 486).

[49] It is important to note, however, that this list of *indicia* or factors is not intended to be exhaustive and that these *indicia* or factors will "differ with the nature and extent of the undertaking" (*Moldowan* at 486; *Stewart* at para. 55). In the particular context of earnings from gambling and lotteries, the TCC and its predecessors have considered the following subfactors: the management and minimization of risk, skill set in the game, the taxpayer's calculating and disciplined engagement in the activity in question, as well as the time committed to the venture

(*Cohen v. The Queen*, 2011 TCC 262 at para. 21 (*Cohen*), citing *Balanko v. Minister of National Revenue*, 88 D.T.C. 6228; *Luprypa v. The Queen*, [1997] 3 C.T.C. 2363; *Leblanc v. The Queen*, 2006 TCC 680; and, to a lesser extent, *Duhamel* at para. 85).

[50] Finally, assessing whether the taxpayer carried on the activity in question with the intention of making a profit requires a global review. However, as the Supreme Court reminds us, the reasonable expectation of profit should not be a conclusive factor in this review. The reasonable expectation of profit is a criterion that was first outlined in *Moldowan* and on which, according to *Stewart*, too much emphasis has been put in subsequent decisions. Rather, it is the commercial—or sufficiently commercial—nature of the activity in question that should be evaluated, not the taxpayer's business acumen (*Stewart* at para. 55). The outcome of this review will depend on the specific facts of each case (*Moldowan* at 486; see also *Radonjic v. Canada (Revenue Agency)*, 2013 FC 916 at para. 44; *Cohen* at para. 20).

[51] Furthermore, income from a business is explicitly a "source of income" under the Act. The term "business" is broadly defined in subsection 248(1) of the Act. It includes a "profession, calling, trade, manufacture or undertaking of any kind whatever" including "an adventure or concern in the nature of trade but does not include an office or employment". Business income is defined in subsection 9(1) of the Act as the profit that the taxpayer derives from a business in the taxation year at issue. The debate in this case does not concern these definitions.

[52] It is also important to underscore, as the appellants came to acknowledge at the hearing, that there is no case law, statutory provision or principle of tax law holding that gambling

winnings, such as from playing poker, are not taxable. Whether or not these winnings are taxable will depend in each case on whether the activity in question was carried on with the intention of making a profit or, if applicable, whether it was carried on in a sufficiently commercial manner.

[53] In this case, there can be no doubt that the Judge was well aware of the applicable law. He set out in detail the respective positions of the parties in that regard. After expressing the opinion that the parties essentially had a common understanding of this aspect, the Judge reasoned that the real dispute between them concerned the application of the law to the particular facts in each appellant's case (Fournier-Giguère Judgment at para. 115; Bérubé Judgment at para. 108; D'Auteuil Judgment at para. 113).

[54] I cannot say that, in stating the applicable law as he did, the Judge misapprehended its scope. At this stage, the question is whether he altered its content by applying it to the facts in the evidence before him. I repeat that the content of a review aiming to establish a commercial or sufficiently commercial activity may vary "with the nature and extent of the undertaking" and that the ultimate goal of such a review is to determine the overall nature of the taxpayer's activities and whether, in carrying on those activities, the taxpayer intended to make a profit (*Moldowan* at 486; *Stewart* at para. 55).

[55] In my opinion, although the Judge's decision could have been structured so as to address the various *indicia* or sub-*indicia* of commerciality of the appellants' activities separately, as was done in *Cohen* and *Duhamel*, when his decisions are read as a whole, it can be seen that the Judge did not alter the applicable legal test.

[56] Indeed, with regard to the taxation years at issue, he was satisfied of the following:

(a) To the appellants, the poker activities they undertook were much more than mere entertainment or recreation.

(b) The appellants played poker to earn a living, making them professional poker players.

(c) Their poker activities represented their only source of income (or the main source, in Mr. D'Auteuil's case).

(d) The appellants devoted almost all of their time, apart from when they were sleeping, eating, or partying, to poker.

(e) Based on their poker earnings, the appellants were able to make a profit on a yearly basis both consistently and regularly, even though they could not predictably control the outcomes of poker games.

(f) With this level of earnings over such a long period of time, they could reasonably expect to be able to earn a living by playing poker.

(g) Despite their unconventional lifestyle, they behaved in a "businesslike" manner: they played to win; they had strategies that they adapted depending on the level of the tables and their opponents' prowess; and they used software programs that allowed them to get information on their opponents' playing habits, track their earnings on gambling websites and analyze their own statistics.

(h) They adopted objective standards of risk management and minimization and income maximization.

(i) They used their expertise and their abilities to earn their living through poker, a game of chance in which skill plays an important role.

[57] With regard to the training factor, the Judge noted that Mr. Fournier-Giguère had never received any poker training; Mr. Bérubé spent hours on training, analyzing other players and participating in discussion forums; and Mr. D'Auteuil had subscribed to the website of a company that provided consultation and teaching services, and services to help develop one's poker game.

[58] In my opinion, the review carried out by the Judge in each case takes into account, explicitly or implicitly, the aforementioned *indicia* and sub-*indicia* of commerciality, namely (i) the profit and loss experience in past years; (ii) the taxpayer's training; (iii) the taxpayer's intended course of action; (iv) the capability of the venture to show a profit; (v) the management and minimization of risk; (vi) skill set in the game; (vii) the taxpayer's calculating and disciplined engagement in the activity in question; and (viii) the time committed to the venture.

[59] Contrary to the appellants' claims, I see no error of law in the way the Judge conducted his analysis in the three cases. In other words, I am not convinced that in proceeding as he did, the Judge deviated from the legal test that he was required to apply.

[60] On the contrary, it is my opinion that, overall, his approach respects the particulars of the test. I reiterate, in this regard, that the adequacy of a trial judge's reasons is normally assessed on the basis of practicality and functionality. This means that an appellate court does not expect trial judges to explicitly discuss all the issues before them or to show in every case how they arrived at the conclusion that they did. Rather, reasons must "be read as a whole in their overall context, including the evidentiary record before the court, the submissions made, the issues that were live before the court and the fact that judges are presumed to know the law on basic points". In other words, a trial judge's reasons, short as they may be, will be adequate if they are "intelligible or capable of being made out and permit meaningful appellate review" (*Canada v. Long Plain First Nation*, 2015 FCA 177 at para. 143 (*Long Plain*), citing *R. v. R.E.M.*, 2008 SCC 51 at paras. 17, 43 and 44; *R. v. Dinardo*, 2008 SCC 24 at para. 25; *R. v. Walker*, 2008 SCC 34 at para. 27; *R. v. Sheppard*, 2002 SCC 26 at para. 25; and see also *Canada v. Olumide*, 2017 FCA 42 at para. 40).

[61] In my opinion, the Judge's reasons meet these requirements, even if the appellants would have liked them to have been more detailed and better structured.

[62] It remains to be determined whether, on application of the aforementioned analytical framework to the facts of each case, the Judge committed a palpable and overriding error in finding that the appellants' poker earnings in the taxation years at issue were taxable as business income.

(2) The Judge did not commit a palpable and overriding error

[63] As a preliminary issue, the appellants criticize the Judge for not having concluded, based on the expert evidence, that poker is essentially a game of chance in which [TRANSLATION] "any skills that a player might develop may do only very little to influence the outcome of a poker game".

[64] They then endeavour to demonstrate that the evidence in the record did not allow the Judge to conclude that their poker activities in the taxation years at issue met the various *indicia* and sub-*indicia* of commerciality that make it possible to define the resulting earnings as a "source of income" within the meaning of the Act.

[65] At this point, it is important to recall what the standard of palpable and overriding error entails and the role of the Court when it is required to apply it. The standard is highly deferential. This applies equally to questions of fact, whether based on the credibility of witnesses or not; to the inferences that a trial judge draws from the facts; and to questions of mixed fact and law, with the exception of a pure question of law that is extricable from the question of mixed fact and law under review (*Housen* at paras. 20–25, 36). For example, an appellate court is not free to interfere with a finding of fact that it disagrees with where such disagreement "stems from a difference of opinion over the weight to be assigned to the underlying facts" or because it "takes a different view of the evidence" (*Housen* at paras. 23-24; *Nelson (City) v. Mowatt*, 2017 SCC 8 at para. 38).

[66] An appellate court may intervene only when there is a palpable and overriding error. The error is palpable when it is "plainly seen" and, therefore, when "all the evidence need not be reconsidered in order to identify it", and it is overriding or determinative "if it has affected the result" (*Hydro-Québec v. Matta*, 2020 SCC 37 at para. 33; *Housen* at paras. 4-6, 27 and 28). As this Court evocatively stated in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165 at paragraph 46, "[w]hen arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall" (see also *Canada (Attorney General) v. Hutton*, 2023 FCA 45 at paras. 39-41 (*Hutton*)).

[67] This burden, to put it mildly, is heavy. In my view, it has not been met in this case.

(a) *Preliminary issue*

[68] This argument is, for all intents and purposes, based on paragraph 40(2)(f) of the Act. According to the appellants, the Judge should have found that poker is a betting game within the meaning of that provision. I have already rejected this argument. Again, the Judge was satisfied that poker is a game that combines luck with skill and that the question of which of the two prevails over the other was irrelevant to the dispute before him.

[69] I note in this regard that the expert Mathieu Dufour, retained by the appellants, opined in paragraph 9 of his main report that [TRANSLATION] "[t]he outcome of a poker game clearly depend[ed] on both chance (if only because of the distribution of the cards) and the skill of the players" (Appeal Book at 2581 (Mr. Fournier-Giguère), 1993 (Mr. Bérubé) and

2221 (Mr. D'Auteuil)). Their other expert in this case, Jeffrey S. Rosenthal, expressed a similar opinion at paragraph 14 of his report, stating, "I completely agree" with the Minister's expert that poker "is a game in which both skill and chance play a role in the ultimate outcome" (Appeal Book at 2451 (Mr. Fournier-Giguère), 1863 (Mr. Bérubé) and 2351 (Mr. D'Auteuil)).

[70] Not only did the Judge make no palpable and overriding error in finding that paragraph 40(2)(f) of the Act does not apply, but the appellants' contention underlying this preliminary issue that poker is just a game of chance is also not supported by the evidence.

(b) *The profit and loss experience in past years*

[71] The appellants relied on their respective uncontradicted testimony to say that they engaged in poker recreationally in the taxation years at issue and that their activities in connection with that game exhibited neither the progression nor the consistency that typically characterize the carrying on of a business.

[72] These arguments do nothing more than invite this Court to reconsider all the evidence. However, as we have seen—and for the policy reasons invoked in *Housen*, i.e., (i) limiting the number, length and cost of appeals; (ii) promoting the autonomy and integrity of trial proceedings; and (iii) recognizing the expertise of the trial judge and his or her advantageous position—that is not what is expected of an appellate court.

[73] I would add this: the Judge had to assess the issues submitted to him in respect of all the evidence adduced before him and not only in respect of the appellants' testimony, even if this testimony is uncontradicted. In this regard, I repeat that the issue of whether the appellants undertook their poker activities with the intention of making a profit had to be assessed not only subjectively, and therefore solely on the basis of the appellants' view of them, but also objectively. According to the Judgment, that is what the Judge endeavoured to do.

[74] I would also add that the probative value of testimony, even if it is uncontradicted, is always for the trial judge to assess in light of all the evidence in the record. In other words, it is open to a trial judge, who is presumed to have examined all of the evidence, to prefer one party's evidence over another's and, I repeat, it is not this Court's role to reweigh evidence and substitute its own appreciation of the witnesses' testimonies (*Apotex Inc. v. Eli Lilly and Company*, 2021 FCA 149 at para. 28 (*Apotex*), citing *Packers Plus Energy Services Inc. v. Essential Energy Services Ltd.*, 2019 FCA 96 at para. 33; *Eli Lilly and Company v. Apotex Inc.*, 2010 FCA 240 at para. 8).

[75] Finally, I would point out that in the Judge's view, the figures (earnings and losses) adduced in evidence—which are undisputed and set out in paragraph 14 of these reasons—showed, aside from one year of nil earnings for Mr. D'Auteuil in 2009, that the appellants were able to make a profit on a "yearly basis both consistently and regularly". Although it was not expressly stated by the Judge, considering the Judgment as a whole, I take it as an indication that he considered the loss and profit factor indicative of the appellants' intention to make a profit.

(c) *The appellants' training*

[76] The appellants contend that the evidence adduced at trial on this point shows that they had, at most, a personal interest in poker and that the training they received in the taxation years at issue was not comparable to that which a person engaged in poker in a businesslike manner would have taken.

[77] As noted earlier, according to the Judge, the appellants used software programs that allowed them to get information on their opponents' playing habits, track their earnings on gambling websites and analyze their own statistics. In Mr. D'Auteuil's particular case, the Judge accepted from the evidence that he devoted two hours per week to watching television and other shows about poker with the aim of staying competitive and informed about the general trends affecting online poker.

[78] The appellants do not explain how the training of a person engaged in poker in a businesslike manner would differ from their own. In any case, the appellants' claim on this point is yet another invitation for this Court to reweigh the evidence adduced at trial and substitute its own appreciation of the evidence. The question is not whether this Court—or even another TCC judge faced with the same problem—could have come to a different conclusion than the Judge did. Rather, the question is whether, in ruling as he did on this point, the Judge committed a palpable and overriding error (*Hutton* at para. 46). With respect, I am of the opinion that the Judge committed no such error on this point.

[79] The appellants cite *Tarascio* and *Cohen* in support of their claims, but in my view, these two judgments are of no assistance to them.

[80] In *Tarascio*, where the taxpayer claimed losses related to the gambling that he spent time on after work and at the weekends, this Court did not say that having special knowledge and skill as a gambler due to experience did not satisfy the training factor. It simply refused to intervene on the ground that the fact that the TCC did not, in the taxpayer's view, give it sufficient weight did not constitute a palpable and overriding error in light of all the evidence in the record. I note that the taxpayer in that case had engaged in gambling on horse racing for a time before switching to "slots and the casino". I also note that, according to the TCC, the taxpayer "spent no time practising his skills" (*Tarascio* at para. 5). That case is therefore easily distinguishable from this one.

[81] In my view, the same is true of *Cohen*. In that case, the taxpayer was also seeking to deduct from his income as business losses amounts that he spent on poker activities in a taxation year. That case is unique in that the taxpayer was employed by a large law firm. He stated that in January 2006, after failing to be elevated to Partner for the second time, he decided to become a professional poker player while keeping his job at the firm, at least for the first quarter of the taxation year at issue (2006). His ambition to become a professional poker player lasted only a few months, during which period he joined a new law firm almost at the same time as his previous job ended. His balance sheet of gains and losses for the taxation year at issue was essentially negative. More importantly, the TCC questioned that taxpayer's credibility relevant to

his position of having created a business plan and conducting himself commercially (*Cohen* at paras. 48-49).

[82] More specifically with respect to training, the TCC noted that the taxpayer had "not submitted any reliable evidence of any meaningful formal or other training", nor had he submitted reliable evidence that this training had "improved his level of play to a level of a professional poker player as he called himself" (*Cohen* at para. 30).

[83] The factual matrix in *Cohen* is thus significantly different and does not assist the appellants' case, particularly in a context where the Court is called on to undertake a review at this stage based on the standard of palpable and overriding error.

[84] Lastly, the appellants argued that the training factor is relative when it comes to poker because ultimately, luck determines the outcome of the game. As I have previously said, this argument does not have the traction that the appellants would like it to have.

(d) *The appellants' intended course of action*

[85] The appellants criticize the Judge for not having sufficiently considered what motivated them to play poker or the fact that none of them had a business plan, at least not of the nature one would expect from a person operating in a businesslike manner. They also criticize the Judge for concluding that they could reasonably expect to be able to earn a living by playing poker based on a sample of three or four [TRANSLATION] "successful" years.

[86] Here again is an invitation to the Court to reweigh the evidence and substitute its own appreciation of the facts. I repeat, this goes beyond what is permitted on appeal on questions of fact or mixed fact and law (*Apotex* at para. 28). The fact that we could have weighed the evidence differently and, ultimately, come to a different conclusion than the one reached by the Judge on this point does not change this (*Hutton* at para. 46).

[87] Here as well, the appellants rely on the judgment in *Cohen* to support their claims. I have already described the limitations of that decision given the particular facts of that case. The appellants also rely on the 1961 judgment of the Exchequer Court in *M.N.R. v. Morden*, [1962] Ex. C.R. 29 (*Morden*). At issue was whether winnings from betting on sporting events were taxable. What the appellants do not say is that for the taxation years at issue in that case, the taxpayer's gambling activities were only occasional and amounted to nothing more than indulging in a hobby (*Morden* at 35).

[88] As the Exchequer Court aptly put it in *Morden*, each case must depend on its own particular facts. On this point, I find no palpable and overriding error on the part of the Judge in his treatment of the evidence submitted to him.

(e) *The capability of the venture to show a profit*

[89] The appellants say that the earnings they made from playing poker could lead one to believe ([TRANSLATION] "give the illusion") that they had the capability to make a profit. However, according to them, this capability is unpredictable and unstable, a factor that the Judge failed to take into account.

[90] I repeat that, based on the earnings and losses entered into evidence, the Judge found that the appellants each had the capability of showing a profit on a yearly basis, both consistently and regularly, even though, he added, the outcome of the poker games could not predictably be controlled. The numbers, set out in paragraph 14 of these reasons, indeed show consistent—and significant—earnings throughout the taxation years at issue, with the exception, once again, of the year 2009 for Mr. D'Auteuil.

[91] This finding is supported by the evidence, and I see no reason to intervene.

(f) *Minimization of risk*

[92] The appellants submit that the Judge could not conclude that they were taking businesslike steps to minimize risk since they gambled for fun and entertainment and regularly played while under the influence of alcohol and drugs.

[93] The Judge considered their unusual lifestyle but said that he was satisfied, giving a few examples, that they had adopted objective standards of management, risk minimization and income maximization.

[94] In keeping with our role in this case, the question is not whether, in the Judge's place, we would have concluded as he did on this issue. The only issue before us is whether this finding is the result of a palpable and overriding error—one that causes the entire tree to fall, not just its leaves and branches. That is not the case here.

(g) *Frequency of play and number of games*

[95] The appellants claim that the fact that they played poker frequently and over an extended period of time does not prove anything. They say that the amount of time they spent playing poker was comparable to the time many people spend playing video games or watching television.

[96] The Judge concluded that the appellants devoted almost all of their time to poker, while acknowledging that the data relating to the number of hours and the number of games played in the taxation years at issue may have varied over time. I repeat that the issue of whether the income generated by a taxpayer was made with the intention of making a profit, in light of the applicable *indicia* and sub-*indicia* of commerciality, must be assessed globally.

[97] I do not agree that the Judge's conclusion, given all the evidence in the record, is vitiated by a palpable and overriding error.

[98] Finally, at best, the appellants criticize the Judge for omitting, refusing or neglecting to [TRANSLATION] "really" comment on the *Duhamel* decision which, according to them, involves the same questions of fact and law as the present case.

[99] I understand the appellants' argument as revolving around the adequacy of the reasons. It is true that the Judge's comments about *Duhamel* are succinct, but is this enough to vitiate his judgment? I do not believe so.

[100] As I have already stated, the Judge's reasons must be read as a whole and considered in their overall context, including in light of the evidence in the record and the submissions of the parties. Again, short as they may be, reasons will be adequate if they are "intelligible or capable of being made out and permit meaningful appellate review" (*Long Plain* at para. 143).

[101] In this case, in reading *Duhamel*, I identified a number of factual dissimilarities that may explain why the Judge did not feel bound by that decision. In addition, I note the following:

(a) Mr. Duhamel enjoyed a degree of notoriety that the appellants never did, having been crowned world poker champion, at the age of 23 in 2010 (the first of his three taxation years at issue in his case), in a championship that saw him pocket

millions of dollars. His “career” in the taxation years at issue (2010, 2011 and 2012) accordingly followed a very different path from those of the appellants.

(b) That same year, following the championship, he entered into an agreement with PokerStars under which he was paid large sums of money between 2010 and 2015, including US$1 million for the first year.

(c) These sums were paid to a corporation that Mr. Duhamel created for that purpose and through which Mr. Duhamel carried on a number of activities required of him under the agreement.

(d) According to the TCC, the evidence did not reveal any structured and serious method likely to help Mr. Duhamel win; rather, the method imputed to him by the Minister followed from the requirements imposed by his sponsor, PokerStars, and was one that he had never really put into practice.

(e) Also according to the TCC, the evidence revealed that Mr. Duhamel did not use software providing information and statistics on his opponents and did not teach poker courses or lead poker seminars. Furthermore, he did not prepare himself carefully before tournaments.

(f) The world championship earned him sources of income other than poker tournament winnings: returns on investments made using part of the money won, and dividends from the corporation he created in relation to the agreement signed with PokerStars.

(g) Also, he performed tasks other than playing poker, including representational activities for PokerStars, the goal of which was to get as many players as possible to play poker on PokerStars online platforms. In this way, his poker-playing activities were not his main occupation.

(h) His world championship win afforded him the luxury of not having to work to support himself.

(i) Other than the significant earnings made at that world championship, Mr. Duhamel recorded a financial loss overall for his poker-playing activities alone in the taxation years at issue.

[102] I note that a lot of importance seems to have been given to the reasonable expectation of profit in *Duhamel*, a factor that, as the Supreme Court reminded us in *Stewart*, is not conclusive but merely one among others in the overall assessment of the *indicia* of commerciality. This assessment depends on the weight that the trial judge, as the expert on the facts, assigns to it (*Housen* at para. 18) in light of the particular circumstances of each case (*Stewart* at paras. 4 and 37).

[103] Since every case is different, it is my opinion that concluding, as the Judge did, that the application of the *indicia* of commerciality to the particular circumstances of each appellant might lead to a different outcome than that arrived at by the TCC in *Duhamel* does not give rise to a palpable and overriding error.

[104] Again, it is important to remember that it is not our role to ask whether we—or another TCC judge with the same issue before him or her—would have come to the same conclusion as the Judge on this point. The Court's role is rather to determine whether the Judge made a palpable and overriding error in concluding as he did (*Hutton* at para. 46).

[105] As I have just said, I am not persuaded that that is the case.

[106] In summary, I see no palpable and overriding error on the part of the Judge in his application of the *indicia* of commerciality to the facts of each appellant.

D. *Dismissal of Mr. D'Auteuil's appeal from the notice of reassessment for the 2008 taxation year*

[107] Mr. D'Auteuil claims that the Judge erred in dismissing his appeal from the assessment for the 2008 taxation year on the ground that the notice of reassessment for that year had not been objected to, a condition precedent to appealing an assessment before the TCC under subsection 169(1) of the Act. However, the Judge had already, in June 2015, removed the penalties that had been imposed by the Minister.

[108] This argument is without merit. The penalties for the 2008 taxation year—as for all the taxation years at issue—were removed following a consent to judgment signed by the parties. However, as the Minister pointed out, the conduct of the parties cannot govern when the jurisdiction of the TCC is denied by statute (*Canada v. Telus Communications (Edmonton) Inc.*, 2005 FCA 159 at para. 23).

[109] In other words, in the absence of an objection to the notice of reassessment for the 2008 taxation year, the consent to judgment did not give the TCC jurisdiction over the appeal filed by Mr. D'Auteuil against that notice.

VI. Conclusion

[110] In order to be included in the computation of a taxpayer's income, a "source of income" must have been created with the intention of making a profit. This excludes income from a purely recreational activity, but the earnings made from such an activity may become a "source of income" under the Act if it is undertaken in a sufficiently commercial manner. A number of *indicia* have been established by the case law to help determine, for tax purposes, whether a recreational activity was undertaken in a sufficiently commercial manner.

[111] This requires a global analysis that will vary depending on the nature of the activity at issue. In some cases—and I am willing to concede that these are rather rare—the line between a purely recreational activity and a gambling activity undertaken in a sufficiently commercial manner is thin. Ultimately, it will depend on the circumstances of each case. Accordingly, where the law was correctly understood and applied by the trial judge, this Court will intervene only if the trial judge made a palpable and overriding error in his or her assessment of the facts. This makes for a very small opening, one that was too small in this case.

[112] For these reasons, I would dismiss the three appeals, with costs.

[113] This set of reasons applies to the three appeals. The original of these reasons will be placed in file A-276-22 and a copy will be placed in files A-54-23 and A-55-23.

"René LeBlanc"

J.A.

"I agree.
George R. Locke J.A."

"I agree.
Peter G. Pamel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-276-22
STYLE OF CAUSE:	MARTIN FOURNIER-GIGUÈRE v. HIS MAJESTY THE KING
AND DOCKET:	A-54-23
STYLE OF CAUSE:	ANTOINE BÉRUBÉ v. HIS MAJESTY THE KING
AND DOCKET:	A-55-23
STYLE OF CAUSE:	PHILIPPE D'AUTEUIL v. HIS MAJESTY THE KING
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	DECEMBER 9, 2024
REASONS FOR JUDGMENT BY:	LEBLANC J.A.
CONCURRED IN BY:	LOCKE J.A. PAMEL J.A.
DATED:	JUNE 10, 2025

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