Docket: 2010-385(IT)G

BETWEEN:

MINA KAWKAB YUNUS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on February 29, 2012, May 10, 2012
and December 4 and 5, 2013 in Montreal, Quebec,
before the Honourable Judge Gaston Jorré
and decision rendered on November 3, 2015 by

The Honourable Associate Chief Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Normand Pépin
Counsel for the Respondent:	Emmanuel Jilwan

JUDGMENT

The appeals from assessments made under the *Income Tax Act* for the 2002, 2003 and 2004 taxation years are allowed and the assessments are referred back to the Minister for reconsideration and reassessment on the following basis: the additional income is reduced from $40,771 to $30,271 for the year 2002; from $31,443 to $30,443 for the year 2003; and from $10,698 to $9,698 for the year 2004. The penalties are cancelled.

Each party shall bear their own costs.

Signed at Ottawa, Canada, this 3rd day of November 2015.

"Lucie Lamarre"

Lamarre A.C.J

Translation certified true
On this 18th day of January 2016.

François Brunet, Revisor

Citation: 2015 TCC 272
Date: 20151103
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REASONS FOR JUDGMENT

Lamarre A.C.J.

[1] This is an appeal from reassessments made on May 7, 2007 under the *Income Tax Act* (**ITA**), concerning the 2002, 2003 and 2004 taxation years (**taxation years at issue**).

[2] On her income tax returns for the taxation years at issue, the Appellant reported total incomes of $22,520 for the 2002 taxation year, $9,153 for the 2003 taxation year and $26,260 for the 2004 taxation year.

[3] In reassessing the Appellant, the Minister of National Revenue (**Minister**) added to the Appellant's income additional income of $40,771 for the 2002 taxation year, $31,443 for the 2003 taxation year and $10,697 for the 2004 taxation year. The Minister determined this additional income using the cash flow method. This selection method consists of comparing the income reported by the household (composed of the taxpayer, her spouse and her dependent children) and asset-related expenses (investments and finance charges) as well as the cost of living of the household during the period at issue.[1]

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[1] See audit report, Exhibit I-1, Tab 19, at page 3.

[4] Under subsection 163(2) of the ITA, penalties were also imposed for the three taxation years.[2]

[5] The Appellant contests before the Court the addition of this income and the imposition of the penalties.

[6] The appeals were heard by Judge Jorré in 2012 and in 2013. The parties agreed by letter on July 16, 2015 that the decision on these appeals be rendered by another judge of the Court based on the transcripts and the exhibits in the Court file.

[7] By way of preliminary comment, I will briefly summarize the proceedings. The hearings were held on February 29 and May 10, 2012 as well as on December 4 and 5, 2013.

[8] On February 29, 2012, the Court heard Naheed Kawkab Taufiq, the Appellant's sister, who travelled from California to testify. For personal reasons, Counsel for the Appellant requested that the hearing be adjourned to a later date once Ms. Taufiq's testimony was finished (so that she could be discharged).

[9] On May 10, 2012, Counsel for the Respondent commenced the hearing by making preliminary remarks. Counsel argued that there were new allegations that were not included in an amended notice of appeal. The Appellant apparently informed the Respondent that she intended to contest the entire assessment, whereas initially it was only part of the income discrepancy that was being contested. Counsel for the Respondent indicated that, up to that point, the Appellant had not contested the income discrepancies, but rather contested the source of the income. Counsel for the Respondent indicated that he had prepared for a dispute involving a total amount of $46,000 based on the answers provided

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[2] In his argument, Counsel for the Respondent (Transcript, December 5, 2013, page 63) indicated that the Appellant had not raised the issue of the limitation period for the reassessment made for the 2002 taxation year. From the reply to the notice of appeal, I can infer that the Appellant was reassessed beyond the normal reassessment period for 2002 (i.e. more than three years after the sending of a notice of original assessment, as per paragraph 152(3.1)(*b*) ITA). This is permitted only if the Minister demonstrates that this is justified under subparagraph 152(4)(*a*)(i) of the ITA. However, the Respondent does not raise this issue in its reply. I shall speak of this again below in my reasons.

during the examination for discovery.[3] Beyond that amount, he stated that he was caught unprepared.

[10] Judge Jorré accepted the argument that the Respondent had been caught unprepared and agreed to adjourn the hearing. On May 17, 2012, Judge Jorré ordered the Appellant to pay $3,000 in costs to the Respondent for the day of May 10, 2012 and for the preparation for the hearing. He also ordered the Appellant to file a new notice of appeal and the Respondent to file a new reply.

[11] The hearing subsequently resumed on December 4 and 5, 2013, and the case moved on to the deliberation stage.

[12] Several witnesses were heard for the Appellant. In addition to Naheed Kawkab Taufiq (the Appellant's sister), the Appellant herself, her son Mustafa Yunus, her spouse Mohammed Yumin Yunus, and Noshin Kairzada (a friend of the Appellant) also testified.

[13] The Respondent called as a witness Bernard Lafortune, an auditor with the Agence du Revenu du Québec (**ARQ**), who made the assessment for the Canada Revenue Agency (**CRA**).

[14] During the hearing on December 4, 2013, the exclusion of the witnesses was ordered at the request of Counsel for the Respondent. Only the Appellant and Mr. Lafortune, representing the Respondent, were exempted under section 133 of the *Tax Court of Canada Rules* (*General Procedure*).

FACTS

[15] The Appellant is of Afghan origin. She arrived in Montreal in 1984 as a refugee. She took training courses, in French, for three years at the Université du Québec (**UQAM**) to obtain a certificate in early childhood education. Since 1995, she has worked as an educator in a private school.[4]

[16] To explain the discrepancy between her standard of living and the income that she reported, the Appellant alleges, among other things, that she received various amounts from an inheritance from her father. According to the Appellant's testimony and that of her sister Naheed, their father died in 1985 in Germany, a

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3 Transcript, May 10, 2012, at pages 16-17.

4 Transcript, December 4, 2013, at pages 38-39 and 113.

year and a half after leaving Afghanistan.[5] He was a businessman involved in an import and export business between Germany and Kabul.[6] The Court accepted in evidence the document filed as Exhibit A-3, which indicates that the father died in November 1985 in Hanover, Germany.

[17] The Appellant's evidence rests largely on testimony. Documentary evidence was also filed concerning some of the transfers, but this evidence was in part contested by the Respondent.

[18] The Appellant alleges that her share of the inheritance was given to her by various members of her family. These amounts were allegedly deposited into her personal bank account when she received money transfers from members of her family living in Germany and in the United States. The Appellant also claims to have borrowed money from a friend in addition to using various credit cards and a line of credit obtained by her spouse. These various amounts that she received allegedly explain her standard of living.

[19] The Appellant's tax file was selected as part of an audit project called "Indices de richesse" [wealth indicators].[7]

[20] Bernard Lafortune, the auditor in the Appellant's tax file, explained that this project involved investigating individuals whose reported income was low, but who had a lavish lifestyle. In these situations, the ARQ conducts a more in-depth audit, and this is what happened in the Appellant's case.[8]

[21] As a first step, Mr. Lafortune sent a questionnaire to the Appellant and to her spouse in order to determine all the inflows and outflows of funds in order to establish the variations in their assets during each of the years at issue. Mr. Lafortune explained that, if the cash flow analysis shows a large discrepancy, the discrepancy is considered unreported income. Moreover, when taxpayers do not answer or provide answers deemed unreasonable to the questions asked, the ARQ uses Statistics Canada data.[9]

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5 Transcript, February 29, 2012, at pages 8, 28 and 52; Transcript, December 4, 2013, at page 28.

6 Transcript, December 4, 2013, at page 35.

7 Transcript, December 4, 2013, at page 160; audit report, Exhibit I-1, Tab 19, at page 3.

8 Transcript, December 4, 2013, at page 161.

9 *Ibid.*, at pages 162-164.

[22] Mr. Lafortune also explained that the reason why the Appellant was assessed rather than her spouse, Mr. Yunus, is that she is the person who owns the household assets that were considered for the purposes of the assessment, and, in the case at bar, all the assets are in the Appellant's name.

[23] According to Mr. Lafortune's audit report, the Appellant's file was selected by the ARQ on July 14, 2005. The questionnaires for establishing the inflows and outflows of the Appellant's funds for the taxation years at issue were mailed on July 29, 2005.[10]

[24] The ARQ received the answers to the questionnaires on September 6, 2005. Two separate questionnaires were completed, one by the Appellant (Exhibit I-1, Tab 24) and the other by her spouse (Exhibit I-5). The Appellant and her spouse both indicated that they did not have any lines of credit and that they had not received any loans, including loans from family members.

[25] Mr. Lafortune commented on the amounts indicated for food expenses on the personal expenses form completed by the taxpayers, on which $3,000 was reported as food expenses for the year 2004.[11] Mr. Lafortune explained that, when an amount is not reasonable, the ARQ's software corrects it by using amounts based on Statistics Canada data.[12] According to Statistics Canada, the food expenses for a family of two adults and five children should be, as a minimum, $7,192 for the year.[13] During the hearing, the Appellant said that she made a mistake and that food expenses were in fact $500 a month,[14] which works out to $6,000 for the year.

[26] The ARQ then requested more information from the Appellant. In particular, bank and mortgage statements were obtained.

[27] Mr. Lafortune also explained that the various statements made by persons to support the Appellant's statements did not constitute sufficient proof of the gifts and advances allegedly received and that he had therefore requested bank documents to corroborate the content of the statements made by these persons.[15]

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10 Audit report, Exhibit I-1, Tab 19, at page 4. See also the Transcript, December 4, 2013, at pages 89 and 172-173.

11 Exhibit I-1, Tab 31.

12 Transcript, December 4, 2013, at page 165.

13 Exhibit I-1, Tab 19, Appendix 4.

14 Transcript, December 4, 2013, at pages 89-100.

15 *Ibid.*, at pages 175-176.

He said that at that time he had not been informed of an inheritance that was allegedly received by the Appellant.[16]

[28] On January 20, 2006, a proposed assessment was sent to the Appellant since the ARQ noted significant cash flows that were not consistent with the income reported.[17]

[29] On March 22, 2006, a meeting between Mr. Yunus and Mr. Lafortune took place, during which Mr. Yunus was accompanied by a representative.[18] Mr. Yunus stated that, during the audited period, he had borrowed $15,000 on a line of credit and had received money from an inheritance by bank transfers and in cash. The ARQ again requested legal and bank documents as evidence, as well as documents attesting to the various loans and gifts received by the Appellant.

[30] Mr. Lafortune explained that he was able to consider only certain elements of the material provided. For example, transfers that occurred in a year prior to the period at issue were not considered. Also, funds allegedly received but not supported by the necessary evidence were not counted as sources of non-taxable income. Credit card statements were not accepted if the balances on December 31 of a year at issue were not available. Finally, the line of credit ($15,000 according to Exhibit A-9) in the name of Mr. Yunus' company, Canroyal Distribution Corporation (**Canroyal**), was not considered, since there was no indication of a shareholder advance in the corporation's financial statements.[19]

[31] Ms. Naheed Kawkab Taufiq, one of the Appellant's sisters, travelled from California to testify. During her testimony, she explained that their father left $300,000 in the bank when he died. It was she who was reportedly responsible for settling the estate, with the agreement of their mother. However, the full official legal process was not followed. Before being distributed, the money was in a bank account in Germany.[20]

[32] She explained that Islamic law provides that the inheritance be divided among the children. According to tradition, it is the mother who should have been

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16 *Ibid.*, at page 177.

17 Exhibit I-1, Tab 19, at page 4.

18 Transcript, December 4, 2013, at page 169.

19 Transcript, December 4, 2013, at pages 192-194; audit report, Exhibit I-1, Tab 19, page 5, as well as the cash flow report in the same tab; Exhibit I-2, Tab 62.

20 Transcript, February 29, 2012, at pages 9, 10 and 53.

responsible for the estate. However, since her mother was going through a difficult period, she reportedly assumed this responsibility.[21]

[33] Ms. Taufiq explained how her father's money was distributed among the members of her family. Each of her brothers and sisters – they are seven children[22] – apparently received an amount of $30,000, with the exception of herself and the Appellant, who reportedly each received $50,000, since they had greater financial needs.[23] She added that her mother received $20,000.[24]

[34] Ms. Taufiq stated that she needed money to buy a business and that the Appellant had loaned her the $50,000 share that was hers.[25] She explained that she gradually repaid the Appellant between 2001 and 2004 as follows:[26]

— In 2001, she transferred to the Appellant the amount of US$13,800 by bank transfer. Again in 2001, she asked a friend named Raouf Kawomi Kossimi, who lives Toronto and to whom she had earlier loaned $5,000, to repay her for her debt by paying the Appellant directly.

— She stated that she gave US$9,500 in cash to Mustafa, the Appellant's son, during his visit to California in 2002, so that he could give this amount to the Appellant.

— Between 2001 and 2004, she borrowed money from two of her sisters living in Germany in order to be able to repay the Appellant. A first amount of US$9,000 was borrowed from Diba (the Appellant's sister) and this amount was reportedly transported to Canada by Miena Abas, Diba's daughter. A second amount of US$9,000 was borrowed from Lida (the other sister) and was reportedly brought to Canada by their mother. These amounts were apparently handed over in cash.

— Finally, between 2001 and 2004, she repaid the Appellant the remaining $3,700 by sending jewelry.

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21 *Ibid.*, at pages 9 and 52.

22 It appears from the Appellant's testimony that she has four sisters and two brothers. Transcript, December 4, 2013, at page 19.

23 Transcript, February 29, 2012, at pages 15-16, 21, 59-61 and 83-85.

24 *Ibid.*, at pages 84-85.

25 *Ibid.*, at pages 15-18 and 31.

26 Transcript, February 29, 2012, at pages 32-43.

[35] Ms. Taufiq briefly discussed the letters filed as Exhibits A-1 and A-2, in which she indicates, first, that she had sent $50,000 to the Appellant to help her financially, and second, that she was acting as executrix of her father's estate and has sent money to the Appellant since 2001. In her testimony, she simply explained that she signed these letters at the request of Counsel for the Appellant.[27]

[36] In cross-examination, Ms. Taufiq explained that their father did not have a written will and that his assets had been sold before he left Afghanistan to settle with his family in Germany. She testified that, when her father died, he had $300,000.[28]

[37] Ms. Taufiq added that it is not the custom in an Afghan family to keep accounts and to ask a brother or sister what amount he or she received. She could not clearly explain when and how each of her brothers and sisters received their share of the inheritance.[29] A similar custom apparently also exists with regard to close friends, which would explain the absence of written evidence of the loan that she had made to Raouf.[30]

[38] Ms. Taufiq explained that the letter contained in Exhibit I-2, Tab 39, refers to a loan of $8,500 that she made to the Appellant in 2003. Her testimony was not very clear on this point, and it is not clear whether this amount was part of the repayment of the amount of $50,000.[31] Moreover, the signature on this document is problematic since it differs from the other documents signed by Ms. Taufiq in Exhibits A-1 and A-2.

[39] For her part, the Appellant indicated that in 1988 she bought her first house, in Saint-Hubert, on the South Shore of Montreal, in which she lived with her family until she bought a new house in Ville Saint-Laurent in 2001. She says that she received financial assistance at that time. That assistance reportedly represented her $50,000 share of the inheritance that she had first loaned to her sister, Ms. Taufiq. When she decided to buy the house in 2001, she therefore asked her sister to repay the loan.[32]

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27 *Ibid.*, at pages 47 et seq.
28 *Ibid.*, at pages 51-52.
29 *Ibid.*, at pages 60-62.
30 *Ibid.*, at pages 64 and 72.
31 *Ibid.*, at pages 71-75.
32 Transcript, December 4, 2013, at pages 40-44, 46-48.

[40] The Appellant essentially repeated the same statements as Ms. Taufiq concerning the various money transfers.[33] The Appellant indicated that Ms. Taufiq had sent her $14,000 by bank transfer. The Appellant explained that the amount was $14,000, but that there were expenses.[34] Then, another bank transfer was reportedly made by Raouf, a friend of Ms. Taufiq, for an amount of $4,990.[35] These two transfers were made in 2001 (according to the bank statements, Exhibit A-5).[36]

[41] The Appellant then mentioned that her son Mustafa brought back $9,000 for her in US currency when he returned from California in 2002.[37]

[42] The Appellant also said that her sister Diba Hoffmann-Kawkab, who lives in Germany, had sent her an amount of US$9,000 in July 2003. It was her daughter, Miena Abas, who reportedly brought this amount with her when she came to visit the Appellant in Canada.[38] Her sister apparently sent her a letter confirming that she was giving her this amount of money (Exhibit A-8).[39]

[43] She also testified that, in 2002 or 2003, her sister Lida Kawkab had sent her US$8,500 or US$9,000. It was the Appellant's mother who reportedly brought this amount of money to her when she came to Canada.[40] Lida made an unsworn statement according to which she had made an advance of $9,500 to the Appellant in 2002 (Exhibit I-2, Tab 37).

[44] The Appellant stated that her sister, Ms. Taufiq, had sent her by mail jewelry valued at $3,700.[41] According to the Appellant, Naheed considered that she had repaid her entire share of the inheritance.

[45] In 2003 or 2004, one of her friends, Noshin Kairzada, allegedly loaned her $10,000.[42] The Appellant reportedly left jewelry with her as collateral for this loan.

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33 *Ibid.*, at pages 46-63.
34 *Ibid.*, at pages 47-48.
35 *Ibid.*, at page 48.
36 *Ibid.*, at pages 48-49. These transfers are documented by a page of a bank document (Exhibit A-5).
37 *Ibid.*, at page 56.
38 *Ibid.*, at pages 57-60.
39 *Ibid.*, at pages 84-85.
40 *Ibid.*, at page 61.
41 *Ibid.*, at pages 62-63.
42 *Ibid.*, at pages 64-65.

For her part, Ms. Kairzada stated in her testimony that she had loaned $10,000 to the Appellant in the summer of 2002. She reportedly had in her possession an amount of $5,000 in cash and withdrew another amount of $5,000 from the bank over a period of two or three days. However, she did not know in what denominations she had given this amount to the Appellant. She also confirmed having received from the Appellant a box of jewelry as collateral, but indicated that she had never opened that box. The Appellant allegedly repaid Ms. Kairzada the following year by money order.[43] No evidence of that money order was produced.

[46] The Appellant also described her various sources of income. She received child tax benefits, as well as rent from the house that she still owns in Saint-Hubert.[44] Concerning the money from the inheritance, the Appellant says that she deposited it in the bank to cover the family expenses;[45] at least that is what she did with the American money (i.e. the money brought back by her son, her mother and her niece). She also mentioned that her spouse paid 15% of the family expenses.[46]

[47] She states that, in 2002 and 2003, she made three $10,000 payments which were transferred from her account at the credit union and applied to the mortgage account.[47] (This is corroborated by the credit union, Exhibit A-6.) She claims that this money came from the inheritance.[48]

[48] She also admitted that she made errors in filling out the questionnaires. In fact, for the food expenses, she maintains that the correct amount is in fact $500 a month.[49] However, she stated that there were no other errors on the forms than those concerning the amounts for food.[50]

[49] In cross-examination, she stated that it was her accountant who had prepared her income tax return for the year 2002[51] and that she had simply signed it.[52]

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43 Transcript, December 5, 2013, at pages 3-11.
44 Transcript, December 4, 2013, at pages 68-70.
45 *Ibid.*, at pages 70-73.
46 *Ibid.*, at pages 67-73.
47 *Ibid.*, at page 79.
48 *Ibid.*, at pages 74-79.
49 *Ibid.*, at pages 89-90.
50 *Ibid.*, at pages 99-100.
51 Exhibit I-2, Tab 71.

[50] The testimony of Mustafa Yunus, the Appellant's son, essentially concerns the transfer of US$9,000 that occurred in 2002, when he was 19 years old.[53] On the occasion of his cousin's engagement, he was visiting his aunt, Ms. Taufiq, in California in the United States. He explained that his aunt gave him the amount of $9,000 in US currency so that he could give it to his mother, the Appellant. Ms. Taufiq reportedly explained to him that this was money from the inheritance. He stated that he did not know before leaving for California that he was supposed to bring back an amount of money for his mother. He carried this amount in his hand luggage in the airplane during the return flight. He stated that he did not report this money to the Canadian Customs officers. He was not aware of the requirement to report all funds totalling CAN$10,000 or more to Customs upon entering Canada. Mustafa Yunus indicated that he returned with this amount of money and then gave it to his mother. He maintained that his mother counted the money in front of him and that it was in fact US$9,000.

[51] Mr. Mohammed Yumin Yunus is the Appellant's husband. During his testimony, he explained that he was the owner of a car wash.[54] He also said that he went into business with another man, who had to withdraw from the business venture, however, due to illness. That partner reportedly made various small loans to Mr. Yunus, but no documentary evidence was provided on this point. Mr. Yunus also said that he borrowed $15,000 on a line of credit (Exhibit A-9). He claimed that he used approximately 15% of this line of credit for the family expenses, or approximately $2,000. He also indicated that he had two credit cards on which he had borrowed in total approximately $6,500 ($5,150 + $1,390) in 2004 (Exhibits A-10 and A-11). I note that these are account statements for January and March 2004. Finally, a person who works in the same building as him apparently loaned him $2,000. Once again, there is nothing entered in evidence attesting to this.

[52] Mr. Yunus also mentioned that he applied for a third credit card in late 2005 (after the period at issue) in order to repay the debt accumulated on his other two credit cards and on his line of credit, given his low income.

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52 Transcript, December 4, 2013, at page 108.

53 *Ibid.*, at pages 8-16.

54 *Ibid.*, at pages 118-132.

[53] Mr. Yunus states that he met with the auditor, Mr. Lafortune, twice and claims that the latter allegedly showed him a sample form and suggested amounts to enter on the income and expenses forms.[55]

[54] Mr. Lafortune does not recall having suggested to Mr. Yunus figures to enter on the forms.[56] He maintains that he does not recall providing any information concerning the amounts to enter on the forms, whether in writing or verbally, and says that he does not provide this kind of instructions.[57]

Issues

(1) Was the inclusion of the unreported income as determined by the reassessments justified?

(2) Although the issue was not raised in the notice of appeal, could the Minister reassess the Appellant for the 2002 taxation year under subparagraph 152(4)(*a*)(i) of the ITA?

(3) Was the Minister justified in imposing gross negligence penalties for each of the taxation years at issue under subsection 163(2) of the ITA?

ANALYSIS

1) Was the inclusion of unreported income justified?

[55] In *Hsu v. Canada*, 2001 FCA 240, paragraph 22, the Federal Court of Appeal noted that the Minister can make arbitrary assessments using any method appropriate in the circumstances:

> Subsection 152(7) of the Act empowers the Minister to issue "arbitrary" assessments using any method that is appropriate in the circumstances.
>
> Subsection 152(8) grants a presumption of validity to these assessments and places the initial onus upon the taxpayer to disprove the state of affairs assumed by the Minister […]. Notwithstanding the fact that such an assessment is "arbitrary", the Minister is obliged to disclose the precise basis upon which it has been formulated […]. Otherwise, the taxpayer would be unable to discharge his or

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55 *Ibid.*, at pages 143-144 and 152.
56 *Ibid.*, at pages 171-172.
57 *Ibid.*, at pages 218 and 220.

> her initial onus of demolishing the "exact assumptions made by the Minister but no more" […]

[56] In *Lacroix v. Canada*, 2008 FCA 241, 2008 DTC 6551, Judge Pelletier of the Federal Court of Appeal reasoned as follows, at paragraphs 18 to 20 and 22, in the case of an assessment that used the net worth method to determine unreported income:

> 18 In my view, this jurisprudence does not establish a rule to the effect that the Minister may not use the net worth method to add unreported income to a taxpayer's income unless the Minister can establish the source of the unreported income. Our tax collection system is based on the taxpayer's self-reporting of the income he or she has earned during a taxation year. Should the Minister doubt, for whatever reason, the accuracy of the taxpayer's return, the Minister may conduct an investigation in such manner as deemed necessary. The Minister may then make a reassessment. If the taxpayer appeals the reassessment, the Minister does not have to prove the facts giving rise to the reassessment. In the reply to the notice of appeal, the Minister need only set out the presumptions of fact used in the reassessment. The onus is on the taxpayer, who knows everything there is to know about his or her own affairs, to "demolish" the Minister's assumptions; otherwise, they are presumed to be true.
>
> 19 The Supreme Court has endorsed this approach on a number of occasions, including in *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, to name just one example. In that case, the Court stated the following at paragraphs 92-93:
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> > 92 … The Minister, in making assessments, proceeds on assumptions (*Bayridge Estates Ltd. v. M.N.R.*, 59 D.T.C. 1098 (Ex. Ct.), at p. 1101) and the initial onus is on the taxpayer to "demolish" the Minister's assumptions in the assessment (*Johnston v. Minister of National Revenue*, [1948] S.C.R. 486; *Kennedy v. M.N.R.*, 73 D.T.C. 5359 (F.C.A.), at p. 5361). The initial burden is only to "demolish" the exact assumptions made by the Minister but no more: *First Fund Genesis Corp. v. The Queen*, 90 D.T.C. 6337 (F.C.T.D.), at p. 6340.
> >
> > 93 This initial onus of "demolishing" the Minister's exact assumptions is met where the Appellant makes out at least a prima facie case: *Kamin v. M.N.R.*, 93 D.T.C. 62 (T.C.C.); *Goodwin v. M.N.R.*, 82 D.T.C. 1679 (T.R.B.) ... The law is settled that unchallenged and uncontradicted evidence "demolishes" the Minster's assumptions: see for example *MacIsaac v. M.N.R.*, 74 D.T.C. 6380 (F.C.A.), at p. 6381; *Zink v. M.N.R.*, 87 D.T.C. 652 (T.C.C.) …
>
> 20 Applying the net worth method changes nothing in this method of proof. Where the Minister presumes that the income detected using the net worth method is

> taxable income, the onus is on the taxpayer to demolish this presumption. If the taxpayer presents credible evidence that the amount in question is not income, the Minister must then go beyond these assumptions of fact and file evidence proving the existence of this income.
>
> […]
>
> 22 The amount and the nature of the unreported income having been alleged by the Minister in his assumptions of fact, the onus was on the taxpayer to prove to the judge of the Tax Court of Canada that the amounts detected using the net worth method were not taxable income.

[57] In the case at bar, the amount and the nature of the unreported income having been alleged by the Minister in his assumptions of fact, the onus is on the taxpayer to prove that the income added by the Minister was not taxable income.

Credibility of the testimony

[58] Concerning the testimony of the Appellant and her spouse, the fact that French is obviously not their first language posed a problem. It is clear from the transcript that it was sometimes difficult to understand them. Their testimony was interrupted more than once to ask them to give more specific answers that would enable the Court to understand their statements.

[59] Counsel for the Respondent argues that the Court should not accept the Appellant's evidence since the testimony is not credible. To support his assessment of the testimony, he makes the following points:

- The Appellant and her spouse allegedly filled out the expenses forms in an unreasonable manner (he mentions for example the fact that they did report any expenses for gasoline even though they had cars (Exhibit I-1, Tab 31).

- The statements provided by the Appellant to explain the sources of income are not sworn statements and come from persons related to the Appellant.

- Naheed Taufiq, the Appellant's sister, who travelled to testify, had difficulty explaining the statement, in Exhibit I-2, Tab 39, that she allegedly made concerning a loan of $8,500 in 2003 through her nephew. She was not able to explain if that amount was part of the amount of $50,000 that she was supposed to

repay to the Appellant, corresponding to her share of the inheritance. Counsel for the Respondent also pointed out that the signature on this document was not the same as on the other statements that Naheed Taufiq also made and which were filed as Exhibits A-1 and A-2.

- In addition, the Appellant and her spouse stated that they did not have any personal lines of credit nor had they borrowed money from anyone (Exhibit I-1, Tab 24 and Exhibit I-5).

- The Appellant and her spouse never mentioned the inheritance to the auditor until after he issued the proposed assessment. Counsel for the Respondent adds that there is no tangible evidence of this inheritance.

- The $15,000 line of credit was obtained by the Canroyal Corporation and there is no evidence indicating that part of the money from this source was transferred to its shareholder, Mr. Yunus.

- During the period at issue, the early mortgage repayments total $40,000. According to the Respondent, this demonstrates a fairly high standard of living that is not consistent with the income reported by the Appellant.

- In her answers to the written examination for discovery found at Tab 7 of the "Record of Proceedings" filed in evidence, the Appellant stated that she was not the owner of the principal residence or of the rental building, when in fact she is the owner.

- She has changed her version since the beginning of the audit. She did not mention the inheritance until after the proposed assessment and, in her amended notice of appeal, she added that she had borrowed money from a friend and that credit cards were used for family expenses.

- According to Counsel for the Respondent, the testimony came from related persons, who have a vested interest in the outcome of the appeal. Furthermore, that testimony was vague, confused and contradictory.

- Finally, Counsel for the Respondent points out that the US$9,000 transported to Canada by the Appellant's son was equivalent to an amount greater than CAN$10,000 during the years at issue and that this amount should have been reported to Canadian Customs in accordance with section 12 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, and that no such amount was reported.

- He concludes that the Appellant's evidence is not credible and that she knowingly made false statements, which justifies the imposition of gross negligence penalties.

Analysis of the evidence

[60] First of all, I note from the evidence that, except for the food expenses, the Appellant is not contesting the cash outflows determined by the auditor and described in his cash flow report (Exhibit I-1, Tab 19). With respect to food expenses, the auditor determined an amount of $7,192 a year based on Statistics Canada data (Exhibit I-1, Tab 19, Appendix 4 of the cash flow report). During her testimony, the Appellant corrected the food expenses, claiming a figure of $6,000 a year. This is a difference of $1,000 a year.

[61] The controversy thus mainly concerns the sources of income during the years 2002, 2003 and 2004. From the evidence, I note that the Appellant claims to have received, in 2002, US$9,000 from her sister Naheed Taufiq and another US$9,000 from her sister Lida as partial payment of the inheritance from her father.

[62] The Appellant also reportedly received a loan of $10,000 from her friend Nashin Kairzada. However, she claims to have repaid that loan in 2003. And yet, that outlay of $10,000 does not appear in the cash flow report drawn up by the auditor. If I were to accept the version of the Appellant and of Ms. Kairzada, then an amount of $10,000 should be added in 2003 to the cash outflows to take into account the repayment made by the Appellant, which would have the effect of increasing the discrepancy by $10,000 in 2003.

[63] For the year 2003, the Appellant claims to have received the amount of US$9,000 from her sister Diba, who allegedly sent the money to her via her daughter, who came to Canada. This amount was reportedly given to her at the request of her sister Naheed Taufiq and represented another part of the inheritance.

According to another document, Naheeb also allegedly loaned her $8,500 during 2003. Naheeb was not very explicit on this point, and there is no trace of this loan in the bank statements submitted in evidence. In addition, the signature on the document in question (Exhibit I-2, Tab 39) is problematic.

[64] The Appellant claims that, in 2004, her spouse contributed 15% from a $15,000 loan that he allegedly made through Canroyal in 2004, which is equivalent to approximately $2,000. There is no indication of a shareholder loan in the financial statements of this corporation. In addition, if such a loan existed, there would be a taxable benefit of the same amount.

[65] The Appellant's husband also reported net incomes of $338 in 2002, $2,682 in 2003 and $2,711 in 2004 (see the first page of each of the Appellant's income tax returns on which her spouse's net income appears (Exhibit I-1, Tab 1). He reported total incomes of $1,015 in 2002, $8,841 in 2003 and $8,941 in 2004 (see paragraph 15 (a)(iii) of the reply to the amended notice of appeal) (**reply**).

[66] According to the documents filed in evidence, the spouse, in addition to small personal loans, apparently also contracted debts of approximately $6,500 in 2004 on his credit cards, which, according to him, had still not been repaid after the period at issue. However, the credit card account statements filed in evidence do not enable us to verify the amounts outstanding at the end of 2004. In addition, both the Appellant and her spouse stated that they had not borrowed money from anyone or from any member of the family; they also stated that they did not have a personal line of credit.

[67] Mr. Yunus also testified that he applied for a third credit card in late 2005, to have an additional cushion, in the light of the debts accumulated on his other two credit cards in the years at issue.

[68] I agree with the Respondent that the evidence contains contradictions and that the testimony comes largely from family members (namely the Appellant, her spouse and her son), who may have a vested interest in the outcome of the case.

[69] Furthermore, it is very difficult for me to accept without reservation the evidence concerning the inheritance, which the Appellant allegedly did not receive until 2001. First, neither the Appellant nor her spouse mentioned this inheritance to Mr. Lafortune during the audit. It was only after the proposed assessment was issued that they mentioned it. Second, the Appellant's father died in 1985. It seems to me quite odd that the Appellant did not receive her share of the inheritance until

2001 (i.e. 16 years later). The Appellant and her spouse arrived in Canada as refugees in 1984. She received welfare benefits for six months, and then worked as a hairdresser before beginning her studies at the UQAM.[58] I find it hard to imagine that they did not need the money from the inheritance at the time of the father's death, particularly since, according to her testimony, the Appellant purchased a first property, in 1988, in which the family lived until their move to Ville Saint Laurent in 2001.[59]

[70] On the other hand, I realize from reading the evidence that the Appellant and her spouse may not have fully grasped the seriousness of the audit conducted in their case. I will therefore try to analyze the real and plausible probability of each amount that the Appellant claims to have received during the years at issue, since the amounts that she says she received before 2002 cannot be used to explain the income for the years 2002 to 2004.

[71] Naheed Taufiq, the Appellant's sister, travelled from California to testify. She states that in 2002 she gave US$9,500 in cash to the Appellant's son, who confirmed this version, although he reported an amount of US$9,000. The son stated that he saw his mother count this amount and noted that it was definitely US$9,000. The Respondent points out that this amount was not reported to Canadian Customs, but the evidence does not mention the exchange rate between the Canadian dollar and the US dollar at that time. In any case, this argument was not raised in the reply, and it was therefore up to the Respondent to prove this assertion.

[72] In the light of those three testimonies, I will give the benefit of the doubt to the Appellant and I am therefore prepared to accept that she received US$9,000 from her sister Naheed in 2002, without necessarily concluding that this amount came from the inheritance from her father. Moreover, the Appellant did not provide any evidence concerning the exchange rate. It was argued that an amount of CAN$9,500 should be considered in the inflows of funds, and I will therefore use that figure (Exhibit I-2, Tab 35).

[73] The Appellant also said that in 2002 she received a loan of $10,000 from her friend, which was allegedly repaid in 2003. As I mentioned above, if I accepted this version, then this amount should have appeared in the cash outflows in 2003, but this loan was never reported to the auditor, either before or after the proposed

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58 Transcript, December 4, 2013, at pages 38-39.

59 *Ibid.*, at pages 40-41.

assessment was issued. It was before this Court that Ms. Kairzada told this story for the first time, and it has not even been corroborated by the Appellant.

[74] The Appellant has not demonstrated that this money was deposited into her bank account and that it was taken out again. Rather, the $10,000 withdrawals were made for the purpose of repaying the mortgage. I consider the evidence insufficient and lacking plausibility to enable me to lend weight to Ms. Kairzada's testimony.

[75] Similarly, in 2002 and 2003, the two amounts of US$9,000 that were reportedly given in cash by her sister Diba's daughter and by her mother, both coming from Germany, suffer from a problem of evidence. These two individuals made statements, but not under oath, and did not otherwise testify, which did not enable the Respondent to test the truth of their claims. My understanding is that there is no record that these funds were deposited into a bank account belonging to the Appellant. It is true that her sister Naheed mentioned that she had asked her other two sisters to give these amounts to the Appellant. However, there is no way to verify whether the Appellant actually received those amounts, and I consider that the explanation of the inheritance is not sufficiently plausible to lend credence to that explanation.

[76] Concerning the loan of $8,500 that was allegedly made by Naheed, the evidence on this point is not credible. First, the document attesting to this loan bears a signature that does not match Naheed's signature found in Exhibits A-1 and A-2. Second, Naheed's testimony was very nebulous on this point. Finally, both the Appellant and her spouse reported that they had not received any loans from family members.

[77] I therefore consider that, apart from the amount of $9,500 received from Naheed in 2002, the Appellant has not demonstrated having received, on a balance of probabilities, the other amounts that she claims to have inherited or received as a loan from her family or from her friend, Ms. Kairzada.

[78] Furthermore, the Appellant and her spouse have not proven that the $15,000 loan on the line of credit in 2004 was used to pay the expenses in a proportion of 15%. The loan was made to Canroyal, in which the Appellant's spouse was a shareholder (Exhibit A-9). If the Appellant's version were confirmed, this amount would in any case have been taxable as a taxable benefit from the corporation.

[79] Finally, I consider that the Appellant and her spouse have not proven that Mr. Yunus still had debts totalling approximately $6,500 on his credit cards at the end of 2004. This amount, therefore, cannot be considered for explaining the discrepancies between the standard of living of the household according to the cash flows and the income reported. In addition, I consider insufficient the evidence concerning the various small loans that were allegedly made to the spouse during the period at issue.

[80] In conclusion, I consider that the difference of $1,000 a year in food expenses is minimal and can be granted in favour of the Appellant.

[81] In addition, I accept that an amount of $9,500 was received by the Appellant from her sister Naheed in 2002, but, as for the rest, the evidence submitted is insufficient and highly improbable and cannot justify reducing the additional taxable income.

[82] Accordingly, the assessments for the years 2002, 2003 and 2004 must be amended as follows. The additional income must be reduced:

from $40,771 to $30,271	for the year 2002
from $31,443 to $30,443	for the year 2003
and from $10,698 to $9,698	for the year 2004

2) Could the Minister reassess the Appellant for the year 2002 under subparagraph 152(4)(*a*)(i) of the ITA?

Paragraph 152(4)(*a*) ITA:

> (4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if
>
> (*a*) the taxpayer or person filing the return

> (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or
>
> (ii) has filed with the Minister a waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year.

[83] Hence, to make a reassessment beyond the normal reassessment period, as is the case here for 2002, the Minister must establish that the Appellant made a misrepresentation that is attributable to neglect, carelessness or willful default, since the Appellant has not filed a waiver.

[84] Counsel for the Respondent only vaguely raised this point in his arguments by saying that, since the Respondent had not been informed by the Appellant in her notice of appeal that she intended to contest this point, the Respondent did not have to prove this point.[60]

[85] Whether or not this argument was raised in the notice of appeal, the fact remains that the burden is on the Respondent to demonstrate (1) that there was misrepresentation and (2) that it was attributable to neglect, carelessness or wilful default (*Dao v. The Queen*, 2010 TCC 84).

[86] The simple fact of making an inaccurate statement is a misrepresentation (*Francis v. The Queen*, 2014 TCC 137, at paragraph 20). As for whether there was neglect, carelessness or wilful default, it is sufficient for the Minister to demonstrate the taxpayer's neglect with regard to one or more elements of her income tax return. This neglect is established if it is demonstrated that the taxpayer did not exercise due diligence in preparing and filing her income tax return (*Venne v. Canada*, [1984] F.C.J. No. 314 (QL), 84 DTC 6247. The standard required is that of a wise and prudent person (*Canada v. Regina Shoppers Mall Ltd.*, [1991] F.C.J. No. 52 (QL), [1991] 1 C.T.C. 297 (FCA)).

[87] In the case at bar, I consider that the discrepancy between the income determined according to the cash flows and the income reported is sufficient to conclude that there was misrepresentation. In addition, a wise and prudent person would have paid more careful attention to the income reported in his or her income tax returns.

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[60] Transcript, December 5, 2013, at pages 62 and 63. *Bigayan v. The Queen*, 97-2699(IT)G, 2000 DTC 1619 (TCC).

[88] During the period at issue, the Appellant and her spouse had been in Canada for nearly 20 years, they did business with an accountant and had purchased two properties. The Appellant went to school and became a teacher. Her spouse was operating a small business. I consider that they had the necessary knowledge to learn more about their tax obligations. In cross-examination, the Appellant acknowledged that she allowed her accountant to fill out her income tax returns and that she simply signed them. There was certainly carelessness, and for this reason, I consider that the Minister has proven that the assessment could be made beyond the normal reassessment period for the year 2002.

3) Was the Minister justified in imposing gross negligence penalties for each of the years at issue under subsection 163(2) ITA?

[89] Subsection 163(2) of the ITA allows the Minister to impose penalties on any person who, knowingly or under circumstances amounting to gross negligence, has made a false statement or omission in an income tax return. Subsection 163(2) of the ITA reads in part as follows:

> **163(2) False statements or omissions** — Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% of the total of […]

[90] Under subsection 163(3) of the ITA, the onus is on the Minister to prove the circumstances justifying the imposing of a gross negligence penalty. Subsection 163(3) reads as follows:

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

[91] In *Venne v. Canada*, *supra*, Judge Strayer explained what is meant by the concept of "gross negligence":

> […] "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. […]

[92] In *Lacroix v. Canada*, *supra*, the Federal Court of Appeal concluded that the taxpayer had committed gross negligence because he was unable to provide a credible explanation concerning the source of the income that he did not report:

> [29] […] In the case at bar, the Minister found undeclared income and asked the taxpayer to justify it. The taxpayer provided an explanation that neither the Minister nor the Tax Court of Canada found to be credible. Accordingly, there is no viable and reasonable hypothesis that could lead the decision-maker to give the taxpayer the benefit of the doubt. The only hypothesis offered was deemed not to be credible.
>
> [30] The facts in evidence in this case are such that the taxpayer's tax return made a misrepresentation of facts, and the only explanation offered by the taxpayer was found not to be credible. Clearly, there must be some other explanation for this income. It must therefore be concluded that the taxpayer had an unreported source of income, was aware of this source and refused to disclose it, since the explanations he gave were found not to be credible. In my view, given such circumstances, one must come to the inevitable conclusion that the false tax return was filed knowingly, or under circumstances amounting to gross negligence. This justifies not only a penalty, but also a reassessment beyond the statutory period.

[93] It is important to point out that, while the burden is on the taxpayer to demonstrate that the additional income determined by the application of the method used here was not taxable, the burden is on the Respondent to establish that the Appellant made a false statement knowingly or under circumstances amounting to gross negligence. Moreover, the law is well settled: the type of conduct by a taxpayer that justifies the Minister reopening statute-barred years, under subparagraph 152(4)(*a*)(i) of the ITA, does not necessarily justify the imposing of penalties under subsection 163(2) of the ITA. In fact, the provisions of subsection 163(2) are penal in nature and call for a higher degree of culpability. (See *Dao v. The Queen*, *supra*, paragraph 39.)

[94] In the case at bar, I have concluded that the Appellant was not able to justify that part of the discrepancy found by the CRA came from a source of non-taxable income. I have reached this conclusion mainly because the evidence was insufficient under the circumstances. However, I conclude from the evidence that this additional income could just as easily have been attributed to the Appellant's spouse, who was operating a business.

[95] If I may quote in full the reasoning of Judge Strayer in *Venne v. The Queen*, *supra*, he stated as follows:

> 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. […]

[96] Also, in *Lacroix*, the Federal Court of Appeal cited the reasoning of Judge Bowman in *Farm Business Consultants Inc.*:

> [28] In a similar vein, in *Farm Business Consultants Inc. v. Her Majesty the Queen*, [1994] 2 C.T.C. 2450, 95 D.T.C. 200, Judge Bowman wrote the following at paragraph 27:
>
> > 27 A court must be extremely cautious in sanctioning the imposition of penalties under subsection 163(2). Conduct that warrants reopening a statute-barred year does not automatically justify a penalty and the routine imposition of penalties by the Minister is to be discouraged… Moreover, where a penalty is imposed under subsection 163(2) although a civil standard of proof is required, if a taxpayer's conduct is consistent with two viable and reasonable hypotheses, one justifying the penalty and one not, the benefit of the doubt must be given to the taxpayer and the penalty must be deleted…

[97] Similarly, in *Udell v. M.N.R.*, 70 DTC 6019, (Ex. Ct.), Judge Cattanach made the following observations at page 6025:

> There is no doubt that subsection 56(2) is a penal section. In construing a penal section there is the unimpeachable authority of Lord Esher in *Tuck & Sons v. Priester*, (1887) 19 Q.B.D. 629, to the effect that if the words of a penal section are capable of an interpretation that would, and one that would not, inflict the penalty, the latter must prevail. He said at page 638:
>
> > We must be very careful in construing that section because it imposes a penalty. If there is a reasonable interpretation which will

> avoid the penalty in any particular case, we must adopt that construction.
>
> […]
>
> I take it to be a clear rule of construction that in the imposition of a tax or a duty, and still more of a penalty, if there be any fair and reasonable doubt the statute is to be construed so as to give the party sought to be charged the benefit of the doubt.

[98] I consider in the present case that the income discrepancy that was attributed to the Appellant could have been attributed to her spouse, who was operating a business. Hence, there could be a viable and reasonable hypothesis that would make it possible to give the benefit of the doubt to the Appellant. In this situation, I am not convinced that the Appellant herself made a false statement under circumstances amounting to gross negligence, since she may have thought that this additional income should be included in her spouse's income tax return. (See *Dridi v. The Queen*, 2006 TCC 199, 2006 DTC 3268, at paragraph 22.) I therefore consider that the Respondent did not discharge its burden of proof and I will cancel the penalty.

[99] The appeals are allowed and the assessments are referred back to the Minister for reconsideration and reassessment on the following basis: the additional income is reduced from $40,771 to $30,271 for the year 2002; from $31,443 to $30,443 for the year 2003; and from $10,698 to $9,698 for the year 2004. The penalties are cancelled.

[100] In the light of the outcome of the dispute, I consider it reasonable that each party bear their own expenses.

Signed at Ottawa, Canada, this 3rd day of November 2015.

"Lucie Lamarre"

Lamarre A.C.J.

Translation certified true
On this 18th day of January 2016.

François Brunet, Revisor

CITATION:	2015 TCC 272
COURT FILE NO.:	2010-385(IT)G
STYLE OF CAUSE:	MINA KAWKAB YUNUS v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montreal, Quebec
DATES OF HEARING:	February 29 and May 10, 2012 and December 4 and 5, 2013
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