Citation: 2007TCC294
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Dockets: 2003-2350(GST)G
2003-3536(IT)G

BETWEEN:

943372 ONTARIO INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

- AND -

2003-3543(IT)G

BETWEEN:

VALERIE CHANDELLE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

RULING ON NONSUIT MOTION

Bowman, C.J.

[1] These appeals were heard together. In the case of the corporate appellant (943372 Ontario Inc.) ("943") the appeals are from assessments made under the *Income Tax Act* ("*ITA*") for the 1992 to 1996 taxation years as well as an assessment made under the *Goods and Services Tax* ("GST") provisions of the *Excise Tax Act* ("*ETA*") for the periods from June 1, 1991 to May 31, 1996. With respect to the individual appellant, Valerie Chandelle (Valerie Sr.), the appeals are from assessments for her 1991 to 1994 taxation years.

[2] There were three groups of assessments: the initial assessments, the reassessments in 2001 and the reassessments in response to objections in 2003.

[3] By way of background, the corporate appellant, 943, in the years in question ran a strip club near Toronto airport. In 2001, 943 was assessed on alleged unreported sales of about $697,000. Also, GST was assessed against 943 on alleged unreported taxable supplies of $697,000. Also, input tax credits ("ITCs") were denied. On objection, the ITCs were allowed and the alleged unreported income was reduced to $160,653.65 and the alleged taxable supplies were reduced to the same $160,653.65.

[4] On the first set of reassessments (the 2001 reassessments) as well, Valerie Sr.'s daughter, ("Valerie Jr.") was assessed on the $697,000 of alleged unreported sales by 943 as well as payments made to Schnier Holdings Limited, ("Schnier") and Sun Life. Also, the appellant, Valerie Sr. was assessed on a net worth basis.

[5] On objection, the assessments against Valerie Jr. were vacated. On objection Valerie Sr. was assessed on the $160,653.65 of alleged unreported sales by 943 as well as the payments made by 943 to Schnier and Sun Life. The net worth assessment disappeared and was superseded by the specific assessments of $160,653.65 (943's alleged unreported sales) and the amounts paid by 943 to Schnier and Sun Life. The alleged payments to Schnier on which Valerie Sr. was assessed according to the notice of appeal were $8,312 in 1992, $30,250 in 1993 and $24,800 in 1994. The alleged payments to Sun Life on which the appellant was assessed, according to the notice of appeal, were $4,425 in 1991, $19,808 in 1992, $16,437 in 1993 and $8,858 in 1994. These figures do not appear in the reply to the notice of appeal and they bear no discernable resemblance to the figures in the evidence.

[6] The appeals are related and involve essentially the same amounts of money. The *ITA* assessments against 943 (whose fiscal year-end was May 31 for the taxation years 1992 to 1996) were based on the view that in those years 943 had unreported income from sales of liquor totalling $160,653.65. This is made up of $51,516.92, $51,692.42 and $57,444 for 1992, 1993 and 1994, respectively. The appeals before the court are from the 2003 assessments that were issued at the objection level. For the purposes of the GST assessments against 943, it was assumed that the alleged unreported sales also were unreported taxable supplies. Also, the 2003 assessments against Valerie Sr. were based on the view that the same amounts were taxable benefits under section 246 of the *ITA*. In addition, Valerie Sr. was taxed on certain other payments that it is alleged 943 made on her behalf to third parties.

[7] It is admitted that all of the 2001 reassessments against 943 and Valerie Sr. were made outside of the normal reassessment period. Accordingly, the onus was upon the respondent to establish misrepresentation that permitted the otherwise statute-barred assessments. If the otherwise statute-barred 2001 reassessments cannot be justified under subsections 152(4) and (4.01), the 2003 reassessments in response to the notices of objection must also fall. The reason is self-evident: assume a statute-barred assessment is issued and the taxpayer objects on the basis that the assessment is out of time. Could the Minister of National Revenue cure the defect by issuing a reassessment in response to the objection under subsection 165(3) and rely on subsection 165(5)? The question answers itself.

[8] After the case was argued I put two questions to counsel. They are set out in Mr. Vita's letter of April 16, 2007 as well as his answer as follows:

> We are writing to the Court further to the conference call with Chief Justice Bowman on March 27, 2007.
>
> In the course of the conference call, Chief Justice Bowman posed two questions to counsel and requested that counsel provide answers to them as soon as possible. The questions are as follows:
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> 1. Does a reassessment pursuant to ss. 165(3) of the *Income Tax Act* ("Act") cure the statute-barred prior reassessment?
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> 2. If the Appeal is allowed and the 2003 reassessment is vacated on the basis that there was not misrepresentation what is the status of the first reassessment?
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> We have considered the two questions and the Respondent's answers are as follows:
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> 1. The reassessment issued pursuant to ss. 165(3) of the *Act*, notwithstanding the provisions of ss. 165(5), will not cure the fact that the 2001 reassessment was with respect to a statute-barred year. (see *Anchor Pointe Energy Ltd. v. R.*, 2003 DTC 5512 paras. 33 to 35).
>
> 2. If the appeal from the 2003 reassessment is allowed on the basis that the Respondent failed to satisfy the Court that the Appellant made a misrepresentation with respect to the income earned, then the 2001 reassessment that was also made with respect to a statute-barred year is no longer valid and binding (see *Lomport Investments Ltd. v. R.*, 92 DTC 6231 para. 7). However, in order to ensure that there is no confusion the Court may exercise its jurisdiction, pursuant to paragraph 171(1)(*b*) of the Act and refer the 2003 reassessment back

> to the Minister for reconsideration and reassessment in accordance with the assessment.

[9] Mr. Kutkevicius' position is substantially the same. I agree with the position of both counsel. If a reassessment is statute-barred and cannot be justified under subsection 152(4), a reassessment under subsection 165(3) in response to an objection does not cure the defect of untimeliness by reason of subsection 165(5). If the 2001 reassessments cannot stand then the 2003 reassessments must equally fall. If the 2003 reassessments are vacated this may leave the 2001 assessments intact. The solution suggested by counsel of allowing the appeals and referring the matter back to the Minister commends itself.

[10] There is one other problem about the Crown's case against Valerie Sr. that I find somewhat troubling. The 2001 assessments against Valerie Sr. are statute-barred and can only be salvaged if the conditions in subsections 152(4) and 152(4.01) are met. The 2001 assessments against Valerie Sr. are net worth assessments. They are arbitrary assessments not specifically based on any particular sources of income. How can a net worth assessment ever meet the conditions set out in subsection 152(4.01)? To conform to subsection 152(4.01) a reassessment under subsection 152(4) must be limited by the words in subsection 152(4.01) ". . . to the extent that, but only to the extent that, it [the reassessment] can reasonably be regarded as relating to a misrepresentation attributable to neglect, carelessness or wilful default or any fraud . . .". This point was not argued and I express no concluded view on it.

[11] Since the initial burden lies upon the Crown to justify the statute-barred assessments and the penalties, counsel for the respondent opened and called Valerie Sr., Ms. Teresa Chui, an auditor with the Canada Revenue Agency ("CRA") and David Clive Evans, a GST auditor who took over the GST audit from another CRA GST auditor, John Adams, and Bruce Riddiford, a senior appeals officer with CRA who dealt with the objections of the taxpayers.

[12] At the conclusion of the Crown's evidence Mr. Kutkevicius moved that the appeals be allowed with costs and the assessments of tax, interest and penalties be vacated on the basis that the Crown had failed to put forward a case for the appellants to meet. This type of motion is customarily referred to as a motion for a nonsuit. In *410812 Ontario Limited v. The Queen*, [2002] G.S.T.C. 40, I set out some guidelines with respect to nonsuits. It may be useful to repeat them in the context of an income tax appeal. They are not binding but they do represent a consensus of the judges of this court. They are:

[32] We are seeing motions for nonsuits in this court with increasing frequency. The judges of the court have reached a consensus on the procedure in nonsuits (to the extent that it can ever be said that 22 judges are capable of reaching a consensus on anything) and I think it might be useful if I were to set out the guidelines that I have developed and circulated among the members of the court. They are of course not binding but they represent an attempt to put the procedure in nonsuits in this court in a relatively comprehensible and organized form. In preparing the guidelines I consulted four authorities:

1. The Law of Evidence in Canada, Second Edition, Sopinka, Lederman and Bryant.

2. The Trial of An Action, Second Edition, Sopinka, Houston and Sopinka.

3. Cross and Tapper on Evidence, Ninth edition.

4. Phipson on Evidence, Fourteenth Edition.

[33] There are several preliminary observations.

(a) The law relating to nonsuits appears to be going through an evolution.

(b) To the extent that we can derive assistance from the experience of or practices in other courts, it must be with respect to civil, non-jury cases.

(c) The procedure must be appropriate to this court. What might be suitable in, say, a non-jury matrimonial or libel action, or a case of professional negligence in a court in a province, might not be suitable in a tax appeal.

(d) There are a number of aspects of an income tax appeal in the Tax Court of Canada that may require a different approach to nonsuits. Among the differences from other civil actions are the following:

> (i) The existence of two procedures, informal and general. In the former the appellants are frequently unrepresented.
>
> (ii) The rules of onus in an income tax appeal are a little complicated. For example the onus on the appellant is to "demolish" the so-called assumptions pleaded by the respondent but the onus may shift to the Crown to establish a new basis for upholding the assessment. Also, the Crown has the onus in the case of penalties and in the case of opening up statute-barred years (the latter being a shifting onus).

[34] Bearing in mind the somewhat peculiar nature of an appeal in this court against an assessment of tax the following guidelines seem workable.

1. The court should not generally entertain motions for nonsuits in the informal procedure. I say this not as a technical or legal matter but because I do not think an unrepresented appellant should be faced with a technical motion such as a nonsuit. This of course does not apply where the Crown has the onus of proof, as in a penalty case.

2. Where a party — usually the respondent — moves for a nonsuit counsel for that party should be put to an election whether to call evidence before the court rules on the motion.

3. If counsel elects to call evidence the judge should reserve on the motion until all the evidence is in. In determining whether there is no evidence the court may of course consider any evidence called by the party moving for the nonsuit.

4. If counsel elects to call no evidence the court should immediately rule on the nonsuit motion.

5. If the judge rules that there is no evidence supporting the appellant's appeal he or she should, before dismissing the appeal, invite argument on the question whether the assumptions as pleaded support the assessment. If they do the judge should dismiss the appeal. If they do not, one of the alternatives open to the judge is to allow the appeal. If the Crown has pleaded an alternative ground for upholding the assessment, the court should ask whether the Crown intends to call evidence. It is not possible to set out any hard-and-fast rules in this unusual situation. What the court does will depend on the particular circumstances.

6. If the judge dismisses the motion on the basis that there is some evidence supporting the appellant's case two results should flow:

(i) Counsel who brought the motion for a nonsuit (usually counsel for the respondent) should be held to his or her election and should not, after losing the motion, be entitled to withdraw the election and call evidence.[1]

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[1] This is the current orthodox view. There is, however, a different view that seems to have some support to the effect that no real purpose is achieved by a rigid adherence to this rule and that a party moving for nonsuit is entitled to have the judge's ruling on whether there is any evidence and if the motion fails it is in the interests of justice that that party not be precluded from calling evidence. There is admittedly merit in this view and it would certainly be open to a trial judge to adopt it.

(ii) Counsel should then be entitled to argue that, notwithstanding the judge's ruling that there is some evidence supporting the appellant's case (or the case of whoever has the onus), the evidence is insufficient to satisfy the onus. (This is the distinction between no evidence — a question of law for the judge — and insufficient evidence (a question of fact)).

7. Matters can become a little complicated where there is a split onus as, for example, where the appellant has the onus of showing the assessment of tax is wrong, and the Crown has the onus of establishing a penalty, or opening up a statute-barred year or where the Crown raises a new and alternative basis of supporting the assessment. The question arises whether a nonsuit motion should be entertained in the middle of a trial where one party has put in its evidence and, if that party thinks that it has made out a *prima facie* case, so that the onus has shifted to the other party. I see no reason for complicating matters further by cluttering up the proceeding by mid-trial motions. If one party wants to bring a motion for a nonsuit that party should be forced to elect whether to call evidence on all aspects of the case and take his or her chances. In other words the ordinary rule should apply. Ultimately, however, the matter is in the discretion of the trial judge.

8. The trial judge should never of his own motion undertake to nonsuit a party. It should only be on the motion of a party. This was the view expressed by Rowell C.J.O. in *M^{c}Kenzie v. Bergin*, [1937] O.W.N. 200 (C.A.). It is inconsistent with the view expressed by Riddell J.A. in *Martin v. Canadian Pacific Railway*, [1932] O.R. 571 (C.A.). Apart from this point Riddell J.A.'s judgment in *Martin* is a very good summary of the rule that I think this court should follow.

The relevant passages in the judgments of Riddell J.A. in *Martin* and Rowell C.J.O. in *M^{c}Kenzie* are quite succinct and it may be worthwhile to reproduce them here.

In *Martin*, Riddell J.A. said at pages 573-574:

> At the close of the plaintiff's case, the trial Judge may nonsuit, *proprio motu*; this is so rare a proceeding that I know of but one instance in nearly half a century of active experience; and it cannot be said that there is any established practice in such a case; in the only case of which I am aware the Divisional Court of the Common Pleas Division held that the defendant not objecting but opposing an appeal from the nonsuit was in the same position as if he had moved for the nonsuit. This, of course, is not binding upon us; and if the extremely unlikely case should come before the present Divisional Court, it would be disposed of untrammeled by authority.
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> The usual, indeed, almost universal case is a motion by the defendant; the Judge may pursue any one of three courses.
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> He may, (1) allow the motion and grant the nonsuit, in which case on an appeal, the defendant must abide by the evidence given as though it were the only evidence available, and the appeal will be dealt with on that basis.
>
> Or the Judge may, (2), dismiss the motion, or (3), reserve his decision until the end of the trial; in either of these cases, the defendant may, (a) close his case

offering no evidence, in which case he is in the same position as the defendant in the case just mentioned; or, (b) give evidence, in which case the matter is decided on all the evidence offered, and the defendant on an appeal has no relief on the ground that a nonsuit should have been ordered--in other words, he has no relief if he has himself furnished the evidence, which gives the plaintiff a proper right of action.

These are the rules of strict practice in our Courts, but they in no way interfere with the action of the Court "in the exercise of its discretion."

In *M^{c}Kenzie*, Rowell C.J.O. said at page 201:

Possibly it would not be out of place, in view of the manner in which this action was disposed of at the trial, to suggest procedure which it would be desirable for Judges to follow in dealing with the question of a nonsuit and which would result in a saving of expense to both litigants and to the Counties, particularly in jury cases:

> (1) The trial Judge should not, of his own motion, undertake to nonsuit, but in all cases it should be left for counsel for the defendant to move for a nonsuit if he desires to do so.
>
> (2) Even if counsel for the defendant moves for a nonsuit, it would be wise and convenient if the trial Judge would reserve his decision on the motion for nonsuit and ask the defendant if he desires to put in evidence. If the defendant desires to put in evidence, the case should proceed and the jury's finding obtained. If the learned trial Judge then decided that the nonsuit should be granted he could dismiss the action, and, if appeal were taken, this Court would have all the facts before it, including the assessment of damages, and if it should be of opinion that the nonsuit should not have been granted the action could be finally disposed of.
>
> (3) If, on the other hand, the defendant said he did not desire to put in any evidence but rested his case on the weakness of the plaintiff's case, then the learned trial Judge could properly dispose of the motion for nonsuit.

9. On pages 155-158 of The Trial of An Action there is some discussion of nonsuit motions where there are multiple defendants. In the context of an income tax appeal where there are two or more appellants' cases being heard together should a nonsuit motion be entertained as against one but not as against the other(s)? Whatever theoretical justification might be found for such a course of action I think that as a matter of principle such a motion should be dismissed. If the court were to allow such a motion as against one appellant and then permit the Crown to adduce evidence against the other it is possible that the Crown's evidence might support the case of the appellant who had been nonsuited. This

> would be anomalous. If the Crown were to bring a motion to have one appellant nonsuited the Crown should be forced to elect whether it was going to call evidence as against any of the appellants.
>
> 10. There is some debate, discussed in Phipson at page 223 (paras.11-36), about the criteria to be applied in a nonsuit motion: should it be whether there is a scintilla of evidence, in which case the motion should be denied, or should it be whether there is any evidence on which the court can reasonably find for the party on whom the burden of proof rests. I am aware that Phipson is discussing the matter in the context of a jury case where the decision is more critical because it involves the fairly serious step of taking the case away from the jury. Phipson favours the second approach: is there any evidence on which the court can reasonably find for the appellant? With respect I do not agree. If there is any evidence supporting the appellant's case I think the motion should be denied. It is premature at the close of the appellant's case to consider questions whether the evidence adduced reasonably supports a finding for the appellant.
>
> [35] It is hoped that these guidelines may be of some assistance where nonsuit motions are brought in this court.

[13] In the above discussion of nonsuits I neglected to refer to a decision of Justice Bell in *Skukan v. The Queen*, [1997] 1 C.T.C. 2228, in which he granted a motion for a nonsuit on the basis that the evidence put forward by the Crown to justify the imposition of the penalties was inadmissible hearsay. The case is a very useful discussion of a number of issues including the hearsay rule, the type of evidence required to justify a penalty under subsection 163(2) of the *ITA* and nonsuits.

[14] Essentially, I have to decide, as Bell J. put it, whether the appellants have a case to meet. There is one modification to the guidelines that I set out in *410812 Ontario Limited, supra*. In paragraph 6, I stated that if the motion for a nonsuit is dismissed, counsel who brought the motion should be held to his or her election and not be entitled to call evidence. In the footnote to that paragraph, I stated that there was a different view that a party who unsuccessfully moves for a nonsuit should be entitled to call evidence. On reflection, this view seems to make sense and it is consistent with the view expressed by Sheppard J.A. in *Active Construction Limited v. Routledge Gravel Limited*, 27 W.W.R. 287, (quoted in *Skukan*), where he said:

> The motion for nonsuit raises the issue whether the plaintiff has a case to be met; that is the sole issue. It follows that if the judge holds that there is no case to be met, his finding will determine the motion and also the action as against the plaintiff. On the other hand, the refusal of the motion does not permit judgment in the action to be

> given against the defendant because it does not follow that there is no defence. That issue has not been raised by the motion. Accordingly, upon the motion being refused the defendant should be afforded an opportunity of calling evidence to establish his defence unless he has waived his right of doing so: *Yuill v. Yuill* [1945] P 15, 114 LJP 1, per Lord Greene, M.R. at p. 3. No doubt the trial judge has a discretion to refuse to entertain the motion for nonsuit unless the defendant elects not to call evidence: *Martin v. C.P.R.* [1932] OR 571, 40 CRC 144, per Riddell, J.A. at 574; *Hayhurst v. Innisfail Motors Ltd.* [1935] 1 WWR 385, per Harvey, C.J.A. at 390; a practice usually followed: *Protopappas v. B.C. Elec. Ry. and Knap* [1946] 1 WWR 232, 62 BCR 218, per Robertson, J.A. at 235 (varied on another point by the S.C. of Can. [1946] 60 CRTC 28). But this defendant was not called upon so to elect and it follows that the learned judge, upon refusing the nonsuit, should have given the defendant an opportunity then requested by the defendant, of calling evidence to establish a defence: *Yuill v. Yuill, supra.* That was not done. Hence the appeal should be allowed and the action referred back so that the trial may proceed in the usual course.

[15] Before I deal with the facts it may be useful to set out the statutory provisions that deal with the Minister's right to reassess beyond the normal reassessment period under the *ITA* and the *ETA.* Subsection 152(4) of the *ITA* reads in part, as follows:

> Subject to subsection (5), the Minister may at any time assess 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, and may
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> (*a*) at any time, if 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,

[16] Subsection 152(5) previously read:

> There shall not be included in computing the income of a taxpayer for a taxation year, for the purposes of any reassessment, additional assessment or assessment of tax, interest or penalties under this Part that is made after the normal reassessment period for the taxpayer in respect of the year, any amount
>
> (*a*) that was not included in computing the taxpayer's income for the purposes of an assessment of tax under this Part made before the end of the normal reassessment period for the taxpayer.
>
> (*b*) in respect of which the taxpayer establishes that the failure so to include it did not result from any misrepresentation that is attributable to negligence, carelessness or wilful default or from any fraud in filing a

return of the taxpayer's income or supplying any information under this Act; and

(*c*) where any waiver has been filed by the taxpayer with the Minister, in the form and within the time referred to in subsection (4), with respect to a taxation year to which the reassessment, additional assessment or assessment of tax, interest or penalties, as the case may be, relates, that the taxpayer establishes cannot reasonably be regarded as relating to a matter specified in the waiver.

[17] In 1998, applicable after April 27, 1989, subsection 152(5) was substantially amended to get rid of the requirement that the taxpayer establish the absence of negligence, carelessness, wilful default or fraud. Also, subsection 152(4.01) was introduced in 1998, applicable after April 27, 1989. Subsection 152(4.01) now reads:

> Notwithstanding subsections (4) and (5), an assessment, reassessment or additional assessment to which paragraph 4(*a*) or (*b*) applies in respect of a taxpayer for a taxation year may be made after the taxpayer's normal reassessment period in respect of the year to the extent that, but only to the extent that, it can reasonably be regarded as relating to,
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> (a) where paragraph (4)(*a*) applies to the assessment, reassessment or additional assessment,
>
> (i) any misrepresentation made by the taxpayer or a person who filed the taxpayer's return of income for the year that is attributable to neglect, carelessness or wilful default or any fraud committed by the taxpayer or that person in filing the return or supplying any information under this Act, or
>
> (ii) a matter specified in a waiver filed with the Minister in respect of the year; and

The corresponding provisions of the *ETA* read:

> 2**98(4)** An assessment in respect of any matter may be made at any time where the person to be assessed has, in respect of that matter,
>
> (a) made a misrepresentation that is attributable to the person's neglect, carelessness or wilful default;
>
> (b) committed fraud
>
> (i) in making or filing a return under this Part,
>
> (ii) in making or filing an application for a rebate under Division VI, or
>
> (iii) in supplying, or failing to supply, any information under this Part; or

> (c) filed a waiver under subsection (7) that is in effect at that time.

The French version of the *ETA* reads:

> **298(4)** Une cotisation peut être établie à tout moment si la personne visée a :
> (a) fait une présentation erronée des faits, par négligence, inattention ou omission volontaire;
> (b) commis quelque fraude en faisant ou en produisant une déclaration selon la présente partie ou une demande de remboursement selon la section VI ou en donnant, ou en ne donnant pas, quelque renseignement selon la présente partie;
> (c) produit une renonciation en application du paragraphe (7) qui est en vigueur au moment de l'établissement de la cotisation.

[18] The evolution of these provisions can be briefly summarized as follows: originally, subsection 152(4) permitted the Minister to open up a statute-barred year for all purposes if he could find any misrepresentation of the type described in subsection 152(4), however small, and reassess any items whether the subject of any type of misrepresentation or not. This obviously appeared somewhat unfair and the result was paragraph 152(5)(*b*) which was introduced in 1973-1974 with effect from 1972. This provision permitted the taxpayer to establish that the omission of an amount of income was not the result of a misrepresentation that was attributable to neglect, carelessness, wilful default or fraud. Nonetheless it did cast on the taxpayer an onus. Subsection 152(4.01) was therefore introduced and its effect, according to Mr. Kutkevicius, is to remove that onus from the taxpayer and put a two-fold onus on the Minister to establish:

> (a) that there was misrepresentation, and
>
> (b) that the misrepresentation was attributable to neglect, carelessness, wilful default or fraud.

I think this is the correct interpretation. If the onus that was imposed on the taxpayer under former paragraph 152(5)(*b*) survived the amendment to subsection 152(5) and the enactment of subsection 152(4.01), subsection (4.01) would have no purpose.

[19] The English version of subsection 298(4) of the *ETA* contains essentially the same limitations as subsection 152(4.01) of the *ITA*. I draw this conclusion from the words in the opening part of subsection 298(4) ". . . in respect of any matter. . ." followed by the words ". . . in respect of that matter. . .". This makes it clear in my view that the "matter" in respect of which the Minister may reassess outside the normal reassessment period must be a "matter" in respect of which the taxpayer

has made a misrepresentation of the type described in paragraph 298(4)(*a*) or has committed a fraud.

[20] What is rather surprising however is that the French version, which I have reproduced above, appears to contain no such limitation. Considered without reference to the English version, the Minister's powers of reassessment once there is any misrepresentation or fraud as described in subparagraph (*b*) and (*c*) appear to be wide open and unlimited. On the face of it, there appears to be a difference between the French and English versions of subsection 298(4). If I had to decide the issue I should have thought that the more restrictive English version is more consistent with the scheme of the *ETA* and with that that of the *ITA*, which is *in pari materia*, and any ambiguity should be resolved in favour of the taxpayer. This is certainly the rule of statutory interpretation when considering only one version of a statute. I see no reason to believe that it should not be equally applied when considering two apparently different versions of bilingual statutes.

[21] Obviously, if it is not established that there was misrepresentation or fraud in the first place it does not matter who has the onus of establishing what it is, or is not, attributable to.

[22] It should be noted that Valerie Sr. was not a shareholder of 943. She was the general manager of the strip club, and a salaried employee. Her daughter, Valerie Jr. was the sole shareholder and president of 943. It is alleged in the Reply that Valerie Sr. was a *de facto* shareholder of 943 but no evidence was adduced to support the allegation. Just being a manager of a company's business does not make one a *de facto* shareholder. Cf. *Scavuzzo v. The Queen*, [2006] 2 C.T.C. 2429, where the concept of *de facto* director was discussed. I have not previously encountered the notion of "*de facto* shareholder". I presume it implies some sort of arrangement whereby the registered shareholder holds the shares as agent or bare trustee for the "real" shareholder, i.e. the beneficial owner of the shares. It is unnecessary to pursue this question as it is not alleged or established that Valerie Jr. held the shares as agent for her mother and moreover the assessment against Valerie Sr. is not based on her receiving shareholder benefits.

[23] Although I intend to review some of the evidence in detail I can summarize my conclusions briefly. I think that there may be some rather weak evidence that there may have been an understatement by 943 of sales of liquor for income purposes or of taxable supplies for GST purposes. Most, if not all, of the evidence is hearsay but I would need to hear representations from counsel on whether such evidence is sufficient to justify reopening the statute-barred years and whether it

has been established that such understatement is attributable to misrepresentation of the type described in section 152 of the *ITA* and section 298 of the *ETA*.

[24] So far as Valerie Sr. is concerned the assertion is that she received a benefit within the meaning of section 246 of the *ITA* equal to $160,653.65, the amount that 943 is alleged to have understated its sales of liquor. For the reasons that I shall develop in somewhat greater detail below, I think that if there is any admissible evidence of such understatement of sales by 943 it is very thin, if it exists at all. However, let us assume that the understatement of sales by 943 had been established. How does that understatement of sales end up being taxed not only in 943's hands but also in the hands of Valerie Sr. who is not even a shareholder? There is no evidence that any of the alleged understated sales (if they existed at all) ever found their way into her hands.

[25] As a matter of evidence and of pleading, there is

(a) no allegation and no evidence that 943 paid Valerie Sr. any of the proceeds of the alleged unreported sales;

(b) no evidence supporting the suggestion that Valerie Sr. was a *de facto* shareholder;

(c) even if she were a shareholder, *de facto* or *de jure*, there is no evidence or allegation that any benefit in respect of the alleged unreported sales was conferred on her *qua* shareholder (or, for that matter, *qua* employee or *qua* anything else).

Leaving aside these rather substantial lacunae in the Crown's case against Valerie Sr., there is the additional problem with respect to section 246 of the *ITA*. The Crown's basis for the assessments against Valerie Sr. in respect of the alleged unreported sales by 943 is section 246 of the *ITA*. That section reads:

> BENEFIT CONFERRED ON A PERSON
>
> 246. (1) Where at any time a person confers a benefit, either directly or indirectly, by any means whatever, on a taxpayer, the amount of the benefit shall, to the extent that it is not otherwise included in the taxpayer's income or taxable income earned in Canada under Part I and would be included in the taxpayer's income if the amount of the benefit were a payment made directly by the person to the taxpayer and if the taxpayer were resident in Canada, be

> (a) included in computing the taxpayer's income or taxable income earned in Canada under Part I for the taxation year that includes that time; or
>
> (b) where the taxpayer is a non-resident person, deemed for the purposes of Part XIII to be a payment made at that time to the taxpayer in respect of property, services or otherwise, depending on the nature of the benefit.
>
> ARM'S LENGTH
>
> (2) Where it is established that a transaction was entered into by persons dealing at arm's length, *bona fide* and not pursuant to, or as part of, any other transaction and not to effect payment, in whole or in part, of an existing or future obligation, no party thereto shall be regarded, for the purpose of this section, as having conferred a benefit on a party with whom the first-mentioned party was so dealing.

Section 246 does not create a separate head of taxation. Taxpayers are subjected to tax on a variety of bases — business income, employment income, interest, dividends, shareholder benefits under subsection 15(1), a variety of sources specified in section 56 and income from trusts to the extent required by section 104 are examples. Section 246 is not an addition to the other heads of taxation. Its purpose is to translate benefits that might not otherwise be caught in the tax net into their appropriate monetary value as if they were direct payments and require that the amount thereof should be included in the income of the recipient if it were to be included as a direct payment. The Canada Tax Service has put it succinctly as follows:

> The purpose of section 246 is to require that the monetary value of certain benefits conferred on a taxpayer by another person by one or more sales, exchanges or other means whatever be accounted for by the taxpayer for the purposes of Part I or Part XIII tax, as the case may be, to the extent that the amount of the benefit has not otherwise been included in the taxpayer's income or taxable income earned in Canada and would have been included in the taxpayer's income if the taxpayer were resident in Canada and the amount of the benefit were a payment made to the taxpayer. The section does not apply where a transaction was entered into by arm's length persons, bona fide, and not as part of any other transaction and not as payment of an existing or future obligation.

[26] Section 246 does not sweep into the tax net all benefits that are not otherwise taxable. If a parent gives his or her child a birthday present of a new car with a value of $50,000 this is undoubtedly a benefit to the child but it is certainly not taxable under section 246 by reason only of its being a benefit.

[27] The above discussion, albeit self-evident, is of course academic when one considers that there is no evidence that any benefit of any sort and of any value

was conferred by 943 on Valerie Sr. in respect of the alleged unreported sales. Even if the unreported sales by 943 had been established it is a *non sequitur* to say that this by itself results in Valerie Sr. being taxed under section 246 on an amount equal to the alleged unreported sales of 943.

[28] The payments allegedly made to Schnier and Sun Life have not been established with precision, although there is evidence that some payments were made to these two lenders. The evidence about these payments is unsatisfactory but at this point I am not prepared to say unequivocally that there is no evidence that the payments to Schnier and Sun Life were benefits that 943 intended to confer on Valerie Sr. Counsel for the appellant may be able to argue that the evidence is insufficient or he may elect to call some evidence but at all events I think these payments may call for an explanation.

[29] I should also mention that the reply says that Valerie Sr. was assessed on the basis of sections 3 and 9. Section 3 is the general section at the beginning of the *ITA* that says a taxpayer's income is the income from all sources. It sheds no light on the basis of the assessment. Section 9 has to do with business income. It is not alleged anywhere else that the additional income on which Valerie Sr. was taxed was income from a business. In argument, however, counsel for the respondent restricted the basis upon which it was alleged that Valerie Sr. was taxable to section 246.

[30] Before I examine some aspects of the evidence in greater detail, I should say that the replies to the notices of appeal were not helpful. The Minister had the initial onus of establishing misrepresentation justifying the opening up of the statute-barred years. In such cases specificity and precision in the replies are of paramount importance. The figures in the replies bore no relationship to the figures advanced at trial.

[31] On cross-examination Valerie Sr. admitted to a number of corporate bank accounts held by 943. Some, if not all of them, were required for the various credit card accounts, such as Visa, MasterCard and American Express.

[32] With respect to the payments made to Valerie Sr., the following is the evidence that emerged from the oral testimony of Valerie Sr. and Exhibits A-1 to A-5. Valerie Sr. loaned her brother's company, 515088 Ontario Limited ("515"), $550,000. She assigned that debt to 943 for $10.00 and other good and valuable consideration.

[33] There was default and 943 took over the business and property of 515. On May 30, 1991, 943 acknowledged its indebtedness to Valerie Sr. and signed a demand promissory note in her favour in the amount of $550,000. This indebtedness was increased over the years until, at one point, it exceeded $800,000. Some of the money that Valerie Sr. received was for salary and there is no suggestion that this was not declared. The rest, it is alleged, was applied against 943's indebtedness to her. The authenticity of the loan arrangements contained in Exhibits A-1 to A-5 is not challenged by the respondent.

[34] As she advanced money to 943 this increased her loan account (the amount 943 owed her) and as payments were made to her it reduced her loan account. The bookkeeping may not have been perfect but what is clear is that she was owed a substantial amount of money by 943 and that amount kept increasing, either because of cash advances or because she paid 943's business expenses with her credit card. Payments made to her (apart from payroll amounts) were said to be in partial repayment of that indebtedness or to pay credit card companies for expenses she incurred for 943.

[35] Leaving aside the point that I mentioned above that subsection 152(4.01) might not permit net worth assessments, it seems that Schnier loaned $100,000 on August 5, 1993. 943 was among those shown as borrowers, but the money all went to 943. The appellant's position is that any payments to Schnier were in repayment of that indebtedness and that, contrary to the Crown's contention, the payments by 943 to Schnier were not a taxable benefit to Valerie Sr. because they were not repaying a personal loan of Valerie Sr. from Schnier. I do not recall having seen any evidentiary foundation for the Crown's assertion that Valerie Sr. made a misrepresentation in not including these amounts in her income.

[36] The evidence of Ms. Chui, an auditor with the CRA added nothing to the assertion of misrepresentation by Valerie Sr. or 943. She had one meeting with Valerie Jr. and one, along with another auditor, Mr. John Adams, with Valerie Sr. and 943's accountant. The thrust of her evidence was that getting information from the appellant was difficult. If this is so, and perhaps it is, it does not establish misrepresentation or underreporting of sales. Ms. Chui did not make the original or subsequent assessments. She had no information on the alleged payments to Sun Life. I read carefully the transcripts of Ms. Chui's oral testimony. She described the meetings she had with the representatives of 943 but she presented no evidence of any type that supported the allegations of misrepresentation or understatement of income by either 943 or Valerie Sr.

[37] The Crown's third witness was Mr. David Evans. Mr. Evans was a GST auditor who took over the GST audit from Mr. John Adams, a GST auditor who dealt previously with the GST. Mr. Adams did not testify, having retired several years prior to the trial. On March 4, 1997, Mr. Evans took over the audit of 943 for the period June 1, 1991 to May 31, 1996. On May 17, 1997 he wrote to 943 asking for further information and was invited by Valerie Sr. to visit the office. He spent about a week going through documentation at the office of 943.

[38] Much of his testimony had to do with the so-called Z-tapes. These were tapes generated by the cash registers that contain summaries of sales up to the time the tape is produced from the time of the production of the previous tape. Mr. Evans noted that the numbers on the bottom of the tape were not consecutive or that in some cases the numbers went backwards. From this he suggests that the inference should be drawn that some Z-tapes were missing or that someone was "fiddling", to use Mr. Evans' words, with the computer program.

[39] Mr. Evans' testimony on this was as follows:

> The problem is the way the Z-tape counter is set up, it's not supposed to go backwards. It's supposed to go forwards one at a time. The only way it can go backwards is if someone is basically fiddling with the computer software program.
>
> Every time you close off the cash register tape it's supposed to go up one number. It can't go backwards. It's the first time I've ever seen a cash register tape go backwards.
>
> …
>
> **MS MBOUTSIADIS:**
>
> **Q.** I think you were just saying that this is something that can be fiddled with, if you fiddle with the computer program; is that what you said?
>
> **A.** There are computer programs out there that can reduce, artificially, the amount of sales. One of the programs is called a "Zapper" where you can actually program the computer to remove a certain percentage of the sales from the big computer.
>
> I have no evidence that this took place because, unfortunately, the cash machines, I don't think they even existed at the time when the audit took place.

All I know is that the numbers, there's something really strange going on in the Z-tape count in the way that the close off of the system is operating. It's not a normal reading.

Q. What does this say about the reliability of the sales that are being reported?

A. It brings it into question. It's one of the factors that I had to look at. I had to consider that the Z-tapes were not accurate. That there had been multiple closing offs of the Z-tapes.

[40] On cross-examination, at pages 634-5 of the transcript, it was pointed out to Mr. Evans that the tapes came from different cash registers. His testimony was as follows.

THE WITNESS: I don't think we have to go any further. You're correct. It's on different cash registers. I may have been mistaken.

MR. KUTKEVICIUS:

Q. Fair enough.

A. It's strange because usually it doesn't work that way, but there is a possibility, so I admit that I could be mistaken.

Q. Would that be sufficient for you to say that the Z-tapes were then accurate?

A. Accurate?

Q. Assuming that the issue you had was about the backwards and –

A. In terms of functionality?

Q. Yes. Is that enough to make you basically retract all the previous statements and say that the Z-tapes are fine or do you still have any other problems?

A. In terms of functionality, I have no evidence that they are inaccurate.

Q. You have no evidence that they are inaccurate, okay.

A. In terms of functionality. At least as far as I can see. I don't think so. 101 – yes, could be. Good point.

[41] I think the evidentiary value of the Z-tapes, which formed an important part of the Crown's case, has been demolished.

[42] The next part of Mr. Evans' testimony, Tab 58 of Volume II of the appellants' documents, which were referred to as bank reconciliations show discrepancies between receipts from the business as shown in the tapes and the deposits to the bank. The same documents also indicate payments to "Val" (i.e. Valerie Sr.) of $1,475, her monthly salary and payment of large amounts, $28,150, $18,900, $7,000) by "Val to Chez Paree" (i.e. Valerie Sr. to the strip club).

[43] Mr. Evans compared the amounts on the Z-tapes with the amounts deposited in the BCI account and noted that the numbers did not match. That is true. There is no matching between the figures in Tab 62 (the bank statements) and the cash summaries in Tab 55. I do not think that the inability to reconcile the figures in these documents justifies drawing a conclusion that there was an understatement of revenues. As noted above, moneys were coming from Valerie Sr.
[44] Also, in January 1992 the amount deposited according to the bank reconciliation (Tab 58) matches with the bank statements.

[45] Mr. Evans was cross-examined at some length by Mr. Kutkevicius but in the final analysis it did not make any difference because there was nothing in the fluctuation in Valerie Sr.'s loan account that indicated in any way an appropriation of funds by her. There were payments to her by 943 and payments by her to 943. These were reflected in the corporate records. In any event I am somewhat at a loss to understand what the evidence about Valerie Sr.'s loan account was in aid of. The respondent admits that the assessments against Valerie Sr. were not based upon any amounts paid to her as reflected in her loan account statement. Indeed, at page 571 of the transcript the following appears:

> **MR. KUTKEVICIUS:**
>
> **Q.** So let me just confirm; in respect of amounts that Ms Chandelle – her loan account has been debited, is there any way – you take the position that those amounts are appropriations to her of potential unreported income?
>
> **A.** If she receives loans from – okay. She's not a shareholder so it can't be.

[46] At pages 603 to 606 of the transcript it was established that the amounts loaned by Valerie Sr. to 943 totalled $138,840.

[47] To summarize where we are at up to now, the Crown's case for reopening the statute-barred years or periods rests on several premises.

(a) Valerie Sr.'s loan account. Although a great deal of evidence went in about the activity in the loan account, there is no evidentiary basis for saying that any money was appropriated by Valerie Sr. from the company. Indeed the evidence is that she advanced large sums to the company. In any event the respondent does not rely upon any amount paid to Valerie Sr. by the company through her loan account as forming the basis for the allegation of misrepresentation.

(b) Section 246 is pleaded as the basis for taking the alleged understatement of income of 943 and taxing it again in Valerie Sr.'s hands. As stated earlier in these reasons there is neither a factual nor a legal basis under section 246 for taxing 943's alleged understatement of income in Valerie Sr.'s hands.

(c) The Z-tapes. As stated above they do not provide evidence of misrepresentation or understatement of income by 943.

(d) Finally, we have the analysis (or perhaps more accurately, the estimate) of the liquor and beer sales that were alleged to have been made by 943.

[48] Tab 45 of the Respondent's Book of Documents contains a number of pages but the two that are key to the Crown's position are entitled "943372 Ontario Inc. o/a Airport Strip, Appeals Working Paper – Proposed liquor sales based on provincial volumes" and "Proposed adjustment GST Returns".

[49] These schedules require plenty of explanation. I shall start at the conclusion and then work back. The alleged unreported sales totalling $160,653.65 come from the GST adjusted schedule. Although it may seem a little tedious, the most efficient way of showing where those numbers come from is to reproduce part of the schedule.

FPE	Liquor	Food per f/s	Beverage	Kitchen Sales	A Total Sales	B Reported Sales	C=A-B Proposed Increase To Income	D Audit Increase To Income	E=C-D Change
May 31, 1992	1,107,202	73,422.80	58,867.80		1,239,492.60	1,187,975.65	51,516.95	272,784.00	-221,267.05
May 31, 1993	926,045	42,535.33	44,455.60		1,013,035.87	961,348.45	51,692.42	207,435.00	-155,742.58
May 31, 1994	919,328	22,091.04	44,455.60		985,874.34	928,430.06	57,444.28	217,649.00	-160,204.72
		Income change	Legal Expenses		Change to Net Income		160,653.65	697,868.00	-537,214.35

		Allowed	
May 31, 1993	-155,742.58	-25,000.00	-180,742.58

[50] I will, for illustrative purposes, take the adjustment of $51,516.95 for the financial period ending May 31, 1992. For this period the Minister appears to have calculated liquor sales of $1,107,202. This represents the “total projected sales of $1,107,202” on the preceding schedule.

[51] As will be seen from the portion of the schedule reproduced above this was added to the “Food” and to the “Beverage” for a total of $1,239,492.60. This figure was compared to the reported sales according to the financial statements of $1,187,975.65 for an increase of $51,516.95. What strikes me as strange is that the projected sales of $1,107,202 that were used in the calculation are less than the liquor sales of $1,114,552.85 reported in the financial statements for the period ending May 31, 1992. For the periods ending May 31, 1993 and 1994 the Minister’s calculations are slightly higher ($926,045 versus $919,208 and $919,328 versus $906,339). Most of the difference appears to be attributable not to liquor but to the amounts shown under the item “Beverage”.

[52] Since, however, the alleged understatement of liquor sales forms the basis of the assertion of misrepresentation let us look at the way the liquor sales were calculated by the Minister. In the first place they were done by a previous auditor, Mr. Adams, who based his conclusion on an audit done by a provincial auditor who was auditing for the purposes of the Ontario sales tax on liquor and beer.

[53] The schedules put forward by the respondent are double hearsay. At page 651 of the transcript the following appears.

> **JUSTICE BOWMAN:** Well, do you know how the Provincial Auditor reached his conclusions? Does he go in and follow the same methodology you used?
>
> **THE WITNESS:** No, that’s part of the problem. His methodology is a little bit different. Some parts of it I don’t even understand why it’s done the way it’s done. Some of it’s the same, some of it’s different.
>
> The other problem is he got information from Brewers Retail and LCBO directly. They have a different fiscal year end than the Airport Strip’s fiscal year end. So his calculations are based on LCBO and Brewers Retail fiscal year end, I think.

[54] Let us recall at this point just what the court is supposed to be trying to do here. I am supposed to be trying to decide whether a *prima facie* case has been

made out that the appellant, 943, made a misrepresentation attributable to negligence, carelessness or fraud, that would permit the Minister to reassess beyond the normal period.

[55] The question is whether I can make such a determination on the basis of evidence before me as set out above using a civil standard of proof. The evidence appears to be hearsay or double hearsay and that would exclude it but let us assume that I was prepared to stretch the hearsay rules, would it be sufficient to make out a *prima facie* case of misrepresentation? We all know the traditional rule that the question of no evidence is one of law whereas that of sufficiency of evidence is one of fact. This principle is perhaps of greater relevance where we are dealing with a judge and jury. There, the functions of each differ. Here, I might say there is no evidence of misrepresentation but if I prefer to say that I would prefer to hear from counsel as to whether there is sufficient evidence to make out a *prima facie* case.

[56] There are other problems. For part of the period in question provincial numbers were used and for part where they did not have provincial numbers they simply prorated the provincial numbers. Prorating hearsay evidence does not purge the hearsay from the prorated numbers. It merely perpetuates the hearsay and enhances its unreliability. In any event we have an extraordinary mélange of figures based on two differing methodologies and two levels of hearsay. There may be nothing wrong with assumptions based on hearsay where the taxpayer bears the onus of proof but here the Crown has the onus of establishing misrepresentation and hearsay evidence is not an acceptable form of proof.

[57] I shall not set out in detail Mr. Kutkevicius cross-examination of Mr. Evans. It establishes that the Crown's figures were based on estimates, assumptions, averages and prorating derived from two different methodologies. It is hard to see what evidentiary value they have. At page 797 of Mr. Evans' testimony he agreed that the increase was not the result of any calculation that he had made. The increase was based on calculations done by Mr. Adams for part of the period and on calculations done by the provincial auditor for part of the period. Neither the provincial auditor nor Mr. Adams was called to remove at least one level of hearsay. They could not be cross-examined and this makes it questionable whether their reports can be accepted as evidence even if they were otherwise admissible.

[58] At page 693 Mr. Evans spoke of a figure of $64,137.88 as "likely suppressed sales". I should be interested to hear from counsel as to whether there is any evidence to support this conjecture at all. This number which Mr. Evans surmises

was suppressed sales included bank deposits of credit card sales and advances to 943 by Valerie Sr. The assessment was in any event not based upon the "suppressed sales" that formed the basis of Mr. Evans conjecture.

[59] One of the things that is most striking about the audit process that the CRA engaged in was the fact that the first assessments against 943 added $697,868 to its income and to the taxable supplies. The second set of assessments from which these appeals are taken reduced the amount added by $537,214.36 to $160,653.65, over the three years ending May 31, 1992, 1993 and 1994. The increase of $697,868 was arrived at by the gross margin methodology (purchases multiplied by an average sales price).

[60] At page 818 of Mr. Evans's testimony it is clear — as indeed it was clear from his previous testimony — that with all of the payments to Valerie Sr. by 943 and all of the payments by her to 943 — none of these amounts were taxed in her hands. Indeed no one has ever calculated whether as between Valerie Sr. and 943 there was a net credit or debit position. Valerie Sr.'s testimony was that she was always owed more by 943 than 943 ever paid her.

[61] In discussing the payments between Valerie Sr. and 943 the following exchange occurred between Mr. Evans and the Court.

> **JUSTICE BOWMAN:** The way you calculated the money she got to have been taxed on it, did it come from these –
>
> **THE WITNESS:** No.
>
> **JUSTICE BOWMAN:** No, it didn't.
>
> **THE WITNESS:** It didn't come from these. It came from the calculation of the gross margin.
>
> **JUSTICE BOWMAN:** So the assumption was that there was a gross margin calculation that resulted in suppressed income by the corporation and that also she was taxable on the corporation's suppressed income; is that it?
>
> **THE WITNESS:** Yes.
>
> **JUSTICE BOWMAN:** So that the assumption must have been that she got from the company – I won't use the word "appropriation" – she got from the company an amount equal to the excess gross margin?
>
> **THE WITNESS:** Well, basically I think – yes, you're correct, sir.

JUSTICE BOWMAN: So it isn't these figures here that form the basis of the assessment?

THE WITNESS: No.

[62] In other words the amount she was assessed on was precisely the amount of 943's alleged suppressed income for 1992, 1993 and 1994 not, at least according to pleadings and arguments, *qua* shareholder or *qua* employee but solely by virtue of section 246. Why so much time was devoted to the payments flowing between Valerie Sr. and 943 when they did not form the basis of the assessments is something of a mystery to me.

[63] The final witness was Mr. Bruce Reddeford, a senior appeals officer with the CRA. Mr. Reddeford testified that the 2001 assessments against 943, Valerie Sr. and Valerie Jr. were based on:

(a) in the case of 943, alleged suppressed sales of $697,868;

(b) in the case of Valerie Jr., the same amount of alleged sales of 943;

(c) in the case of Valerie Sr., a net worth basis.

[64] The second group of assessments, those involved in these appeals, were made at the objection level. In the course of Mr. Reddeford's testimony there was a great deal of discussion between the court and counsel for the respondent about the extent to which without prejudice discussions between counsel for the appellant and the officials of the CRA with a view to settlement (which, as it happens, did not materialize) could be introduced in evidence. I find that such discussions were without prejudice and are therefore inadmissible in evidence.

[65] It boils down to this. Now that I have had an opportunity of reviewing the voluminous transcripts and documentary evidence, I think counsel for the appellants should be given an opportunity of telling the court whether he intends to call no evidence on the basis that the Crown has put in "no evidence", or argue that there is "insufficient evidence" or call evidence. I have indicated above the areas in respect of which I would like to have argument but there may be other areas which counsel may wish to deal with. I should also be interested in hearing some argument on the question whether a net worth assessment can conform to subsection 152(4.01).

[66] The parties should communicate with the court about fixing a date to deal with the argument on these points.

Signed at Ottawa, Canada, this 30th day of May 2007.

"D.G.H. Bowman"

Bowman, C.J.

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