Docket: 2006-3533(IT)G

BETWEEN:

STANLEY LABOW,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on May 5, 6, 7, 8, 12, 13, 14, 15, and
June 4 and 5, 2009, at Ottawa, Canada

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellants:	Shelley J. Kamin and Kimberley Cunnington-Taylor
Counsel for the Respondent:	Luther P. Chambers Q.C. and Jennifer Neill

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JUDGMENT

The appeals from reassessments made under the *Income Tax Act* for the 1996, 1997, 1998 and 1999 taxation years are dismissed, with costs.

Signed at Ottawa, Canada, this 6th day of August, 2010.

"E.A. Bowie"

Bowie J.

Docket: 2007-2496(IT)G

BETWEEN:

DANNY S. TANASCHUK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on May 5, 6, 7, 8, 12, 13, 14, 15, and June 4 and 5, 2009, at Ottawa, Canada

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellants:	Shelley J. Kamin and Kimberley Cunnington-Taylor
Counsel for the Respondent:	Luther P. Chambers Q.C. and Jennifer Neill

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JUDGMENT

The appeals from reassessments made under the *Income Tax Act* for the 1998 and 1999 taxation years are dismissed, with costs.

Signed at Ottawa, Canada, this 6th day of August, 2010.

"E.A. Bowie"

Bowie J.

Docket: 2007-2611(IT)G

BETWEEN:

MARCANTONIO CONSTRUCTORS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on May 5, 6, 7, 8, 12, 13, 14, 15, and
June 4 and 5, 2009, at Ottawa, Canada

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellants:	Shelley J. Kamin and Kimberley Cunnington-Taylor
Counsel for the Respondent:	Luther P. Chambers Q.C. and Jennifer Neill

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JUDGMENT

The appeals from reassessments made under the *Income Tax Act* for the 1999 and 2000 taxation years are dismissed, with costs.

Signed at Ottawa, Canada, this 6th day of August, 2010.

"E.A. Bowie"

Bowie J.

Citation: 2010 TCC 408
Date: 20100806
Docket: 2006-3533(IT)G, 2007-2496(IT)G
and 2007-2611(IT)G

BETWEEN:

STANLEY LABOW, DANNY S. TANASCHUK
and MARCANTONIO CONSTRUCTORS INC.,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bowie J.

[1] The appeals of Stanley Labow, Danny Tanaschuk and Marcantonio Constructors Inc. ("MCI") from reassessments under the *Income Tax Act*[1] (the *Act*) were heard consecutively over a total of 10 days. Parts of the evidence of two witnesses, William Johnston and Sylvain Parent, were, by agreement of the parties, common to all three proceedings. The facts in each case, although not identical, are similar, and a number of the legal issues are common to all.

[2] The Minister of National Revenue (the Minister) raised the reassessments under appeal as a result of the participation by each of the appellants in what were referred to in the evidence as group sickness and accident insurance trusts and plans I shall refer to these as the trusts and the plans. By the reassessments the Minister denied to the appellants the deductions from income that they had claimed on account of their accrued liabilities to the trusts arising out of the plans. In the case of Stanley Labow, the reassessments also included in his income for each of the taxation years 1997, 1998 and 1999 the income of the trust attributable to his contributions to

1 R.S. 1985 c.1 (5th supp.), as amended.

it. In the case of Danny Tanaschuk the reassessments under appeal did not include trust income in his income, but the reassessment for 1999 disallowed his claim to deduct professional fees associated with the trust. In the case of MCI, the reassessments only disallowed the contributions to the trusts. The amounts in issue in each of the appeals are the following:

Name	Year	Amount	Explanation
Labow	1996	$150,000	Contribution to the Trust disallowed
	1997	247,691	Contribution to the Trust disallowed
		1,320	Trust income attributed to the appellant
	1998	23,646	Trust income attributed to the appellant
	1999	47,619	Trust income attributed to the appellant
Tanaschuk	1998	$149,000	Contribution to the Trust disallowed
	1999	171,000	Contribution to the Trust disallowed
		9,735	Professional fees disallowed
Marcantonio	1999	$544,500	Contribution to the Trust disallowed
	2000	709,500	Contribution to the Trust disallowed

[3] It is common ground that these reassessments were all made beyond the normal reassessment period defined by subsection 152(3.1) of the *Act*. The respondent relies on subparagraph 152(4)(*b*)(iii), and in the alternative subparagraph 152(4)(*a*)(i), to justify the reassessments. The reassessments having been made outside the normal reassessment period, the respondent has the onus of proof in respect of the Minister's entitlement to raise the reassessments. What must be proved is either a misrepresentation that is attributable to neglect, carelessness, or willful default, or fraud, in relation to the subject of the reassessments, or alternatively, that the taxpayer and the trustees were not dealing with each other at arm's length.

[4] Prior to the scheduled trial date, the respondent brought a motion seeking a ruling as to the order in which the parties should lead evidence at trial. The respondent's view was that the appellants should lead their evidence first, notwithstanding that the reassessments were made outside the normal reassessment period, and notwithstanding the judgment of Bowman J (as he then was) in *Farm Business Consultants Inc. v. The Queen*.[2] The motion was dismissed, and the respondent filed a Notice of Appeal to the Federal Court of Appeal. To avoid the

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[2] 95 DTC 200.

inevitable delays that this appeal would cause, the appellants elected to lead their evidence first. As a result, the trials proceeded before me with the appellants' witnesses testifying before any evidence was called by the respondent. At the conclusion of the appellants' evidence, the respondent elected not to call any witnesses. As Bowman J. pointed out in *Farm Business Consultants*, the respondent, if required to call evidence first, could, and doubtless would, have called the individual appellants and Mr. Filoso, a director of MCI, and cross-examined them pursuant to Rule 146. The evidence before me would have been essentially the same.

[5] At the trial all the appellants specifically waived the privilege attaching to their communications with Mr. Johnston as to the trusts and plans.

[6] Unlike employee pension plans, employer contributions to employee sickness and accident insurance plans are not accorded special treatment under the *Act*. The appellants' claims to deduct their contributions to these plans are based on the proposition that the contributions are ordinary business expenses, laid out for the purpose of gaining or producing income, the deduction of which is not prohibited by any provision of the *Act*.

[7] The respondent argues that the contributions are not deductible expenses on a number of alternative grounds.

(i) The trusts and the plans were shams;
(ii) The contributions were not laid out for the purpose of gaining or producing income;
(iii) The contributions were payments on account of capital;
(iv) The amounts of the contributions to the trusts were unreasonable;
(v) The amounts were contributions to employee benefit plans, the deduction of which is prohibited by paragraph 18(1)(*a*) of the *Act*.
(vi) If the contributions were in fact contributions to genuine employee group sickness or accident insurance plans, they were consideration for insurance in respect of years after the years in which they were paid, and so not deductible by reason of subparagraph 18(9)(*a*)(iii) of the *Act*.

The respondent asserts that the income of the trust in the years 1997, 1998 and 1999 is properly attributed to Dr. Labow by the operation of subsection 75(2) of the *Act.*

[8] As to Danny Tanaschuk's claim that he is entitled to deduct professional fees paid in connection with the trust funds from his income, the appellant's position is that they were amounts expended for the purpose of gaining or producing income,

and so deductible. The respondent's position is that their characterization should be determined according to the characterization of Dr. Tanaschuk's contributions to the trust.

[9] These three appellants are among some 75 clients of William Johnston, an Ottawa solicitor, for whom he has established similar plans, ostensibly to provide medical and disability insurance to selected employees of the clients. Mr. Johnston gave evidence, applicable to all three proceedings, in which he described in some detail the background to the establishment of these plans, and specifically how he and Sylvain Cloutier, an actuary, adopted and developed the concept of creating the plans for small entrepreneurial clients. Mr. Johnston has considerable experience in establishing pension plans for this type of client, and in his evidence he described disability insurance plans as being similar to pension plans in that both have income replacement as their goal. I think it is fair to say that Mr. Johnston views it as a serious flaw in Canada's tax policy that there is specific provision in the *Act* for the establishment of registered pension plans with favourable income tax treatment, but no analogous legislation to provide for health and disability insurance plans. His plans are, in his mind, designed to remedy this statutory lacuna.

[10] Contributions to employee medical and disability insurance plans are, of course, deductible from income under the provisions of the *Act*, provided they satisfy the requirement that the expenditure is made for the purpose of gaining or producing income from the employer's business, and that they are not prohibited by some other provision of the *Act*. The Canada Revenue Agency has published its view of the relevant law in an Interpretation Bulletin.[3] From Mr. Johnston's evidence I understand that he considers the CRA view of the law to be unduly restrictive. Clearly, the respondent considers that the plans established by Mr. Johnston do not qualify for the deduction of contributions. These are not test cases in any formal sense, but it is obvious that a significant number of taxpayers who have established similar plans in similar circumstances will be affected by their ultimate outcome.

[11] I should say, in fairness to Mr. Johnston, that both in his reporting letters to his clients and in his evidence before me, he expressed the view that if at some future time one of his plans were to be terminated and the funds returned to the employer, then the amounts contributed to the trust and deducted by the employer in computing income would have to be taken into income by the employer at that time. The tax

[3] IT-85R2.

benefit in that case, therefore, would be in the nature of a postponement of the incidence of tax until that later event took place.

[12] In each of these cases the appellants had an existing relationship with an accountant who introduced them to Mr. Johnston, who offered to establish a plan for them. In brief, the elements of establishing such a plan consist of the following:

(a) the creation of a trust, the trustee being a trust company in either the Cayman Islands or Bermuda, to hold and invest the funds contributed by the employer, and to make payments of benefits under the plan in accordance with its provisions;

(b) the creation of a plan, in which an employer can elect to participate in respect of one or more specific named employees, with specific provisions as to the benefits to be paid from the trust fund. There can be more than one employer participating in a plan and contributing to the trust associated with it, but in that case the trustee is required to maintain separate accounts for each employer, and to make any payments of benefits only from the account of the employer of the recipient of the payments. The potential benefits to employees are income replacement in the event of inability of the employee to work due to sickness or accident, and payment of medical, dental and vision care expenses for the employee and the employees dependants, to the extent that they are not payable under some other health care scheme. Disability benefits are funded by contributions during the first and second year of the employer's participation in the plan, in amounts determined by an actuary. Medical, dental and vision care expenses are funded by the employer on a pay-as-you-go basis, which is to say that the trustee pays these claims and then invoices the employer for the amount paid;

(c) an election by the employer to participate in the plan, naming the employee (or employees) who are to be entitled to benefits under the plan, and agreeing to make contributions to the trust fund according to the recommendation of the actuary. In the case of Marcantonio the plans were specific to one employer. Two trusts (the MGAS trust and the 509 trust) were created to fund the plans. The only members of the plans were two of the directors of Marcantonio and each plan was funded with a single contribution;

(d) an actuarial valuation prepared by the firm Welton Beauchamp, Parent, Inc. quantifying the contributions required to be made by the employer to the Plan to fund the disability benefits; and

(e) one or more invoices from the trustee to the employer, in the amounts recommended by the actuary, which, under the terms of the plan, created the liability of the employer to make the contributions, and payment of those invoices by the employer.

There are some differences in the documents created for these three taxpayers, but there is also a high degree of similarity among them. I conclude from the evidence of Mr. Johnston that it was his intention that all of these schemes should work in essentially the same way, and that the differences in the documentation simply represent evolution of the precedents that he used.

[13] Mr. Johnston and Mr. Parent gave evidence for the appellants, some of which was an overview of their development of these and similar plans. By agreement of the parties, this formed part of the evidence of all three appellants. Mr. Johnston also gave evidence that was specific to each of the three appellants' cases, and Mr. Parent and Joann Williams, an actuary employed in his office, testified specifically in relation to the actuarial advice that they gave in each case. Mr. Parent gave that advice in relation to Dr. Labow's plan, and Ms. Williams gave the advice in relation to the other two plans. Dr. Labow and his wife Rosalind Labow testified in the Labow case, as did Dr. Tanaschuk in his case and Dominic Filoso in the Marcantonio case. No witnesses were called by the respondent.

[14] Under these circumstances, I am required to decide on the preponderance of the evidence before me whether the facts bring the case within subparagraph 152(4)(*a*)(i) or subparagraph 152(4)(*b*)(iii) of the *Act,* and on that basis whether the Minister was entitled to reassess as he did. In view of the nature of Minister's allegations, consideration of the question whether the taxpayers made any misrepresentation that is attributable to neglect, carelessness or willful default, or committed any fraud in filing their returns, necessarily requires an examination of the true nature of the contributions that they made to the trusts: see *Lacroix v. The Queen*.[4]

the Labow appeals

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[4] 2008 FCA 241.

[15] Stanley Labow is a surgeon with a busy practice in the city of Ottawa. He was reassessed for the taxation years 1996, 1997, 1998 and 1999 to disallow the deductions that he had claimed for his contributions to the trust in 1996 and 1997, and to include the income of the trust on his contributions to it in his income for 1997, 1998 and 1999.

[16] At the relevant time, he was chief of plastic and reconstructive surgery at the Ottawa Hospital, and an assistant professor of surgery at the University of Ottawa Faculty of Medicine. He did not have an office in the hospital, but carried on his practice at an office nearby which he shared with another surgeon. He had three employees during the years with which these appeals are concerned, all of whom worked for him on a part-time basis. One of these was his wife, Rosalind Labow. The other two were unrelated to him, and each of them worked half-time. They shared a job, the main duties of which were booking appointments for patients and operating room time, recordkeeping and the general office correspondence. Rosalind Labow has a PhD in bio-chemistry and is on the faculty of the University of Ottawa, where she runs a research laboratory at the Heart Institute. Her salary from the University in 1996 and 1997 was approximately $80,000 per year. In addition to that she worked about 20 hours per week for her husband, for which she was paid $20,000 per year. This work consisted of keeping Dr. Labow's *curriculum vitae* up-to-date, and ensuring that it was updated appropriately with the University, the medical associations and other accrediting bodies, looking after the financial aspects of his practice, and acting as his liaison with his accountant, Mr. Katz, and his office staff.

[17] At some time in the fall of 1996, Mr. Katz introduced the Labows to Mr. Johnston and suggested that Dr. Labow consider establishing a plan for his wife. The suggestion was adopted, and the trust and the plan that resulted are at tabs 1 and 2 of Exhibit A-1. They are a document styled Memorandum of Agreement, dated October 21, 1996, that was entered into between "William Johnston on behalf of all Participating Employers" and Royal Bank of Canada Trust Company (Cayman) Limited ("RBCC") as Trustee, and a Health and Welfare Insurance Plan executed by William Johnston (presumably on behalf of the participating employers) and effective October 31, 1996. It is said in the Trust Agreement that the Plan is annexed to it as Schedule "A", and certainly the two must be read together.

[18] The trust agreement creates a trust fund consisting of the employer contributions, and the income from them, to be administered by the trustee. The fund is to be used exclusively to provide benefits to the participating employees and their dependants. The trustee is given the usual powers to invest the funds, and has the

usual duty to keep records and to account. The employer is given the right to replace the trustee upon one month's written notice. Paragraph 8(c) of the trust agreement provides:

> 8(c) The Employer and any person claiming by, through or under the Employer shall have no right, title or interest in or to the Trust Fund or any part hereof nor any claim against the Trustee in respect of the Trust Fund, it being the intent that all contributions made by the Employer or for which it is liable shall be free of any interest or claim whatsoever of or by the Employer and no part of the contributions shall be returned to the Employer or be subject to the debts, liabilities or obligations of the Employer or be considered part of the assets or property of the Employer.

Paragraph 9 provides that the employer and the trustee may, by agreement, amend the trust agreement.

[19] Article II of the Plan provides that its purpose is to make dental insurance, disability benefits, and eligible medical expense benefits available to certain employees of participating employers, and the dependants of those employees, and that the trust fund is to be used for that and no other purpose. Participating employers are employers who have filed a written notice that they will participate in the Plan.

[20] Article 9.01 of the Plan provides that the employer "shall select, from time to time, a Trustee to administer the Plan", and that the trustee must be independent of the employer. Article 9.03 provides that the trust funds "shall not from [*sic*] any part of the revenue of [*sic*] assets of any Participating Employer", and that the funds may only be used for the benefit of participating employees and their dependants. Article 9.04 provides that;

> 9.04 The Assets of each Participating Employer shall be kept separate from the assets of all other Participating Employers and shall be used only for the purpose of providing benefits payable hereunder to Participating Employees of the Participating Employer.

[21] Those benefits are specified in Article V. A participating employee who is unable to work because of sickness or accidental injury is entitled to income replacement benefits equal to 75% of weekly earnings up to age 70. A participating employee, and dependants of the employee, are entitled to reimbursement for dental, medical and vision care expenses that are not otherwise reimbursed by a provincial medical insurance plan. The entitlement to benefits is limited by paragraph 5.6, however:

5.6 Notwithstanding any other provision of this plan, benefits are only payable to an employee to the extent that the Employers [sic] Participating Account, as determined solely by the Administrator, has sufficient assets to make such payment or part payment.

[22] The funding of benefits is governed by Article VII.

ARTICLE VII
PAYMENT OF BENEFITS

7.01 The Employer shall, from time to time, make such payments to the Trustee as shall be necessary to provide the benefits referred to in Articles V and VI hereof. The Trustee shall, each year, send an invoice for payment of the amount recommended by the actuary for that year. The Employer shall, upon receipt of the invoice, be immediately liable to pay the invoice.

7.02 The benefits referred to in Articles V and VI hereof shall be funded by the Employer by contributions payable at such intervals as may be agreed upon between the Employer and the Trustee. All contributions hereunder shall be credited to the Participating Employer's Account. Such contributions shall be in the amounts sufficient to fund for such term as the Actuary considers appropriate under accepted actuarial principles, the total disability benefits to be provided and shall be maintained in a segregated account by the Trustee. The Trustee shall cause to be prepared from time to time (but not less than every three years) an actuarial valuation of the segregated account by an actuary who is a Fellow of the Canadian Institute of Actuaries or the Society of Actuaries. Employer contributions may only be made on the basis of such actuarial valuation.

The effect of these limitations (and of paragraph 9.04) is that a claim by an employee, whether it is for income replacement in the case of disability, or for dental, medical or vision care expenses, can only be paid from the contributions to the trust made by the employer of that employee, and any income produced by those contributions.

[23] Article XI of the Plan is headed MODIFICATION OR TERMINATION OF THE PLAN, and it is of sufficient significance that I reproduce it here in its entirety:

ARTICLE XI
MODIFICATION OR TERMINATION OF THE PLAN

11.01 A Participating Employer has agreed to participate in this plan for the benefit of their Participating Employees and has the expectation that it will continue

> indefinitely but reserves the right at any time and for any reason whatsoever and [*sic*] to cease their participation in the Plan in whole or in part; provided that no amendment shall increase the duties or liabilities of the Trustee without their written consent and provided further that there shall be no amendment of section 11.02 hereof without the prior approval of the Trustee and all then Participating Employees.
>
> 11.02 The discontinuance of contributions of itself shall not constitute termination of an Employee's Participation in the Plan but in the event that the Employer has notified the Trustee of its intention to terminate their participation in the Plan, the Trustee shall, with all reasonable dispatch, use and apply the assets remaining in the Participating Employer's Account held in the Trust Fund, firstly, for the purpose of paying all reasonable and necessary expenses incurred in the termination of the employer's participation, and secondly to satisfy all outstanding liabilities that may exist prior to the date of termination. Any balance remaining in the Participating Employer's Account which cannot be so applied shall be refunded to that Participating Employer.
>
> 11.03 Notwithstanding any other provisions of this plan, a Participating Employer has absolutely no interest in law or equity in any assets held in any other Participating Employer's Account under this plan. The interest of a Participating Employer is limited to the assets held [*sic*] that Employer's Participating Employer Account.
>
> 11.04 When no property remains in the hands of the Trustee, the Plan shall terminate.

[24] Mr. Johnston and Mr. Parent described the way in which the required contributions to the trust were determined. Once the decision had been made that an employer would enter into a Plan for an employee, the employer would establish the amount that he could afford to contribute to the plan in the first year, and he would advise Mr. Johnston of this, and of the particulars concerning the sex and age, and the salary of the employee. Mr. Johnston would pass this information on to Mr. Sylvain Parent, or Ms. Joann Williams. Mr. Parent is the principal of the firm of actuaries Welton Beauchamp, Parent Inc., and Ms. Williams works for that firm. They are both Fellows of the Society of Actuaries. For each employee covered by a Plan, one or other of them would calculate the contributions that the employer had to make to the trust in order to fund the potential liability of the trust in the event of a disability claim by the employee. Crucial to this calculation is the assumption made by the actuary as to the event of a claim, and its timing.

[25] Mr. Parent explained that as the actuary charged with advising the Trustee as to the required contributions, it was his duty to base his calculations and his advice

on conservative assumptions as to future claims. Generally, the contributions were payable in two annual installments, and Mr. Parent and Ms. Williams discharged their duty by assuming that the participating employee would be totally disabled at the end of the second year of the Plan, and would remain so until age 70 when the benefit period expired. Having made this assumption, and assumptions as to the rate of income that the fund would produce and the rate of inflation, it required only a simple calculation, applying an actuarial table to account for the possibility that the disabled employee would not live until the end of the benefit period, to establish the sum required at the assumed date of disability to fund the payments to age 70. Once that amount was established, and the employer had specified the amount of the first year contribution, another simple calculation established the amount that the employer was required to contribute in the second year.

[26] One other assumption was required in order to arrive at the quantum of the contributions. In most cases, Mr. Johnston advised the actuaries that they should assume that a 50% rate of taxation would be applied to earnings of the trusts.

[27] Article VII of the Plan provides that the trustee shall invoice the employer in the amount recommended by the actuary, whereupon the amount immediately becomes due and owing. It was this invoice that created the liability to the trust that the appellant recorded as a payroll cost. Exhibit A-1 Tab 5 is the Actuarial Valuation prepared by Sylvain Parent on December 5, 1996, “as at January 1, 1996” for Dr. Labow’s plan. Mr. Parent calculated the required contributions to be made by Dr. Labow in respect of the coverage for his wife based on these assumptions:

Interest rate:	7% per annum net of expenses;
Salary increases:	5.5% each year;
Inflation:	4.0% annually;
Mortality:	none prior to disability, and GAM 1983 after disability; and
Incidence of disability:	total permanent disability occurring at the end of the second year following the valuation date.

[28] Mr. Parent’s evidence was that he was told either that the disability benefit for Rosalind Labow was to be $29,000, or that Dr. Labow’s total contribution to the plan was to be $400,000. He could not remember which. It is improbable that he was told that the benefit was to be $29,000; that could only be so if her income from Dr. Labow was $38,667. I am satisfied that the first year contribution had been fixed by Dr. Labow at $150,000, and that Mr. Parent was told that the total contribution was to be $400,000. His computation was made in order to establish that this would

support a benefit of at least $15,000, which in fact it would. In fact, the contribution of $397,696 recommended by Mr. Parent in his valuation was almost double the amount that would have been required to provide disability payments at the maximum level provided for in the Plan.

[29] Having taken the decision late in 1996 to follow the advice of Mr. Johnston and Mr. Katz, and having determined that he would fund the trust in the first year to the extent of $150,000, Dr. Labow signed a Notice of Participation on December 3, 1996. It specified that his wife Rosalind Labow was to be his only employee entitled to benefits under the Plan, and it made explicit reference to Dr. Labow's right to terminate the plan according to Article XI. On December 5, Mr. Parent signed his actuarial valuation. For some reason that the evidence does not explain, the trustee issued its invoice to Mr. Johnston on December 1, 1996, before the Notice of Participation had been signed by Dr. Labow, and in the amount of $75,000 rather than $150,000. It is clear, however, that Dr. Labow did in fact remit to the trustee the first year contribution of $150,000 and the second year contribution of $247,696.

[30] Some time in 1998 Mr. Johnston, exercising his powers under paragraph 5(c) of the trust, removed RBCC as trustee and appointed Continental Trust Corporation Limited of Hamilton, Bermuda as the new trustee in substitution for it. The evidence of Stanley and Rosalind Labow makes it clear that this was done at their request, if not insistence. They were, it seems, distressed by the large number of communications regarding financial transactions in relation to the trust fund that the trustee was sending to them, The concern went beyond that, however. As Rosalind Labow put it in her evidence:

> … we had some concern about the way the RBC Trust Cayman was handling our funds and we spoke to Gary [Katz] who spoke to Bill [Johnston] and at some point in time Bill made a decision to change our participation in the trust company and chose another.[5]

[31] As I have said above, the question whether there has been a misrepresentation of the kind contemplated by subparagraph 152(4)(*a*)(i) can only be considered in the light of the particular circumstances of the case. That requires a consideration of the question whether Dr. Labow made the two contributions to the trust for the purpose of gaining or producing income from his medical practice. In

5 Evidence of Rosalind Labow, transcript, May 7, 2009, page 17, lines 17 to 22.

my view the answers to the latter question is in the negative, for the reasons that follow.

[32] The reliability of witnesses who have a substantial stake in the outcome of the proceedings in which they give evidence cannot be taken for granted, but must be tested against the known objective facts. The following passage from the judgment of O'Hallaran J.A. in *R. v. Pressley*[6] was recently adopted by Newbould J. in *Fiorillo v. Krispy Kreme Doughnuts, Inc*.:[7]

> The Judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.

This approach to the evidence commends itself to me, as it did to Justice Newbould.

[33] There are more than a few circumstances of this case that are inconsistent with the appellant's contention that Dr. Labow became a participating employer in the Plan, and funded the trust to the extent of almost $400,000, for the purpose of gaining or producing income.

[34] First, there was no commercial reason for Dr. Labow to spend $400,000 to provide Rosalind Labow with disability and medical insurance. She had worked for him for many years without it, and he had no reason to think that she would not continue to do so. She had no need for insurance. She had disability insurance through the university that would provide her with more than $50,000 per year in the event of disability. Moreover, any benefits that Rosalind might ever receive under the Plan could only be paid from the funds contributed to it by her husband (together with any accretions through income or capital gain produced by those contributions). Articles 5.6 and 9.04 of the plan make it very clear that no employee covered by the plan can ever be paid benefits except from the contributions of that employee's employer. It is difficult to see how there could be any commercial purpose to Dr. Labow entering into such an arrangement. This plan did not provide the usual benefit of risk sharing that is the hallmark of insurance contracts, where many people contribute to a fund that pays benefits only to the unfortunate few who suffer a loss.

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6 94 C.C.C. 29 (B.C.C.A.).

7 (2009) 98 O.R. (3d) 103 @ para 6 (Ont. S.C.J.).

[35] Second, the appellant did not make a considered judgment as to whether entering into the plan could be of commercial benefit to his practice, or as to whether he should extend the "coverage" to his other secretaries. Rosalind was paid somewhere between $65 and $80 per hour; his other two secretaries were paid much less per hour of work. There is no reason to believe that Rosalind, had she chosen to stop working for her husband, could not have been easily replaced by someone competent to do the work she did at the same or a lesser rate of pay. The fact that he did not extend the benefit of the plan to his two part-time secretaries itself suggests that the coverage of Rosalind under the plan was a personal and not a commercial matter. The appellant's only reason for entering into the plan for Rosalind's benefit, according to his own evidence, was because Mr. Katz and Mr. Johnston recommended it. I infer that their recommendation had much more to do with tax planning than with human relations considerations.

[36] Third, the appellant did not attempt to compare the "cost" of Mr. Johnston's plan with the cost of purchasing similar coverage for his wife from an insurance company. This would be remarkable indeed if Dr. Labow had considered that his contributions to the plan were an expenditure rather than an off-shore investment. It seems unlikely that he would have spent $400,000 for a benefit that his wife really had no need for without some comparative data, if it had truly been an outlay in the nature of an expense and not simply a way of accumulating capital in a tax-free jurisdiction.

[37] Fourth, Dr. and Mrs. Labow clearly considered the funds held in the hands of the Trustee in the Caribbean to be their funds. They exhibited concern about the number of trades entered into by RBCC. In her evidence-in-chief, Rosalind Labow spoke of the concern that she and her husband had about "… the way that RBC Trust (Cayman) was handling our funds…". In considering contribution to the trust, the question never was "how much do I have to pay to provide a key employee with a benefit?" Rather it was "how much do I want to contribute to the trust fund?" That is why Dr. Labow actually contributed almost twice the amount that would have been necessary to provide the defined maximum benefit under the plan. No one seems to have noticed that Mr. Parent calculated the required contribution on the basis of a salary of $39,000, rather than Rosalind's actual salary of $20,000. Such a mistake would surely have been detected if the transaction were a true purchase of insurance rather than a means of off-shore saving.

[38] Whether Dr. Labow's intention was simply to accumulate wealth in a tax-free jurisdiction, or was to provide medical and disability insurance benefits to his wife as

he maintained in his evidence, his contributions to the trust were not made for the purpose of gaining or producing income. I do not believe that his motivation was to provide his wife with medical and disability insurance, but, even if that were so, it was certainly not in the capacity of employee, but rather in the capacity of wife, that he provided her with the benefits. He would never have made contributions of this magnitude to a trust to benefit an arm's length employee[8].

[39] The circumstances satisfy me that Dr. Labow decided to participate in the plan, and made his contributions to the trust, for purely personal reasons having nothing to do with gaining income from his medical practice, and that as a result the contributions do not qualify as expenses of the business and are not deductible in computing the profit from the business.

[40] There remains the question whether the Minister was entitled to assess Dr. Labow beyond the three-year normal reassessment period. Subparagraph 152(4)(*a*)(i) of the *Act* reads:

> 152(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 willful default or has committed any fraud in filing the return or in supplying any information under this *Act*, or

This provision is limited in its effect by subparagraph 152(4.01)(*a*)(i):

> 152(4.01) Notwithstanding subsections (4) and (5), an assessment, reassessment or additional assessment to which paragraph (4)(*a*), (*b*) or (*c*) 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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8 Evidence of Stanley Labow, transcript, May 6, 2009, pages 121, l.14 to p. 122, l. 19.

(*a*) where paragraph 152(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 willful default or any fraud committed by the taxpayer or that person in filing the return or supplying any information under this *Act*, …

[41] Dr. Labow's income tax returns for the taxation years 1996 and 1997 certainly contained misrepresentations as to the amount of his professional income. His return for 1996 discloses his professional income both in the Statement of Professional Activities (Form T2032) that is part of the printed T1 General Individual Income Tax Return (the T1), and in financial statements for the practice prepared by Mr. Katz and appended to the T1. In 1997, the Form T2032 simply shows the net professional income declared of $86,820 "as per F/S". The computation of it is revealed only in the financial statements appended. In 1996, he declared professional income of $135,147 and in 1997 of $86,820, in contrast to the $321,665 that he had declared in 1995. The major element causing this substantial decrease in his professional income is the increase in salary expense from $62,888 in 1995 to $217,760 in 1996, and $317,278 in 1997. The reason for these increases is that the 1996 and 1997 salary expenses are inflated by the inclusion there of his two contributions to the trust. There is nothing in either return that would reveal to the reader that these amounts described as salary expense include contributions to a trust to fund a plan for his wife, the purpose of which had nothing to do with gaining or producing income. That is a misrepresentation, as it represents a contribution made to the trust fund for purely personal reasons as being a business expense.

[42] Dr. Labow said in his evidence that he met with Mr. Katz each year to review his returns and sign them, but that he relied entirely on Mr. Katz to complete the returns correctly, and that he did not have either the expertise or the time to review the returns in any detail. It is clear, however, that Dr. Labow must have known that these contributions to the trust were being deducted as business expenses; he said in his evidence that he could not have afforded to make the payments if they were not deductible. He also must have known, if he had given it any thought at all, that he was not making those payments because they would in some way advance his business. For the reasons that I have given, I have no doubt that he understood the reason for entering into the plan, and making the contributions to the trust, was entirely personal. While Dr. Labow was content in his evidence to say that he simply

relied on Mr. Katz and Mr. Johnston, he was, at best, willfully blind to the reality of these transactions. Quite clearly, subparagraph 152(4)(*a*)(i) applies to permit the Minister to reassess at any time. Undoubtedly, it took the Minister a surprisingly long time to issue those reassessments; however, where the requirements of the subparagraph are met, there is no time limit that applies. The words "at any time" mean exactly that: see *Canada v. Addison & Leyen*.[9]

[43] Dr. Labow has also been reassessed in 1997, 1998 and 1999 to include the income produced by his account in the Trust in his income for those years. The amounts in question are:

1997	$ 1,320.00
1998	$23,646.00
1999	$47,619.00

Ms. Kamin suggested in argument that these amounts had been wrongly computed, but they were admitted before trial in the Appellant's response to a Request to Admit Facts, and so are not now open to question.

[44] Subsections 75(2) and (3) of the *Act* provide as follows:

> 75(2) Where, by a trust created in any manner whatever since 1934, property is held on condition
>
> (*a*) that it or property substituted therefor may
>
> (i) revert to the person from whom the property or property for which it was substituted was directly or indirectly received (in this subsection referred to as "the person"), or
>
> (ii) pass to persons to be determined by the person at a time subsequent to the creation of the trust, or
>
> (*b*) that, during the existence of the person, the property shall not be disposed of except with the person's consent or in accordance with the person's direction,
>
> any income or loss from the property or from property substituted for the property, and any taxable capital gain or allowable capital loss from the disposition of the property or of property substituted for the property, shall, during the existence of the person while the person is resident in

9 2007 SCC 33; [2007] 2 S.C.R. 793.

Canada, be deemed to be income or a loss, as the case may be, or a taxable capital gain or allowable capital loss, as the case may be, of the person.

75(3) Subsection 75(2) does not apply to property held in a taxation year

(*a*) by a trust governed by a deferred profit sharing plan, an employee benefit plan, an employees profit sharing plan, a registered disability savings plan, a registered education savings plan, a registered pension plan, a registered retirement income fund, a registered retirement savings plan, a registered supplementary unemployment benefit plan, a retirement compensation arrangement or a TFSA;

(*b*) by an employee trust, a related segregated fund trust (within the meaning assigned by paragraph 138.1(1)(*a*)), a trust described in paragraph (*a.1*) of the definition "trust" in subsection 108(1), or a trust described in paragraph 149(1)(*y*);

(*c*) by a trust that

(i) is not resident in Canada,

(ii) is resident in a country under the laws of which an income tax is imposed,

(iii) is exempt under the laws referred to in subparagraph 75(3)(*c*)(ii) from the payment of income tax to the government of the country of which the trust is a resident, and

(iv) was established principally in connection with, or the principal purpose of which is to administer or provide benefits under, one or more superannuation, pension or retirement funds or plans or any funds or plans established to provide employee benefits;

(*c*.1) by a qualifying environmental trust; or

(*d*) by a prescribed trust.

[45] The Minister relies on subparagraph 152(4)(*b*)(iii) for the authority to reassess during the three-year period following the normal reassessment period.

152(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*) …
>
> (*b*) the assessment, reassessment or additional assessment is made before the day that is 3 years after the end of the normal reassessment period for the taxpayer in respect of the year and
>
> (i) …
>
> (iii) is made as a consequence of a transaction involving the taxpayer and a non-resident person with whom the taxpayer was not dealing at arm's length, …

[46] Can it be said that Dr. Labow's share of the income of the trust in the three years in question is a consequence of a transaction or transactions involving Dr. Labow and a non-resident person with whom he was not dealing at arm's length? In my view it can, because the income was the direct result of Dr. Labow's contributions to the trust to obtain coverage for his wife. Article 5(c) of the trust gives the employer the power to replace the trustee upon 30 days' notice. By the terms of the trust, both Dr. Labow as a participating employer and Mr. Johnston, his solicitor and representative under the terms of the trust, could exercise that power of removal and replacement. In fact, Mr. Johnston did so at the behest of Dr. Labow. Dr. Labow therefore had control of the trust, with the result that he and the trust were clearly not operating at arm's length.[10] The Minister was therefore empowered by subparagraph 152(4)(*b*)(iii) to reassess at any time up to three years following the normal three-year reassessment period.

[47] The trust specifically provides in paragraph 11.02 that on termination of an employer's participation in the plan, trust funds may revert to the employer. The income of the appellant's share of the trust fund is therefore deemed to be his income, unless it is excepted by the provisions of subsection 75(3). The appellants acknowledged in argument that the plans in issue here are not "employee benefit plans" under the *Act*,[11] as the definition of that term excludes a group sickness or accident insurance plan and a private health services plan. The appellant argues that the trust property is excluded from the operation of subsection 75(2) by paragraph

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[10] *Robson Leather Co. Ltd. v. M.N.R.* 77 DTC 5106.

[11] Appellant's Closing Argument, para. 43.

75(3)(b) because it is a trust described in paragraph (a.1) of the definition of trust in subsection 108(1). This exclusion would apply only to the last year under appeal.[12]

> A trust … all or substantially all of the property of which is held for the purpose of providing benefits to individuals each of whom is provided with benefits in respect of, or because of, an office or employment or former office or employment of any individual.

In my view, this trust cannot meet that definition for the simple reason that, as I have found above, if the purpose of the plan was to provide any benefits to Rosalind Labow, then those benefits were not provided to her because of her office or employment, but because she was married to the appellant. Consequently, subsection 75(2) applies, and the income of the trust is taxable to Dr. Labow.

[48] It is apparent from the evidence of Dr. Labow and Rosalind Labow that they must both have been aware that the trust fund was producing income each year. I have already found that Dr. Labow was aware that the purpose of the fund was personal and not for the benefit of his medical practice. It follows that he should have been aware that he was required to report that income each year. It is an admitted fact that Dr. Labow did not review his income tax returns for the four years under appeal personally before he signed them. It is not adequate for him simply to say, as he did, that he relied on his accountant. The obligation to report is a personal one that cannot be avoided in that way. His failure to include the trust income in his return each year, therefore, is a misrepresentation attributable to neglect or carelessness, and it makes subparagraph 152(4)(*a*)(i) applicable. For both these reasons the Minister was entitled to reassess when he did.

the Tanaschuk appeals

[49] Danny Tanaschuk is a radiologist. He is appealing income tax reassessments for the years 1998 and 1999. Those reassessments disallowed his contributions to a plan established for him and his wife by Mr. Johnston in 1998. At that time he was Chief of Radiology at the Riverside Hospital in Ottawa, and one of four equal partners in a partnership consisting of himself and three other radiologists, and known as Riverside Imaging Associates (RIA). His wife, Danielle Lafortune, and the wives of the other three partners were employees of the partnership, Ms. Lafortune on a full-time basis, doing the billing and the reconciliation for all the partners, as well as the maintenance of her husband’s accreditation, correspondence and

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[12] S.C. 2001, c.17, s. 83(6), applicable to 1999 and subsequent taxation years.

scheduling. The other partners' wives worked on a part-time basis. In 1998 the hospitals in Ottawa were merging, and Dr. Tanaschuk was named the interim Chief of Diagnostic Imaging for the merged Ottawa Hospital. This involved him in a great deal of administrative and committee work in addition to his professional responsibilities. During this period Ms. Lafortune took on substantial additional duties, working for her husband in connection with the merger. She worked some 20 to 30 hours per week for RIA, and was paid was paid $2,000 per month by RIA. In 1998 she was paid $1,750 per month for the additional work that she did in connection with the hospital merger, and this was increased to $2,500 per month in 1999. These latter amounts were paid to her by Dr. Tanaschuk, not RIA, as the work was not done in connection with the partnership's practice.

[50] Towards the end of 1997, Mr. Katz proposed to Dr. Tanaschuk and the other partners of RIA that they should establish a plan that would provide disability and health care benefits to their wives. In early 1998, Mr. Johnston made a detailed proposal to them of a plan that would provide disability coverage for the employees of the partnership, and medical, dental and vision care benefits for the employees and their dependants.

[51] Dr. Tanaschuk testified that he found Mr. Johnston's proposal attractive because he had some history of medical problems, and a family history that suggested he would have more medical problems in the future. He said that he had looked at other possible medical insurance plans, but that he had not found any of those available to him to be satisfactory.

[52] It was in March 1998 that Dr. Tanaschuk and one of his partners decided to participate in Mr. Johnston's proposed plan. Dr. Tanaschuk, on behalf of RIA, and William Johnston, as Administrator, signed a Participation Agreement, to be effective as of March 15, 1998. That agreement refers to the Bermuda Professional Health and Welfare Trust established on March 1, 1998, and it names Danielle Lafortune as the only employee participating in the plan. Paragraph 3 and 4 read as follows:

> 3. The Employer shall be solely liable for the cost, as determined by HWT's actuary, of all benefits accrued under the Plan by any of its employees.
>
> 4. Should an Employer not have sufficient funds to pay for any of its liabilities under the Plan, it is hereby acknowledged that the Administrator will reduce any or all benefits that have been credited to any employee or former employee under the Plan.

[53] As Dr. Tanaschuk's wife was the only employee named in this Participation Agreement, and as RIA was named as the employer, Dr. Tanaschuk agreed with the partners that he alone would make the financial contributions to the trust that were required under the plan. Accordingly, on December 14, 1998 he signed a document titled Indemnification. It reads as follows:

> I, Dr. Danny Tanaschuk, hereby agree to indemnify RIVERSIDE IMAGING ASSOCIATES, for all costs associated with the participation of RIVERSIDE IMAGING ASSOCIATES in the Bermuda Professional HWT ("HWT") that are related to the membership of Danielle Lafortune in the HWT.
>
> These costs include, but are not limited to, the contributions made to the HWT by RIVERSIDE IMAGING ASSOCIATES, all fees associated with the membership in the plan and any taxes, interest, penalties that RIVERSIDE IMAGING ASSOCIATES IS required to pay by Revenue Canada.

[54] There was a good deal of discussion during the trial about what document actually was the trust agreement that governed the plan to which Dr. Tanaschuk subscribed. There are in evidence two documents, each styled "DEED OF SETTLEMENT between Arthur Morris and Continental Trust Corporation Limited of Hamilton, Bermuda". One is Tab 1 of Exhibit A-1 and the other is Exhibit A-3. Both state on their face that they were made on March 1, 1999. Both are signed by Arthur Morris, the settlor, and by a director on behalf of Continental Trust, but with no indication of when they were signed.

[55] Mr. Johnston's explanation of this is that Exhibit A-3 was in fact signed on or about March 1, 1998, and that it was replaced by Exhibit A-1, Tab 1 on or about August 1, 2000, because there were a number of errors in the original document that had to be corrected. Mr. Johnston was clearly of the view that the latter document governed the plan. Whether it was open to Mr. Morris and Continental Trust to change the document in this way is not something that I need to decide. The changes that were made are inconsequential for purposes of these appeals. I shall consider the matter as though Exhibit A-1, Tab 1 governed the plan from the outset.

[56] Dr. Tanaschuk, ostensibly on behalf of RIA, made two contributions to the trust. His first contribution was $149,000 and the second was $170,000[13].

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[13] The evidence is unclear as to why the amount of the second contribution actually paid was $170,000 and the amount disallowed on reassessment in respect of it was 171,000.

Dr. Tanaschuk testified that Mr. Johnston had told him at the early stages of discussions that his required contribution, based on his wife's age and income, would be in the range of $300,000 to $320,000. He decided to contribute $149,000 in the first year and the balance, which the actuary would determine, in the second year. These payments were wired from the RIA bank account to the trustee in Bermuda, but the first was deducted from Dr. Tanaschuk's allocation of partnership income at the 1998 year end, and the second was paid by Dr. Tanaschuk to the partnership by a draft drawn on his bank account in November 1999, and then wired from RIA to Bermuda.

[57] By the time that second contribution was made in November 1999 Dr. Tanaschuk had been appointed Chief of Radiology at the Montfort Hospital, which did not become part of the amalgamated Ottawa Hospital. He withdrew from the RIA partnership to take up this position at the end of June 1999, and his wife ended her employment by RIA at the same time. Dr. Tanaschuk was in the rather curious position, then, of contributing some $170,000 to a Health and Welfare Trust in Bermuda, under the terms of a Health and Welfare Plan on behalf of an employer from whom he had severed all connection, for the benefit of an employee who had left the employment of that employer some four or five months previously.

[58] Joann Williams did the valuation computation for the plan to which Dr. Tanaschuk subscribed in the name of RIA. In fact she did three separate computations. The first was done on or about December 18, 1998. In that document she recommended a single payment of $149,000 to be made in the first year of the plan, 1998, to sustain a benefit of 75% of the employee's earnings, up to a maximum of $9,633 per annum. Ms. Lafortune at that time was earning $20,000 per annum from RIA, so $9,633 was less than 50% of her earnings. It is clear from her evidence, and also from that of the appellant, that Dr. Tanaschuk had made the decision that he would contribute $149,000 in the first year. That payment had in fact been made before the RIA yearend, which was 31 March, 1998. Ms. Williams did no more than verify that this contribution of $149,000 would not exceed what would theoretically be required to fund 75% of her salary until age 70 in the event of her becoming disabled. Her starting point was the agreed upon $149,000.

The actuarial computation of the second contribution, prepared by Joann Williams and invoiced by the trustee to RIA was $170,262.

[59] On May 18, 1999 Ms. Williams produced her second valuation for this Plan. This time it was based upon presumed earnings by the employee of $30,000 per annum, and a single contribution to be made in the first year of the plan, which of course was 1998. Her opinion was that a single contribution of $313,505 remitted on January 1, 1998 would sustain a benefit of $11,748, which, together with the maximum disability benefit available under the Canada Pension Plan, would yield 75% of Ms. Lafortune's supposed $30,000 salary. Ms. Williams did not know, apparently, that Dr. Tanaschuk had already made a payment of $149,000 to the trustee prior to March 31, 1998. Nor did she know that within less than two months Ms. Lafortune would no longer be employed by RIA, or that her salary from RIA was actually $24,000 per year. She simply used the spreadsheets that Mr. Parent had developed, the assumptions that she was given by Mr. Johnston, and her own assumption, similar to that of Mr. Parent, that it was prudent to assume that the employee would be totally and permanently disabled at the end of the third year of the plan.

[60] Ms. Williams produced her third valuation report on May 27, 1999. By this time she had been made aware of the first year payment that had been made, and that the intent was that there would be two contributions made in the first two years totaling about $300,000. It appears that in her third valuation Ms. Williams did in fact compute the amount of the second contribution to be $170,262, rather than starting with that number and working towards the annual income required to justify it, as she had done in preparing the first valuation. However, it also appears that the goal of a total contribution of $300,000 made in two installments had been conveyed to her, and that certain assumptions were made with a view to maximizing the required second contribution. These included using a pension mortality table rather than a disability mortality table, providing for a 4% per year inflation of the disability benefit payments, although the plan did not provide any adjustments for inflation, and the assumption, on Mr. Johnston's direction, that the trust income would be taxed at 50%. All these had the effect of inflating the required second contribution. So too did the assumption that Ms. Lafortune's salary was $30,000 per annum when in fact RIA was paying her only $24,000. Based on these assumptions, Ms. Williams opined that the required contribution in the second year of the plan was $170,262. Strangely, the trustee invoiced RIA for that amount by a document dated March 30, 1999, two months before the date of Ms. Williams' third valuation.

[61] The Bermuda Professional Health and Welfare Trust and Plan to which Dr. Tanaschuk subscribed is different in wording from the one to which Dr. Labow subscribed, but not significantly so, except for the winding-up provision. The clauses relating to contribution and benefits are essentially the same. The Trustee is

required to maintain separate accounts and asset pools for each employer who participates. The disability benefit is payable only upon disability of the employee, and other benefits for dental, health and vision care are available to the employee and dependants. In the event of disability of the employee, benefits are to be paid from the trust fund established by the employer. Dental, health and vision care benefits are only payable if the services are not available without charge under another scheme. If such benefits are paid by the trust for an employee or dependant, it is on a pay-as-you-go basis, which is to say that the trust will pay the benefit to the employee, and then invoice the employer for the cost of it plus an administrative charge. The employer then becomes liable to contribute that amount to the trust fund.

[62] The winding-up provision is somewhat different. The Bermuda plan provides in paragraph 9:

> 9. **Winding-up of the Plan**
>
> (a) The Plan shall be wound-up on the earlier of:
>
> (i) the Termination Date;
>
> (ii) the passing of a resolution of the Employer, subject to the prior simultaneous written consent of the Protector (unless the Employer shall be in receivership or liquidation) to wind-up the Plan at an earlier date; and
>
> (iii) the service of written notice by the Protector on the Trustee to wind-up the Plan at an earlier date.
>
> (b) If the Plan is wound-up, the Trustee shall after payment of all costs, charges and expenses of administration and winding-up and payment of such taxes, if any, apply the assets of the Trust Fund in accordance with paragraph 6 of the Professional Health and Welfare Trust.

The termination date is defined to be the termination date of the trust, which in turn is defined in subparagraph 1(o) of the trust deed:

> (o) ¨Termination Date¨ means such date from the date hereof as the Protector may in his absolute discretion by deed delivered to the Trustee prior to the date so determined;

[63] In effect, then, either the employer, with the consent of the protector, or the protector alone, can effect a winding-up of the plan. In that event, paragraphs 4, 5 and 6 of the trust deed apply:

4. **Objects**

The Objects of this trust are:

(a) to supply the Trust Property for the Purposes in accordance with Clause 5; and

(b) subject to and in default of the foregoing (as originally framed or as reformed) to apply the Trust Property for charitable purposes.

5. **Purposes**

(a) The Purpose for which this trust [*sic*] is to ensure payment of those benefits provided for under the Health & Welfare Plan if they become due and payable;

(b) The Trustee and the Protector jointly shall have power to resolve any uncertainty as to the Purpose or to the mode of execution of the trusts created by or under this trust.

(c) The Trustee shall endeavor to carry out the Health & Welfare Plan and shall act accordingly in dealing with the Trust Property.

(d) In so far as the Health & Welfare Plan is unspecific as to the Trustee action and does not require the Trustee to act as directed by another, or to delegate to another, the Trustee shall have a discretion to act as they think fit having regard only to the letter and spirit of the Health & Welfare Plan.

(e) If in the Trustee's option compliance with the letter of the Health & Welfare Plan would be contrary to the spirit of the Health & Welfare Plan whether because of changed or unforeseen circumstances or otherwise, the Trustee shall adhere to the spirit rather than the letter of the Health & Welfare Plan and act accordingly, but the Trustee shall notify in writing the Protector and if time permits, shall do so before acting.

6. **Termination Date**

> Notwithstanding any other provision hereof the Trustee shall on the Termination Date hold the Trust Fund upon trust for the Final Repository absolutely to the intent that there shall be no resulting trusts of the Trust Fund. It is hereby declared that the inclusion of the Final Repository as an entity which could take an interest in the Trust Fund is only for the purpose of excluding any possibility of a resulting trust of the Trust Fund and not with the intention of giving any benefit to the Final Repository except in the event of a failure of the trusts hereby declared in favour of the Objects. Failing the appointment of a Final Repository, the Trustee shall stand possessed of the Trust Fund for such charity or charities absolutely as the Trustee shall by deed or deeds revocable or irrevocable executed on or before the Termination Date but not revocable thereafter appoint and, in default of appointment for general charitable purposes to the intent that there shall be no resulting trusts of the Trust Fund.

The "final repository" is a defined term in the trust deed:

> "Final Repository" means the person, if any, (other than the Protector or a person who is a resident of Canada for purposes of the Income Tax Act) appointed by the Protector at any time after the date of this trust but before the Termination Date by deed delivered to the Trustee.

[64] The Protector under the Bermuda plan was Mr. Johnston, or upon his death or incapacity, Mr. Katz. Mr. Johnston was also named as the Administrator under the plan.

[65] Dr. Tanaschuk was asked on cross-examination about his expectations in respect of the $320,000 that he contributed to the trust. His first answer was to the effect that he expected that health care costs would deplete the funds. When confronted with his answer given on his examination for discovery, he agreed that he had been told that there were two options on termination of the plan:

> Q. All right. In that plan, certainly in the plan if the members, your wife ceased to be an employee or an employee of the plan no longer applied to her, in that event what did you expect would happen to the money?
>
> A. It was explained that there were a number of options: one was a charitable contribution, the other was that the money would be repatriated. The balance of what was left in the trust, if there was any, could be repatriated back to Canada with tax implications.
>
> Q. Repatriated to you, in other words?

A. Yes.[14]

[66] It is not at all clear to me how, within the terms of the trust, the funds would be returned to Dr. Tanaschuk or his estate. It is clear, however, that when he signed the participation agreement, and when he made the payments, he did so based on advice that when the plan was terminated the funds remaining in his participating employer account would be returned to him, less any amounts paid for disability benefits to his wife. I do not believe that he intended that any remaining funds should be allowed to go to charity. He viewed the funds in the participating employer account as his funds. In fact, it was not the trustee, but Dr. Tanaschuk, who made the original investment decision in respect of his participating employer account. Speaking of the trustee's advice to him in February 1998, he testified as follows:

> Q. Did you discuss investment strategies with him?
>
> A. Not on that particular meeting but earlier on, back in Ottawa, in February, we had asked Colin what would happen with the money and he said that initially what he does with all the funds is they get put in a money market fund with the Bank of Bermuda and then depending on what you want and what they suggest, he says they can remain in the Bank of Bermuda or we can propose a number of different vehicles and possibly grow in value of the funds.
>
> He went through, I think three different scenarios where he had directed clients to, and the one that we elected to go with was a Fidelity World Advisor offshore fund.[15]

Mr. Johnston said in that part of his testimony that became evidence in all three appeals that it was the intention in setting up these plans that on termination the funds in the employer's trust account would be returned to the employer, and that "… the rules require a re-inclusion in the tax year of the employer that the termination occurs."[16] In the same context he said:

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[14] Evidence of Dr. Tanaschuk, May 8, 2009, page 217, lines 3 to 24.

[15] Evidence of Dr. Tanaschuk, May 9, 2009, page 65, lines 21 to page 66, lines 1 to 11.

[16] Evidence of William Johnston, May 5, 2009, p. 59, l. 18 to 60, l. 20.

> There is no certainty that the funds will be used for the disability, and at the end of the day, they should come back to the employer and the employer should have a re-inclusion. Assumptions are made all the time, and if they don't happen, there are mechanisms in place that require re-inclusion of the income back to the original deductions".[17]

While this statement is far from precise, and it was not followed up, it does satisfy me that Mr. Johnston had good reason to believe that the trustee would, directly or indirectly, return the balance of the account to the employer upon a winding-up of the plan, notwithstanding paragraphs 4, 5 and 6 of the trust deed, and that he advised Dr. Tanaschuk accordingly. I do not believe that he would have agreed to participate, and to contribute $320,000 to the trust, without some assurance of that kind.

[67] I find that neither RIA nor Dr. Tanaschuk entered into the participation agreement under the Bermuda Professional Health & Welfare Trust for the purpose of providing disability or medical insurance to Danielle Lafortune in her capacity as an employee of the RIA partnership, or of her husband. In reality, it was not the partnership but Dr. Tanaschuk who subscribed to the plan, and he did so not to provide insurance to an employee, but for the purpose of accumulating income or capital gains, or both, in a tax-free jurisdiction, and so that tax on the contributions could be deferred until some later time when these amounts would be returned to Dr. Tanaschuk or his estate. The first contribution was not made by the partnership, which was Ms. Lafortune's employer, but by her husband. When the second contribution was made in November 1999, Ms. Lafortune was no longer employed by RIA, and Dr. Tanaschuk had withdrawn from the partnership.

[68] Paragraph 5(a) of the Plan provides the following:

> 5(a) Any member shall cease to be covered for any or all of the Benefits set forth in this Plan on the date they cease to be an employee of the Employer notwithstanding that the Plan is still in existence.

Ms. Lafortune ceased to be an employee of RIA, the employer named in the participation agreement, at the end of June 1999. She therefore was not covered after that date for any of the benefits which the plan was supposedly created to provide to her. Despite that, Dr. Tanaschuk, apparently without complaint, sent the trustee the second contribution in the amount of $170,000 in November 1999. If

17 *Ibid.*, p. 82, l.l. 8-14.

this were a real plan of insurance, rather than a savings device, he surely would not have made that payment.

[69] Quite clearly, the participation of RIA, or Dr. Tanaschuk, in the Bermuda Health & Welfare Trust had nothing to do with gaining or producing income. The amounts of $149,000 in the 1998 taxation year and $170,000 in the 1999 taxation year were not expended to provide a benefit to an employee; no sensible person would have made those payments for that purpose under those circumstances. Only because Danielle Lafortune was his wife, and only because he expected the return of the $320,000, hopefully with accretions, at some time in the future, did Dr. Tanaschuk enter into this scheme and make those two payments.

[70] Dr. Tanaschuk was reassessed for the two taxation years in issue on December 1, 2003, beyond the normal reassessment period of three years. The respondent relies on both subparagraphs 152(4)(*a*)(i) and 152(4)(*b*)(iii) to justify the assessments.

[71] It is clear that in filing his income tax returns for 1998 and 1999, Dr. Tanaschuk did not reveal the substantial payments to the trustee that he had deducted in the computation of his income. In both those years he prepared and filed his returns himself. His original return for 1998 is not in evidence, but his working copies of both returns are at Tab 35 of Exhibit A-1, and the filed return for 1999 is at Tab 29. It is not disputed that the filed return for 1998 is identical in substance to the working copy that is in evidence.

[72] In 1998 Dr. Tanaschuk declared a gross professional income of $149,702, and a net professional income of 95,395.94. The statement of professional activities that is part of the return reveals a number of expenses claimed that account for the difference; of these the only one that refers in any way to salaries or benefits is line 9060 “Salaries wages and benefits (including employer’s contributions)”. Here Dr. Tanaschuk entered 1750 x 12 = $21,000, which was the salary that he paid to Ms. Lafortune for her work in connection with the hospital amalgamation. The source of the amount of $149,702 is the financial statements of RIA for the year ended March 31, 1998. These are in evidence at Tab 4 of Exhibit A-1. Dr. Tanaschuk did not include a copy of the RIA financial statements with his 1998 return. Even if he had done so, they would not have revealed to the Minister that he had paid $149,000 by way of a purported employee benefit. In the partnership income statement the $149,000 is subsumed in Salaries and benefits of $247,551. That in itself is misleading as it was not an expense of the partnership at all. In the statement of partners’ capital the allocation of the partnership income of $1,045,808 is shown as

$298,702 to each of the other three partners, and $149,702 to Dr. Tanaschuk with no explanation in the statement, or by way of a note to the reader, of the reason that his share of net income is less than that of each of his three partners by $149,000. Even if the financial statements had been given to the Minister along with the return, it would not have been apparent that Dr. Tanaschuk was claiming to deduct $149,000 from his income as payment for a purported employee benefit. In plain terms, the return that he filed failed to disclose half his income. The evidence clearly established that Dr. Tanaschuk had been told by Mr. Johnston that the Canada Revenue Agency was likely to consider that the payments were not deductible. In those circumstances Dr. Tanaschuk's return amounts to willful misrepresentation, and so entitles the Minister to reassess beyond the normal three year period.

[73] The evidence with respect to disclosure, or more correctly the lack of it, in the 1999 income tax return is essentially the same as that for 1998. Dr. Tanaschuk prepared and filed his return himself. He reported gross professional income of $242,865.25 and net professional income of $130,452.50. The statement of professional activities claims a deduction of $45,000 for wages and severance pay, and there is no disclosure in the return of the claim to deduct $170,000 as an employee benefit expense. Nor do the financial statements reveal that this payment was made or why. On the statement of partners' capital all four partners are shown to have been credited with different amounts as their shares of the net income. Dr. Tanaschuk's share is $170,000 less than Dr. Mendell's share, but there is no explanation of the difference. The evidence was unclear as to whether Dr. Tanaschuk filed the 1999 financial statements of RIA along with his 1999 return, but even if he had done so they would not have revealed to the reader that there was a claim to deduct 170,000 as an employee benefit. As in 1998, the effect was to fail to disclose more than half his income for the year. The Minister is entitled to reassess 1999 beyond the three year period.

[74] The claim to deduct professional fees of $9735 in the 1999 taxation year is found in the statement of professional activities, where they are described as legal, accounting and other professional fees. The printed form makes it clear that only business expenses are to be listed. Had the expenses related to a genuine business expense then they would be appropriately claimed and adequately described. However, the fees charged for the establishment and maintenance of the trust, like the contributions to the trust, were not amounts expended for the purpose of the appellant's business, and to list them as business expenses was a misrepresentation. In view of the advice that Mr. Johnston had given him at the outset that the Canada Revenue Agency would probably consider the trust contributions not to be deductible as business expenses, to list either the contributions themselves or the associated fees

as business expenses without making known what they were paid for does not satisfy the appellant's obligation to

> … thoughtfully, deliberately and carefully assess the situation and file[s] on what he believes *bona fide* to be the proper method …[18]

The Minister was therefore entitled to reassess with respect to the professional fees.

the Marcantonio appeals

[75] MCI is a firm engaged in the construction industry in the Ottawa area. Its principal business is the installation of steel studs, drywall and acoustic tile. The shares are owned equally by Pantaleone Marcantonio ("Leone"), Carlo Marcantonio, Giuseppe Marcantonio and Domenico Filoso. The three Marcantonios are brothers and Mr. Filoso is their nephew. Until September 28. 1999, Leone and Carlo were the two directors of the company; on that date, Giuseppe and Mr. Filoso became directors.

[76] Domenico Filoso was in charge of the business and financial side of MCI, Leone was in charge of estimating and obtaining new business, and Giuseppe and Carlo were the site supervisors. In 1999, Mr. Filoso's salary was $60,950 and in 2000 it was $69,800. Giuseppe Marcantonio's salary was $67,950 in 1999 and $81,800 in 2000.

[77] According to the evidence of Domenico Filoso, the company had created a group sickness and accident insurance plan for Leone and Carlo at some time in the late 1990s, to which the company made a payment of $300,000. In 1999 Mr. Johnston, along with the accountants for MCI, suggested a second plan with a contribution of approximately $500,000. Mr. Filoso and Giuseppe Marcantonio then became directors, according to Mr. Filoso, so that they could be the individuals covered by the second plan.

[78] This second trust and plan, referred to in the evidence as the Marcantonio Group Accident and Sickness, or MGAS Trust and Plan, was created by a Deed of Settlement dated December 1, 1999 between MCI and Continental Trust Corporation Limited of Hamilton, Bermuda. The property initially settled on the trust was $100.

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[18] *The Queen v. Regina Shoppers Mall Limited*, 91 DTC 5101 @ 5103.

[79] This trust deed is not significantly different from the Tanaschuk deed that is described above. The role of the protector is now called the enforcer, and William Johnston was the original enforcer, with Rob Rock of Ottawa, one of MCI's accountants, named to replace him in case of death or incapacity. The termination date is stipulated to be 100 years from the date of the trust deed, but under clause 9 of the plan, the employer or the enforcer can cause the plan to be wound up, in which event the trustee is required to apply the assets according to paragraph 6 of the trust. That paragraph 6 is identical to paragraph 6 of the trust in the Tanaschuk case found above. The MGAS trust and plan, unlike the others I have described earlier, has only one employer, MCI, and only two members, Giuseppe Marcantonio and Domenico Filoso. Hence there is no reference to participating employers or participating employee accounts.

[80] The benefit provisions of the MGAS plan are essentially the same as those of the multi-employer plans, except that under the MGAS plan the dental, medical and vision benefits but not the disability benefit, are payable post-employment as well as during employment. The disability benefit is limited to 75% of the employee's salary, but subject to an overall limitation that the benefit is payable only if there is trust property available from which to pay it, and also to a gross amount maximum payment established according to an actuarial valuation.

[81] By a deed of settlement dated December 1, 2000, MCI created another trust and plan known as the Marcantonio 509 Group Accident and Sickness Trust. The trustee again is Continental Trust Corporation Limited of Hamilton, Bermuda. The enforcer of this trust was Hil S. de Frias of Hamilton, Bermudas. The terms of the 509 trust and plan are almost identical to those of the MGAS trust and plan. The only significant differences are that the 509 trust makes no reference to a final repository, and clause 6 of it is somewhat different as a result, and the addition of clause 15 to the 509 plan. These read as follows:

> 6. **Termination Date**
>
> Notwithstanding any other provision hereof, the Trustee shall on the Termination Date hold the Trust Fund upon trust for such charity or charities absolutely as the Trustee shall by deed or deeds revocable or irrevocable executed on or before the Termination Date but not revocable thereafter appoint and, in default of appointment for general charitable purposes to the intent that there shall be no resulting trusts of the Trust Fund.
>
> 15. **Refund of Payments**

> The Trustee may, in its sole discretion, refund out of the capital of the Trust, to a person, other than the Employer or a person related as defined under Canadian Income Tax Act Law, designated by both the Trustee and the Enforcer.

As with the MGAS trust and plan, MCI is the only employer and Giuseppe Marcantonio and Domenico Filoso are the only employees who are members of the 509 plan.

[82] The contributions to be made to the MGAS and 509 trusts by MCI were not determined by an actuarial calculation of the fund required to provide benefits. The decision was made by the appellant that it would contribute $500,000 to the MGAS trust, and on December 1, 1999, Continental Trust Corporation, as trustee of the MGAS trust, invoiced MCI for that amount. On December 15, 1999, MCI passed a resolution establishing the MGAS plan in accordance with the trust. For reasons that are obscure, the company then set up an accrued liability in respect of the plan in the amount of $545,500 which was reflected in the 1999 profit and loss statement, and in the appellant's T2 income tax return for 1999, as a component of "management salaries expense". The payment of $500,000 was made to the trustee by wire on November 28, 2001.

[83] Similarly, the determination that the contribution to the 509 trust would be in the amount of $754,000 was made by the appellant, not as the result of any actuarial computation but on the basis that this was the amount that it could afford to, and wanted to, contribute. In spite of this, the invoice from the trustee to MCI dated December 1, 2000 reads as follows:

INVOICE

Date:	December 1, 2000
To:	Marcantonio Constructors Inc.
From:	Continental Trust Corporation Limited as Trustee of the Marcantonio 509 Group Accident and Sickness Trust in accordance with the actuarial evaluation prepared by Welton Beauchamp Parent Inc.
Total Owing:	CDN$754,000

[84] It is quite clear from the evidence of Mr. Johnston given in the Marcantonio appeals that the decision to contribute $500,000 to the MGAS trust and $750,000 to the 509 trust was made by Mr. Filoso on behalf of MCI in consultation with Mr. Johnston, and that these amounts were not determined on the basis of any actuarial requirement to fund a benefit of 75% of the salaries of Giuseppe Marcantonio and Domenico Filoso in the event of their disability. Once agreed on, these numbers were given to Joann Williams, and she was asked to confirm that these contributions were not excessive, having regard to the salaries of the two individuals. This is clear from the testimony of Mr. Johnston and Ms. Williams. Nevertheless, Ms. Williams provided actuarial cost certificates for both trusts[19] that purported to certify $500,000 and $750,000 as the funding required to provide the gross annual maximum payments of $24,338 for each of Giuseppe Marcantonio and Domenico Filoso under the MGAS plan and $37,436 for each under the 509 plan.

[85] Although Mr. Filoso testified that he believed that medical, dental and vision expenses were payable by the trustee from the trust property, it is clear that no provision was made by Ms. Williams for funding these benefits. No claims were made by either Mr. Filoso or Mr. Marcantonio, but as with the Labow and Tanaschuk trusts, it is clear that had claims been made then the trustee, if it were to adhere to sound actuarial principles, would have had to invoice the employer for the amounts of those claims.

[86] At Tabs 29 and 31 of Exhibit A-1 are two documents, one dated November 30, 2003 and the other dated December 17 2003, whereby Continental Trust Corporation Limited ceased to be the trustee of the 509 trust and the MGAS trust, respectively, and was replaced in that capacity by Landmark Trust (Bermuda) Limited. By that time, Mr. de Fias had replaced Mr. Johnston as the enforcer of the MGAS trust. It appears from the evidence of both Mr. Filoso and Mr. Johnston that this change of trustee was effected by Mr. de Frias as the enforcer, exercising his power under clause 3 of the First Schedule to each of the trust deeds, not on his own initiative, but to give effect to a decision arrived at jointly by Mr. Filoso and Mr. Johnston.

[87] Neither Mr. Filoso nor Mr. Johnston would acknowledge that it was MCI that made the decision to replace Continental Trust with Landmark Trust as trustee. However, they did agree that both were unhappy with Continental Trust's

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19 Exhibit A-1, tabs 34 and 35.

reporting, that Mr. Johnston thought that it would be a good idea to replace Continental, and that they discussed it. I infer from their evidence that Mr. de Frias was willing to, and did, replace the trustee to implement a decision made by Mr. Filoso on the advice of Mr. Johnston, and that Mr. Filoso did have the *de facto* power necessary to replace the trustee at will.

[88] I turn now to the question whether the appellant's contributions of $500,000 and $750,000, respectively to the MGAS and 509 trusts were made for the purpose of gaining or producing income from the appellant's business. The appellant's position is that these liabilities were incurred to provide Giuseppe Marcantonio and Domenico Filoso, as management employees, with a group accident and sickness insurance plan, and that the contributions were determined in accordance with standard insurance principles and actuarial standards and practices. In my view, the evidence does not permit that conclusion.

[89] The salary of Mr. Filoso in 1999 was $60,950. In 2000, it was $69,800, Mr. Marcantonio's salary in 1999 was $67,950. In 2000, it was $81,800. It is simply nor credible that an employer would spend four and a half times the aggregate of the salaries of the two employees for the two years in question to provide them with a plan to provide disability income and the medical, dental and vision care benefits not otherwise available to them under provincial Government plans.

[90] This is all the more improbable when considered in the light of Mr. Filoso's evidence concerning the appellant's contributions to the Plasterers' and Cement Masons' Trust Funds and the Acoustical and Drywall Trust Funds on behalf of its unionized employees. According to Mr. Filoso, the company's contributions in total to these funds to provide disability and health and welfare benefits (and possibly pension benefits as well – his evidence is unclear as to that) for the two-year period 2007 and 2008 was "in excess of $1.3 million for those two years",[20] and for 1999 and 2000, it would have been "… somewhat less than that, but it would be the same sort of magnitude …".[21]

[91] In other words, the "cost" to provide the benefit to Mr. Marcantonio and Mr. Filoso was approximately the same as the cost to provide a similar, or perhaps greater, benefit to the entire unionized work force of "…somewhere around 80

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20 Evidence of Domenico Filoso, May 13, 2009, p. 109, l. 9 to l. 23.

21 *Ibid,* p. 110, l.6 to l.13.

employees, 60 to 80 employees".[22] If the appellant's purpose was to provide Mr. Marcantonio and Mr. Filoso with a benefit in their capacity as employees, it would have done so at considerably less cost.

[92] Mr. Filoso testified that one of the primary reasons that he and Giuseppe Marcantonio were made directors of the appellant on September 28, 1999 was so that they could participate in the MGAS plan. At that time, they each owned 25% of the equity in the company, as did each of the other two directors. The four shareholders/directors were all closely related. The wives of two of the directors and the sister of the Marcantonio brothers also held management positions within the company, but they were not provided with any accident and sickness plan. The inference that I draw is that if MCI intended to confer any benefit on Giuseppe Marcantonio and Domenico Filoso by establishing the MGAS and 509 trusts and plans, it was not to do so as an element of their employment remuneration, but in their capacity as shareholders and directors. The expenditures therefore do not satisfy the requirement of paragraph 18(1)(*a*) of the *Act*.

[93] This is borne out, too, by the fact that the amounts of the contributions to the two trusts were fixed not by an actuarial computation of the cost of the benefit to be provided, but by a corporate decision as to the amount that the appellant could afford to and wished to contribute. The appellant's statement of operations for 1999 shows pre-tax income of $73,845, after accruing the $544,500 contribution to the MGAS trust as a component of "management salaries". Without that accrual, the operating profit would have been $585,315 and the income before taxes, including interest income, would have been $618,345. In other words, in 1999, the appellant chose to contribute 93% of its operating profit (88% of its total pre-tax income) to the MGAS trust, purportedly to provide an employee benefit to Giuseppe Marcantonio and Domenico Filoso. In 2000, the corresponding percentages were 75% and 68%. It is not believable that the appellant would make such a business decision.

[94] Clauses 4, 5 and 6 of the MGAS trust deed provide as follows:

> 4. **Objects**
>
> The Objects of this trust are:

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22 *Ibid*, p. 104, l. 5 to l. 9.

(a) to apply the Trust Property for the Purposes in accordance with Clause 5, and

(b) subject to and in default of the foregoing (as originally framed or as reformed) to apply the Trust Property for charitable purposes.

5. **Purpose**

(a) The Purposes for which this trust is established are to carry out the Group Accident and Sickness plan and for greater certainty the Trustee may, in the fulfillment of this purpose, acquire any contract of insurance wherein the Insurer assumes the liability to pay the benefits provided under the Group Accident and Sickness plan.

(b) The Trustee and the Enforcer jointly shall have power to resolve any uncertainty as to the Purposes or to the mode of execution of the trusts created or under this trust.

(c) The Trustee shall endeavour to carry out the Plan and shall act accordingly dealing with the Trust Property.

(d) In so far as the Plan is unspecific as to the Trustee action and does not require the Trustee to act as directed by another, or to delegate to another, the Trustee shall have a discretion to act as they think fit having regard only to the letter and spirit of the Plan.

(e) If in the Trustee's opinion, compliance with the letter of the Plan would be contrary to the spirit of the Plan whether because of changed or unforeseen circumstances or otherwise, the Trustee shall adhere to the spirit rather than the letter of the Plan and act accordingly, but the Trustee shall notify in writing the Enforcer and if time permits, shall do so before acting.

6. **Termination Date**

Notwithstanding any other provision hereof, the Trustee shall on the Termination Date hold the Trust Fund upon trust for the Final Repository absolutely to the intent that there shall be no resulting trusts of the Trust Fund. It is hereby declared that the inclusion of the Final Repository as an entity which could take an interest in the Trust Fund is only for the purpose of excluding any possibility of a resulting trust of the Trust Fund and not with the intention of giving any benefit to the Final Repository except in the event of a failure of the trusts hereby declared in favour of the Objects. Failing the appointment of a Final Repository, the Trustee shall stand possessed of the Trust Fund for such charity or charities

> absolutely as the Trustee shall by deed or deeds revocable or irrevocable executed on or before the Termination Date but not revocable thereafter appoint and, in default of appointment for general charitable purposes to the intent that there shall be no resulting trusts of the Trust Fund.

[95] Clauses 4 and 5 of the 509 trust are identical to those of the MGAS trust. Paragraph 6 of it reads:

> 6. **Termination Date**
>
> Notwithstanding any other provision hereof, the Trustee shall on the Termination Date hold the Trust Fund upon trust for such charity or charities absolutely as the Trustee shall by deed or deeds revocable or irrevocable executed on or before the Termination Date but not revocable thereafter appoint and, in default of appointment for general charitable purposes to the intent that there shall be no resulting trusts of the Trust Fund.

[96] In the case of each trust, the plan is the Third Schedule, and clause 9 of it provides for winding-up of the plan.

> 9. **Winding-up of the Plan**
>
> (a) The Plan shall be wound-up on the earlier of:
>
> (i) the Termination Date;
>
> (ii) the passing of a resolution by the Employer, subject to the prior simultaneous written consent of the Enforcer (unless the Employer shall be in receivership or liquidation) to wind-up the Plan at an earlier date; and
>
> (iii) the service of written notice by the Enforcer on the Trustee to wind-up the plan at an earlier date.
>
> (b) If the Plan is wound-up, the Trustee shall after payment of all costs, charges an expenses of administration and winding-up and payment of such taxes, if any, apply the assets of the Trust Fund in accordance with paragraph 6 of the Marcantonio 509 Group Accident and Sickness Trust.

[97] It would appear from these provisions, and the stipulation in clause 1(o) of each of the trusts that the termination date is 100 years following the date of the declaration of trust, that the trust property could not revert to the appellant. It is

clear, however, from the evidence of Mr. Filoso and Mr. Johnston that the appellant did not intend that on a winding-up of the plan, $1.25 million, plus any subsequent accretions, would pass to some unnamed charity.

[98] Questioned as to what would take place upon a voluntary winding-up of the plans by resolution of the directors of the appellant, Mr. Johnston clarified the real intentions of the appellant:

THE WITNESS:	So we would wind the plan up, and all the assets would be surplus. At that point, the trust would have to be amended to name who would get - - you'd have to do amendments to the trust in order to name who would get the surplus. So you unlock the surplus at that point, if there is any, and you would name whoever could get it, which would – you know, the intention – because when you wind the plan up, GASP does an automatic re-inclusion of the amount deducted by the employer, because the assumptions that were made of disability proved incorrect, didn't pan out. So GASP – and there's a number of other scenarios where, you know, assumptions are made that don't pan out. So if it doesn't pan out, then it's my understanding – I'm not an accountant, but GASP would require a re-inclusion of that back into the hands of the employer. So the employer should get the money back, but that requires an amendment, sir, to the – Your Honour, to the trust.
JUSTICE BOWIE:	Which, the protector and the trustee can do that?
THE WITNESS:	Correct. And that's the intention.
JUSTICE BOWIE:	Or if there's no amendment – well, if the money goes to charity.
THE WITNESS:	Correct, but that certainly wasn't the intention or the spirit of it.[23]
JUSTICE BOWIE:	Okay, I guess as long as the protector and the trustee - -

[23] Evidence of William Johnston, May 15, 2009, p. 162, l. 24 to p. 164, l. 4.

ANSWER:	Correct.
JUST BOWIE:	- - aren't very fond of the Bermudian Red Cross, then the money can –
THE WITNESS:	Correct. Absolutely, and it's totally up to them. It's not up – the legal responsibility is on the protector and the trustee.

[99] Mr. Filoso's evidence was to the same effect:

Q.	Was it your understanding that you could wind up the plan, should it be your decision? When I say you, I apologize. I mean MCI.
A.	I guess, if we became deceased, the plan could be wound up. I guess that we could do that. Or, for whatever other reasons I guess we could have.
Q.	Financial difficulties?
A.	I don't know that we would have done it for that. I don't know what the parameters would have been for us to wind up the plan.
Q.	Turn to page 5 of the same tab, paragraph 6, under Termination Date. Did you read this paragraph with Mr. Johnston?
A.	As I just said, I can't specifically remember reading each paragraph with Mr. Johnston.
Q.	Did you discuss what might happen to the funds, should you choose to wind up the plan?
A.	My understanding, as I have mentioned earlier, is that if the plan was would up, that the funds would come back to Marcantonio and would be treated as income to Marcantonio.
Q.	Did you ever anticipate that it might go to charity instead?
A.	I can't say that. Our intent was to use the plan for its intended purpose. That was our intent was to use the plan

> for what it was set up to do. I can't say that I went through every other case that could have possibly happened, no.[24]

[100] No doubt, Mr. Filoso's assertion that "[o]ur intent was to use the plan for its intended purpose … to use the plan for what it was set up to do" was intended to mean that the plan was simply established to provide himself and Giuseppe Marcantonio with disability, medical, dental and vision benefits. I think it extremely likely that if that were the true intention that it would have been done by establishing a plan to which the appellant was the only contributor and its two shareholder/directors were the only persons admitted or admissible. Considering all the evidence, I think it much more probable that the appellant's true intention was to accumulate wealth in a tax-free jurisdiction until such time as it was expedient to return the trust property to the appellant in Canada, albeit on a taxable basis, at that later time. Tax deferral, in other words, was the objective.

[101] For the foregoing reasons, I conclude that the appellant's contributions to the trusts were not made for the purpose of gaining or producing income, and that paragraph 18(1)(*a*) of the *Act* therefore precluded deduction of those contributions in the computation of the appellant's income. I turn now to the question whether the Minister was entitled to reassess the appellants as he did, after the expiry of the normal three-year reassessment period.

[102] The respondent relies on both subparagraph 152(4)(*a*)(i) and subparagraph 152(4)(*b*)(iii). In my view, the requirements of both are satisfied and either one entitles the Minister to reassess.

[103] The appellant's income tax return for the 1999 taxation year is in evidence at Tab 6 of Exhibit A-1. Incorporated as part of that return are the financial statements of the appellant for the year ended December 31, 1999. The net income declared by the appellant is $198,483. This amount is computed on Schedule 001 and the starting point for that computation is the income before income taxes of $73,845, derived from the Statement of Operations.[25] The largest overhead expense in that Statement of Operations is described as Management Salaries - $920,220. This amount includes within it the $504,500 accrued contribution to the MGAS trust.

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24 Evidence of Domenico Filoso, May 13, 2009, p. 164, l. 20 to p.166, l. 2.

25 Exhibit A-1, Tab 6, page 37.

[104] Similarly, the net income declared by the appellant for the 2000 taxation year is computed on Schedule 001 of the return, and the starting point for it is the net income of $263,279 derived from the Statement of Operations.[26] The Management Salaries expense is shown there to be $1,355,950 of which $709,500 is the accrued contribution to the 509 trust.

[105] Thus, the appellant claimed to deduct the two amounts of $544,500 in 1999 and $709,500 in 2000 by describing them as management salaries. For the reasons I have given, I find that these two amounts were not amounts that could properly be deducted from the appellant's income at all.

[106] The failure of the appellant to disclose in its returns for 1999 and 2000 the very large accruals to these two purported employee health and welfare plans must be considered in the light of Mr. Johnston's advice given to Mr. Filoso, who was the appellant's officer responsible for financial and taxation matters, including signing and filing the corporation's returns. In his two letters of opinion (Exhibit A-1, Tabs 18 and 19), which are virtually identical, he states, after discussing his own and Revenue Canada's divergent views as to the validity of these deductions:

> [The Revenue Canada] opinions are not based on law and as a result, do not have force of law. They do, however, indicate that Revenue Canada would challenge the GASP should they be made aware of it.

These letters were written after the income tax returns for 1999 and 2000 had been filed, but Mr. Johnston had given essentially the same advice to Mr. Filoso when the establishment of these trusts was first discussed with him in 1999.

[107] Viewed in that light, the failure of the appellant to disclose that more than $500,000 in 1999 and more than $700,000 in 2000 was being deducted from income on account of accrued liabilities to the MGAS and 509 trusts is nothing less than deliberate misrepresentation. Mr. Filoso, in his evidence, took the position that the income tax returns were prepared by qualified and experienced accountants, and that he simply relied on their advice in signing them. However, the officer signing the income tax returns cannot avoid his obligation in this way. He must:

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[26] Exhibit A-1, Tab 14, p. 6.

> … demonstrate a reasonable effort on his part in the circumstances and within his own framework of comprehension and competence to understand the component elements of that final result.[27]

Mr. Filoso admitted in his evidence that when signing the appellant's income tax returns he did no more than take a quick look through them. This is not adequate care in any circumstances. In this case he clearly knew that the amounts in question were being deducted as that was central to the decision to contribute them to the trusts in the first place, and he knew too that Revenue Canada, if it knew about them, would almost certainly consider them to be amounts that were not deductible. Taxpayers are, of course, entitled to claim as deductions items as to which they and the Minister hold different views, but they are not entitled to do it in a way that conceals from the Minister the fact that the deduction has been claimed. The taxpayer knows of the issue between them, and the Minister is entitled to know of it too. To conceal it in the way that the appellant did here is more than negligence or carelessness. It is wilful default, and it entitles the Minister to reassess beyond the normal time for doing so.

[108] The Minister's reassessments of MCI are also authorized by subparagraph 152(4)(*b*)(iii) as they are consequent upon transactions:

> … involving the taxpayer and a non-resident person with whom the taxpayer was not dealing at arm's length.

My conclusion that the taxpayer had the power to, and did, effect the change of the trustee from Continental Trust to Landmark Trust must lead to the conclusion that MCI and the trustee did not deal with each other at arm's length.[28]

[109] Ms. Kamin argued that subparagraph 152(4)(*b*)(iii) was enacted specifically to apply to transfer pricing cases, and cited the June 1987 White Paper on Tax Reform in support. The legislative history may of course, shed light on the true intended meaning of ambiguous legislation. Where the statutory language applies to the facts of the case, however, then the plain words must be given their full effect.[29]

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27 *Howell v. MNR*, 81 DTC 230, quoted with approval by Rouleau J. in *Can-Am Realty Ltd. v. The Queen*, 94 DTC 6293 @ p. 6300.

28 *Robson Leather Co. Ltd. v. MNR, supra.*

29 *Bell Expressvu Limited Partnership v. Rex,* [2002] SCC 42.

other grounds

[110] The respondent has pleaded numerous other grounds upon which she contends that the assessments may be sustained. In view of my conclusion that the contributions to the trusts in each of these cases were not made for the purpose of gaining or producing income I do not propose to deal with each of the alternatives. I will, however, address the respondent's argument that the plans and the trusts were shams, and therefore should be ignored for tax purposes.

[111] In each of these three cases the respondent has alleged that the trusts and the plans were shams. In the *Labow* appeals sham was pleaded as an assumption made by the Minister in assessing, based on four facts said to have been assumed. These are found in subparagraph 16(n) of the Further Amended Reply:

> **Sham**
>
> n) the Plan was a sham for the following reasons;
>
> i) the Appellant still held the funds;
>
> ii) the Appellant never had the intention of creating an insurance plan;
>
> iii) the Plan was created to produce a deduction;
>
> iv) the Plan did not pay any benefits during the relevant period;

The definition of sham that is generally accepted for purposes of taxation law is that of Diplock, L.J., found in *Snook v. London and West Riding Investments Ltd.*:[30]

> As regards the contention of the plaintiff that the transactions between himself, Auto-Finance, Ltd. and the defendants were a "sham", it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. One thing I think, however, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. Maclure* (16); *Stoneleigh Finance, Ltd. v. Phillips* (17), that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto

[30] [1967] 1 All E.R.518 @ 528.

> must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived. …

[112] As to the first of the factual allegations, the evidence shows clearly that the trustee held the funds, although the appellant did control the trustee through his power of removal and replacement given in the trust deed. As to the second, it turns on the question whether a one employer plan, or a multi-employer plan under which each employer's employees have access only to that employer's segregated fund to satisfy their claims, can properly be described as an insurance plan. As to the third allegation, I do not accept Dr. Labow's evidence on that point, and it is therefore not shown to be an incorrect assumption by the Minister. The fourth assumption is clearly correct. However, none of this necessarily brings the trust and the plan within the *Snook* definition of a sham, because it does not show that Dr. Labow and the trustee shared a common intention that the documents not create the legal rights and obligations that are set out in them.

[113] In the cases of Tanaschuk and MCI the allegations of sham are pleaded not as being based on facts assumed by the Minister in assessing, but as an alternative ground in support of the assessments added by the Deputy Minister of Justice in pleading. The respondent therefore bears the onus of proof regarding sham in those cases. In the Amended Reply in the *Tanaschuk* case it is pleaded this way in paragraph 21:

> 21 The purported creation of the Trust and Plan relied upon by the Appellant was a sham, in that it was intended to give the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations, if any, which the parties intended to create, because the parties to that Trust and Plan did not intend that the funds subject to it were to provide any benefits to the Appellant's employees, but were rather intended to be available for the future use of the Appellant and his spouse in her personal capacity.

In the Further Amended Reply in the *MCI* appeals the pleading is similar:

> 19 In the further alternative, the Trusts and Plans were shams, in that they were intended to give the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations, if any, which the parties intended to create, because the parties to the Trusts and Plans did not intend that the funds subject to them were to be used to provide any benefits to the Appellant's employees, but were rather intended to be available for the future use by the Appellant or its shareholders.

The evidence is far from clear that the trusts and the plans in these cases were not intended to create the legal relations that they appear to create. I have found that the appellants intended that the funds would be "repatriated" at some time, but that does not preclude the possibility that the trustee might receive and honour claims in the meantime. It is not clear from the evidence how, or on what authority, Mr. Johnston thought that the trusts could be amended if the plans were to be wound up at some future time. He was not asked to explain this, and he did not do so. The proper law of the trusts according to their express terms is the law of Bermuda, and neither party called any evidence as to the applicable Bermudian law. I note, too, that under the terms of the trusts in the *Tanaschuk* and *MCI* appeals the trustee, with the consent of the protector, or the enforcer in the case of *MCI*, may change the proper law of the trust to that of some other jurisdiction of its choosing. All these circumstances make me disinclined to express any conclusion as to the sham issue.

[114] The respondent also advanced as alternatives a number of other grounds in support of the reassessments, but in view of my conclusion with respect to paragraph 18(1)(a) of the *Act* it is not necessary to deal with these.

[115] The appeals of all the appellants for all the years under appeal are dismissed. The respondent is entitled to costs, including a counsel fee for two counsel for 10 days of trial. If the parties are unable to agree as to the apportionment of the liability among the appellants, or as to the appropriate disposition of costs in the appeals of Guiseppe Marcantonio and Domenico Filoso that were allowed on consent at the beginning of the trial, then they may each file written submissions, not to exceed six pages.

Signed at Ottawa, Canada, this 6th day of August, 2010.

"E.A. Bowie"

Bowie J.

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DATE OF JUDGMENT:	August 6, 2010

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