Docket: 2014-3401(IT)G

BETWEEN:

JAMES T. GRENON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of The RRSP Trust of James T. Grenon (552-53721) by its Trustee CIBC Trust Corporation – 2014-4440(IT)G

Appeal heard on February 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 2019 and September 9, 10, 11, 12 13, 2019, at Winnipeg, Manitoba.

Before: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the Appellant:	Cy M. Fien Brandon Barnes Trickett Ari M. Hanson Aron W. Grusko
Counsel for the Respondent:	Ifeanyi Nwachukwu Tanis Halpape Christopher Kitchen Jeremy Tiger

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AMENDED JUDGMENT

[This Amended Judgment is issued in
substitution of the Judgment dated April 9, 2021 to
correct and add counsel's names.]

In accordance with the attached Reasons for Judgment, the appeal from Notices of Reassessment made by the Minister of National Revenue on February 28, 2013 in respect of the 2008 and 2009 taxation years, pursuant to subsection 56(2) of the *Income Tax Act* AND the appeal from the Notices of Assessment made on March 1, 2013 in respect of the 2004 to 2011 taxation years, pursuant to subsection 204.1(2.1) of the *Income Tax Act*, are hereby allowed.

The parties will have 60 days from the date of hereof to provide written submissions regarding costs. Such submissions shall not exceed 15 pages for each party.

Signed at Ottawa, Canada, this 27th day of April 2021.

"Guy R. Smith"

Smith J.

Docket: 2014-4440(IT)G

BETWEEN:

THE RRSP OF JAMES T. GRENON (552-53721)
BY ITS TRUSTEE CIBC TRUST CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of
James T. Grenon – 2014-3401(IT)G

Appeal heard on February 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 2019 and September 9, 10, 11, 12 13, 2019, at Winnipeg, Manitoba.

Before: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the Appellant:	John J. Tobin Linda Plumpton James Gotowiec Cy M. Fien Brandon Barnes Trickett Ari M. Hanson Aron W. Grusko
Counsel for the Respondent:	Ifeanyi Nwachukwu Tanis Halpape Christopher Kitchen Jeremy Tiger

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AMENDED JUDGMENT

[This Amended Judgment is issued in
substitution of the Judgment dated April 9, 2021 to
correct and add counsel's names.]

In accordance with the attached Reasons for Judgement, the appeal from Notices of Assessment made by the Minister of National Revenue on March 6, 2013 in respect of the 2004 to 2009 taxation years, pursuant to subsection 146(10.1) of the *Income Tax Act* is allowed and the appeal is referred the back to the Minister for reconsideration and reassessment on that basis that the income of the RRSP Trust received from the Income Funds (described herein as the Distribution Transactions) during the 2005 taxation year, shall be reduced by $136,654,427;

The appeal from Notices of Reassessment dated March 6, 2013 in respect of the 2004 to 2009 taxation years, pursuant to subsection 207.1(1) of the *Income Tax Act*, is hereby dismissed.

The parties will have 60 days from the date of hereof to provide written submissions regarding costs. Such submissions shall not exceed 15 pages for each party.

Signed at Ottawa, Canada, this 27th day of April 2021.

"Guy R. Smith"

Smith J

Table of Contents

Citation:2021 TCC 30
Date:20210601
Docket: 2014-3401(IT)G

BETWEEN:

JAMES T. GRENON,

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Docket: 2014-4440(IT)G

THE RRSP OF JAMES T. GRENON (552-53721)
BY ITS TRUSTEE CIBC TRUST CORPORATION,

Appellant,

and

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Respondent.

FURTHER AMENDED REASONS FOR JUDGMENT

Smith J.

I. **OVERVIEW**

[1] James T. Grenon (the "Appellant") was the annuitant of a Registered Retirement Savings Plan (the "RRSP Trust") in which he had accumulated substantial assets. CIBC Trust Corporation ("CIBC Trust") acted as trustee.

[2] The Appellant established and promoted several income funds (the "Income Funds") each of which raised a relatively modest amount of capital relying on the exempt distribution rules of the provinces of Alberta and British Columbia. The investors in each fund were essentially the same but the Appellant also participated, acquiring units personally and through investment vehicles he owned or controlled.

[3] Following the closing of the exempt distributions, the Appellant (acting alone or in concert with two other individuals and their respective RRSPs) then arranged for the RRSP Trust to acquire in excess of 99% of the units of the Income Funds.

[4] The Income Funds then invested in flow-through investment vehicles that served as conduits for the acquisition of business ventures or investments controlled directly or indirectly by the Appellant, the profits of which flowed back to the Income Funds and were distributed to unitholders, including the RRSP Trust.

[5] It is not disputed that the Appellant intended from the beginning to structure the Income Funds as qualified investments for RRSP purposes and one of the key issues in this appeal is whether they met the definition of a "mutual fund trust".

[6] The Minister of National Revenue (the "Minister") has taken the position that the steps undertaken to establish the Income Funds were not legally effective such that they were not a "qualified investment" for RRSP purposes or alternatively, that they were a sham or mere window dressing intended to allow the Appellant to manipulate the RRSP regime by using the funds in the RRSP Trust to acquire and actively manage businesses or investments, the profits of which flowed back to the RRSP Trust where they continued to accrue on a tax-exempt basis. The Minister has also relied on the general anti-avoidance rule ("GAAR").

[7] The appeals herein were heard on common evidence with the appeals in *Magren Holdings Ltd. v. Her Majesty the Queen*, 2017-486(IT)G; *2176 Investments Ltd. v. Her Majesty the Queen*, 2017-605(IT)G; and *Magren Holdings Ltd. v. Her Majesty the Queen*, 2017-606(IT)G (the "Corporate Appeals"). Reasons for Judgment in respect of the Corporate Appeals will be issued separately.

[8] The "Appellant" will refer to Mr. Grenon in his personal capacity and as the annuitant of the RRSP Trust and the "Appellants" will refer to both Mr. Grenon and the CIBC Trust. Unless otherwise indicated, the 2004 to 2011 taxation years will be referred to as the relevant period (the "Relevant Period").

[9] Unless otherwise indicated, all references to legislative provisions in these Reasons for Judgment are references to the legislative provisions of the *Income Tax Act*[1], (the "*Act*") including Regulations promulgated under the *Act*, that relate to the assessments or reassessments and the taxation years in question.

[1] R.S.C., 1985, c.1 (5th Suppl.)

II. **BACKGROUND FACTS**

[10] The Appellant testified on his own behalf but also called four fact witnesses, all of whom had acquired units in the Income Funds. Two other witnesses testified on behalf of the CIBC. Their respective testimony will be reviewed below.

[11] Alan B. Martyszenko testified as an expert witness but his testimony relates primarily to the Corporate Appeals and will not be reviewed herein.

[12] The Minister did not call any witnesses but relied on the affidavit of Helen Little, an auditor with the Canada Revenue Agency ("CRA").

a) The Appellant

[13] The Appellant completed a law degree at University of Manitoba in 1980 and practiced law in Alberta for a short period of time before pursuing an interest in corporate finance and investments. He resided in Alberta during the Relevant Period but became a non-resident when he emigrated to New Zealand in 2012.

[14] Early in his career, the Appellant became involved with a company known as Tom Capital Associates Inc. ("Tom Capital") that focused on general corporate finance including loans and distressed lending. During the Relevant Period, it was controlled by Grencorp Management Inc. ("GMI"), wholly-owned by the Appellant.

[15] The Appellant also owned or controlled numerous other companies or entities that were used in the Income Funds structure including 100% of the shares of 1042946 Alberta Inc. ("1042 Inc.") and 1019109 Alberta Inc. ("1019 Inc.") that acted as general partners as well as participating interests in Colborne Capital Corporation ("CCC") and Landcraft Development Corporation ("Landcraft").

[16] The Appellant was also involved in the early stages of the Alberta oil and gas industry and as a result of these activities, gained significant personal wealth.

[17] By 2003, the Appellant had accumulated substantial assets in the RRSP Trust including approximately $39 million in cash and cash equivalents and a 58% interest in Foremost Industries Income Fund ("FMO"), a publicly traded mutual fund trust created in 2001, of which he was a trustee.

[18] By March 2004, the units of FMO were valued at $46 million and the total value of the RRSP Trust at that point in time was approximately $90 million.

[19] It was apparent that the Appellant was a sophisticated individual whose knowledge of income tax law surpassed that of ordinary taxpayers. He readily admitted that he frequently consulted the *Act* and generally followed developments in income tax law. He described this as one of his hobbies.

[20] With respect to the RRSP Trust, the Appellant explained that he was not interested in passive investments or in a diversified portfolio of publicly traded companies. He wanted to be as actively involved as possible in the management of the investments acquired. He understood the financial consequences of withdrawing funds from an RRSP which he described as financial "suicide".

[21] With respect to the structure of his investments or businesses, the Appellant explained that he preferred a flow-through structure using business trusts or limited partnerships that he viewed as more efficient from an income tax point of view.

[22] With respect to the Income Funds, the Appellant's objective was to broaden his RRSP investment horizon and to provide flexibility in the management of his investments in a way that was not normally possible within an RRSP.

[23] He was also not especially interested in raising large amounts of capital from a wide array of investors. As will be seen below, he only sought to raise as much capital from as many investors as was needed to meet or exceed the minimum requirements of a "mutual fund trust" as defined by the *Act*.

[24] Since he had already accumulated substantial assets in the RRSP Trust, what he needed was an appropriate vehicle to invest those funds. He was of the view that the Income Fund structure was "best aligned with his investment objectives."

[25] With respect to at least two Income Funds, the Appellant collaborated with two other business associates, namely Bruce MacLennan ("MacLennan") and Angus Sutherland ("Sutherland"). Both individuals acquired units of two Income Funds, accepting a transfer from the Grenon RRSP in exchange for cash from their respective RRSP's (the "MacLennan RRSP" and "Sutherland RRSP") and assumed various roles in the Income Fund structure. They acted as trustee of some funds or as directors of various companies that acted as general partners. As will be seen in greater detail below, the MacLennan RRSP and Sutherland RRSP each held a 49% interest in two Income Funds.

[26] Although the Appellant was the promoter of all the Income Funds, the Minister has described all three individuals as insiders (the "Insiders") in connection

with the Income Fund structure. According to the Minister's assumptions[2] "the structures were crafted so that Insiders could obtain a number of tax related benefits from these non-arm's length structures" including the following (the Minister refers to the Income Funds as the "Promoted Funds"):

- The reduction and postponement of taxes payable by Grenon and various businesses owned by Grenon, through the payment of interest and management fees to related entities;

- The deferral of tax on the distribution of income to the various RRSP Trusts held by the Insiders, including the Grenon RRSP Trust, income that would otherwise be distributed as dividends, or otherwise, subject to tax;

- The avoidance of Part 1 and Part X1.1 tax on non-qualifying investments held by the Insiders' RRSP Trusts, including the Grenon RRSP Trust;

-The avoidance of Part X.1 tax on excess amounts contributed to the Grenon RRSP Trust in respect of the amounts that the Grenon RRSP Trust received from the Promoted Funds.

b) The Income Funds

[27] The Income Funds that are relevant to these appeals were established in 2003 and 2006. The 2003 series of Income Funds (described as Tom 2003-1, Tom 2003-2, Tom 2003-3, Tom 2003-4) were established in Alberta by separate deeds of trust dated March 14, 2003. The 2006 series of Income Funds (known as Tom 2006-5 and Tom 2006-8) were similarly established on June 30, 2006.

[28] Each Income Fund undertook a first distribution of units to 171 Investors (the "First Distribution") relying on a prospectus exemption pursuant to the securities legislation of the provinces of Alberta and British Columbia ("BC") known as the "Offering Memorandum Exemption" ("OME").

[29] The units in the 2003 series of Income Funds were distributed pursuant to the OME requirements described in Part 4 of Multilateral Instrument 45-103 *Capital Raising Exemptions.*[3] The units in the 2006 Income Funds were issued pursuant to the OME requirements described in Part 2 of National Instrument 45-106 *Prospectus*

[2] Paragraph 19(dd) of the Fresh as Further Amended Reply.
[3] Adopted by the Alberta Securities Commission effective March 30, 2002 and by the BC Securities Commission effective April 3, 2002.

and Registration Exemptions[4]. The OME requirements of Multilateral Instrument 45-103 and National Instrument 45-106 (the "Instruments") are substantially the same and where there are differences, they are not material in these appeals.

[30] An Offering Memorandum ("OM") was prepared for each Income Fund indicating that a minimum of 100 units (a "block of units") valued at $7.50 per unit for a total of $750 would be issued to each investor, subject to a minimum of 160 investors (the "Investors"). All units had the same rights. The investment process involved delivery of the OM to prospective investors who were then required to sign the risk acknowledgment (the "Risk Acknowledgment") and subscription agreement (the "Subscription Agreement") forms.

[31] Each Income Fund allegedly issued units to 171 Investors thus raising approximately $128,250, subject to nominal legal and accounting fees. As explained by the Appellant, the minimum subscription amount and minimum number of Investors, was established by him with the intention that it meet or exceed the minimum requirements of a "mutual fund trust", as defined by the *Act*.

[32] The Appellant participated as an Investor in the First Distribution acquiring a block of units for himself but additional units were acquired by entities owned or controlled by him including Grencorp, Tom Capital, Tom Capital Consulting Corp and Tom Consulting Limited Partnership. All were included as part of the Investors.

[33] As will be seen in greater detail below, the units were promoted and distributed to the Appellant's immediate and extended family members, friends, employees, business associates and others with whom he was not as closely connected. In any event, it is not disputed that Investors who acquired units in the 2003 and 2006 series of Income Funds were essentially the same persons. Additionally, I find that all Investors were residents of Alberta or BC.

[34] The OM indicated that it was a "blind pool offering" or "junior capital pool" and that the business would be identified by trustees at a later date. It indicated that investors would be "restricted from selling their units for an indefinite period to time" but that the Appellant would provide liquidity to those who might wish to redeem their units at cost (though this never occurred). It also indicated that the Appellant would "invest at least $1,000,000 in the Fund" and that he or other trustees

[4] Adopted by the Alberta Securities Commission and the BC Securities Commission effective September 14, 2005.

would acquire at least 66.66% of the units, thus allowing them "to substantially control the Fund".

[35] Each OM contained a certificate indicating: "This Offering Memorandum does not contain a misrepresentation". It was signed by the Appellant as trustee and promoter and included the following statement:

> No securities regulatory authority has assessed the merits of the Units or reviewed this offering memorandum. Any representation to the contrary is an offence. This is a risky investment (…)

[36] Finally, the OM contained an explanation of the "Tax Status of the Fund" indicating that, subject to certain conditions, it would be a "unit trust" and a "mutual fund trust" and thus a "qualified investment for Exempt Plans". It added that if the fund ceased to qualify as a "mutual fund trust", investors who acquired units in an exempt plan would have to pay a 1% tax on the fair market value of the units and report any income or gains personally.

[37] Upon completion of the First Distribution, the Appellant selected and arranged for the appointment of the trustees of the Income Funds, including Bruce MacLennan and Deborah Nickerson, as well as various legal counsel.

[38] As will be seen in greater detail below, the income fund structure generally included a series of trusts described as fund venture trusts ("FVT's") wholly-owned by the Income Funds. The FVT's in turn held 99.99% of the units of a master limited partnership ("MLP") that established a series of limited partnerships, as required, to acquire various investments or businesses. A corporation generally wholly-owned or controlled by the Appellant or other Insiders acted as general partner and held a 0.01% interest. The 2006 series of Income Funds did not use an FVT and investments were held directly.

c) The acquisition of units by the RRSP Trust

[39] Following completion of the First Distribution (including the filing of a report with the Alberta and BC securities commission), the Appellant undertook a second distribution of units in favour of his RRSP Trust which resulted in a substantial dilution of the initial Investors' aggregate holdings.

[40] The table below provides a detailed breakdown of the subscriptions made by the RRSP Trust in the 2003 and 2006 series of Income Funds, setting out the date of

the subscription, the number of units acquired, the value of the units and the subscription amount, collectively referred to as the second distribution (the "Second Distribution"):[5]

Subscriptions made by the RRSP Trust in the Income Funds

2003-1 Income Fund

Sub. Date	# of Units	Value of Units	Amount ($)
June. 2003	1,575,000	7.50	11,812,500
Jan. 2005	3,400,000	9.06	30,804,000
Dec. 2007	1,390,500	8.99	12,500,595
Total			**55,117,095**

2003-2 Income Fund

Sub Date	# of Units	Value of Units	Amount ($)
Sept. 2003	540,000	7.50	4,050,000
Sept. 2006	225,800	15.50	3,499,900
July 2007	60,000	14.94	896,400
May 2008	147,700	15.08	2,227,316
July 2010	41,666	18.00	749,988
Total			**11,423,604**

2003-3 Income Fund

Sub Date	# of Units	Value of Units	Amount ($)
Sept. 2003	540,000	7.50	4,050,000
Total			**4,050,000**

2003-4 Income Fund

Sub Date	# of Units	Value of Units	Amount ($)
Nov. 2005	3,821,850	40.00	152,874,000
May 2006	4,000,000	5.53	22,120,000
Total			**174,994,000**

2006-5 Income Fund

Sub Date	# of Units	Value of Units	Amount ($)
March 2008	320,000	7.50	2,400,000
July 2008	213,333	7.50	1,599,998
Total			**3,999,998**

2006-8 Income Fund

Sub Date	# of Units	Value of Units	Amount ($)
August 2008	5,333,333	7.50	39,999,998

[5] Tab 3 of the Appellant's Compendium of Documents

August 2009	3,176,620	7.87	24,999,999
Total			**64,999,997**

[41] The total amounts are further summarized in the table below. The RRSP Trust acquired units of the 2003 Income Funds and the 2006 Income Funds, valued at approximately $245 million and $69 million, respectively:

Total number and value of units acquired by the RRSP Trust[6]

Subscription Year	2003 Income Funds		2006 Income Funds	
	Number of Units	Amount ($)	Number of Units	Amount ($)
2003	2,655,000	19,912,500	0	0
2004	0	0	0	0
2005	7,221,850	183,678,012	0	0
2006	4,225,800	25,619,900	0	0
2007	1,450,500	13,396,995	0	0
2008	147,700	2,227,316	5,866,666	43,999,996
2009	0	0	3,176,620	24,999,999
Total	**15,742,516**	**$245,584,711**	**9,043,286.00**	**$68,999,995**

[7]

[42] As a prerequisite to the acquisition of units in the Income Funds (the "Acquisition Transactions"), CIBC Trust required delivery of certain documents including copies of the OM, the subscription documents and a legal opinion from a reputable law firm to confirm that the Income Funds were qualified investments. The process and documentation required was more fully explained by Kerri Calhoun and Sabrina Tam, employees of the CIBC, whose testimony is summarized below.

[43] A total of twelve legal opinions were issued, one for each Acquisition Transaction (collectively, the "Legal Opinions"). The Legal Opinions were set out

[6] See below

[7] This table was taken, with slight modifications, from the Written Submissions of the Crown (Volume 1 of 3). I have corrected the table to include the subscription amount of $3,999,998 for the 2006-5 Income Fund in 2008. This has the effect of increasing the total amount for the 2006 Promoted Funds to $68,999,995 instead of $64,999,997.

on the law firm's letterhead and addressed to CIBC Trust. They contained four paragraphs including the following:

> For the purposes of this opinion, we have relied upon the facts represented to us by James T. Grenon in the form of the Trustee's Certificate attached hereto and other matters as we have considered necessary or appropriate for the purpose of this opinion.

[44] Four of the Legal Opinions were distinct in that they included a caveat that the facts represented in the Trustee's Certificate (the "Certificates") had not been "independently verified" and that if the facts differed "from those presented (…) this opinion may not be valid." All of the Legal Opinions concluded that the Income Funds were "qualified investments under the Act for the RRSP maintained for the benefit of James T. Grenon."

[45] The Certificates signed by the Appellant contained an acknowledgment that the Legal Opinions would be based in part on the factual information set out in the certificate wherein the Appellant represented that he knew those facts to be true and correct and specifically that:

> In respect of the Fund, an offering memorandum has been filed with the Alberta Securities Commission and the British Columbia Securities Commission and there has been a lawful distribution in Alberta and British Columbia to the public of Units of the Fund in accordance with the offering memorandum.

[46] When the RRSP Trust acquired units of the Income Funds that were already engaged in business or investment activities, valuation reports prepared by accounting firm Grant Thornton (the "Grant Thornton valuations") were included with the Legal Opinions. These valuation reports were intended to support the issuance of units at prices exceeding the initial subscription price of $7.50 per unit.

[47] As will be seen in greater detail below, the Income Funds were required to file a report with the securities commission within 10 days from the completion of the distribution of units. Reports were filed in connection with the First Distribution but no evidence was adduced to demonstrate that reports were filed in connection with the Second Distributions.

d) The income distributions made by the Income Funds

[48] The profits from the various investments or businesses were flowed-up through the various entities, including the FVT's, to the Income Funds and were then

distributed to unitholders, including the RRSP Trust. Trustee resolutions to support the distribution of profits were prepared and reported in the T3 Returns.

[49] According to the Minister, a total of $186,489,148 was distributed to the RRSP Trust (the "Distribution Transactions"). The table below represents a summary of all distributions made from the Income Funds to the RRSP Trust during the Relevant Period (the "Distribution Transactions"):

Total distributions made by the Income Funds to the RRSP Trust

	2003-1	2003-2	2003-3	2003-4	2006-8	**Total**
2004		4,192,015	1,924,362			6,116,377
2005	6,372,526	3,493,797	4,773,945	136,654,427		151,294,695
2006	4,176,831	861,930	3,232,052	2,636,201		10,907,014
2007	2,513,091	2,194,196	2,838,325	2,554,003		10,099,615
2008	1,381,913	2,050,920				3,432,833*
2009		1,516,445			3,122,169	4,638,614
Total	**14,444,361**	**14,309,303**	**12,768,594**	**141,844,631**	**3,122,169**	**186,489,148**

[8]

[50] As will be seen in greater detail below, there is some dispute as to the actual distributions made in 2005 by the 2003-4 Income Fund. The Appellant argues that the distributions made in that year resulted from the issuance of new units to the RRSP Trust in exchange for the transfer of the FMO units to the 2003-4 Income Fund and that this did not have the effect of increasing the value of the RRSP Trust. The Appellant also argues that the Minister failed to account for a loss of $129,876,648 realized by the RRSP Trust on the disposition of those units in 2008.

[51] In any event, the Appellant has acknowledged that the RRSP Trust earned approximately $58 million from the Income Funds during the Relevant Period.

[8] The Minister has acknowledged that this amount should be reduced by $1,806,008 to $3,432,833: Written Submissions of the Crown, volume 1, page 40.

[52] The Appellant as trustee, approved the filing of the respective T3 Trust Income Tax and Information Returns on an annual basis indicating that each fund was a "mutual fund trust". Similarly, CIBC as trustee filed a T3GR Return in which it was required to list all "taxable" RRSP's (meaning RRSPs that held non-qualified investments) with the applicable tax withheld and remitted to the Minister. The RRSP Trust was grouped with others in a specimen plan but was not listed as a taxable RRSP holding non-qualified investments. The annual filing of the T3GR Returns was explained by the CIBC employees and will be addressed below.

e) Tom 2003-1 Income Fund

[53] In June 2003 (shortly after the closing of the First Distribution), the RRSP Trust initially subscribed for 1,575,000 units of the Tom 2003-1 Income Fund at $7.50 per unit for total proceeds of $11,812,500. Additional subscriptions were made at later dates, as detailed above.

[54] As with all Income Funds, a corporation acted as trustee of the FVT to ensure a form of creditor protection, as explained by the Appellant. In this instance, 1019 Inc., a corporation wholly owned by the Appellant, acted as general partner.

[55] This fund held 100% of the units of the Tom 2003-1 FVT that owned 99.99% of the units of the Tom 2003-1 Master Limited Partnership. ("MLP-1"). 1042 Inc., another corporation wholly owned by the Appellant, acted as general partner. Beginning in 2005, MLP-1 acquired a 99.99% in both the Raywal Limited Partnership and the Tom 2003-1 Limited Partnership-1 that held 100% of the units or shares in 1213321 Alberta Ltd., Raywal Kitchens Inc. and 2037629 Ontario Inc.

[56] In 2006, the Tom 2003-1 Income Fund acquired a 99.99% interest in Can-Am Kitchens Limited Partnership and a 75% participating interest in Landcraft Limited Partnership with Landraft as the general partner. Prior to these transactions, 75% of the shares in Landcraft were owned by the Appellant. The Appellant also owned or controlled several of the companies that acted as general partners.

[57] The Tom 2003-1 Income Fund also entered into several loan transactions. On August 1, 2003, it entered into a loan agreement for $10 million with CCC, owned in part by Grencorp, the Appellant's management company. Security for the loan in the form of a general security agreement securing the assets and undertakings of CCC, was signed by the Appellant on behalf of the borrower.

[58] As noted in the table above, the 2003-1 Income Fund distributed a total of $14,444,361 to the RRSP Trust during the Relevant Period.

f) Tom 2003-2 Income Fund

[59] In September 2003, the RRSP Trust initially subscribed for 540,000 units of the Tom 2003-2 Income Fund at $7.50 per unit for total proceeds of $4,050,000. The MacLennan RRSP owned 49% of the units in this fund. MacLennan owned 100% of the shares in Century Services Inc. ("Century Services") that was involved in the business of distressed lending.

[60] The Tom 2003-2 Income Fund held 100% of the units in a FVT whose primary investment was a 99.99% interest in the Century Services Limited Partnership ("CSLP") established on November 15, 2003. Century Services held the remaining interest and acted as general partner.

[61] In December 2003, CSLP purchased the assets and liabilities of Century Services Partnership for $12.6 million. The only assets of that partnership were the shares of Century Services. In 2005, Century Services paid management fees of $5,692,000 to CSLP. The net income of CSLP was paid to the 2003-2 FVT and then to the Tom 2003-2 Income Fund.

[62] As noted above, this fund distributed a total of $14,309,303 to the RRSP Trust during the Relevant Period, excluding the amounts distributed to the MacLennan RRSP.

g) Tom 2003-3 Income Fund

[63] In September 2003, the RRSP Trust subscribed for 540,000 units of the 2003-3 Income Fund at $7.50 per unit for total proceeds of $4,050,000. The RRSP Trust and Sutherland RRSP each owned 49% of the units and the remaining units were held by the Investors. This fund owned 100% of the units in the Tom 2003-3 FVT which owned 99.99% of the units in MLP-3 formed in January 2004. The general partner was 661314 B.C. Ltd. ("661 Ltd."), a company controlled by Sutherland.

[64] Sutherland had a controlling interest in Silvercreek Development Corporation and was involved in the development, subdivision and sale of commercial and residential properties in Alberta and British Columbia.

[65] MLP-3 owned 99.99% of the units in Silvercreek Abbortsford Limited Partnership ("SALP"), formed in February 2004. Several other limited partnerships were later created but in all instances 661 Ltd. was the general partner.

[66] Properties were identified for development and a corporation owned by Sutherland would acquire the property. SALP or other limited partnerships in which MLP-3 owned 99.99% of the units, acted as limited partners while 661 acted as general partner. These properties were developed and sold to third parties. The net income was paid by the limited partnerships to MLP-3 and then to the 2003-3 FVT, followed by distributions to the 2003-3 Income Fund.

[67] As appears from the table above, the Tom 2003-3 Income Fund distributed a total of $12,768,594 to the RRSP Trust during the Relevant Period, excluding amounts paid to the Sutherland RRSP.

h) Tom 2003-4 Income Fund

[68] The Tom 2003-4 Income Fund was not directly involved in any business and its income was generated from loans made to related parties including other Income Funds. It was referred to by the Appellant as the "fund of funds".

[69] As noted above, the Tom 2003-4 Income Fund acquired the units of FMO, a publicly traded mutual fund trust, held by the RRSP Trust. As long as the units of FMO were actually held by the RRSP Trust, the Minister has acknowledged that they were a qualified investment for RRSP purposes.

[70] This transaction took place on November 14, 2005, and involved, *inter alia*, a transfer by the RRSP Trust of its 58% interest in FMO to the 2003-4 Income fund, in exchange for units. As part of that transaction, the RRSP Trust submitted a subscription for 3,821,850 units valued at $40 per unit for a total $152,874,012.

[71] In May 2006, the RRSP Trust submitted a further subscription for 4 million units valued at $5.53 per unit for net proceeds of $22,120,000. No explanation was provided to the Court as to why the value of the units had decreased in value between November 2005 and May 2006.

[72] As noted in paragraph k) of the Reply to the Fresh as Further Amended Reply, the transaction involving the transfer of the FMO units is more particularly described in the Corporate Appeals.

i) Tom 2006-5 Income Fund

[73] The Tom 2006-5 Income Fund was settled in 2006.

[74] In March 2008, the RRSP Trust subscribed for 320,000 units at $7.50 per units for net proceeds of $2,400,000 and in July 2008, it subscribed for an additional 213,333 units at $7.50 per unit for net proceeds of $1,599,998.

[75] As a result of these subscriptions, the RRSP Trust controlled more than 99% of the outstanding units but no distributions were made during the Relevant Period. The proposed acquisition was never completed and all units were eventually redeemed at cost.

j) Tom 2006-8 Income Fund

[76] The 2006-8 Income Fund was also settled in 2006.

[77] In March 2008, the RRSP Trust subscribed for 5,333,333 units at $7.50 per unit for net proceeds of $39,999,998 and in August 2009, it subscribed for a further 3,176,620 units at $7.87 per unit for net proceeds of $24,999,999.

[78] On August 12, 2008, the Tom 2006-8 Income Fund entered into a loan transaction with the Appellant extending a loan of $18,000,000 at 9%per annum. The loan proceeds were used for investment purposes and the Appellant acknowledged in oral testimony that he claimed the interest charges as a deduction on his personal tax return. Several other loans were made to related corporations.

[79] As noted in the table above, the 2006-8 Income Fund made distributions of $3,122,169 to the RRSP Trust during the Relevant Period.

k) The Fact witnesses

Geoffrey Merritt

[80] The Appellant called Geoffrey Merritt, a chemical engineer with extensive experience in the oil and gas industry. He invested in both the 2003 and 2006 series of Income Funds with his spouse and 2 children, aged 15 and 18 in 2003.

[81] Mr. Merritt was made aware of the funds through the Appellant's brother and since he knew that the Appellant would be investing his own money, he did not feel the need to conduct any further due diligence. He confirmed signing the subscription documents on behalf of his spouse and children and receiving income distributions and T3's over the years. He stated that his children held investments in other securities from a young age but no corroborating evidence was adduced.

Mary Yee

[82] Mary Yee was employed as a legal assistant with Tom Capital for 14 years and provided administrative assistance for the Income Funds, including up-dates to unitholders, distributions, tax slips and notices of annual meetings.

[83] She testified that all the investors in the Income Funds were residents of Alberta or BC and that while minors had subscribed for units, none had ever refuted the subscription or refused or returned a distribution cheque, even upon reaching the age of majority. She and her spouse had subscribed for units in the 2006 series of Income Funds based on the success of the 2003 series.

Deborah Nickerson

[84] Deborah Nickerson joined the accounting team of Tom Capital in 2005 and eventually assumed a leadership role. She also provided accounting services for both Tom Capital and the Income Funds and served as trustee for several funds. She provided those services through a numbered company.

[85] Ms. Nickernon also provided advice as to the appropriate interest rate and security to be provided for loans from the Income Funds to related parties such as the Appellant. She felt that the terms were commercially reasonable but acknowledged that she had no formal training or credentials in this area. She also indicated that the Income Funds were regularly reviewed by external accountants, that clarifications were provided where needed and that if any issues arose, they were always resolved.

[86] In connection with the Income Funds, she too confirmed that all Investors were residents of either Alberta or BC and that units had been issued to minors. In fact, she testified that she had signed the Subscription Agreement and Risk Acknowledgment forms for her two children, aged 10 And 13 at the time of the subscriptions in 2003. She also indicated that the subscription funds for her children

were intended as loans to be reimbursed once the units were redeemed. She acknowledged that she had no documentation to support this.

Bruce MacLennan

[87] Bruce MacLennan was the president of Century Services whose core business was appraising real estate or other assets for institutional and private lenders. It was also involved in distressed lending which is how he came into contact with the Appellant and Tom Capital.

[88] Mr. MacLennan served as trustee of the 2003 series of Income Funds. He testified that he signed the subscription and risk acknowledgement forms for his two children (both aged 5 in 2003) who acquired units in the 2003 series of Income Funds. Both children signed their own documents for the 2006 series of Income Funds but he witnessed their signature. During cross-examination, he acknowledged that he had actually paid the subscription price for his spouse and two children and, on re-examination, indicated that the amounts paid on their behalf were intended as gifts. All distribution cheques were deposited in their respective bank accounts.

Kerri Calhoun

[89] Kerri Calhoun joined CIBC Trust Corporation in 1988 and at the time of her testimony was Executive Director. She explained that only trust companies could act as trustees of an RRSP and as a result, CIBC, being a Canadian chartered bank, had appointed CIBC Trust as trustee for all its RRSP's. That said, CIBC Wood Gundy, and later CIBC Capital Markets Inc., were appointed as agents to manage the day-to-day administration and ensure that assets were qualified investments.

[90] Ms. Calhoun also explained that in a self-directed plan, the annuitant made all investment decisions and the role of CIBC Wood Gundy, as agent for CIBC Trust, was to ensure that investments were qualified investments under the *Act*.

[91] Other investments, described as non-public offerings or private placements, required additional documentation including the OM, Subscription Agreement as well as a legal opinion from a reputable law firm confirming that the investment was a qualified investment. The team tasked with the review of the documents would have been familiar with the requirements of the *Act* and *Regulations*.

[92] From CIBC's perspective, they relied on the legal opinions provided as to the status of the investment though it understood that the law firm itself would be relying on the statements made in a trustee certificate. If the investment was an initial offering, the value of the securities was determined with reference to the OM but for a secondary or subsequent offering, a valuation report prepared by a reputable accounting firm might be required. On cross-examination, she indicated that there was no obligation to obtain a comprehensive valuation report. They were only required to make reasonable efforts to obtain a fair market value of the proposed investment. She also indicated that for self-directed plans, in accordance with the contractual documentation required to open such a plan, it was ultimately up to the annuitant to ensure that the acquired assets were qualified investments.

[93] With respect to the CIBC Trust's filing obligations with the CRA, Ms. Calhoun indicated that CIBC would submit an application and declaration of trust. If the documentation was approved, CRA would assign a specimen plan number that could reference hundred of thousand of RRSP plans. On an annual basis, CIBC would then submit a T3GR – *Group Income Tax and Information Return for RRSP, RRIF, RESP, or RDSP Trusts*, being the prescribed form that included the fair market value of all RRSP's listed under that specimen plan.

[94] The T3GR included a listing of all RRSPs within the specimen plan that held non-qualified investments, described as taxable RRSP's, in which case taxes were deducted from the RRSP and paid to the CRA. In this instance, the RRSP Trust was not listed on any of the T3GR forms filed during the Relevant Period because, according to Ms. Calhoun, it did not hold any non-qualified investments.

[95] With respect to the documentation submitted by the Appellant or his agents, she was not aware and could not comment as to whether minors had acquired units in the Income Funds or who had actually paid the subscription amounts. Such enquiries were not made given the reliance on legal opinions.

[96] On cross-examination, she acknowledged her understanding that the T3GR was both an income tax return and information return but that if an RRSP trust had taxable income, a T3 Trust and Information Return was required to be filed.

[97] She indicated that a T3 Return was not filed for RRSPs that held only qualified investments as CRA did not require it to do so. She acknowledged that a T3 return had not been filed with the CRA in connection with the RRSP Trust.

Sabrina Tam

[98] Sabrina Tam was a director of business risk effectiveness at CIBC World Markets Inc. She commenced her employment with CIBC in 1999 as a compliance officer moving on in 2005 to the business risk and sales supervision group ("BBRS Group") tasked with reviewing and approving private-placement transactions.

[99] The BBRS Group reviewed all private placement documentation. If concerns arose, they consulted with the CIBC compliance or legal departments. She confirmed that the required documents included a subscription agreement to confirm both the value and number of securities being purchased as well as a risk acknowledgement and legal opinion from a reputable law firm confirming that the investment was a qualified investment for RRSP purposes. On cross-examination, she stated that they would typically rely on the legal opinion provided and would not parse the representations or certificates contained in the OM.

III. **THE ASSESSMENTS**

[100] The Minister has issued a number of assessments or reassessments (the "Reassessments") as described below but has acknowledged that the Part 1 assessments in both appeals seek to tax the same amounts for the 2008 and 2009 taxation years and that she can only be successful in one or the other:

a) Grenon Appeal - Part 1 Reassessments

[101] The Appellant appeals from Notices of Reassessment made by the Minister on February 28, 2013, on the basis that the payments of $3,432,833 and $4,638,614 made by the Income Funds to the RRSP Trust during the 2008 and 2009 taxation years, respectively, (the "Grenon Part 1 Reassessments"), should be assessed as indirect payments taxable in the hands of the Appellant on the basis of subsection 56(2)[9] or in the alternative on the basis of sham, window dressing or GAAR. The 2009 taxation year gave rise to a nil assessment, such that it is not under appeal, but the Appellant claimed a non-capital loss for that year, the amount of which is not in dispute, which he carried back to the 2006 taxation year. The Minister reduced the non-capital loss by $4,638,614, thus resulting in a consequential increase of the Appellant's taxable income for the 2006 taxation year.

b) Grenon Appeal - Part X.1 Assessments

[9] An assessment pursuant to subsection 15(1) was later abandoned.

[102] The Appellant also appeals from Notices of Assessment (T1-OVP) made by the Minister on March 1, 2013 (late filing penalties were later deleted by Notice of Reassessment dated August 13, 2014) in respect of the 2004 to 2011 taxation years (the "Grenon Part X.1 Assessments") on the basis that payments made by the Income Funds to the RRSP Trust (described herein as the Distribution Transactions) should be re-characterized as excess contributions to the RRSP Trust and subject to a tax of 1 % calculated monthly pursuant to subsection 204.1(2.1), or in the alternative, on the basis of sham, window dressing or GAAR.

c) RRSP Trust Appeal - Part 1 Assessments

[103] The RRSP Trust appeals from Notices of Assessment made by the Minister on March 6, 2013, served on CIBC as trustee, in respect of the 2004 to 2009 taxation years (the "RRSP Trust Part 1 Assessments") assessing taxes and late filing penalties on the payments made by the Income Funds to the RRSP Trust (described herein as the Distribution Transactions), pursuant to subsection 146(10.1) or in the alternative, on the basis of sham, window dressing or GAAR.

d) RRSP Trust Appeal - Part XI.1 Reassessments

[104] The RRSP Trust also appeals from Notices of Reassessment made by the Minister on March 6, 2013, served on CIBC as trustee, in respect of the 2004 to 2009 taxation years (the "RRSP Trust Part XI.1 Reassessments"), assessing a tax of 1% on the fair market value of the units of the Income Funds acquired by the RRSP Trust, pursuant to subsection 207.1(1) or, in the alternative, on the basis of sham, window dressing or GAAR. Late filing penalties were also assessed.

IV. **THE ISSUES**

[105] The issues in this appeal may be described as follows:

a) Grenon Appeal - Part 1 Reassessments and Part X.I Assessments

i. Whether the Income Funds were a "qualified investment" for RRSP purposes, as that term is defined in subsection 146(1) of the Act and *Regulation* 4900(1) and, more particularly, whether the Income Funds were properly constituted as a "mutual fund trust" as defined in subsection 132(6) and met the prescribed conditions set out in *Regulation* 4801, or alternatively qualified as a unit trust as described in *Regulation* 4900(1)(d.2);

ii. Whether the Income Funds were shams or mere window dressing;

iii. Whether the Minister was entitled to include the Income Fund payments made in respect of the 2008 and 2009 taxation years to the Appellant's personal income on the basis that they were "indirect payments" relying on subsection 56(2) or, in the alternative, whether the Minister was entitled to do so relying on sham, window dressing or GAAR, as a basis for the application of subsection 56(2);

iv. Whether the Minister was entitled to re-characterize the payments made by the Income Funds to the RRSP Trust, described herein as the Distribution Transactions, as "excess contributions" to the RRSP Trust, relying on sham or window dressing or alternatively on GAAR, and if so, whether the Appellant was entitled to a credit of $152,874,000 (or at least $136,654,427, being the lesser amount used by the Minister), being the value of the units issued to the RRSP Trust in exchange for the FMO units and/or to a further credit of $129,876,648 as a result of a loss suffered by the RRSP Trust from the disposition in 2008 of the units held in the 2003-4 Income Fund;

v. Whether the Part 1 and Part X.1 Reassessments are statute-barred and in particular, whether the Appellant was required to file a separate T1-OVP Return to report and pay tax on the excess contributions;

b) RRSP Trust Appeal - Part 1 Assessments and Part XI.1 Reassessments

i. Whether the Minister was entitled to assess the RRSP Trust on the basis that the Income Fund payments, described herein as the Distribution Transactions, were income derived from non-qualified investments, taxable pursuant to subsection 146(10.1) of the Act or alternatively, on the basis of sham, window dressing or GAAR and if so, whether the Appellant was entitled to a credit of $129,876,648 resulting from a loss suffered by the RRSP Trust from the disposition in 2008 of the units held in the 2003-4 Income Fund;

ii. Whether the Minister was entitled to assess the RRSP Trust for a tax equal to 1% calculated monthly on the fair market value of the units in the Income Funds at the time they were acquired, pursuant to subsection 207.1(1) of Part XI.1 of the Act or alternatively, on the basis of sham, window dressing or GAAR;

iii. Whether the Part 1 and Part XI.1 assessments are statute-barred on the basis that CIBC filed the T3GR form within 90 days from the end of each

applicable year, as required by subsection 207.2(1) and was assessed accordingly;

V. **PRELIMINARY ISSUES**

[106] The Court reserved on two issues at the conclusion of the hearing and what follows is the final disposition forming part of these Reasons for Judgment.

a) Admissibility of the Affidavit of Helen Little

[107] As noted above, the Respondent did not call any witnesses but on the final day of the hearing, tendered the affidavit of Helen Little (the "Affidavit"), an auditor with the CRA, relying on the following provision of the *Act*:

> **244(9) Proof of Documents –** An affidavit of an officer of the Canada Revenue Agency, sworn before a commissioner or other person authorized to take affidavits, setting out that the officer has charge of the appropriate records and that a document annexed to the affidavit is a document or true copy of a document, or a print-out of an electronic document, made by or on behalf of the Minister or a person exercising a power of the Minister or by or on behalf of a taxpayer, is evidence of the nature and contents of the document.

[108] Appended to the Affidavit, was a computer screen shot of the name and birthdate of all minors who had acquired units in the Income Funds. The Appellant was aware of its contents since it had been in the possession of counsel for several months prior to the actual hearing of the appeals.

[109] Helen Little's name had been included in the Respondent's list of potential witnesses with a short summary of her proposed testimony but she was not called to testify. When the Affidavit was tendered as evidence as the Respondent closed its case, the Appellant requested a sealing order given the confidential nature of the information pertaining to minors. The Court issued the Order, restricting access to Court officials, the parties to these proceedings and their authorized agents.

[110] The Appellant also reserved the right to make further written submissions as to the admissibility or weight of the Affidavit. There were no further objections.

[111] Aside from the sealing Order, no further ruling was made at that time and the intention of the Court, though not clearly expressed as appears from the transcript of the hearing, was to mark the Affidavit for identification purposes and to reserve on its admissibility, subject to written submissions to be delivered at a later date.

[112] The Appellant indicates in written submission that Helen Little was to be cross-examined at the hearing. It is argued that although she was present in court for most of the hearing, she was not present when the Respondent closed its case and this has deprived him of the fundamental right of cross-examination.

[113] There is little doubt that the facts that the Affidavit seeks to establish are relevant to the Minister's position i.e. whether minors acquired units of the Income Funds. It had been established that "the presumption is that relevant evidence is admissible and that all those called to testify with respect to relevant evidence are compellable": *Globe and mail v. Canada (AG)*, (2010) 2 SCR 592, (para 56).

[114] Thus, although Hellen Little was "compellable", the Appellant did not indicate to the Court that he wished to cross-examine her nor request an adjournment to secure her presence. Given that 5-6 days remained in the scheduled time allotted for the hearing of the appeals, there was still ample time to do so.

[115] As excerpted above, subsection 244(9) indicates that an "affidavit of an officer of the Canada Revenue Agency (…) setting out that the officer has charge of the appropriate records and that a document annexed" is a true copy of "a print-out of an electronic document (…) is evidence of the nature and contents of the document". Similarly, subsection 25(1) of the *Canada Evidence* Act, RSC, 1985, c C-5 provides that "[w]here an enactment provides that a document is evidence of a fact (…) that document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary".

[116] The Minister submits that the Appellant failed to introduce "any evidence to the contrary" by way of documentary or *viva voce* evidence as to the age of unit-holders in the Income Fund. As will be reviewed in greater detail below, the Appellant confirmed in oral testimony that subscription documents signed by minors or their guardian, had been accepted and units issued accordingly. This was also confirmed by several fact witnesses, as noted above.

[117] As noted by the Court at the hearing, the fact that minors had signed subscription documents was relatively uncontroversial. In fact, CIBC Trust has since indicated in written submissions (para. 44) that "[b]etween 35 and 40 unitholders were under the age of 18 years old when they subscribed".

[118] In *James Scott et al. vs. HMTQ*, 2017 TCC 224 ("*James Scott*") (paras 36-64), Sommerfeldt J. conducted a review of the applicable law on the admissibility of an affidavit under subsection 244(9). In that instance, the appellant had objected to the

filing of an affidavit without prior notice arguing that it "constituted prejudicial 'last-minute trial-by-ambush type tactics" and that the affidavit "should not be admitted into evidence".

[119] Justice Sommerfeldt reserved on its admissibility and later reviewed subsection 89(1) of the *Tax Court of Canada Rules (General Procedure)* SOR/90-688a (the "Rules") which provides as follows:

> **89 (1)** Unless the Court otherwise directs, except with the consent in writing of the other party or where discovery of documents has been waived by the other party, no document shall be used in evidence by a party unless
>
> > **(a)** reference to it appears in the pleadings, or in a list or an affidavit filed and served by a party to the proceeding,
> >
> > **(b)** it has been produced by one of the parties, or some person being examined on behalf of one of the parties, at the examination for discovery, or
> >
> > **(c)** it has been produced by a witness who is not, in the opinion of the Court, under the control of the party.
>
> **(2)** Unless the Court otherwise directs, subsection (1) does not apply to a document that is used solely as a foundation for or as part of a question in cross-examination or re-examination.

[120] Justice Sommerfeldt noted (para 47) that "the opening words of subsection 89(1) (…) provide the Court with a discretion to allow a document into evidence even if the requirements of that provision have not been met" and that:

> (47) "(…) The Court must exercise its discretion judicially, according to the rules of reason and justice, and not arbitrarily. In determining whether to admit a previously undisclosed document, there must be a balancing of the competing interest of justice and the overriding importance of having all of the relevant information before the Court to enable it to arrive at a proper and just disposition of the particular appeal (…)."

[121] In this instance, as noted above, the Appellant reserved the right to make written submissions as to the admissibility of the Affidavit but did not indicate that he wished to conduct cross-examinations nor request an adjournment for that purpose.

[122] The contents of the Affidavit are relevant to these proceedings and are relatively uncontroversial (as noted above) since the Minister had made an assumption that minors had acquired units in the Income Funds. The Appellant has not seriously disputed the Minister's position on this issue but has not outright admitted the actual number of minors (except as noted above by the CIBC Trust) indicating in response to a request to admit that there was no reason to conclude that the listed minors were not minors, arguing in any event that the issue was not relevant since minors could acquire units in the Income Funds.

[123] In the end, I find that the information appended to the Affidavit was readily available or would have been readily available to the Appellant had he taken the time to obtain it in order to contradict the Minister's assumption. He chose not to do so despite having the evidentiary burden of rebutting the assumption.

[124] I conclude that the Court should exercise its discretion pursuant to subsection 89(1) of the *Rules* and that rejecting the Affidavit at this time, would be procedurally unfair to the Minister. Having considered the written and oral submissions of the respective parties and having considered the requirements of subsection 89(1) of the *Rules*, the Court hereby rules that the Affidavit of Helen Little is admissible.

[125] It establishes the birthdates of the minor Investors in the 2003 and 2006 series of Income fund. The relevance of this information will be discussed below.

b) Admissibility of certain Read-ins

[126] Parties are permitted to read into evidence examination for discovery materials pursuant to the operation of section 100 of the *Rules* and *Tax Court of Canada Practice Note 8*, titled "Use of Discovery/Undertakings", July 19, 2001 ("*Practice Note 8*") which governs the use of examinations for discovery and undertakings as evidence at trial. An adverse party may request that other parts of the evidence be introduced to qualify or provide some context concerning the proposed read-ins.

[127] Before the scheduled date for the hearing of theses appeals, the parties had exchanged their list of read-ins from examination for discovery. The Appellant gave notice of his proposed read-ins on February 1, 2019 and the Minister did not request any contextual read-ins in respect of those read-ins.

[128] The Minister served a notice of proposed read-ins on February 6, 2019, exactly four days before the hearing was scheduled to commence. They consisted of

approximately 850 pages of discovery transcript, representing a substantial majority of the discovery. The Appellants reviewed the Minister's proposed read-ins within the two days contemplated by Practice Note 8 and served their notice of proposed contextual read-ins on February 7th and 8th, 2019.

[129] On the last day of trial, the Minister tendered on the Appellant and the Court her list of read-ins from examinations for discovery but the list was a significantly abridged selection of the read-ins which the Minister had identified in her pre-trial notice, constituting about one-third of that original list. The Appellants requested time to perform a new contextual review of the Minister's actual read-ins as the previously identified contextual read-ins were rendered moot by the significant reduction in the Minister's read-ins. The Minister challenged the appellants' request for time to complete a contextual review of the read-ins.

[130] The Court ordered that the parties provide written submissions on the matter and the parties did so later in March of 2019. The Minister challenged certain of the Appellant's requests to read-in additional portions of the discovery evidence in order to qualify or explain the Minister's read-ins pursuant to subsection 100(3) of the *Rules*. The Minister challenged these requests on the basis that section 100 and *Practice Note 8* did not allow additional read-ins at or following trial.

[131] Only four contextual read-ins are at issue. For reasons set out in the attached Appendix A, I find that the contextual read-ins #8, #10 and #18 are admissible and that contextual read-ins #16 is also admissible but subject to certain limits.

VI. **RELEVANT STATUTORY PROVISIONS**

a) The RRSP legislative framework

[132] The basic legislative framework for RRSP's is set out in Division G, entitled "Deferred & Special Income Arrangements" and is governed by section 146 and various other provisions of the *Act* in addition to certain regulations under the *Income Tax Regulations*, CRC, c 945 (the "*Regulations*").

Definitions	**Définitions**
146(1) In this section,	146(1) Les définitions qui suivent s'appliquent au présent article.
annuitant means	

(a) until such time after maturity of the plan as an individual's spouse or common-law partner becomes entitled, as a consequence of the individual's death, to receive benefits to be paid out of or under the plan, the individual referred to in paragraph (a) or (b) of the definition retirement savings plan in this subsection for whom, under a retirement savings plan, a retirement income is to be provided, and (b) thereafter, the spouse or common-law partner referred to in paragraph (a); (rentier) **benefit** includes any amount received out of or under a retirement savings plan other than (a) the portion thereof received by a person other than the annuitant that can reasonably be regarded as part of the amount included in computing the income of an annuitant by virtue of subsections 146(8.8) and 146(8.9), (b) an amount received by the person with whom the annuitant has the contract or arrangement described in the definition retirement savings plan in this subsection as a premium under the plan, (c) an amount, or part thereof, received in respect of the income of the trust under the plan for a taxation year for which the trust was not exempt from tax by virtue of paragraph 146(4)(c), and (c.1) a tax-paid amount described in paragraph (b) of the definition tax-paid amount in this subsection that relates to interest or another amount included in computing income otherwise than because of this section	**déductions inutilisées au titre des REER** a) Jusqu'au moment, après l'échéance du régime, où son conjoint acquiert le droit, par suite du décès du rentier, de recevoir des prestations qui doivent être versées sur ce régime ou en vertu de ce régime, le particulier visé aux alinéas a) ou b) de la définition de régime d'épargne-retraite au présent paragraphe pour lequel est prévu, en vertu d'un régime d'épargne-retraite, un revenu de retraite; b) après ce moment, son conjoint. (annuitant) **prestation** est comprise dans une prestation toute somme reçue dans le cadre d'un régime d'épargne-retraite, à l'exception a) de la fraction de cette somme reçue par une personne autre que le rentier et qu'il est raisonnable de considérer comme faisant partie de la somme incluse dans le calcul du revenu d'un rentier en vertu des paragraphes (8.8) et (8.9); b) d'une somme reçue à titre de prime en vertu du régime par la personne avec laquelle le rentier a conclu le contrat ou l'arrangement visé à la définition de régime d'épargne-retraite au présent paragraphe; c) d'une somme, ou d'une partie de cette somme, reçue relativement au revenu de la fiducie en vertu du régime, pour une année d'imposition, à l'égard de laquelle la fiducie n'était pas exonérée d'impôt en vertu de l'alinéa (4)c);

and without restricting the generality of the foregoing includes any amount paid to an annuitant under the plan (d) in accordance with the terms of the plan, (e) resulting from an amendment to or modification of the plan, or (f) resulting from the termination of the plan; (prestation) (…) **issuer** means the person referred to in the definition retirement savings plan in this subsection with whom an annuitant has a contract or arrangement that is a retirement savings plan; (émetteur) (…) **non-qualified investment**, in relation to a trust governed by a registered retirement savings plan, means property acquired by the trust after 1971 that is not a qualified investment for the trust; (placement non admissible) (…) **qualified investment** for a trust governed by a registered retirement savings plan means (a) an investment that would be described in any of paragraphs (a), (b), (d) and (f) to (h) of the definition qualified investment in section 204 if the references in that definition to a trust were read as references to the trust governed by the registered retirement savings plan,	c.1) d'un montant libéré d'impôt, visé à l'alinéa b) de la définition de cette expression au présent paragraphe, qui se rapporte à des intérêts ou à un montant inclus dans le calcul du revenu autrement que par l'effet du présent article. Sans préjudice de la portée générale de ce qui précède, le terme vise toute somme versée à un rentier en vertu du régime : d) soit conformément aux conditions du régime; e) soit à la suite d'une modification du régime; f) soit à la suite de l'expiration du régime. (benefit) (…) **émetteur** la personne visée à la définition de régime d'épargne-retraite au présent paragraphe et avec laquelle un rentier a conclu un contrat ou un arrangement qui constitue un régime d'épargne-retraite. (issuer) (…) **placement non admissible** dans le cas d'une fiducie régie par un régime enregistré d'épargne-retraite, s'entend des biens acquis par la fiducie après 1971 et qui ne constituent pas un placement admissible pour cette fiducie. (non-qualified investment) (…) **placement admissible**« placement admissible » Dans le cas d'une fiducie

(b) a bond, debenture, note or similar obligation (i) issued by a corporation the shares of which are listed on a prescribed stock exchange in Canada, or (ii) issued by an authorized foreign bank and payable at a branch in Canada of the bank, (c) an annuity described in the definition retirement income in respect of the annuitant under the plan, if purchased from a licensed annuities provider, (…) (d) such other investments as may be prescribed by regulations of the Governor in Council made on the recommendation of the Minister of Finance; (placement admissible) (…) **No tax while trust governed by plan** 146(4) Except as provided in subsection 146(10.1), no tax is payable under this Part by a trust on the taxable income of the trust for a taxation year if, throughout the period in the year during which the trust was in existence, the trust was governed by a registered retirement savings plan, except that (a) if the trust has borrowed money (other than money used in carrying on a business) in the year or has, after June 18, 1971, borrowed money (other than money used in carrying on a business) that it has not repaid before the commencement of the year, tax is payable under this Part by the trust on its taxable income for the year;	régie par un régime enregistré d'épargne-retraite a) placement qui serait visé aux alinéas a), b), d) et f) à h) de la définition de placement admissible à l'article 204 si la mention « fiducie » y était remplacée par la mention de la fiducie régie par le régime enregistré d'épargne-retraite; b) obligation, billet ou titre semblable qui, selon le cas : (i) est émis par une société dont les actions sont inscrites à la cote d'une bourse de valeurs au Canada visée par règlement, (ii) est émis par une banque étrangère autorisée et payable à sa succursale au Canada; c) rente visée à la définition de revenu de retraite relativement au rentier en vertu du régime, si elle a été achetée d'un fournisseur de rentes autorisé; d) tout autre placement qui peut être prévu par règlement pris par le gouverneur en conseil, sur recommandation du ministre des Finances. (qualified investment) (…) **Exonération d'impôt d'une fiducie régie par le régime** 146(4) Sous réserve du paragraphe (10.1), aucun impôt n'est payable en vertu de la présente partie par une fiducie sur son revenu imposable pour une année d'imposition si, tout au long de la période de l'année où la fiducie

(b) in any case not described in paragraph 146(4)(a), if the trust has carried on any business or businesses in the year, tax is payable under this Part by the trust on the amount, if any, by which (i) the amount that its taxable income for the year would be if it had no incomes or losses from sources other than from that business or those businesses, as the case may be, **exceeds** (ii) such portion of the amount determined under subparagraph 146(4)(b)(i) in respect of the trust for the year as can reasonably be considered to be income from, or from the disposition of, qualified investments for the trust; and (c) if the last annuitant under the plan has died, tax is payable under this Part by the trust on its taxable income for each year after the year following the year in which the last annuitant died. (…) **Disposition of non-qualified investment** 146(6) Where in a taxation year a trust governed by a registered retirement savings plan disposes of a property that, when acquired, was a non-qualified investment, there may be deducted, in computing the income for the taxation year of the taxpayer who is the annuitant under the plan, an amount equal to the lesser of (a) the amount that, by virtue of subsection 146(10), was included in computing the income of that taxpayer in	existait, elle était régie par un régime enregistré d'épargne-retraite; toutefois : a) si la fiducie a emprunté de l'argent (autre que de l'argent utilisé pour l'exploitation d'une entreprise) au cours de l'année ou a emprunté, après le 18 juin 1971, de l'argent (autre que de l'argent utilisé pour l'exploitation d'une entreprise) qu'elle n'a pas remboursé avant le début de l'année, un impôt est payable par la fiducie, en vertu de la présente partie, sur son revenu imposable pour l'année; b) dans tout cas non visé à l'alinéa a), si la fiducie a exploité une ou plusieurs entreprises au cours de l'année, un impôt est payable par elle en vertu de la présente partie sur l'excédent éventuel du montant visé au sous-alinéa (i) sur le montant visé au sous-alinéa (ii): (i) le montant qui constituerait le revenu imposable de la fiducie pour l'année si elle n'avait pas tiré de revenu, ni subi de pertes de sources autres que l'entreprise ou les entreprises en question, (ii) la partie du montant déterminé selon le sous-alinéa (i) à l'égard de la fiducie pour l'année, qu'il est raisonnable de considérer comme un revenu provenant soit de placements admissibles pour elle, soit de la disposition de tels placements; c) si le dernier rentier en vertu du régime est décédé, un impôt est payable par la fiducie en vertu de la présente partie sur son revenu imposable pour chaque année postérieure à l'année suivant l'année du décès de ce rentier. (…)

respect of the acquisition of that property, and (b) the proceeds of disposition of the property. (…) **Benefits taxable** 146(8) There shall be included in computing a taxpayer's income for a taxation year the total of all amounts received by the taxpayer in the year as benefits out of or under registered retirement savings plans, other than excluded withdrawals (as defined in subsection 146.01(1) or 146.02(1)) of the taxpayer and amounts that are included under paragraph (12)(b) in computing the taxpayer's income. (…) Where acquisition of non-qualified investment by trust 146(10) Where at any time in a taxation year a trust governed by a registered retirement savings plan (a) acquires a non-qualified investment, or (b) uses or permits to be used any property of the trust as security for a loan, the fair market value of (c) the non-qualified investment at the time it was acquired by the trust, or (d) the property used as security at the time it commenced to be so used,	**Disposition d'un placement non admissible** 146(6) Lorsque, au cours d'une année d'imposition, une fiducie régie par un régime enregistré d'épargne-retraite dispose d'un bien qui, au moment où il a été acquis, était un placement non admissible, il est permis de déduire, dans le calcul du revenu du contribuable qui est le rentier du régime, pour l'année d'imposition, une somme égale au moins élevé des montants suivants : a) le montant qui était, en vertu du paragraphe (10), inclus dans le calcul du revenu de ce contribuable à l'égard de l'acquisition de ce bien; b) le produit de disposition du bien. (…) **Prestations imposables** 146(8) Est inclus dans le calcul du revenu d'un contribuable pour une année d'imposition le total des montants qu'il a reçus au cours de l'année à titre de prestations dans le cadre de régimes enregistrés d'épargne-retraite, à l'exception des retraits exclus au sens des paragraphes 146.01(1) ou 146.02(1), et des montants qui sont inclus, en application de l'alinéa (12)b), dans le calcul de son revenu. (…) **Acquisition d'un placement non admissible par une fiducie** 146(10) Lorsque, à un moment donné d'une année d'imposition, une fiducie

as the case may be, shall be included in computing the income for the year of the taxpayer who is the annuitant under the plan at that time.	régie par un régime enregistré d'épargne-retraite : a) acquiert un placement non admissible; b) utilise à titre de garantie d'un prêt un bien quelconque de la fiducie ou en permet l'utilisation, la juste valeur marchande : c) du placement non admissible au moment de son acquisition par la fiducie; d) du bien utilisé à titre de garantie, au moment où il a commencé à être ainsi utilisé, selon le cas, doit être incluse dans le calcul du revenu, pour l'année, du contribuable qui est le rentier en vertu du régime à ce moment.

[133] Subsection 146(10) was amended in 2011 (*Keeping Canada's Economy and Jobs Growing Act, SC 2011, c. 24 at s.65*) to introduce the concept of a "controlling individual" for Registered Retirement Savings Plans in section 207.04 of Part XI.01 of the Act and impose a tax of 50% on the fair market value of non-qualified investments held by the controlling individual in the calendar year. Those amendments only apply to non-qualified investments acquired after March 22, 2011 such that they are not at issue in this appeal.

[134] In any event, the Appellant, being "the taxpayer" who is the annuitant under the plan, was not assessed by the Minister pursuant to subsection 146(10) and the Minister assessed the RRSP Trust pursuant to subsection 146(10.1) which provides as follows:

Where tax payable	**Impôt payable**
146(10.1) Where in a taxation year a trust governed by a registered retirement savings plan holds a property that is a non-qualified investment,	146(10.1) Lorsqu'une fiducie régie par un régime enregistré d'épargne-retraite détient, au cours d'une année

(a) tax is payable under this Part by the trust on the amount that its taxable income for the year would be if it had no incomes or losses from sources other than non-qualified investments and no capital gains or losses other than from dispositions of non-qualified investments; and (b) for the purposes of paragraph 146(10.1)(a), (i) income includes dividends described in section 83, and (ii) paragraphs 38(a) and 38(b) shall be read without reference to the fractions set out in those paragraphs (…)	d'imposition, un bien qui est un placement non admissible : a) la fiducie doit payer un impôt en vertu de la présente partie sur le montant qui serait son revenu imposable pour l'année si les sources de ses revenus et pertes n'étaient que des placements non admissibles et si ses gains en capital et pertes en capital ne résultaient que de la disposition de tels placements; b) pour l'application de l'alinéa a): (i) sont compris dans le revenu les dividendes visés à l'article 83, (ii) aux alinéas 38a) et b) il n'est pas tenu compte des fractions qui y figurent.

PART X.I - Tax in Respect of Over-contributions to Deferred Income Plans

Tax payable by individuals 204.1 (1) (…) **Tax payable by individuals -- contributions after 1990** 204(2.1) Where, at the end of any month after December, 1990, an individual has a cumulative excess amount in respect of registered retirement savings plans, the individual shall, in respect of that month, pay a tax under this Part equal to 1% of that cumulative excess amount. (…) **Waiver of tax** 204.1(4) Where an individual would, but for this subsection, be required to pay a tax under subsection 204.1(1) or 204.1(2.1) in respect of a month and the	**Impôt payable par les particuliers** 204.1(1) (…) **Impôt payable par les particuliers — cotisations postérieures à 1990** 204(2.1) Le particulier qui, à la fin d'un mois donné postérieur au mois de décembre 1990, a un excédent cumulatif au titre de régimes enregistrés d'épargne-retraite doit, pour ce mois, payer un impôt selon la présente partie égal à 1 % de cet excédent. (…) **Renonciation** 204.1(4) Le ministre peut renoncer à l'impôt dont un particulier serait, compte non tenu du présent paragraphe, redevable pour un mois selon le

individual establishes to the satisfaction of the Minister that (a) the excess amount or cumulative excess amount on which the tax is based arose as a consequence of reasonable error, and (b) reasonable steps are being taken to eliminate the excess, the Minister may waive the tax. (…) **Cumulative excess amount in respect of RRSPs** 204.2(1.1) The cumulative excess amount of an individual in respect of registered retirement savings plans at any time in a taxation year is the amount, if any, by which (a) the amount of the individual's undeducted RRSP premiums at that time exceeds (b) the amount determined by the formula A + B + R + C + D + E where A is the individual's unused RRSP deduction room at the end of the preceding taxation year, B is the amount, if any, by which (i) the lesser of the RRSP dollar limit for the year and 18% of the individual's earned income (as defined in subsection 146(1)) for the preceding taxation year exceeds the total of all amounts each of which is	paragraphe (1) ou (2.1), si celui-ci établit à la satisfaction du ministre que l'excédent ou l'excédent cumulatif qui est frappé de l'impôt fait suite à une erreur acceptable et que les mesures indiquées pour éliminer l'excédent ont été prises. (…) **Excédent cumulatif au titre des REER** 204.2(1.1) L'excédent cumulatif d'un particulier au titre des régimes enregistrés d'épargne-retraite à un moment donné d'une année d'imposition correspond à l'excédent éventuel du montant visé à l'alinéa a) sur le montant visé à l'alinéa b): a) les primes non déduites, à ce moment, qu'il a versées à des régimes enregistrés d'épargne-retraite; b) le résultat du calcul suivant : A + B + R + C + D + E où : A représente les déductions inutilisées au titre des REER du particulier à la fin de l'année d'imposition précédente, B l'excédent éventuel du moins élevé du plafond REER pour l'année et de 18 % du revenu gagné du particulier, au sens du paragraphe 146(1), pour l'année d'imposition précédente sur le total des montants représentant chacun : (i) le facteur d'équivalence du particulier pour l'année d'imposition précédente quant à un employeur,

(ii) the individual's pension adjustment for the preceding taxation year in respect of an employer, or (iii) a prescribed amount in respect of the individual for the year, C is, where the individual attained 18 years of age in a preceding taxation year, $2,000, and in any other case, nil, D is the group RRSP amount in respect of the individual at that time, E is, where the individual attained 18 years of age before 1995, the individual's transitional amount at that time, and in any other case, nil, and R is the individual's total pension adjustment reversal for the year. **Return and payment of tax** 204.3 (1) Within 90 days after the end of each year after 1975, a taxpayer to whom this Part applies shall (a) file with the Minister a return for the year under this Part in prescribed form and containing prescribed information, without notice or demand therefor; (b) estimate in the return the amount of tax, if any, payable by the taxpayer under this Part in respect of each month in the year; and (c) pay to the Receiver General the amount of tax, if any, payable by the taxpayer under this Part in respect of each month in the year. **Provisions applicable to Part**	(ii) le montant prescrit quant au particulier pour l'année, C si le particulier a atteint 18 ans au cours d'une année d'imposition antérieure, 2 000 $; sinon, zéro, D le montant relatif à un REER collectif quant au particulier à ce moment, E si le particulier a atteint 18 ans avant 1995, le montant de transition qui lui est applicable à ce moment; sinon, zéro; R le facteur d'équivalence rectifié total du particulier pour l'année. **Déclaration et paiement de l'impôt** 204.3 (1) Les contribuables visés par la présente partie doivent, dans les 90 jours qui suivent la fin de chaque année postérieure à 1975: a) produire auprès du ministre, sans avis ni mise en demeure, une déclaration pour l'année en vertu de la présente partie, selon le formulaire prescrit et contenant les renseignements prescrits; b) estimer, dans cette déclaration, l'impôt dont ils sont redevables en vertu de la présente partie pour chaque mois de l'année; c) verser cet impôt au receveur général. **Dispositions applicables** 204.3(2) Les paragraphes 150(2) et (3), les articles 152 et 158, les paragraphes 161(1) et (11), les articles 162 à 167 et la section J de la partie I s'appliquent à la présente partie, avec les adaptations nécessaires.

204.3(2) Subsections 150(2) and 150(3), sections 152 and 158, subsections 161(1) and 161(11), sections 162 to 167 and Division J of Part I are applicable to this Part with such modifications as the circumstances require.	

PART XI.I – Tax in Respect of Deferred Income Plans and Other Tax Exempt Persons

Tax payable by trust under registered retirement savings plan 207.1(1) Where, at the end of any month, a trust governed by a registered retirement savings plan holds property that is neither a qualified investment (within the meaning assigned by subsection 146(1)) nor a life insurance policy in respect of which, but for subsection 146(11), subsection 146(10) would have applied as a consequence of its acquisition, the trust shall, in respect of that month, pay a tax under this Part equal to 1% of the fair market value of the property at the time it was acquired by the trust of all such property held by it at the end of the month, other than (a) property, the fair market value of which was included, by virtue of subsection 146(10), in computing the income, for any year, of an annuitant (within the meaning assigned by subsection 146(1)) under the plan; and (b) property acquired by the trust before August 25, 1972. (…) **Return and payment of tax**	**Impôt payable par les fiducies régies par des régimes enregistrés d'épargne-retraite** 207.1(1) La fiducie régie par un régime enregistré d'épargne-retraite et qui, à la fin d'un mois donné, détient des biens qui ne sont ni un placement admissible (au sens du paragraphe 146(1)) ni une police d'assurance-vie à l'égard de laquelle, sans le paragraphe 146(11), le paragraphe 146(10) aurait été applicable à la suite de son acquisition doit payer, pour ce mois, en vertu de la présente partie, un impôt égal à 1 % de la juste valeur marchande des biens au moment où ils ont été acquis par la fiducie, de tous ces biens qu'elle détient à la fin du mois, autres que : a) les biens dont la juste valeur marchande a été incluse, en vertu du paragraphe 146(10), dans le calcul du revenu, pour une année donnée, d'un rentier (au sens du paragraphe 146(1)) en vertu du régime; b) les biens acquis par la fiducie avant le 25 août 1972. (…) **Déclaration et paiement de l'impôt**

207.2 (1) Within 90 days after the end of each year, a taxpayer to whom this Part applies shall (a) file with the Minister a return for the year under this Part in prescribed form and containing prescribed information, without notice or demand therefor; (b) estimate in the return the amount of tax, if any, payable by it under this Part in respect of each month in the year; and (c) pay to the Receiver General the amount of tax, if any, payable by it under this Part in respect of each month in the year. **Liability of trustee** 207.2(2) Where the trustee of a trust that is liable to pay tax under this Part does not remit to the Receiver General the amount of the tax within the time specified in subsection 207.2(1), the trustee is personally liable to pay on behalf of the trust the full amount of the tax and is entitled to recover from the trust any amount paid by the trustee as tax under this section. **Provisions applicable to Part** (3) Subsections 150(2) and 150(3), sections 152 and 158, subsections 161(1) and 161(11), sections 162 to 167 and Division J of Part I are applicable to this Part with such modifications as the circumstances require. (…)	207.2 (1) Le contribuable assujetti à la présente partie doit, dans les 90 jours qui suivent la fin de chaque année : a) produire auprès du ministre, sans avis ni mise en demeure, une déclaration pour l'année en vertu de la présente partie, selon le formulaire prescrit et contenant les renseignements prescrits; b) estimer dans cette déclaration l'impôt dont il est redevable en vertu de la présente partie pour chaque mois de l'année; c) verser cet impôt au receveur général. **Responsabilité du fiduciaire** 207.2(2) Le fiduciaire d'une fiducie qui est assujettie à l'impôt en application de la présente partie qui ne remet pas au receveur général le montant de l'impôt, dans le délai imparti, est personnellement tenu de verser, au nom de la fiducie, le montant total de l'impôt et a le droit de recouvrer de la fiducie toute somme ainsi versée. **Dispositions applicables** (3) Les paragraphes 150(2) et (3), les articles 152 et 158, les paragraphes 161(1) et (11), les articles 162 à 167 et la section J de la partie I s'appliquent à la présente partie, avec les adaptations nécessaires. (…)

b) Mutual Fund Trusts

132(1) (…) **Meaning of mutual fund trust** 132(6) Subject to subsection 132(7), for the purposes of this section, a trust is a mutual fund trust at any time if at that time (a) it was a unit trust resident in Canada, (b) its only undertaking was (i) the investing of its funds in property (other than real property or an interest in real property), (ii) the acquiring, holding, maintaining, improving, leasing or managing of any real property (or interest in real property) that is capital property of the trust, or (iii) any combination of the activities described in subparagraphs 132(6)(b)(i) and 132(6)(b)(ii), and (c) it complied with prescribed conditions.	132(1) (…) **Sens de fiducie de fonds commun de placement** 132(6) Sous réserve du paragraphe 132(7) et pour l'application du présent article, une fiducie est une fiducie de fonds commun de placement à un moment donné si, à ce moment, les conditions suivantes sont remplies : a) elle est une fiducie d'investissement à participation unitaire résidant au Canada; b) sa seule activité consiste : (i) soit à investir ses fonds dans des biens, sauf des biens immeubles ou des droits dans de tels biens, (ii) soit à acquérir, à détenir, à entretenir, à améliorer, à louer ou à gérer des biens immeubles qui font partie de ses immobilisations ou des droits dans de tels biens, (iii) soit à exercer plusieurs des activités visées aux sous-alinéas (i) et (ii); c) elle satisfaisait aux conditions prescrites portant sur le nombre de ses détenteurs d'unités, la répartition et le commerce de ses unités.

[135] Paragraph 132(6)(c) was amended for 2000 and later years by *Technical Tax Amendments Act*, S.C. 2013, c.34, subsection 278(1) to delete (from the end) the phrase "relating to the number of its unit holders, dispersal of ownership of its units and public trading of its units."

Election to be mutual fund 132(6.1) Where a trust becomes a mutual fund trust at any particular time before the	**Choix de devenir une fiducie de fonds commun de placement**

91st day after the end of its first taxation year, and the trust so elects in its return of income for that year, the trust is deemed to have been a mutual fund trust from the beginning of that year until the particular time.	132(6.1) La fiducie qui devient une fiducie de fonds commun de placement à un moment avant le quatre-vingt-onzième jour suivant la fin de sa première année d'imposition est réputée avoir été une telle fiducie depuis le début de cette année jusqu'à ce moment si elle en fait le choix dans sa déclaration de revenu pour cette année.
Retention of status as mutual fund trust	**Note marginale :Fiducie qui demeure une fiducie de fonds commun de placement**
(6.2) A trust is deemed to be a mutual fund trust throughout a calendar year where	(6.2) Une fiducie est réputée être une fiducie de fonds commun de placement tout au long d'une année civile si, à la fois :
(a) at any time in the year, the trust would, if this section were read without reference to this subsection, have ceased to be a mutual fund trust	a) elle aurait cessé d'être une telle fiducie à un moment de l'année si le présent article s'appliquait compte non tenu du présent paragraphe du fait que, selon le cas :
(i) because the condition described in paragraph 108(2)(a) ceased to be satisfied,	(i) la condition énoncée à l'alinéa 108(2)a) n'est plus remplie,
(ii) because of the application of paragraph (6)(c), or	(ii) l'alinéa (6)c) s'applique,
(iii) because the trust ceased to exist;	(iii) la fiducie a cessé d'exister;
(b) the trust was a mutual fund trust at the beginning of the year; and	b) elle était une telle fiducie au début de l'année;
(c) the trust would, throughout the portion of the year throughout which it was in existence, have been a mutual fund trust if	c) elle aurait été une telle fiducie tout au long de la partie de l'année où elle a existé si, à la fois :
(i) in the case where the condition described in paragraph 108(2)(a) was satisfied at any time in the year, that condition were satisfied throughout the year,	(i) la condition énoncée à l'alinéa 108(2)a) étant remplie à un moment de l'année, elle était remplie tout au long de l'année,
(ii) subsection (6) were read without reference to paragraph (c) of that subsection, and	
(iii) this section were read without reference to this subsection.	

(…)	(ii) le paragraphe (6) s'appliquait compte non tenu de son alinéa c), (iii) le présent article s'appliquait compte non tenu du présent paragraphe. (…)
Income Tax Regulations **Regulation 4801(as it read in 2004)** 4801 For the purposes of paragraph 132(6)(c) of the Act, the following conditions are hereby prescribed in respect of a trust: (a) either (i) a class of the units of the trust shall be qualified for distribution to the public, or (ii) there has been a lawful distribution in a province to the public of units of the trust and a prospectus, registration statement or similar document was not required under the laws of the province to be filed in respect of the distribution; and (b) in respect of any one class of units described in paragraph (a), there shall be no fewer than 150 beneficiaries of the trust, each of whom holds (i) not less than one block of units of the class, and (ii) units of the class having an aggregate fair market value of not less than $500. **Regulation 4801, as amended in 2012 on a retroactive basis to 2000**	**Règlement de l'impôt sur le revenu** **4801 (2004)** 4801 Aux fins de l'alinéa 132(6)c) de la Loi, les conditions suivantes sont prescrites à l'égard d'une fiducie : a) selon le cas : (i) une catégorie d'unités de la fiducie peut faire l'objet d'un appel public à l'épargne, (ii) des unités de la fiducie ont fait l'objet d'un appel public légal à l'épargne dans une province, et un prospectus, une déclaration d'enregistrement ou un document semblable relatif à cet appel n'avait pas à être produit selon la législation provinciale; b) à l'égard de l'une quelconque catégorie d'unités visée à l'alinéa a), il ne doit pas y avoir moins de 150 bénéficiaires de la fiducie, dont chacun détient (i) pas moins d'une tranche d'unités de la catégorie, et (ii) des unités de la catégorie ayant une juste valeur marchande totale non inférieure à 500 $.

4801 In applying at any time paragraph 132(6)(c) of the Act, the following are prescribed conditions in respect of a trust: (a) either (i) the following conditions are met: (A) there has been at or before that time a lawful distribution in a province to the public of units of the trust and a prospectus, registration statement or similar document was not, under the laws of the province, required to be filed in respect of the distribution, and (B) the trust (I) was created after 1999 and on or before that time, or (II) satisfies, at that time, the conditions prescribed in section 4801.001, or (ii) a class of the units of the trust is, at that time, qualified for distribution to the public; and (b) in respect of a class of the trust's units that meets at that time the conditions described in paragraph (a), there are at that time no fewer than 150 beneficiaries of the trust, each of whom holds (i) not less than one block of units of the class, and (ii) units of the class having an aggregate fair market value of not less than $500.	**Règlement 4801, amendée en 2012 sur une base rétroactive à 2000** 4801 Pour l'application, à un moment donné, de l'alinéa 132(6)c) de la Loi, les conditions auxquelles une fiducie doit satisfaire sont les suivantes : a) selon le cas : (i) les conditions ci-après sont réunies : (A) des unités de la fiducie ont, au plus tard à ce moment, fait l'objet d'un appel public légal à l'épargne dans une province, et un prospectus, une déclaration d'enregistrement ou un document semblable relatif à cet appel n'avait pas à être produit selon la législation provinciale, (B) la fiducie : (I) soit a été établie après 1999 et au plus tard à ce moment, (II) soit remplit, à ce moment, les conditions énoncées à l'article 4801.001, (ii) une catégorie d'unités de la fiducie peut, à ce moment, faire l'objet d'un appel public à l'épargne; b) à l'égard d'une catégorie d'unités de la fiducie qui remplit à ce moment les conditions énoncées à l'alinéa a), la fiducie compte, à ce moment, au moins 150 bénéficiaires qui détiennent chacun : (i) pas moins d'une tranche d'unités de la catégorie, et

	(ii) des unités de la catégorie ayant une juste valeur marchande totale non inférieure à 500 $.

[136] The words “at any time” and “at that time” were added to *Regulation* 4801 by an amendment made in 2013[10] applicable for the 2000 and later taxation years.

Regulation 4900	**Règlement 4900**
4900 (1) For the purposes of paragraph (d) of the definition qualified investment in subsection 146(1) of the Act, paragraph (e) of the definition qualified investment in subsection 146.1(1) of the Act, paragraph (c) of the definition qualified investment in subsection 146.3(1) of the Act, paragraph (h) of the definition qualified investment in section 204 of the Act, paragraph (d) of the definition qualified investment in subsection 205(1) of the Act and paragraph (c) of the definition qualified investment in subsection 207.01(1) of the Act, each of the following investments is prescribed as a qualified investment for a plan trust at a particular time if at that time it is	4900 (1) Pour l’application de l’alinéa d) de la définition de placement admissible au paragraphe 146(1) de la Loi, de l’alinéa e) de la définition de placement admissible au paragraphe 146.1(1) de la Loi, de l’alinéa c) de la définition de placement admissible au paragraphe 146.3(1) de la Loi et de l’alinéa i) de la définition de placement admissible à l’article 204 de la Loi, chacun des placements suivants constitue, sous réserve du paragraphe (2), un placement admissible pour une fiducie de régime à une date donnée si, à cette date, il s’agit :
(a) an interest in a trust or a share of the capital stock of a corporation that was a registered investment for the plan trust during the calendar year in which the particular time occurs or the immediately preceding year;	a) d’un intérêt dans une fiducie ou d’une action du capital-actions d’une société qui constitue un placement enregistré pour la fiducie de régime au cours de l’année civile pendant laquelle tombe la date donnée ou de l’année immédiatement antérieure;
(b) a share of the capital stock of a public corporation other than a mortgage investment corporation;	b) d’une action du capital-actions d’une société publique, sauf une société de placement hypothécaire;
(c) a share of the capital stock of a mortgage investment corporation that does not hold as part of its property at any time during the calendar year in which the particular time occurs any indebtedness,	c) d’une action du capital-actions d’une société de placement hypothécaire qui, à aucun moment de l’année civile qui comprend la date donnée, ne détient parmi ses biens une dette — sous forme d’hypothèque ou toute autre forme —

[10] 2002-2013 Technical Bill, 2013, c. 34, s. 398.

whether by way of mortgage or otherwise, of a person who is a connected person under the governing plan of the plan trust; (c.1) a bond, debenture, note or similar obligation of a public corporation other than a mortgage investment corporation; (d) a unit of a mutual fund trust; (d.1) [Repealed, 2007, c. 29, s. 32] (d.2) a unit of a trust if (i) the trust would be a mutual fund trust if Part XLVIII were read without reference to paragraph 4801(a), and (ii) there has been a lawful distribution in a province to the public of units of the trust and a prospectus, registration statement or similar document was not required under the laws of the province to be filed in respect of the distribution; (…)	d'une personne qui est un rentier, un bénéficiaire, un employeur ou un souscripteur en vertu du régime d'encadrement de la fiducie de régime, ou de toute autre personne qui a un lien de dépendance avec cette personne; c.1) de quelque obligation, billet ou titre semblable d'une société publique, sauf une société de placement hypothécaire; d) d'une unité d'une fiducie de fonds communs de placement; d.1) d'une obligation, d'un billet ou d'un titre semblable émis par une fiducie de fonds commun de placement dont les unités sont inscrites à la cote d'une bourse de valeurs visée à l'article 3200; d.2) d'une unité d'une fiducie, dans le cas où, à la fois : (i) la fiducie serait une fiducie de fonds commun de placement si la partie XLVIII s'appliquait compte non tenu de l'alinéa 4801a), (ii) des unités de la fiducie ont fait l'objet d'un appel public légal à l'épargne dans une province, et un prospectus, une déclaration d'enregistrement ou un document semblable relatif à cet appel n'avait pas à être produit selon la législation provinciale; (…)

c) Indirect Payments

Other Sources of Income	**Autres sources de revenu**

Amounts to be included in income for year	**Sommes à inclure dans le revenu de l'année**
56(1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,	56 (1) Sans préjudice de la portée générale de l'article 3, sont à inclure dans le calcul du revenu d'un contribuable pour une année d'imposition :
(…)	(…)
Indirect payments	**Paiements indirects**
56(2) A payment or transfer of property made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person (other than by an assignment of any portion of a retirement pension pursuant to section 65.1 of the Canada Pension Plan or a comparable provision of a provincial pension plan as defined in section 3 of that Act or of a prescribed provincial pension plan) shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to the taxpayer.	56(2) Tout paiement ou transfert de biens fait, suivant les instructions ou avec l'accord d'un contribuable, à toute autre personne au profit du contribuable ou à titre d'avantage que le contribuable désirait voir accorder à l'autre personne — sauf la cession d'une partie d'une pension de retraite conformément à l'article 65.1 du Régime de pensions du Canada ou à une disposition comparable d'un régime provincial de pensions au sens de l'article 3 de cette loi ou d'un régime provincial de pensions visé par règlement — doit être inclus dans le calcul du revenu du contribuable dans la mesure où il le serait si ce paiement ou transfert avait été fait au contribuable.

d) General Anti-Avoidance Rule ("GAAR")

PART XVI

Tax Avoidance	**Évitement fiscal**
Definitions	**Définitions**
245(1) In this section, tax benefit means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount	245(1) Les définitions qui suivent s'appliquent au présent article. attribut fiscal S'agissant des attributs fiscaux d'une personne, revenu, revenu

under this Act, and includes a reduction, avoidance or deferral of tax or other amount that would be payable under this Act but for a tax treaty or an increase in a refund of tax or other amount under this Act as a result of a tax treaty; (avantage fiscal)	imposable ou revenu imposable gagné au Canada de cette personne, impôt ou autre montant payable par cette personne, ou montant qui lui est remboursable, en application de la présente loi, ainsi que tout montant à prendre en compte pour calculer, en application de la présente loi, le revenu, le revenu imposable, le revenu imposable gagné au Canada de cette personne ou l'impôt ou l'autre montant payable par cette personne ou le montant qui lui est remboursable. (tax consequences)
tax consequences / attribut fiscal	**avantage fiscal**
tax consequences to a person means the amount of income, taxable income, or taxable income earned in Canada of, tax or other amount payable by or refundable to the person under this Act, or any other amount that is relevant for the purposes of computing that amount; (attribut fiscal)	Réduction, évitement ou report d'impôt ou d'un autre montant exigible en application de la présente loi ou augmentation d'un remboursement d'impôt ou d'un autre montant visé par la présente loi. Y sont assimilés la réduction, l'évitement ou le report d'impôt ou d'un autre montant qui serait exigible en application de la présente loi en l'absence d'un traité fiscal ainsi que l'augmentation d'un remboursement d'impôt ou d'un autre montant visé par la présente loi qui découle d'un traité fiscal. (tax benefit)
transaction / opération	**opération**
transaction includes an arrangement or event. (opération)	Sont assimilés à une opération une convention, un mécanisme ou un événement. (transaction)
General anti-avoidance provision	**Disposition générale anti-évitement**
245(2) Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.	245(2) En cas d'opération d'évitement, les attributs fiscaux d'une personne doivent être déterminés de façon raisonnable dans les circonstances de façon à supprimer un avantage fiscal qui, sans le présent article, découlerait,
Avoidance transaction	
245(3) An avoidance transaction means any transaction	
(a) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may	

reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit; or (b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit. **Application of subsection (2)** 245(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction (a) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of (i) this Act, (ii) the Income Tax Regulations, (iii) the Income Tax Application Rules, (iv) a tax treaty, or (v) any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any amount that is relevant for the purposes of that computation; or (b) would result directly or indirectly in an abuse having regard to those	directement ou indirectement, de cette opération ou d'une série d'opérations dont cette opération fait partie. **Opération d'évitement** 245(3) L'opération d'évitement s'entend : a) soit de l'opération dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s'il est raisonnable de considérer que l'opération est principalement effectuée pour des objets véritables — l'obtention de l'avantage fiscal n'étant pas considérée comme un objet véritable; b) soit de l'opération qui fait partie d'une série d'opérations dont, sans le présent article, découlerait, directement ou indirectement, un avantage fiscal, sauf s'il est raisonnable de considérer que l'opération est principalement effectuée pour des objets véritables — l'obtention de l'avantage fiscal n'étant pas considérée comme un objet véritable. **Application du par. (2)** (4) Le paragraphe (2) ne s'applique qu'à l'opération dont il est raisonnable de considérer, selon le cas : a) qu'elle entraînerait, directement ou indirectement, s'il n'était pas tenu compte du présent article, un abus dans l'application des dispositions d'un ou de plusieurs des textes suivants : (i) la présente loi, (ii) le Règlement de l'impôt sur le revenu,

provisions, other than this section, read as a whole. **Determination of tax consequences** 245(5) Without restricting the generality of subsection (2), and notwithstanding any other enactment, (a) any deduction, exemption or exclusion in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part, (b) any such deduction, exemption or exclusion, any income, loss or other amount or part thereof may be allocated to any person, (c) the nature of any payment or other amount may be recharacterized, and (d) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored, in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.	(iii) les Règles concernant l'application de l'impôt sur le revenu, (iv) un traité fiscal, (v) tout autre texte législatif qui est utile soit pour le calcul d'un impôt ou de toute autre somme exigible ou remboursable sous le régime de la présente loi, soit pour la détermination de toute somme à prendre en compte dans ce calcul; b) qu'elle entraînerait, directement ou indirectement, un abus dans l'application de ces dispositions compte non tenu du présent article lues dans leur ensemble. **Attributs fiscaux à déterminer** 245(5) Sans préjudice de la portée générale du paragraphe (2) et malgré tout autre texte législatif, dans le cadre de la détermination des attributs fiscaux d'une personne de façon raisonnable dans les circonstances de façon à supprimer l'avantage fiscal qui, sans le présent article, découlerait, directement ou indirectement, d'une opération d'évitement : a) toute déduction, exemption ou exclusion dans le calcul de tout ou partie du revenu, du revenu imposable, du revenu imposable gagné au Canada ou de l'impôt payable peut être en totalité ou en partie admise ou refusée; b) tout ou partie de cette déduction, exemption ou exclusion ainsi que tout ou partie d'un revenu, d'une perte ou d'un autre montant peuvent être attribués à une personne;

	c) la nature d'un paiement ou d'un autre montant peut être qualifiée autrement; d) les effets fiscaux qui découleraient par ailleurs de l'application des autres dispositions de la présente loi peuvent ne pas être pris en compte.

VII. **ANALYSIS**

A. **Whether the Income Funds were "Qualified Investments"?**

a) Overview – "a lawful distribution…to the public"

[137] Qualified investments are defined in paragraphs 146(1)(a) to (d) of the *Act* and paragraphs (a) to (w) of *Regulation* 4900(1) which includes at paragraph (d) a "mutual fund trust". Subsection 248(1) provides that a "mutual fund trust" has the meaning assigned by subsection 132(6).

[138] It is not disputed in this appeal that the Income Funds met the requirements of paragraphs 132(6)(a) and (b) in that they were "a unit trust resident in Canada" whose only undertaking was "the investing of its funds in property" or "the acquiring, holding (…) of real property".

[139] At issue is whether the Income Funds satisfied the requirements of paragraph 132(6)(c) being the prescribed conditions described in *Regulation* 4801 that require that either "there has been (…) a lawful distribution in a province to the public of units of the trust and a prospectus (…) was not, under the laws of the province, required to be filed in respect of the distribution" or "a class of the units of the trust is (…) qualified for distribution to the public".

[140] The second requirement as set out in paragraph 4801(b) of the *Regulation* is that, in respect of each Income Fund, there has been "no fewer that 150 beneficiaries of the trust, each of whom" hold "not less that one block of units (…) having an aggregate fair market value of not less than $500." The latter issue will be discussed in the next section entitled "Summary of Alleged Deficiencies."

[141] It is not disputed in this proceeding that the distribution of securities in Canada is subject to provincial legislation, in this instance the *Alberta Securities Act* ("*ASA*")

and the *British Columbia Securities Act* ("*BCSA*")[11] and to agreements known as national instruments or multilateral instruments adopted by the provinces and territories. It is also not disputed that the Appellant did not file a prospectus or similar document and that he relied on the OME, as described above. However, the requirements of subparagraphs 4801(a)(i) and (ii) of the *Regulation* both refer to a distribution "to the public" and as a result it is necessary to review some general concepts related to the distribution of securities.

[142] It is not disputed that a distribution refers to the process by which securities are issued to prospective investors or subscribers and that securities can only be distributed "to the public" in accordance with applicable securities legislation. This is known as the "closed system" for the distribution of securities that prevails today in most if not all provinces or territories.

[143] It has been suggested that the expression "to the public" is anachronistic in the modern world of securities distribution[12] and that historically, the notion was used to determine whether a prospectus or other disclosure document was required for a distribution to an investor who was not closely connected to the issuer and thus deemed to be in need of protection from unscrupulous or fraudulent behaviour. These investors were viewed as not having the benefit of the "common bonds or interest or association with the issuer of the security or its directors (…) or promoter" and would "have a 'need to know' all relevant matters before making an informed investment decision". Attempts to distinguish between closely connected investors and broader constituents of "the public" gave rise to litigation and "a minefield of interpretive difficulties".[13]

[144] Since the "advent of the closed system in 1979",[14] it is recognized that the triggering event for the registration and prospectus requirements is "a distribution to the public"[15]. The historical distinction between a distribution "to the public" or "to the non-public" was eliminated as recommended by the *Merger Report.*[16]

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[11] *Securities Act*, RSA 2000, c S-4 ("*ASA*") and *Securities Act*, RSBC 1996, c 418 ("*BCSA*").
[12] Canadian Securities Regulation, 5th edition, 2014, pages 169-170.
[13] Canadian Securities Regulation, opcit, pages 169-170.
[14] Canadian Securities Regulation, opcit, page 113.
[15] David Johnston, Kathleen Rockwell & Cristie For, Canadian Securities Regulation, 5th Edition, (Markham, Ont.: Butterworths Canada Ltd, 1998), pages 112-113.
[16] Canadian Securities Regulation, opcit, page 113 - Report of the Committee of the Ontario Securities Commission on the Problems of Disclosure Raised for Investors by Business Combinations and Private Placements (Toronto: OSC, 1970).

[145] It is noted that both the ASA and BCSA continue to distinguish between members of the public and individuals who have "a special relationship with the issuer" and are, for example, an "insider, affiliate or associate"[17] for disclosure, compliance or insider-trading purposes.

[146] None of those provisions are relevant in this instance but they are mentioned to emphasize that the distinction between individuals who fall within those categories and members "of the public" are still relevant for administrative, enforcement or compliance proceedings instituted by the securities commissions.

[147] Subject to the exceptions described below, securities can only be distributed if a disclosure document described as a prospectus has been filed with the provincial securities commission.[18] Such securities are said to be "qualified for distribution to the public" and become freely tradeable in the jurisdiction where they are qualified and typically trade on the public exchanges. The issuer becomes a reporting issuer and is required to provide continuous disclosure to its investors.

[148] However, securities can also be distributed pursuant to one of several capital raising exemptions set out in the provincial legislation or instruments, including the OME requiring delivery of a simplified disclosure document known as an OM, as was used in this instance.

[149] In *Gupta (P.L.) v. Minister of National Revenue* [1992] 1 C.T.C. 2535 ("*Gupta*") the Tax Court of Canada considered the difference between a "prospectus" and an "offering memorandum" and indicated as follows:

> 56. Neither the *Income Tax Act* nor the *Quebec Securities Act* define the words "prospectus" and "offering memorandum" or "registration statements". However, one can find these definitions in the following reference works:
>
> **The Dictionary of Canadian Law**
>
> "PROSPECTUS. n. Any prospectus, notice, circular or advertisement of any kind whatsoever, whether of the kind hereinbefore enumerated or not, whether in writing or otherwise offering to the public for purchase or subscription any shares or debentures of any company."
>
> "OFFERING MEMORANDUM. A document that: (i) sets forth information concerning the business and affairs of an issuer; and (ii) has been prepared primarily

[17] See for example section 9 *ASA* or section 3.3 *BCSA*.
18 Section 110(1) of ASA or section 61(1) of BCSA.

> for prospective purchasers to assist those purchasers to make an investment decision with respect to securities being sold pursuant to a trade that is made in reliance on an exemption."

[My emphasis]

[150] Other exemptions include the "Private Issuer Exemption", the "Family and Friends and Business Associates' Exemption" or the "Accredited Investor Exemption", none of which are at issue in this proceeding. The requirements of these exemptions may vary from one province to another but securities issued pursuant thereto are generally subject to re-sale restrictions. They are not "freely-tradeable" since they have not been qualified for distribution to the public.

[151] As explained by the Appellant, he knew that the filing of a prospectus was an expensive and onerous undertaking and he chose to rely on the OME.

[152] As indicated above, the units in the 2003 Income Funds were distributed pursuant to the OME described in Part 4 of *Multilateral Instrument* 45-103 and the units in the 2006 Promoted Funds were distributed in reliance on *National Instrument* 45-106 (the "*Instruments*"). The OME described in Multilateral Instrument 45-103 provides as follows:

> **Part 4 - Offering memorandum exemption**
>
> 4.1
>
> (1) In British Columbia… the dealer registration requirement does not apply to a person or company with respect to a trade by an issuer in a security of its own issue if the purchaser purchases the security as principal and, at the same time or before the purchaser signs the agreement to purchase the security, the issuer
>
> a. delivers an offering memorandum to the purchaser in compliance with sections 4.2 to 4.4, and
>
> b. obtains a signed risk acknowledgement from the purchaser in compliance with section 4.5(1).
>
> (2) In British Columbia… the prospectus requirement does not apply to a distribution of a security in the circumstances referred to in subsection (1).
>
> (3) In Alberta… the dealer registration requirement does not apply to a person or company with respect to a trade by an issuer in a security of its own issue if

a. the purchaser purchases the security as principal,

b. at the same time or before the purchaser signs the agreement to purchase the security, the issuer

i. delivers an offering memorandum to the purchaser in compliance with sections 4.2 to 4.4, and

ii. obtains a signed risk acknowledgement form from the purchaser in compliance with section 4.5(1),

(…)

(4) In Alberta…the prospectus requirement does not apply to a distribution of a security in the circumstances referred to in subsection (3).

4.2 Required form of offering memorandum

An offering memorandum delivered under section 4.1 must be in the required form.

(…)

4.4 Certificate

(1) An offering memorandum delivered under section 4.1 must contain a certificate that states the following:

"This offering memorandum does not contain a misrepresentation."

(…)

4.5 Risk Acknowledgement

(1) A risk acknowledgement under section 4.1 must be in the required form.

(…)

4.7 Filing of offering memorandum

The issuer must file a copy of an offering memorandum delivered under section 4.1 and any update of a previously filed offering memorandum with the securities regulatory authority on or before the 10th day after each distribution under the offering memorandum or update of the offering memorandum.

(…)

> **7.1 Reporting Requirements**
>
> Subject to subsection (2), if an issuer distributes a security of its own issue under an exemption in section 3.1(2), 4.1(2), 4.1(4) or 5.1(2), the issuer must file a report in the local jurisdiction in which the distribution takes place on or before the 10th day after the distribution.
>
> [My emphasis]

[153] The "Confidential Offering Memorandum" prepared for the 2003 and 2006 Income Funds described the subscription process as follows:

> **5.2 Subscription Procedure**
>
> This Offering is made to, and subscriptions for Units will only be accepted from persons resident in the Provinces of Alberta and British Columbia. The Offering is being made in reliance upon Multilateral Instrument 45-103 – Capital Raising Exemptions ("MI 45-103"). See items 11 and 12
>
> A prospective Investor may acquire Units if the following is received by the Fund and accepted by the Trustees:
>
> a. One manually signed and duly completed subscription agreement substantially in the form of the Subscription Agreement attached as Schedule "A" hereto;
>
> b. One manually signed and duly completed Risk Acknowledgement (Form 45-103F) substantially in the form of the Risk Acknowledgement attached as Schedule "B" hereto; and
>
> c. Payment of the subscription price to be made by cheque or other payment method acceptable to the Trustees.
>
> [My emphasis]

[154] To summarize, "the prospectus requirement does not apply to a distribution of a security", where the issuer relies on the OME and prospective investors have i) received a copy of the OM ii) returned a manually signed and duly completed risk acknowledgement and 'agreement to purchase the security' and iv) provided payment of the subscription amount.

[155] Sections 4.1(1) and (3) of the Instrument simply refer to "the agreement to purchase the security" (there is no prescribed form) but section 5.2 of the OM, noted above, explains the subscription procedure and refers to "the form of Subscription Agreement attached as Schedule "A" hereto" to which was appended Exhibit "A"

being the "Terms and Conditions for the Subscription of Units" (the "Terms and Conditions" or collectively, the "Subscription Agreement"). It contained amongst other matters, the following provision:

5. Representation, Warranties and Covenants of the Investor.

The Investor hereby represents and warrants to and covenants and agrees with the Trustees that:

a. Legal Capacity: If the investor is a corporation, the investor is a duly incorporated and subsisting corporation (…) If the Investor is an individual, he or she has attained the age of majority and has the legal capacity and competence to execute this Subscription Agreement, and to take all Actions required pursuant hereto;

b. No Prospectus: No prospectus has been filed (…) with any securities regulator authorities of the Provinces of Canada (…);

c. Offering Memorandum: the Investors has received from the Trustees the Offering memorandum (…);

d. Prospectus Exemption: (i) The Investor is a resident of British Columbia and Alberta and is purchasing Units as principal for its own account, not for the benefit of any other person (…) ii) it has received a copy of the Offering Memorandum (…);

e. Resale Restrictions: The Investor (…) is aware of the applicable restrictions on the resale of Units (…);

f. Status of Investor: The Investor has such knowledge, skill and experience in business, financial and investment matters so that the Investor is capable of evaluating the merits and risks of an investment in the Units. To the extent necessary, the Investor has retained, at his or her own expense, and relied upon, appropriate professional advice regarding the investment, tax and legal rights and consequences of this subscription and owning the Units;

(…)

6. Reliance upon Representations, Warranties and Covenants.

The Investor acknowledges that the foregoing representations and warranties are made by it with the intent that they may be relied upon by the Trustees and their counsel in determining the eligibility of the Investors to purchase the Units (…) The Fund, the Trustees (…) shall be entitled to rely on the representations and warranties of the Investor contained hereto (…)

> **7. Survival of Representations, Warranties and Covenants**.
>
> All representations, warranties and covenants set out I this Agreement (…) will survive the Closing.
>
> **8. Amendment.**
>
> Neither this Subscription Agreement nor any provisions hereof will be modified, changed, discharged or terminated except by an instrument in writing, signed by the party against whom, any waiver, change, discharge or termination is sought.
>
> [My emphasis]

[156] In compliance with section 4.4 of the Instrument, each OM prepared in connection with the Income Funds included a certificate which stated "This Offering Memorandum does not contain a misrepresentation" (the "Certificate").

[157] The Certificate was required to be true when it was signed and when the OM was delivered to prospective purchasers. Additionally, each OM contained the following statement:

> No securities regulatory authority has assessed the merits of the Units or reviewed this offering memorandum. Any representation to the contrary is an offence. This is a risky investment…

[158] The Companion Policy to National Instrument 45-106[19] provides additional guidance on the need for prospective investors to be fully informed and on the requirement placed on the issuer in relation to the Certificates:

> **Date of certificate and required signatories**
>
> The issuer must ensure that the information provided to the purchaser is current and does not contain a misrepresentation. For example, if a material change occurs in the business of the issuer after delivery of an offering memorandum to a potential purchaser, the issuer must give the potential purchaser an update to the offering memorandum before the issuer accepts the agreement to purchase the securities. The update to the offering memorandum may take the form of an amendment describing the material change, a new offering memorandum containing up-to-date disclosure or a material change report, whichever the issuer decides will most effectively inform purchasers.

[19] The Companion Policy to National Instrument, 45-106.

[My emphasis]

[159] Section 4.7 provides that the OM delivered to prospective investors had to be filed with the securities commission within 10 days of the distribution which corresponded to the timing for the filing of the Report pursuant to section 7.1.

[160] It is not disputed that the Appellant filed a copy of the OM with the filing fee and Form 45-103F4 for Alberta and Form 45-902F for BC, each being a "Report of Exempt Distribution" (the "Reports") in connection with the First Distribution. As noted above, no evidence was adduced to suggest that a Report was filed in connection with the Second Distribution(s) of units.

[161] The cover letters addressed to the respective securities commissions and the Reports were signed by "James T. Grenon – Trustee". By so doing, he certified their accuracy, and included the required schedules that listed the name and address of the Investors, the "position" held by them with the issuer, if any, and the exemption relied upon. Both versions of the Reports to the provinces included a statement that it was "[a]n offence to make a misrepresentation".

b) Summary of the Alleged Deficiencies

[162] The Minister argues that the Income Funds were not properly constituted and that there were multiple deficiencies that resulted in an unlawful distribution as well as misrepresentations in that i) the Reports failed to disclose the "position" held by any of the Investors, notably the Appellant himself; ii) contrary to the Terms and Conditions for Subscription of Units attached to the Subscription Agreement, as noted above, the Appellant accepted Risk Acknowledgment and subscription forms from minors, signed by minors themselves or by guardians or other adults for minors; iii) numerous subscription forms were signed by adults for other adults, and finally iv) all Investors were required to purchase "as principal" but in numerous instances, subscription funds were paid for by third parties.

[163] In particular, the Minister argues that the acceptance by the Trustees of numerous subscriptions was unlawful, as detailed below, and that the filing of the Reports by the Appellant constituted a misrepresentation. Central to the position of the Respondent is that, as a result of the number of deficiencies, the distribution did not meet the requirements of paragraph 4801(b) of the *Regulation* that there be "no fewer than 150 beneficiaries" in each Income Fund. As reviewed above, the OM actually required that there be a minimum of 160 investors.

[164] The Minister takes the position that for 65 of the 171 Investors in the 2003 series of Income Funds, units were issued contrary to the OM in that:

- 39 subscribers were minors at the time of subscription; and

- 65 subscribers (including 39 minors and 26 adults) did not pay the subscription amount themselves.

[165] Of the 39 minors, two signed the Risk Acknowledgement and Subscription Agreement forms themselves while 32 such documents were signed by a guardian. In the remaining five cases, an individual other than a guardian, executed the documents 'in trust' for the minor. Of the 65 subscribers who did not purchase their own units, the subscription amounts were paid by third parties.

[166] The Minister takes the position that 74 of the 171 Investors in the 2006 series of Income Funds were issued contrary to the OM in that:

- 31 subscribers were minors at the time of subscription; and

- 74 subscribers (including 31 minors at least 40 adults) did not pay the subscription amount themselves.

[167] Of the 31 minors, 10 signed the Risk Acknowledgement and Subscription Agreement forms themselves while 21 were signed by a guardian. Of the 18 adult subscribers who did not sign their own Risk Acknowledgment and Subscription forms, it appears these were signed by other adults. For 74 of the subscribers, the subscription amounts were paid by third parties.

[168] As a result of these alleged deficiencies, the Minister takes the position that all the Income Funds was were not validly constituted as a "mutual fund trust" and thus were not "qualified investments" for RRSP purposes.

[169] The following inquiry will consider the objective reality and effectiveness of the steps undertaken by the Appellant to constitute the Income Funds in order to then assess the effectiveness of those arrangements for purposes of the *Act*.

c) The burden of proof in tax appeals

[170] The Appellant has taken the position that he "does not admit" the numbers cited above suggesting that the Minister has the burden of convincing the Court.

[171] A review of the Appellant's written submissions indicates that there is an admission that units were purchased by minors directly or by their guardian and that some adults signed subscription documents for other adults and paid for their units. I find that these admissions are binding on the Appellant and that he has made no effort to provide any further detail or specificity. He has maintained that the issue was unimportant and irrelevant. In particular, the Appellant has relied on the position that all units of the Income Funds had been paid for and issued and that none of the Investors has in any way repudiated the subscription.

[172] The Appellant admitted in oral testimony that he knew that subscriptions were being accepted for minors and that some adults were signing for other adults and paying for their units. Indeed several of the fact witnesses admitted as much. The Appellant has stated that he was not at all concerned with this.

[173] A review of the Minister's assumptions indicates that it was assumed i) that many of the Investors were minors ii) who did not sign their own subscription documents and iii) did not pay for their own units and iv) many of the adult subscribers did not sign their own subscription documents and v) did not pay for their own units and vi) in certain instances, adult subscribers purchased units for multiple investors both minors and adults[20]. I find that these assumptions were sufficiently clear and precise for purposes of the pleadings and that, following the production of documents by the Appellant, including all subscription documents and subscription cheques, the Minister was able to particularize those basic assumptions.

[174] The number of subscriptions challenged by the Minister, as outlined above, are set out in Schedules A and B attached to the Written Submissions of the Crown (Volume 1 of 3) and were presented to the Court during closing submissions as an "aide-mémoire" that sought to reflect the information provided. I find that the Appellant cannot sit on his laurels and argue that he does not admit the numbers.

[175] If the Appellant wished to contradict the tabulation of information that had been prepared based on documents provided by him, it was incumbent on him to call witnesses or adduce some form of evidence to establish on a balance of probabilities that the Minister was mistaken. He has not done so.

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[20] RRSP Trust Reply, paragraphs 17 (p) to (u); Grenon Appeal Reply, paragraphs 21 (r) to (v).

[176] As the Appellant must know, in tax appeals the burden of proof rests on the taxpayer. The basic principles regarding the burden of proof were summarized by the Federal Court of Appeal in *House v Canada*, 2011 FCA 234:

> [30] In determining the issue before us, it is important to keep in mind the Supreme Court of Canada's decision in *Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336 (*Hickman*), where Madam Justice L'Heureux-Dubé enunciated, at paragraphs 92 to 95 of her Reasons, the principles which govern the burden of proof in taxation cases:
>
> 1. The burden of proof in taxation cases is that of the balance of probabilities.
>
> 2. With regard to the assumptions on which the Minister relies for his assessment, the taxpayer has the initial onus to "demolish" the assumptions.
>
> 3. The taxpayer will have met his initial onus when he or she makes a prima facie case.
>
> 4. Once the taxpayer has established a prima facie case, the burden then shifts to the Minister, who must rebut the taxpayer's prima facie case by proving, on a balance of probabilities, his assumptions (...).
>
> 5. If the Minister fails to adduce satisfactory evidence, the taxpayer will succeed.

[177] It is understood that the "assumptions" referred to in the above citation concern assumptions of fact only and do not include assumptions of law or assumptions of mixed fact and law: *Canada v Anchor Pointe Energy Ltd*., 2003 FCA 294. Moreover, the assertions made in paragraphs 4 and 5 above have been the subject of some controversy and in the more recent decision of the Federal Court of Appeal in *Sarmadi v The Queen*, 2017 FCA 131 ("*Sarmadi*"), Justice Webb indicated that:

> [61] In my view, a taxpayer should have the burden to prove, on a balance of probabilities, any facts that are alleged by that taxpayer in their notice of appeal and that are denied by the Crown. In most cases this should end the discussion of the onus of proof since the assumptions of fact made by the Minister in reassessing the taxpayer would generally be inconsistent with the facts pled by the taxpayer with respect to the material facts on which the reassessment was issued.
>
> [62] If there are facts that were assumed by the Minister in reassessing a taxpayer and that are not inconsistent with the facts as pled by that taxpayer, it would also seem logical to require the taxpayer to prove, on a balance of probabilities, that these facts assumed by the Minister (and which are in dispute and are not

> exclusively or peculiarly within the Minister's knowledge) are not correct. Requiring a taxpayer to disprove the facts assumed by the Minister in reassessing that taxpayer simply puts the onus on the person who knows (or ought to know) the facts. It also puts the onus on the person who indirectly asserted certain facts in filing their tax return that would be inconsistent with the facts assumed by the Minister in reassessing such taxpayer.
>
> [63] Once all of the evidence is presented, the Tax Court judge should then (and only then) determine whether the taxpayer has satisfied this burden. If the taxpayer has, on the balance of probabilities, disproven the particular facts assumed by the Minister, based on all of the evidence, there is no burden to shift to the Minister to disprove what the Tax Court judge has determined that the taxpayer has proven. Either the taxpayer has disproven the assumed facts or he, she or it has not.
>
> [My emphasis]

[178] In this instance, I find that the Appellant has failed to satisfy his burden in that he has not established on a prima facie basis that the units in the Income Funds were issued other than as indicated in the Minister's assumptions.

[179] The Appellant has utterly failed to adduce any evidence that might demolish the assumptions made by the Minister as further particularized above. I find that he has not addressed the facts with candour, fairness and honesty. On the contrary, he has made glib admissions "that there were minors", that "adults did sign for other adults" and that "third parties paid the subscription amounts for other subscribers" but he has otherwise declined to address the assumptions with any degree of specificity. Vague admissions of fact do not suffice to shift the burden to the Minister. As indicated by Justice Webb in *Sarmadi*, supra, "either the taxpayer has disproven the assumed facts or (…) not". In this instance, I find that he has not.

[180] I thus conclude that the number of subscriptions challenged by the Minister, as set out above, have been established to the satisfaction of the Court.

[181] What remains to be discussed are the legal consequences.

d) General principles of statutory interpretation

[182] Since *Regulation* 4801 has not been judicially considered to date, it is appropriate to review the basic rules of statutory interpretation as set out by the Supreme Court of Canada that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, and the intention of Parliament (…) according to a textual, contextual

and purposive analysis to find a meaning that is harmonious with the Act as a whole": *Canada Trustco Mortgage Co. v. Canada* [2005] 2 SCR 601 ("*Canada Trustco*").The Supreme Court has added that "where the words are precise and unequivocal, the ordinary meaning of words play a dominant role in the interpretative process" (para. 10)

[183] In the later decision of *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] 1 S.C.R. 715 ("*Placer Dome*"), the Supreme Court referenced tax legislation specifically and noted that "because of the degree of precision and detail characteristic of many tax provisions, a greater emphasis has often been placed on textual interpretation where taxation statutes are concerned" (para 21) and that "where such provision admits of no ambiguity in its meaning or in its application to the facts, it must be simply applied". Reference to the purpose of the provision "cannot be used to create an unexpressed language" (Para 23).

[184] The Appellant argues that terms used in provincial securities legislation should inform the interpretation of similar terms in the *Act,* and relies on two earlier decisions of the Supreme Court of Canada, notably *Backman v. The Queen*, 2001 SCC 10 ("*Backman*") where is was held that a partnership was defined by reference to provincial or territorial definitions and *Will-Kare Paving & Contracting Ltd. v. Canada*, [2000] 1 SCR 915 ("*Will-Kare Paving*") where the Supreme Court emphasized that "a 'plain meaning' interpretation (…) would assume that the Act operates in a vacuum, oblivious to the legal characterization of the broader commercial relationships it effects", noting that the *Act* "is not a commercial code in addition to a taxation statute" (para 31).

e) The meaning of "distribution" in subparagraph 4801(a)(i)A

[185] The Appellant argues that each Income Fund completed a valid and lawful distribution of units to 171 Investors but that in order to satisfy the requirements of sub-paragraph 4801(a)(i)A, all that was required was a valid and lawful distribution to "at least one" Investor.

[186] The Appellant argues that the *Regulation* requires only that "some units of the class have been lawfully distributed" but that "not all units of the class must have been issued in accordance with such requirements" as long as "at least one" of the 150 beneficiaries "has received their securities through a lawful distribution (…) the requirement for a lawful distribution is met", and further that "taken as a whole, Regulation 4801 does not require all of the 150 beneficiaries to have received their

securities through a lawful distribution in a province" as some "might be friends and family of the promoter" who remain as security holders.

[187] The Appellant maintains that a "distribution" is an industry term that refers to a singular trade in securities. He relies on the definition of that term in the ASA as "a trade in securities of an issuer that have not been previously issued"[21] and in the BCSA as "a trade in a security of an issuer".[22]

[188] The Appellant relies on the decision of *Will-Kare Paving, supra*, and argues that any other interpretation of the word "distribution" would create uncertainty in that the acquisition of units by one investor and the validity of that issuance would depend on the acquisition of units by all other investors, many of whom are not known to each other, leading to undesirable results from a practical and policy perspective.

[189] Although this issue is primarily one of statutory interpretation, I note that the Appellant's testimony on the subject was inconsistent and contradictory. When asked during cross-examinations which exemption he had relied on, he expressed some uncertainty explaining that he might have relied on more than one before finally concluding that it was the OME and that he had understood that it required only one lawful trade. But in earlier testimony, he had indicated that the OM was drafted to exceed the minimum requirements of *Regulation* 4801, and in particular that the number of investors had been increased to 160. There was no mention of a single trade to one investor. He understood that units had to be issued to at least 160 investors to satisfy the terms of the OM.

[190] In any event, the Minister maintains that a "mutual fund trust" will be a qualified investment for RRSP purposes only if there has been i) a lawful distribution of securities ii) to at least 150 investors. If these requirements are not met, the Income Fund might continue to exist as an ordinary trust but not as a "mutual fund trust", as defined in the *Act*.

[191] As indicated by the Minister, the word "distribution" is defined in the *Oxford English Dictionary, 2019 Oxford University Press ("Oxford Dictionary") as* "the action of dividing and dealing out or restoring or bestowing in portions among a number of recipients; apportionment, allotment". Also subsection 33(2) of the

[21] ASA, section 1(p)(i).
[22] BCSA, section 1(1).

Interpretation Act, RSC 1985, c I-21, provides that "words in the singular include the plural, and words in the plural include the singular".

Analysis

[192] From a textual analysis point of view, I agree with the Minister that the ordinary meaning of the word "distribution" incorporates the plural form of the term and that the use of the expression "a lawful distribution (…) to the public" suggests that Parliament intended that it would refer to more than one isolated trade.

[193] The plain meaning of the word "public" suggests a collective concept and the *Oxford Dictionary* defines it as "ordinary people in general; the community".

[194] While the definitions set out in the provincial securities legislation, as noted above, refer generally to "a" trade in securities of an issuer, I find that had Parliament intended to refer to an isolated trade to one investor, it would have said so using precise language. As noted by the Minister, in other provisions of the *Act*, Parliament has spoken clearly, for example, by using the expression "to any member of the public"[23]. As argued by the Respondent, this is consistent with the notion that "giving the same words the same meaning throughout a statute is a basic principle of statutory interpretation": *R. v. Zeolkowski*, (1989) 1 SCR 1378 (S.C.C.).

[195] If the notion of "a lawful distribution" referred to only one singular trade, the use of the expression "to the public" would be superfluous and, as noted by the Minister, this would run counter to the presumption against tautology in the sense that Parliament seeks to avoid superfluous words: *Quebec (Attorney-General) v. Carrières Ste. Thérese Ltée.*, (1985) 1 S.C.R. 831 (at 838) (S.C.C.).

[196] The parties agree that the prescribed conditions for a "mutual fund trust" are set out in paragraphs (a) and (b) of *Regulation* 4801, as noted above, but the Appellant argues that paragraph (a) only requires one valid trade as long as there are at least 150 investors at the time the trust claims to be a "mutual fund trust".

[197] On this issue, I agree with the Minister that the use of the conjunctive "and" (and not the disjunctive "or") indicates that the conditions of both paragraphs must be met. From a contextual point of view, it is apparent that Parliament intended to link the requirement in paragraph (a) that there be "a lawful distribution…to the

[23] ITA, Section 39(3) and section 84(6).

public" with the requirement in paragraph (b) of the *Regulation* that there be a widely-held distribution to no fewer than 150 investors.

[198] I agree with the Minister that this inter-connection supports the interpretation of "a lawful distribution" as being to more than one investor. Moreover, the phrase "in respect of a class of the trust's units that meets at that time, the conditions prescribed in paragraph (a)" that appears at the beginning of paragraph 4801(b), provides further context. It requires that "at the time" the lawful distribution is completed, there are no fewer than 150 investors. Moreover, the introductory words to Regulation 4801 indicate that "[i]n applying at any time paragraphs 136(c) of the Act, the following are the prescribed conditions (…)." The word "conditions" is expressed in the plural and not the singular.

[199] As a result I conclude that paragraphs (a) and (b) of *Regulation* 4801 must be read harmoniously as a whole, or "holistically", as argued by the Minister, and that this is consistent with the notion that the purpose of the provision is to establish the precise requirements for a "mutual fund trust" that may provide valuable tax advantages to annuitants as a "qualified investment" for RRSP purposes.

[200] Subsection 132(6.1) provides that "where a trust becomes a mutual fund trust at any particular time" it may so elect "in its return of income for that year". This is consistent with the wording of subsection 132(6) which provides that "a trust is a mutual fund trust if, at that time" it satisfies the conditions set out therein including the requirements of *Regulation* 4801. This suggests that a trust would only become a "mutual fund trust" when it so elects having satisfied "at that time" the requirements of both paragraphs (a) and (b) of *Regulation* 4801.

[201] It may be, as argued by the Appellant, that a distribution to one single investor is "a trade in a security of an issuer" that satisfies the definition contained in provincial legislation, as noted above. But it is not clear how this advances the Appellant's position in establishing that the Income Funds were a "mutual fund trust". If paragraph (a) of the *Regulation* refers to only one lawful trade to one investor, then the Court would have to wonder how or pursuant to what other lawful distribution the remaining units in the trust were issued to other Investors. I agree with the Minister that it would be absurd to condone the possibility that there might be 149 unlawful distributions as long as there was at least one lawful distribution.

[202] The Appellant suggests that sub-paragraphs (a)(i) and (a)(ii) of *Regulation* 4801, do not provide that "all" units must be distributed in the same distribution or pursuant to "a lawful distribution" and do not exclude the possibility of there being

only “one” lawful distribution, as long as there were no fewer than 150 investors “at that time”.

[203] I find that this interpretation is incompatible with and ignores the closed-system for the distribution of securities that prevails in Canada, as reviewed above.

[204] All securities, without exception, must be legally or lawfully distributed and that involves filing a prospectus or relying on a prospectus exemption, as required “under the laws of the province”.

[205] The uncontroverted evidence is that the Appellant undertook only “one” distribution of units in connection with each Income Fund relying on the OME and it was an essential term of the OM that units be issued to at least 160 investors.

[206] There was no evidence of a prior distribution of units by prospectus or pursuant to any other exemption. The evidence on this issue was unequivocal.

[207] Although it is not necessary for the Court to opine in the abstract, I will add that it would be possible (subject to the finer points of securities legislation) to issue securities relying on a prospectus or a combination of different exemptions carried out at different points in time (and possibly in different provinces), given the use of the words “there has been at or before that time” in sub-paragraph 4801(a)(i). For example, a trust might issue units having a value of at least $500 to 50 investors relying on the “Friends, Family and Business Associates Exemption” and, at a later date (or simultaneously), if it intended to qualify as a “mutual fund trust”, undertake a second distribution of units having a value of at least $500 to at least 100 investors, relying on the OME. For the purposes of *Regulation* 4801, as long as a class of units had been distributed “lawfully” to the initial 50 investors, there would be a lawful distribution to the public under the laws of the province. Once the second distribution was completed, there would be “at that time”, no fewer than 150 investors. Having completed two lawful distributions and having reached the “bright-line test” of 150 investors, the trust would qualify as a “mutual fund trust” in accordance with the requirements of *Regulation* 4801.

[208] To conclude on this issue, given the undisputed terms of the OM and the Appellant’s admission that he had raised the bar to exceed the minimum requirements of the provision, the Court finds in this instance that, “a lawful distribution…under the laws of the province” required a distribution to no fewer than 160 investors. Anything less than that would not be “a lawful distribution” since it would be contrary to the precise terms of the OM. I find that this interpretation of

the word "distribution" in *Regulation* 4801 is consistent with the text of the provision and provides a result that achieves the statutory objectives and gives effect to the entire statutory scheme.

f) The meaning of "lawful" in subparagraph 4801(a)(i)A

[209] As noted above, the Minister has argued that as a result of a number of deficiencies, the distribution of units in the Income Funds was not "lawful" in that it was contrary to securities legislation including the OME and the terms of the OM.

[210] The *Oxford Dictionary* defines "unlawful" as "contrary to or prohibited by law; not conforming to, permitted by, or recognized by law; illegal; unjust, wrongful."

[211] Before reviewing the alleged deficiencies in greater detail, I turn to the position of the parties as to the meaning of the word "lawful".

[212] The Minister argues that under the closed-system for the distribution of securities, an issuer is prohibited from distributing securities unless a prospectus has been filed and approved in advance of the distribution or alternatively, the issuer has met the requirements of an exemption as set out in the national or multilateral instruments, as reviewed above. The Minister argues that these requirements are mandatory and have force of law and must be strictly complied with. A distribution that does not strictly comply will be characterized as illegal and thus unlawful.

[213] The Minister cites a number of decisions of the Alberta Securities Commission including *Re Homerun International Inc.*, 2014 ABASC 59 ("*Homerun*"); *Re Cloutier*, 2014 ABASC 170 ("*Cloutier*") and *Bartel Re*, 2008 ABASC 141 ("*Bartel*"). All of these decisions involved enforcement proceedings against issuers or individuals who were prosecuted for having engaged in illegal trades or the distribution of securities where there was no exemption from the prospectus requirements. They had also made prohibited representations to investors. In all instances, the focus was on the conduct of the issuer or individuals involved.

[214] In *Homerun*, the Commission referred to the exempt-distribution rules as the "Prescribed Capital-Raising Exemptions" explaining that they were enacted to "facilitate capital-raising on terms that preserve investor protection" (para. 82) and added that the "onus of demonstrating the availability, and adherence to all the

conditions and requirements, of the Registration Exemption (…) rests with the [person] claiming the benefit of the exemption" (para. 83).

[215] Similarly, in *Bartel,* the Commission noted that "distributions that fall squarely within the exemption requirements will not be illegal" but that "the onus rests on [the promoter] to prove the facts necessary to demonstrate that one or more of those exemptions was available" (para 109). It later noted that "the use of exemptions must be complied with strictly" and that "those who use exemptions are expected to know what the rules are and how they work" adding that "[o]ne is responsible for the trades one conducts" (para. 127).

[216] The Minister also relies on the decisions of *R. v. Del Bianco*, 2008 ABPC 248, confirmed on appeal in *Del Bianco v. Alberta Securities Commission*, 2004 ABCA 344 ("*Del Bianco*"), *R. v. Boyle*, 2001 ABPC 152 ("*Boyle*") and *Ironside v. Smith,* 1998 ABCA 366 ("*Ironside*"). In the latter decision, the court conducted a detailed review of what it described as "the highly regulated world of securities law" (paras. 18-30) noting that it seeks to balance the twin-goals of "investor protection and efficient raising of capital" (para. 19) by regulating issuers and individuals involved in the distribution of securities by providing "civil and criminal sanctions (…) to discourage fraudulent behaviour" (para. 21) and "broad definitions to capture most distributions before excluding various trades by exemption" (para. 22).

[217] In both *Boyle* and *Del Bianco*, individuals were accused of contravening the provisions of the securities legislation by engaging in the illegal trade of securities and failing to comply with various orders of the Alberta Securities Commission, including that they cease trading in securities and resign as officers and directors of any issuers. In *Boyle*, the Provincial Court of Alberta stated that:

> [18] (…) In a closed system, all "trades" of "securities," both of which are broadly defined, must be undertaken in full compliance with the regulatory regime. <u>If an issuer of securities wishes to operate "outside" of the full system, it must take affirmative steps to be exempt from various statutory requirements.</u>
>
> [My emphasis]

[218] The Minister argues that all of these decisions support the broad proposition that under the closed-system of distribution of securities, all distributions must be undertaken in strict compliance with the securities legislation. Moreover, while acknowledging that the Companion Policy 45-106CP *Prospectus Exemption*, is not binding legislation, the Minister points to section 1.9(1) that provides as follows:

> It is the seller that is relying on the prospectus exemption and it is the seller that is responsible to ensure that the terms of the exemption are met. If the seller has any reservations about whether the purchaser qualifies under the exemption, the seller should not sell securities to the purchaser in reliance on that exemption.

[219] The Appellant argues that the alleged deficiencies are of no consequence since the word "lawful" refers to something that is prohibited by law as a consequence of which it is utterly void. The Appellant argues that the distribution of units was in keeping with the requirements of the Instruments and that even if it was contrary to the Instruments or to the OM, as the Minister has alleged, it would not render them automatically unlawful since they would only be voidable.

[220] The Appellant relies *inter alia* on the decision of the Federal Court of Appeal in *Still v. M.N.R.*, [1998] 1 FC 549 ("*Still*") involving an American citizen who was lawfully admitted to Canada to join her spouse. Pending consideration of her application for permanent resident status, she accepted gainful employment without a work permit, contrary to the provisions of the immigration legislation. She was laid-off after several months and sought unemployment benefits. Despite a finding that she was of good faith and had paid insurance premiums, her application for unemployment benefits was denied and the trial judge who up-held the Minister's determination that her failure to obtain a work permit resulted in an illegal contract of service that did not constitute "insurable employment".

[221] On appeal, the Federal Court of Appeal reviewed the common law doctrine of illegality noting that the "classical model" provides that "a contract which is either expressly or impliedly prohibited by statue is normally considered void ab initio". Before concluding that the applicant was entitled to unemployment benefits, the Court noted that "the classical model has long since lost its persuasive force and is no longer being applied consistently" and that:

> "(…) where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so.

[222] I note that *Still* has been cited in several decisions of this Court involving claims for unemployment benefits, notably *Garland v. M.N.R.*, 2005 TCC 176 ("*Garland*") (para. 8) and *Haule v. M.N. R.*, (Docket 98-511-UI) ("*Haule*"). These decisions involved individuals who had been denied unemployment benefits as a result of the alleged illegality of their employment contract. The paragraph from *Still* that is most of often quoted is that of Robertson J.A.:

> (…) As the doctrine of illegality is not a creature of statute, but of judicial creation, it is incumbent on the present judiciary to ensure that its premises accord with contemporary values (…)
>
> [My emphasis]

[223] In *Haule,* Lamarre J. (as she then was), noted that "as the doctrine of illegality rests on the understanding that it would be contrary to public policy to allow a person to maintain an action on a contract prohibited by statute, then it is only appropriate to identify those policy considerations which outweigh the applicant's prima facie right to unemployment benefits" (para. 49).

[224] The Appellant also relies on the Supreme Court of Canada's approach to the doctrine of illegality in *Continental Bank of Canada v The Queen* (1998), 98 DTC 6505 (SCC) ("*Continental*"). In that instance, the Court reviewed the application of the doctrine explaining that it includes both "common law illegality" and "statutory illegality" (para 67) and provides that "a contract prohibited by statute or for an illegal purpose, will be declared void even if it conforms to all other requirements of a valid transaction" (para. 64).

[225] Writing for the majority, McLachlin J. (as she then was) indicated that a finding that "a contract is void or unenforceable for public policy reasons under the doctrine of illegality does not render either the contract itself or the subject of the contract unlawful" (para. 116) and further that, even if the Court concluded (on the facts of that decision) that the bank's participation in the "partnership should be void or unenforceable for public policy reasons under the doctrine of illegality" that would "not necessarily mean that its participation was illegal or unlawful in the traditional sense of either term" (emphasis in the original text, para 117). She concluded that "public policy requires that breaches of the Bank Act should not lead to the invalidation of contracts and other transactions" (emphasis in the original text, para 118) explaining further that the legislation in question specifically provided that "[n]o act of a bank…is invalid by reason only that the act or transfer is contrary to this Act"[24]. In the end, McLachlin J. concluded that "the doctrine of illegality should have no application in the case at bar" (para 119).

[226] The Appellant also relies on the decision of *Sidmay Ltd. v. Wehttam Investments* Ltd., [1967] 1 OR 508 (ONCA) ("*Sidmay*") affirmed on appeal [1968] SCR 828, involving a mortgagor who sought to invalidate a mortgage ("the impugned mortgage") on the basis of illegality since the lender was not registered

[24] Section 20, Bank Act, R.S.C., 1985, c.B-1.

under the *Loan and Trust Corporations Act* [25]. The trial judge declared the mortgage "void and unenforceable", a finding that was rejected by the Ontario Court of Appeal. Laskin J.A. quoted the following phrase with approval: "If refusal to enforce or to rescind an illegal bargain would produce a harmful effect on the parties for whose protection the law making the bargain illegal exists, enforcement or rescission, whichever is appropriate, is allowed" (para 74).

[227] The Appellant argues that *Still*, *Continental* and *Sidmay* all support the broad proposition that even if certain subscriptions for units in the Income Funds were accepted mistakenly or contrary to the provisions of the securities legislation, the Instruments or the OM, they would only be rendered voidable and not unlawful. The Appellant argues that a finding that the issuance of units to some investors was "unlawful" could also harm innocent third parties who were unaware of the potential illegality of the transaction.

Analysis

[228] It is apparent from the decisions cited by the Minister that securities legislation has evolved over time as a highly-regulated area of law intended to facilitate capital-raising efforts while also ensuring investor protection.

[229] In particular, securities legislation provides discreet capital-raising exemptions as an alternative to the more onerous process of filing a prospectus but holds that exemptions must be strictly complied with and "must be undertaken in full compliance with the regulatory regime". Only "distributions that fall squarely within the exemption requirements will not be illegal" (*Bartel*), suggesting that all others will be considered illegal.

[230] I now turn of the decision of *Still* on the issue of statutory illegality. It is not entirely clear how this applies to the facts in this instance since the issue of the enforceability of the subscriptions as between the various unitholders and the Income Funds, and whether they are voidable or utterly void, is not before the Court. The only issue is whether the distribution was "lawful" for the purposes of *Regulation* 4801. In the decisions of *Still*, *Godard* and *Haule*, the applicants had all been engaged in gainful employment and the critical issue was their entitlement to statutory benefits. In this instance, the Minister does not seek to deprive any of the Investors of their entitlement to *pro rata* distributions from the Income Funds much less to any statutory benefits.

[25] R.S.O. 1960, c. 222.

[231] Similarly, the decision of *Sidmay* involved a dispute as to the enforceability of a mortgage that was alleged to be void on the basis of illegality. But Laskin J.A. rejected that notion finding that "the prohibition of the statute affects the mortgagee alone" (para 61) (My emphasis) and that the mortgage was enforceable. As noted above, the Minister does not seek a declaration that the impugned subscriptions are void or voidable, but only whether units were issued as part of "a lawful distribution" to determine whether the Income Funds satisfy the requirements of *Regulation* 4801.

[232] It is relevant to note that in *Continental*, McLachlin J. concluded that "the doctrine of illegality had no application in the case at bar" (para 119) suggesting that her comments on the issue were largely *obiter dicta*. However, even if the Court considers the application of the doctrine, it bears repeating that it rests on the understanding that public policy considerations dictate that an impugned contract that is said to be prohibited by statute, should not be disregarded outright. As noted in *Haule*, in such circumstances, it is only appropriate for the court to identify those policy considerations which would outweigh a finding of illegality.

[233] In this instance, the Court must determine the validity of the assessments wherein the Minister takes the position that the Appellant did not complete "a lawful distribution...under the laws of the province" such that the Income Funds were not a "qualified investment" for RRSP purposes. If the Court concludes that the issuance of units to certain Investors was contrary to the requirements of the OME and OM, then the Income Funds would continue to exist as ordinary trusts (assuming they still exist today). With the exception of the Appellant (and possibly Sutherland and MacLennan who acquired units with their respective RRSP's) the remaining unitholders would not be affected by a decision of this Court.

[234] The issue before the Court is the meaning of the word "lawful". To make that determination, the Court must consider whether the Income Funds have been legally, validly or properly constituted and were compliant with securities legislation. Did they meet the definition of a "mutual fund trust" in *Regulation 4801* and in particular was there "a lawful distribution (…) in accordance with the laws of the province" or stated otherwise, were the Income Funds "qualified investments" for RRSP purposes.

[235] To provide further context on the analytical framework, it bears repeating that in the realm of tax law, form matters a great deal. That the Appellant intended, in good faith or otherwise, to issue units to at least 160 investors per Income Fund does not suffice. In the seminal decision of *The Queen v. Friedberg*, 92 D.T.C. 6031 (FCA) ("*Friedberg*") at 6032, Linden J.A. stated the following:

> In tax law, form matters. (…) If a taxpayer arranges his affairs in certain formal ways, enormous tax advantages can be obtained, even though the main reason for these arrangements may be to save tax (see *The Queen v. Irving Oil* 91 DTC 5106, per Mahoney, J.A.). If a taxpayer fails to take the correct formal steps, however, tax may have to be paid. (…) While evidence of intention may be used by the Courts on occasion to clarify dealings, it is rarely determinative. In sum, evidence of subjective intention cannot be used to "correct" documents which clearly point in a particular direction.
>
> [My emphasis]

[236] I conclude that a distribution will be "lawful" and meet the requirements of paragraph (a) of *Regulation* 4801, where the distribution of securities is made "under the laws of the province" and either i) the distribution of securities is pursuant to one of several exempt-distribution rules (where a prospectus is not required) and the securities are distributed in accordance with that exemption, or ii) the securities have been qualified for distribution to the public by the filing of a prospectus and the securities are distributed in accordance with that document.

[237] In this instance, despite the Appellant's assertion that he "may have relied on more than one exemption", it cannot seriously be disputed that he relied exclusively on the OME. The Reports filed with the securities commissions in connection with the First Distribution, confirm that all listed Investors, without exception, including the Appellant and his related entities, relied on that exemption. At issue is whether the distribution complied with or met the technical requirements of the securities legislation, including the OME and OM.

g) Failure to disclose the position held

[238] As noted above, the Reports included a schedule listing the name and address of Investors, the exemption relied upon, and the "role" assumed by each of them.

[239] The Minister argues that the Appellant did not indicate the "position" held by any of the Investors, including the Appellant himself nor Bruce Maclennan for the 2003 series of funds or Deborah Nickerson for the 2006 series of funds. The Minster argues that this was a misrepresentation.

[240] The ASA provides a broad definition of the word "misrepresentation"[26] as being "an untrue statement of a material fact" or "an omission of a material fact that is required to be stated" or, finally, "an omission to state a material fact that is

[26] ASA, section 1(ii).

necessary to be stated in order for a statement not to be misleading". The BCSA contains a similar definition.

[241] The schedule in question listed a certain "Jim Grenon" as an Investor but described his position as "none". The Appellant explained in oral testimony that his staff knew him by that name and that they prepared the form accordingly, suggesting it was in the nature of a clerical error. The failure to identify his role was also characterized as a clerical error. The Appellant indicated that in any event he had signed the cover page addressed to the securities commission and the Reports in his capacity as trustee and that his role as promoter was described in the OM.

[242] I note that the Appellant's suggestion of a clerical error is uncorroborated. The cover page was signed by the Appellant below the type-written words "James T. Grenon - Trustee". If the said "Jim Grenon" was one and the same as the Appellant, the Court must wonder why his role was not specified and why this error was repeated in at least six Reports that also failed to identify the other trustees.

[243] Moreover, the Court notes that the Appellant's employees were sufficiently diligent and attentive to detail to list numerous entities related to the Appellant in the 2003 Reports and at least 14 other Investors sharing the same address and telephone number as Tom Capital Consulting, including Grencorp, Tom Capital, Tom Consulting Limited Partnership and at least 5 Alberta numbered companies, two of which were noted above as being wholly owned by the Appellant.

[244] To suggest that these was mere clerical errors stretches credulity and, at the very least, raises serious concerns as to how the distribution process was managed.

[245] That said, while I find that the Appellant's testimony on this issue was not credible, I am unable to conclude that the failure to describe his "role" or that of the other trustees in the schedules to the Reports was a "misrepresentation" or "an omission of a material fact that is required to be stated". In the end, the Reports at least identified the Appellant as the trustee and promoter of the Income Funds.

h) The subscription and acquisition of units by minors

[246] For reasons set out above, the Court has concluded that 39 Investors in the 2003 series of Income Funds and 31 Investors in the 2006 series of Income Funds, were minors. In oral testimony, the Appellant indicated that he was not at all concerned with this because of his view that "little Johnny can own shares".

[247] Although there is some disagreement as to the actual age of the minors involved, the Affidavit of Helen Little provides birthdates and in response to requests to admit, the Appellant indicated that he had no reason to dispute that the listed minors were not minors. They were all under the age of majority.

[248] In all instances, the subscriptions were accepted and units were issued to the minors "as named" and over the years, *pro-rata* distributions were made accordingly. The Appellant's testimony on this has been corroborated by the fact witnesses.

[249] The Appellant maintains that under common law, minors[27] can acquire property including securities and enter into contracts with third parties. The common law simply holds that contracts with minors are *prime facie* voidable (with the exception of contracts for "necessaries") and may be rescinded by the minor upon reaching the age of majority. These common law notions have been incorporated into statute. For example, the applicable BC legislation provides that a contract with a minor is unenforceable unless "affirmed by the infant on his or her reaching the age of majority" or "if not repudiated by the infant within one year after his or her reaching the age of majority"[28]. At common law, "all instruments and acts of an infant are voidable only" but not void *ab initio*: *Rex v. Rash*, (1923) 53 O.L.R. 245 (ONCA) (para 49).

[250] The Appellant also relies on an article entitled "The Present Law of Infants' Contracts"[29] in support of the proposition that "[a]ny contract made by an infant for the purchase or other acquisition of shares is voidable at the option of the infant, but is valid unless and until so repudiated." I note that this article predates the introduction of the closed-system in 1979, as described above. It also does not specifically address the issuance of securities pursuant to an OM.

[251] The Appellant also maintains that guardians can enter into legally binding contracts on behalf of minors and thus could lawfully sign the subscription documents on their behalf. In Alberta, the *Domestic Relations A*ct, RSA 2000, c D-14 (section 50(1) (replaced effective 2013, by the *Family Law Act*, SA 2003, c F-4.5), provides that parents are the joint guardians of a child. There is similar legislation in BC: *Family Law Act*, SBC 2011, c 25, section 39.

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[27] In Alberta the age of majority is 18: Age of Majority Act, RSA 2000, c A-6 and in BC it is 19: Age of Majority Act, RSBC 1996, c. 7.
[28] Section 19(1) – Infants Act, RSBC, 1996, c. 223.
[29] 1975, 53 Can. B. Rev. (Source: CED Business Corporations V.9(b) (Ontario) at 401.

[252] The Appellant's position on this issue is best encapsulated by the following phrase: "[g]uardianship is a specific legal construct designed, and inculcated in statute, to address the relatively unique relationship of children and parents (…) The guardian acts, as a child, such that, in a commercial context, any party seeking to deal with the child's property can, by contracting through the guardian, obtain an enforceable agreement"[30].

[253] The Minister does not appear to disagree with the general proposition of law that minors can acquire property and that guardians may sign contracts on behalf of a minor. She relies on the case law referenced above, which holds that under the closed-system for the distribution of securities, a distribution of securities is unlawful unless the requirements of the exemption are strictly complied with.

[254] In particular, the Minister has focused on section 5 of the Terms and Conditions being the "Representations, Warranties and Covenants of the Investor", as noted above, and concluded that it was contrary to the OME and OM for minors to acquire units. Similarly, the Minister has argued that the Risk Acknowledgement is a prescribed form that does not allow for the signature of guardians in the pre-printed signature block. And finally, the Minister has argued that when the Appellant filed the Reports with the securities commission, listing the name and address of all the Investors, having knowledge of the subscriptions by minors, that this was a "misrepresentation" leading to the conclusion that the distribution was contrary to the OME as well as the OM and thus not "a lawful distribution".

[255] I find that there are compelling reasons to agree with the Minister's submissions.

[256] As a preliminary observation, I note that the Appellant's bald assertion that minors can own shares is mistaken or at least too simplistic. Within the realm of private corporations where securities are typically issued pursuant to the "Private Issuer Exemption" or "Family, Friends and Business Associates Exemption", it may be that shares are routinely issued to minors without further consideration. As noted by the Appellant, the *Act* itself contains provisions seeking to reattribute dividend income to adults[31] or to impose the so-called 'kiddie' tax[32]. But outside the narrow confines of those exemptions, I note that even securities that have been "qualified for distribution to the public" (ie. by the filing of a prospectus with the applicable securities commission) and trade on an exchange, cannot simply be acquired by

[30] Trial Submissions of Appellant, paragraph 133.
[31] Section 74.1(2), *ITA.*
[32] Section 120.4, *ITA.*

minors except with the use of a custodial or "in trust" account managed by an adult. No evidence has been lead on this issue, but I take judicial notice of the fact that investment dealers in Canada will not open investment accounts for minors because they are not competent to give instructions. Given the inherent risks of owning securities, it is of little comfort for investment dealers to know that securities acquired for minors are only "voidable" until the age of majority.

[257] In this instance, we are dealing with the OME and securities that have "not" been qualified for distribution to the public and the governing law, as set out in the Instruments, provides that the OM and Risk Acknowledgment "must be in required form", as noted in sections 4.2 and 4.5 above. The Court must take this to mean that the "forms" could not be modified unless otherwise provided for.

[258] It is not disputed that the OM was in required form and that it included various Schedules, including a "Form of Subscription Agreement". The attached Terms and Conditions included the representation that prospective investors had attained the age of majority and had legal capacity and competence.

[259] More importantly, section 5(k) included a representation as to the "Status of Investor" indicating that the investor had such "knowledge, skill and experience in business and investment matters" as was necessary and was "capable of evaluating the merits and risks of an investment in the Units" and "to the extent necessary" had retained "appropriate professional advice regarding the investment, tax and legal merits and consequences of this subscription".

[260] It is true, as argued by the Appellant, that the Subscription Agreement itself was not a prescribed form. However, since it was attached to the OM (and listed in the table of contents) that was delivered to Investors and later filed with the securities commission, I find that it was indivisible from the statutory form. Offering Memorandum Form 45-103F1, entitled "Instructions for Completing", *Offering Memorandum for non-qualifying issuers,* provides as follows:

> 5.2 - It is an offence to make a misrepresentation in the offering memorandum. <u>This applies both to information that is required by the form and to additional information that is provided.</u>
>
> [My emphasis]

[261] I find that both the "Form of Subscription Agreement" and "Terms and Conditions for Subscription of Units" were indivisible or part and parcel of the OM.

They were not simply extraneous documents that could be ignored by the Appellant if he deemed it convenient or expedient to do so.

[262] The Court accepts that the applicable securities legislation does not expressly prohibit the sale of securities to minors. This leads the Appellant to the conclusion that it was therefore not "unlawful" to do so. However, the Court cannot agree and must conclude that in "the highly-regulated world of securities law" (*Ironside*), where issuers are required to strictly comply with capital raising exemptions (*Bartel*, *Homerun*, *Del Bianco, Doyle*), it follows that they must also strictly comply with the OME and OM.

[263] A review of the OM with the attachments as noted above, and the prescribed Risk Acknowledgment form, leads me to conclude that subscription documents could only be signed by individuals or persons who had legal capacity to do so and were able to represent that they had the requisite "knowledge, skill and experience" and were "capable of evaluating the merits and risk" of the investment and seeking "appropriate professional advice" if deemed appropriate. Minors by definition are not legally competent to fulfill those requirements. In this context, it does not matter that at common law, a contract signed by a minor is only voidable.

[264] As a result, I reject the suggestion that the Appellant as trustee "had the discretion to make non-material changes to the form"[33] or that the requirement as to the age of majority or as to the status of the investor, as noted above, was a mere contractual term that could be waived by the Appellant when he knew "that the subscriber's representations are not accurate or fulfilled"[34]. The Appellant relies on *Kempling v. Hearthstone Manor Corp.*, 1996 ABCA 254 and *Saskatchewan River Bungalow ltd. v. Maritime Life Assurance Co.*, [1994] 2 SCR 490, to support the broad proposition that "a party to a contract may waive a stipulation or a condition in a contract to its benefit". However, none of these decisions involved the issuance of securities to minors.

[265] The OM could have stated that a particular representation was inserted for the benefit of the issuer and could be waived at any time before closing. But in this instance, there are no words to that effect. It does not assist the Appellant that section 6 of the Terms and Conditions indicates that "the Trustees and their counsel" would rely on the representation to determine "the eligibility of the Investor to purchase Units". Having determined that subscribers were minors, the Appellant should have

[33] CIBC Reply Submissions, paragraph 25.
[34] Appellant Trial Submissions, paragraph 137.

rejected them or taken affirmative steps to correct the situation, possibly by amending the documentation. No such steps were taken.

[266] Similarly, it is clear that minors were not legally competent to sign the Risk Acknowledgement form and the Court must conclude, given the wording and law applicable to minors, that the Alberta and BC securities commission intended that this document would only be signed by adult subscribers who had legal capacity.

[267] I note parenthetically that this form is not required for the "Private Issuer Exemption" which is limited to 50 investors who are closely-connected or deemed to be closely-connected to the issuer[35] or by the "Family, Friends and Business Associates Exemption" which is also only available to individuals closely-connected or deemed to be closely-connected with the issuer. For the latter two exemptions, a disclosure document is also not required and thus we can conclude that the legislatures of Alberta and BC have sought to relax the rules for a limited and fairly well-defined category of investors who were not deemed to be in need of protection, thus ensuring that the objectives of facilitating capital-raising and investor protection, were being met.

[268] The same cannot be said for the OME because securities are distributed to a much broader category of investors that can best be described as "the public" in the traditional sense even though some investors may be closely-connected to the promoter, such as family, friends and business associates, for example.

[269] Since the Appellant chose to rely on the OME (as confirmed in the Reports), the underlying premise is that prospective investors were deemed not to be closely connected with the issuer (whether they were or not, is not relevant) and as such were deemed to be in need of protection. This is apparent given the requirement for a relatively detailed disclosure document (the OM) and Risk Acknowledgment, all in prescribed form. This suggests that the exemption relied upon in this instance was structured to ensure that the objective of investor protection was given priority given the deemed absence of a close connection with the issuer. As such, all Investors, without exception (even those closely connected to the Appellant), were required to adhere to the requirements of the OME and OM.

[270] At this point, I will mention that during the course of the hearing, the Appellant entered Exhibits A-2 and A-3 purporting to provide a list of investors who were not well-known or closely-connected to him. I find that this list is of no

[35] Except SK and ON.

consequence for reasons set out above. Since he chose to rely on the OME, all prospective investors without exception, including those who were well-known or closely connected to him, were required to sign the subscription documents.

[271] The Appellant could not rely on other capital-raising exemptions on a casual or *ad hoc* basis. That is apparent from the decisions cited above. He relied on the OME as outlined in the Reports. It does not assist him in this proceeding to suggest that "he may have been relying on other exemptions". While it may be possible to rely on multiple exemptions, it is not possible to do so on an *ex post facto* basis. As noted in *Boyle, supra*, the Appellant would have been required to "take affirmative steps to be exempt from various statutory requirements" (para 18). He did not do so.

[272] On the issue of the subscription documents signed by individuals purporting to act as guardians for minors and those signed by unrelated adults for minors, I find that a similar analysis applies. Given the highly-regulated nature of the securities industry and the closed-system for the distribution of securities, the Appellant could not simply waive the requirement that individual investors be of the age of majority by having the subscription forms signed by guardians or other adults for minors who were not their children. This was not permissible. It was contrary to the Terms and Conditions and thus unlawful.

[273] The fact that guardians may bind minors under ordinary contract law, as reviewed above, does not assist the Appellant in this instance. This is so because the case-law has established that the capital-raising exemptions must be strictly construed and applied and the attachments to the OM clearly required that investors have "attained the age of majority" and "the legal capacity and competence" to execute the subscription documents. If it was appropriate for documents to be signed by guardians or other third parties, the Terms and Conditions would have addressed this possibility.

[274] If the Court were to accept that subscription documents could be signed by guardians or other adults for minors, it would be necessary to read-in words that do not appear in the language of these quasi-statutory forms. That is not permissible.

[275] In the end, I find that this interpretation is consistent with the cautionary words of the section 1.9(4) of the Companion Policy titled "Responsibility for compliance and verifying purchaser status", indicating what reasonable steps should be taken too ensure compliance with the exemption and that if an issuer had "any reservations about whether the purchaser" qualified under the exemption, "the seller should not sell securities to the purchaser in reliance on that exemption".

[276] As noted above, the Instrument states that the OM and Risk Acknowledgment were to be in "prescribed form". This must be interpreted to mean that they could not be modified in any way, notably to accommodate the signature of a guardian or other adult, unless this was permissible under another provision.

[277] To reinforce this notion, section 8 of the Terms and Conditions states that "neither the Subscription Agreement nor any provision hereof" could be "modified, changed, discharged or terminated except by an instrument in writing". (My emphasis). Although this suggests that it might have been possible to amend the Terms and Conditions, there was no evidence before the Court that such an instrument had been prepared.

[278] It is noted that the Appellant could have prepared and delivered a modified OM. He did not do so. He could have made an application to the securities commission seeking "an exemption from the Instrument, in whole or in part"[36]. There is no evidence to suggest that a dispensation was sought or obtained.

[279] With respect to the issue of a "misrepresentation", that concept is defined, as noted above, to include "an omission of a material fact that is required to be stated". I find that this relates primarily to the contents of the OM, including the business objectives of the issuer, the use of subscription proceeds or the contractual rights of unit holders, for example. This is apparent from a reading of the Certificate, as noted above, stating that the OM remained true and that the "offering memorandum does not contain of misrepresentation".

[280] However, the obligation to avoid a "misrepresentation" also extended to the Reports since the prescribed form contained a similar caution in bold capitalized letters. Given the conclusions I have reached as to the obligation of an issuer in the closed-system of distribution of securities, the need to ensure investor protection, the express prohibition against issuing securities to minors in the OM, I find that the Appellant made a misrepresentation when he reported to the securities commission attaching a list of Investors that included minors.

[281] The Appellant has argued that a finding that some subscriptions were unlawful and not others would mean that all subscriptions were somehow interconnected which was not desirable from a public policy point of view. I would reject this analysis outright since the funds can continue to exist as ordinary trusts with a reduced number of beneficiaries, if necessary. The number of investors required in

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[36] 45-106, section 7.1(1).

this instance was a function of the OM prepared by the Appellant and his attempt to establish a "mutual fund trust" for RRSP purposes. If the trust was only successful in issuing units to a lesser number of investors, it could have amended the OM to indicate that a revised minimum number of investors was required.

[282] The Appellant cannot, in the context of these proceedings, rely on his own inadvertence or mistaken interpretation as to the requirements of the Instruments, the OME or OM. Even if he mistakenly believed that units had been issued in full compliance with the securities legislation, this would still not result in a "lawful distribution" for the purposes of the Act or *Regulation* 4801. Nor can he rely on the assertion that there were no complaints or enforcement proceedings or that units were issued to minors and other investors who received *pro-rata* distributions over the years. Such considerations are simply not relevant to these proceedings.

[283] I indicated above that the doctrine of illegality had no application to this analysis because the only issue before the Court was the validity of the assessments under the *Act* and compliance with *Regulation* 4801. That said, if I consider for a moment the application of the doctrine of illegality, I need only turn to the words of the Federal Court of Appeal as laid out in *Still*, (a decision relied upon by the Appellant) indicating that where "a contract is expressly or impliedly prohibited by statute" a court may consider all the circumstances "including the objects and purposes of the statutory prohibition" and ask if "it would be contrary to public policy" to grant relief. A similar comment was made in *Haule, supra*.

[284] In this instance, as established by the case law, the closed-system for the issuance of securities mandates strict compliance with the exemptions as described in the Instruments. By extension, the OME requires strict compliance with the OM, including the attached Terms and Conditions. The object and purpose of those provisions is investor protection.

[285] In *Gupta, supra*, the court concluded that there had been "a lawful distribution" where the taxpayer had not filed a prospectus but had obtained a dispensation from the provincial securities commission. The court noted that:

> 71. The Quebec Securities Commission in exempting the appellant from filing a prospectus pursuant to section 263 of the *Quebec Securities Act* determines a certain number of conditions (…) to protect the purchasers. Indeed the protection of purchasers of securities is the main basis of the legislation concerning securities.
>
> [My emphasis]

[286] This was later confirmed by the Supreme Court of Canada in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 SCR 132, where it held that the statutory and public policy goals of the statutory scheme governing the issuance of securities included investor protection, capital market efficiency and public confidence in capital markets.

[287] In the context of an exempt offering of securities relying on the OME, where investors are deemed not to be connected with the issuer or promoter, I find that investor protection is the broad public policy objective. As a result, I have no difficulty in concluding that the issuance of units to minors directly or by their guardians or other adults, was contrary to that public policy objective.

[288] In the words of Robertson J.A., since "the doctrine of illegality is not a creation of statute but of judicial creation, it is incumbent on the present judiciary to ensure that its premises accord with contemporary values". (*Still*, *supra*). I find that those "contemporary values" are implicitly described in the Instruments, the OME and the OM, and that there is no justifiable reason for this Court in the context of a tax appeal, to turn a blind eye and provide relief to the Appellant or to make a finding that the subscriptions in favour of minors were lawful for the purposes of the *Act*.

[289] Given the various decisions reviewed above, I have little doubt that the Alberta and BC Securities Commission, would have come to a similar conclusion had there been a complaint that might have triggered enforcement or compliance proceedings.

[290] It is important to appreciate that contrary to the distribution of securities pursuant to a prospectus that is filed, reviewed and approved by a securities commission, all exempt distributions rules, including the OME, only require the "filing" of a prescribed report "in the jurisdiction where the distribution takes place no later that 10 days after the distribution"[37]. These reports are filed to ensure a minimum level of regulatory oversight but are not reviewed unless there is a complaint or other reason to make enquiries.[38].

[291] On the basis of the foregoing, I have no difficultly in concluding that all subscriptions in favour of minors, whether the documents were signed by the minors themselves, by their guardians or other unrelated adults, were illegal as that term has

[37] Part 6 – Reporting Requirements, section 6.1.
[38] Canadian Securities Regulation, opcit., page 113.

been used in *Bartel, Homerun, Del Bianco or Doyle, supra,* as being contrary to the securities legislation and the Instruments. They were thus unlawful.

[292] As a result, all of the subscriptions in favour of minors should be disregarded for the purpose of this analysis and compliance with *Regulation* 4801.

i) The subscription of units by adults for other adults

[293] The Minister argues that at least 20 adults acquired units in the 2006 Income Funds without signing the Subscription Agreement and Risk Acknowledgment forms.

[294] The Appellant does not dispute that there were "adults who signed for other adults"[39] but argues that this is totally irrelevant since the units were issued in favour of the "named subscriber", regardless of who signed.

[295] Also, the named subscribers received investor packages intended for the annual meetings as well as *pro-rata* distributions and annual T3 slips in normal course. The Appellant argues that all subscriptions were paid for and that there was no evidence that any of the adults had repudiated their subscriptions.

[296] While acknowledging that the OME as set out in the Instruments and OM required that the "purchaser purchase the security as principal" and that the subscriber sign a Subscription Agreement and Risk Acknowledgement form, the Appellant argues that the Instruments do "not preclude one person subscribing on behalf of an identified principal" and that "[t]his requirement is intended to prevent an agent, such as a financial institution, purchasing from one or many undisclosed principals, such as a financial institution's clients" [40].

[297] Moreover, while acknowledging that the OM and Risk Acknowledgement are prescribed forms, the Appellant argues that the Subscription Agreement itself is not, suggesting it does not necessarily need to be signed by the named subscribers.

[298] The Appellant argues that even if securities have "mistakenly" been issued to a named subscriber, that "does not detract from a lawful distribution to another

[39] Appellant Trial Submissions, paragraph 94.
[40] Appellant Trial Submissions, paragraph 97.

unitholder" and "if that were so, large offerings could be nullified by one non-compliant subscription"[41].

[299] The Minister does not agree with any of these submissions and again, as with the subscriptions in favour of minors, I find that there are compelling reasons to conclude that the issuance of units on the basis of subscriptions made by adults for other adults were contrary to the securities legislation and the Instruments and thus were unlawful.

[300] From an evidentiary point of view, the Court was not provided with any context as to why adults were signing for other adults. There may have been acceptable reasons but the record is silent as to the relationship between those who signed the subscription documents and the so-called "named subscribers". The circumstances under which they received units in the Income Funds remains somewhat of a mystery but the Appellant asks that they be accepted as a "*fait-accompli*" that should not be challenged by the Minister or this Court.

[301] I note moreover that although the Appellant has admitted that there were "adults who signed for other adults", as noted above, he has been careful to avoid any admission as to the number of adults who did not subscribe for their own units, despite his knowledge that this was a matter of some controversy and despite the fact that the Minister had made an assumption on the issue. The Appellant has failed to adduce any evidence on the matter and his oral testimony was vague at best. As a result of this the Court must again draw a negative inference.

[302] A review of the requirements of the OME as described in the Instruments indicates in clear and unequivocal terms, that prospective investors must have received a copy of the OM. There was no evidence of this. They also must have signed the subscription documents personally to which were attached the Terms and Conditions described above, including notably the "Status of Investor".

[303] Moreover the Risk Acknowledgment begins with the words "I acknowledge that this is a risky investment – I am investing entirely at my own risk". The form ends with the acknowledgement that "this is a risky investment and I could lose all the money I invest" followed by a space for the "Purchaser" to print his name and appose his signature. The second page of the form includes a reminder that the purchaser will be receiving an OM and that it should be read carefully "because it has important information about the issuer and its securities". There is little doubt

[41] Appellant Trial Submissions, paragraph 101(b).

that prospective subscribers were required to sign this document personally. It could not be delegated to a third party.

[304] The Appellant's testimony on this issue was wholly inadequate. He had little to offer by way of explanation except to say that he relied on his staff and that all units were paid for. The Appellant should have known that the distribution of securities is a highly regulated activity. The steps that needed to be followed were not trivial or inconsequential. Unless the Appellant had sought a dispensation from the securities commission, they were all mandatory. He did not seek a dispensation.

[305] To address the more technical arguments raised by the Appellant, I would say that the Instruments do in fact "preclude" adults from signing for other adults. The OME is predicated on the notion that investors have received a detailed disclosure document that was to be carefully evaluated to ensure the investor was sufficiently informed as to the potential risks involved before signing the subscription. This was not a trivial exercise. It was mandated by the Instruments.

[306] The argument that the named subscribers had not "repudiated" the units received should also be rejected. The notion of a repudiation in contract law relates to a contracting party's obligation to perform the terms of a contract. If the terms are not performed, the contract is said to have been repudiated. This legal principle has no application to these facts. The "named subscribers" who were adults received units from other adults who intended to provide them with a benefit. The Court must wonder for what reason or for what purpose? There must have been an understanding or *quid pro quo* as between the signatories of the subscription documents and the recipients, but no evidence whatsoever was adduced to explain the situation.

[307] In the end, the Appellant has not advanced any credible theory of law that would satisfy this Court that an adult can sign subscription documents on behalf of another adult.

[308] As explained above, it is not necessary for this Court to conclude if the subscriptions signed by adults for other adults are void *ab initio* or merely voidable. Those issues are not relevant to these proceedings.

[309] Since an issuer is required to strictly comply with the requirements of the exemption relied upon, and since the Appellant has failed to do so in connection with the subscriptions submitted by adults for other adults, the Court must conclude that they were unlawful under the laws of the applicable provinces and that they should be disregarded for the purpose of this analysis.

j) The requirement that units be purchased "as principal"

[310] As noted above, according to paragraphs 4.1(2) and (3) of the Instruments describing the OME, the purchaser was required to "purchase the security as principal". Although the Minister has acknowledged that the subscription price was to be paid "by cheque or other payment method acceptable to the Trustees"[42] the parties disagree as to the meaning of this expression.

[311] It is not disputed that numerous adults acquired units and where a cheque was drawn for spouses from a joint bank account, the Minister has conceded that this was an acceptable payment for both spouses. The Minister has also not challenged subscriptions made by various legal entities connected to the subscriber.

[312] Since the Court has already concluded that the subscriptions in favour of minors were unlawful, it is not relevant who paid the subscription amount as they should have been rejected in any event. That said, the Appellant has failed to adduce any evidence to contradict the Minister's assumption that the minors did not pay for their units. I must therefor conclude that none of the minors paid for their units.

[313] At issue then are units in the 2003 Income Funds issued to 27 adults and those in the 2006 Income Fund issued to 43 adults. As noted above, the Minister has particularized the assumption based on the results of the discovery process including requests to admit and production of documents. I find that the assumption that these adults did not pay for their own units was sufficient to indicate that they had not purchased the units as principal for their own account. It was not necessary for the Minister to adduce evidence of an undisclosed principal or resulting trust or other arrangement. The evidentiary onus was on the Appellant to demonstrate that the subject adults had in fact acquired the units as principal.

[314] As noted above, the Appellant has argued in written reply submission that "they have never admitted that the unitholders did not pay for their own units" and "have always maintained that all units were paid for".

[315] For reasons set out above on issue of the burden of proof in tax appeals, I accept the Minister's position that these adults did not pay for their own units and find that it was incumbent on the Appellant to adduce some evidence to prove that they did in fact pay for their own units. Copies of cheques or bank drafts or other proof of payment, possibly evidence of a loan arrangement, should have been

[42] Appellant, page 13, paragraph 25.

provided to the Court in order to allow it to reach its own conclusions. Instead, the Appellant has chosen to rely on the bald assertion that "all units were paid for".

[316] As noted above, the Minister's assumptions stipulated that many investors "of the age of majority, did not purchase units with their own money" and that "one unitholder purchased units (…) with his/her own money for multiple Outsiders, both Minors and persons of the age of majority."[43]

[317] At least three of the Appellant's fact witnesses testified on this issue. Bruce Maclennan admitted that he had paid for the units of his two children but had difficulty explaining the nature of the payment, finally agreeing that it was a gift. Geoff Merrit admitted that he had advanced the money as a gift for his child. Deborah Nickerson was the only witness who indicated that the funds advanced for her two children were intended as loans to be repaid when the units were redeemed. She admitted having no documentation to support this.

[318] In the end, despite the disagreement as to the actual numbers, I draw a negative inference from the Appellant's vague responses to these issues and his failure to adduce any evidence to clarify the matter for the Court or to meet his evidentiary burden in connection with the Minister's assumptions.

[319] I now turn to the position of the parties on this issue.

[320] The Appellant argues that there is no requirement that "a subscriber use his or her own money" or that they draw a cheque from their own bank account, and that "the purchase of securities in Alberta and British Columbia is much like the purchase of anything else: a third party can physically give money to the seller (in this case, the issuer) to fund that buyer's obligation to pay"[44].

[321] The Minister takes the position that the expression "to purchase as principal" has been interpreted to mean "to purchase in one's own right and not on behalf of a third party"[45]. In the Alberta Securities Commission decision of *Little (re)*, 2000 LNABASC ("*Little Re*") it was interpreted to mean "a person acting in a transaction entirely for his or her own account and not on behalf of any other person" (p.13) and in *Cartaway Resources Corp (Re)*, 2000 LNBSSC 391 (para 246) ("*Cartaway*") the BC Securities Commission indicated that it was "to be used in connection with sales

[43] RRSP Trust – Grenon Appeals, Fresh as Further Amended Replies Further Amended Replies, paragraphs 17 (s), (t) and (u) and RRSP Trust Appeal – Fresh as Further Amended Reply, para 21 (t), (u) and (v).
[44] Appellant Trial Submissions, page 35.
[45] Respondent Submissions, paragraph 172.

to persons who are legitimately making the full investment themselves" (para 246). [My emphasis].

[322] In *Cartaway*, a promoter was prosecuted for having actively solicited, encouraged and advised individuals to subscribe for and purchase securities through a private placement by pooling their money with other investors so that separate investments could appear as one combined investment. This was done so that investors could rely on the "sophisticated purchaser" exemption (now known as the "accredited investor" exemption) and following the subscription, the main investor would hold the units on behalf of the other investors. The Alberta Securities Commission highlighted the need for investors to purchase as principal and not on behalf of others since the exemption was "designed for investors who have, by virtue of their net worth, sufficient sophistication to be able to ensure that they obtain adequate information and, if necessary, appropriate advice before deciding that they are prepared to accept the risks associated with the investment".

[323] The Minister argues that the Instruments include a limited category of persons or entities that are "deemed to purchase as principal" for purposes of the "accredited investor" exemption, including financial entities registered to carry on the business of "trading as a trustee or agent on behalf of a fully managed account" or a person or company licensed "to act a portfolio manager or equivalent designation, authorised to act as agent for a fully managed account". The Minister argues that there are no such exemptions for the OME which means that each investor was required "to purchase as principal" meaning to purchase for one's own account and not for the benefit of other persons.

[324] The Minister argues that the securities legislation provides "a complete regulatory code" for the closed-system for the distribution of securities and that since the legislatures have already provided a narrow range of individuals or persons who "are deemed to act as principal", it is not the role of the court to take an expansive interpretation of matters that have already been addressed.

[325] The Minister concludes by indicating that the statutory provisions and Instruments are clear and that the OME does not allow for any person other that the investor to purchase units as principal and that the limited exceptions, noted above, "do not allow guardians, trustee, agents, 'attorneys of fact' to purchase as principal"[46].

[46] Crown Submissions, paragraph 87.

Analysis

[326] I agree with the Minister's submissions on this issue. Subscriptions that have been paid for by third parties should be rejected for the purpose of this analysis.

[327] This is consistent with the notion that the closed-system for the distribution of securities has evolved over time to protect the integrity of the system, to avoid fraudulent or unscrupulous behavior and to ensure that securities are acquired by investors who not only fit within the narrow category of investors targeted by the capital-raising exemption, but also that subscription funds are advanced from an investor's own personal resources, though this could include borrowed money.

[328] The decision of *Cartaway* supports the notion that investors are expected to advance their own funds and not rely on third parties to pay for their subscriptions.

[329] In this instance, how can the Court conclude that subscribers who did not pay for their own units were in fact "acting in a transaction entirely for [their] own account and not on behalf of any other person" (*Little Re, supra*) or were "legitimately making the full investment themselves" (*Cartaway, supra*)? The Instruments address some of these concerns, for example, by explicitly prohibiting the distribution of securities to a person or company that had no pre-existing purpose (also known as a "syndicate") and is created solely for the purchase of securities under an exemption[47].

[330] In the end, the issue once again relates to the evidentiary burden. The Appellant cannot hide behind the bald assertion that "all the units have been paid for". This does not assist the Court in determining whether these adults have purchased as principal. If they have not paid for subscriptions themselves, then the logical inference is that the units were not acquired by them as principal. Third parties do not routinely advance money on a gratuitous basis. There are usually strings attached. What were they? The question remains unanswered.

[331] A person may be a "purchaser for valuable consideration" without advancing money if there is a corresponding "release of a right or the compromise of a claim", as was observed in *Re Laventure*, 1985 CarswellAlta 336 (ABQB), but there would need to be some evidence of such a compromise or other arrangement.

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[47] 45-103, "accredited investor" (p) and (q) and 45-106, 2.3(5).

[332] The Court has absolutely no explanation or information as to why third parties were advancing funds on behalf of other adults (who were not their spouses) including the so-called named-subscribers. As with the previous issue, the Appellant's explanation was wholly inadequate. If there was a *quid pro quo* or some other rational explanation, it was not shared with the Court. If funds were advanced by an arm's length individual as a loan or if a bank draft was delivered instead of a personal cheque, it would have been a simple matter to provide evidence of the arrangement. No such evidence was forthcoming.

[333] The Court cannot simply accept the unsupported theory of law that third parties can advance subscription funds and that as long as the units are issued to a named individual, they have been purchased as principal. The issue is not whether units have been "purchased" but whether they have been "purchased as principal".

[334] The Court must again draw a negative inference from the Appellant's failure to adduce any evidence to contradict the Minister's assumption that numerous subscriptions were paid for by third parties.

[335] As with the previous analysis, it is not necessary to determine if the issuance of these units was voidable or *void ab initio*. That is a matter that remains to be determined as between the issuer and the individuals who received the units.

[336] It is sufficient for the purpose of this analysis to conclude that the issuance of units to individuals whose subscriptions were paid for by third parties, was contrary to the requirement that "the purchaser purchase the security as principal". Since it was contrary to the Instrument, it was illegal and thus unlawful.

[337] As a result of the foregoing, the Court must conclude that all units issued to minors or to adults, whose subscriptions were paid by third parties (excluding payments from joint bank accounts) should be disregarded for the purpose of this analysis.

k) The requirements of Regulation 4900(1)(d.2)

[338] The Appellant argues in the alternative that if the Court concludes that the Income Funds did not issue units to at least 150 beneficiaries and as a result did not meet the requirements of *Regulation* 4801, they are still "qualified investments" because they meet the definition of a "unit of a trust" described as follows:

4900 (1)

(d.2) a unit of a trust if

> (i) the trust would be a mutual fund trust if Part XLVIII were read without reference to paragraph 4801(a), and
>
> (ii) there has been a lawful distribution in a province to the public of units of the trust and a prospectus, registration statement or similar document was not required under the laws of the province to be filed in respect of the distribution;

[339] The Appellant argues that "a unit of a trust" involves a trust that would be a "mutual fund trust" if the requirements of *Regulation* 4801(a) were disregarded. It is argued that since the requirement for at least 150 investors in *Regulation* 4801(b) "is dependant for its vitality on 4801(a) by virtue of a cross-reference to the class of units described in Regulation 4801(a), then 4801(b) is inoperative, and therefor the 150 unitholders test no longer applies". The Appellant argues finally that even if the Income funds have not issued units to at least 150 investors, there was nonetheless a lawful distribution to a number of investors.

[340] This argument was not raised in the pleadings. It should be dismissed outright on that basis alone but I will nonetheless make a few observations.

[341] Regulation 4900)1)(d.2) was added by P.C. 2001-1106 for property acquired after 1983. According to the Technical Notes, it was intended to allow a widely-held trust to make a lawful distribution in a province of its units to qualify as a mutual fund trust without filing a prospectus or similar document where such a document was not required to be filed. This amendment was intended to ensure that the requirements under the *Act* for a distribution were no more onerous than those imposed under provincial securities requirements.

[342] Subparagraph (1)(d.2)(i) of *Regulation* 4900 refers to a trust that would be a mutual fund trust if the definition was considered "without reference to paragraph 4801(a)" - but it does not exclude the application of paragraph 4801(b) and hence it is not possible to simply conclude that paragraph 4801(b) is rendered "inoperative" because 4801(b) is necessarily linked to 4801(a). Had Parliament intended to exclude the application of 4801(b), it would have said so explicitly. Since it did not do so, units would still have to be issued to at least 150 investors.

[343] Secondly, this provision allows a widely-held unit trust that makes a lawful distribution in a province of its units to qualify as a mutual fund trust for the purpose of the qualifying investment determination, without filing a prospectus or similar document where it was not required to be filed. As noted above, the distribution of securities is regulated at a provincial level and in Alberta and BC an issuer must either file a prospectus or rely on one of the capital raising exemptions described above. As a result, it cannot be said that "such a document was not required to be filed" in Alberta or BC.

[344] Finally, the provision refers to a lawful distribution. The Appellant argues that there was such a lawful distribution of units to many investors who paid for their units including the Appellant himself. This argument has already been disposed of since the Court has concluded that the issuance of units to those investors was inextricably tied to the OME and the OM and since the Income Funds had not issued units to at least 160 investors, the Court was unable to conclude that there had been "a lawful distribution" pursuant to subparagraph 4801(i)A. For the same reason, there was not a lawful distribution pursuant subparagraph (1)(d.2)(ii) of *Regulation* 4900.[48] It has been noted that this provision has very little practical application today since it was introduced as a retroactive relieving measure in 2001 for units of certain mutual funds sold by private placement between 1993 and 1999.

[345] As a result, the Court must reject this argument in its entirety.

l) Conclusion

[346] In the end, it is difficult for the Court to disagree with the Respondent's suggestion that the Appellant has demonstrated a wanton and reckless disregard for the requirements of the securities legislation, the OME and the OM.

[347] Without going that far, I would at least conclude that the Appellant was careless, cavalier and possibly indifferent. In particular, he misconstrued, misunderstood and failed to appreciate the importance of the requirements of the securities legislation, the OME and the OM and, more importantly, the important legal steps required to ensure that the Income Fund qualified as a mutual fund trust.

[348] As a result of the foregoing analysis, the Court must conclude that the steps undertaken by the Appellant to constitute the Income Funds were not legally

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[48] Qualified Investments and Prohibited Investment Rules Applicable to Self-Directed Registered Plans: Canadian Tax Foundation: Joelle Kabouchi and Laura White, 2017 Ontario Tax Conference, page 26;

effective. The Income Funds did not qualify as a "mutual fund trust" because they failed to satisfy the prescribed condition that there be "a lawful distribution …to the public of units" under the laws of the provinces of Alberta and BC to not fewer than 160 investors as required by the OM. Even if the Court considers for a moment that "a lawful distribution" should be interpreted to refer to a distribution to "no fewer than 150 beneficiaries of the trust", as set out in paragraph (b) of *Regulation* 4801, the Income Funds have not met that bright-line test.

[349] Since the Court has concluded that the Income Funds did not meet the prescribed conditions set out in *Regulation* 4801, as required by paragraph 132(6)(c), it follows that they were not a "mutual fund trust" and as a result they were not qualified investments for RRSP purposes.

B. **The Sham Doctrine**

[350] I have already concluded that the Income Funds were not validly constituted, that the steps undertaken by the Appellant were legally ineffective to establish a "mutual fund trust" and consequently that they were not a "qualified investment". In the event that I have erred in so finding, I will review whether the Income Funds, including the Acquisition Transactions and Distribution Transactions, were a sham.

[351] Since the existence of a sham and window dressing (to be addressed separately below) was not assumed in assessing the Appellant or the RRSP Trust, it is understood that the Minister has the onus of satisfying the Court on a balance of probabilities that the Income Funds involved a sham or window dressing. This is consistent with the decisions of *Canada v. Anchor Pointe Energy Ltd*, 2007 FCA 188, *Swirsky v. The Queen*, 2013 TCC 73 (para 53.) and *Morrison v The Queen*, 2018 TCC 220 (para 106).

Position of the Respondent

[352] The Respondent argues that the Appellant knew at all times that the Income Funds had not been properly constituted as a "mutual fund trust" since he had not completed a lawful distribution to the public in accordance with the laws of the provinces and that he made a number of misrepresentations.

[353] The Respondent alleges that the initial Certificate attached to the OM contained a misrepresentation in that it suggested that all units would be distributed

pursuant to applicable securities legislation, the OME and the OM, when in fact many units (as described above) were distributed contrary to the terms of those documents. It is also alleged that the Appellant submitted at least six Reports to the securities commissions in connection with the Income Funds and that they contained misrepresentations as to the completion of the distribution and as to the list of unit holders and the securities exemption relied upon, when in fact the Appellant knew that the distribution had not been validly completed and that many units had been issued contrary to the OME and OM, as noted above.

[354] The Respondent alleges further that the Appellant then completed a total of twelve Trustee's Certificates attesting to the existence and validity of the Income Funds as mutual fund trusts. In the preamble to the Certificates, the Appellant specifically acknowledged that the Legal Opinions would be based in part on the factual information set out in the Certificates that were attached to and formed the basis of the Legal Opinions relied upon by CIBC prior to releasing funds for the completion of the Acquisition Transactions. These Opinions confirmed that the Income Funds were mutual fund trusts and thus qualified investments and expressly stated that they had "relied on the facts represented to us by James T. Grenon".

[355] The Respondent alleges further that the Appellant as trustee of the Income Funds then submitted T3 Trust Income Tax and Information Returns for the 2004 to 2009 taxation years in connection with the Distribution Transactions, indicating that all Income Funds were a "mutual fund trust" when in fact he knew that this was incorrect.

[356] Similarly, it is argued that on the basis of the Appellants ongoing misrepresentations, CIBC filed T3GR returns that included the RRSP Trust as part of its specimen plan but did not list it as a taxable plan even though it held non-qualified investments.

[357] In the end, the Respondent argues that the Appellant was at all times on both sides of all transactions. As the promoter of the Income Funds, he established the basic mutual fund structure and controlled the distribution of units to the same 171 investors. As the annuitant of the RRSP Trust (a self-directed RRSP), he directed and controlled the acquisition of units in the various Income Funds, described above as the Acquisition Transactions. As the individual who appointed or controlled the appointment of trustees of the Income Funds, he was directly involved in the preparation of the Trustee Resolutions by which profits were distributed to the various unitholders including the RRSP Trust. He essentially controlled all aspects of the businesses or investments.

[358] I now turn to the position of the Appellant.

[359] The Appellant argues that there are no transactions "involving Mr. Grenon or any other party which meets the definition of a sham", that there was no "intention to deceive the Minister" and that "no part of the [Income Fund] structure or (…) investments (…) was secretive or mis-documented or mis-described". [49] The Appellant argues that "the transaction documents described exactly" what he "intended to carry out" and that there was "no alternative reality to the transactions"[50]. The Appellant adds that the RRSP Trust was simply "a self-directed RRSP that made investments" in the Income Funds that "were created and documented accurately and completely (…) and there was a total absence of deceit". It is argued that the Appellant "intended that the [Income Funds] be created and that the CIBC RRSP invest in the [Income Funds] and that (…) there was no misrepresentation as to the legal relationship among the parties."[51]. He argues that the evidence "established that the unitholders were real beneficiaries (…) who earned a return on their investment."[52]

[360] The Appellant admits that the Income Funds were established for tax purposes but argues that proper tax planning "depends for its effectiveness on real steps being taken in respect of actual entities"[53]. In this respect, the Appellant relies on *Lee v The Queen*, 2018 TCC 230 ("*Lee*"), where Owen J. stated that "[c]reating legal (or equitable) relationships to give effect to a tax plan is not the perpetration of a sham." (para 69)

[361] The Appellant argues that even if the RRSP Trust acquired a high percentage of the units in the Income Funds, that would not equate to a sham and that the definition of a "mutual fund trust" does not restrict the "percentage of units that any one unitholder may own".[54]

[362] The Appellant relies on a number of decisions including *Stubart Investments Ltd v. The Queen*, [1984] 1 SCR 536 ("*Stubart*") where the Supreme Court of Canada reviewed the distinction between the "incomplete transaction test and the sham test". In that instance, the Court found that "the appearance created by the documentation" was "precisely the reality" and that the "obligations created by the documents were

[49] Appellant Submissions, page 18.
[50] Appellant Submissions, page 18.
[51] Appellant Submissions, page 51-52.
[52] Appellant Submissions, page 54.
[53] Appellant Submissions, page 53.
[54] Appellant Submissions, page 55.

legal obligations (…) fully enforceable at law". It concluded that there was "a total absence of the element of deceit, which is the heart and core of a sham" (p. 573).

[363] The Appellant also relies on *Cameco Corporation v The Queen*, 2018 TCC 195 ("*Cameco*") (confirmed on appeal to the Federal Court of Appeal in *Canada v. Cameco Corporation*, 2020 FCA 112) where Owen J. found that there was no evidence that the written terms and conditions of the contracts did not reflect the true intention of parties and that "the arrangements created by the contracts were not a façade". He noted moreover that "a tax motivation does not transform the arrangements (…) into a sham" (paras 602-605).

The meaning of sham according to the case law

[364] The meaning of a sham was addressed in great detail by Owen J. in *Cameco, supra* (confirmed by the Federal Court of Appeal, as noted above) where he cited the decision of *Snook v. London & West Riding Investments, Ltd.*, [1967] 1 All E.R. 518 ("*Snook*"), in which Diplock L.J. stated (p. 528) that a sham refers to:

> "(…) 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."

[365] Owen J. noted that this description of sham was adopted by the Supreme Court of Canada in *M.N.R. v. Cameron*, [1974] S.C.R. 1062 (p. 1068) ("*Cameron*") and later, in *Stubart, supra* where Estey J. stated (p. 545) that:

> "(…) A sham transaction: This expression comes to us from decisions in the United Kingdom, and it has been generally taken to mean (but not without ambiguity) a transaction conducted with an element of deceit so as to create an illusion calculated to lead the tax collector away from the taxpayer or the true nature of the transaction; or, a simple deception whereby the taxpayer creates a facade of reality quite different from the disguised reality (…)"

[366] As further noted by Owen J., in the later decision of *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298 ("*Continental Bank*"), the Supreme Court of Canada interpreted Estey J.'s comments in *Stubart* to mean that the "sham doctrine will not be applied unless there is an element of deceit in the way a transaction was either constructed or conducted" (para 20) and that "the determination of whether a sham exists precedes and is distinct from the correct legal characterization of a transaction". If the transaction is a sham, the true nature of the transaction must be determined from extrinsic evidence (i.e. evidence other than the document(s)

papering the transaction). If the transaction is not a sham, the correct legal characterization of the transaction can be determined with reference to the document(s) papering the transaction" (para 21).

[367] As restated by Owen J. in *Lee, supra* (para 68):

> (…) A sham involves an element of deceit—the parties must intend to give to third parties the appearance of creating between them legal rights and obligations different from the legal rights and obligations, if any, that the parties actually intend to create. An allegation of sham is an allegation that the parties to the alleged sham have been deceitful because they know that the actual legal rights and obligations created by them, if any, differ from the legal rights and obligations presented to the outside world.

[368] In the earlier decision of *2530-1284 Québec Inc. v The Queen*, 2007 TCC 286 (also known as "*Faraggi*"), Rip A.C.J. (as he then was) stated that "[f]or a sham to exist, the taxpayers must have acted in such a way as to deceive the tax authority as to their real legal relationships" such as where the "taxpayer creates an appearance that does not conform to the reality of the situation" (para 86). On appeal to the Federal Court of Appeal (2008 FCA 398), Noel J.A. (as he then was) reiterated that (para 59):

> "(…) the existence of a sham under Canadian law requires an element of deceit which generally manifests itself by a misrepresentation by the parties of the actual transaction taking place between them (…)".

[369] In *Antle v. The Queen*, 2010 FCA 280 ("*Antle*"), Noel J.A. (as he then was) discussed the concept of a sham in *obiter* and but addressed the level of deceit required for the "tort of deceit" noting that "the required intent or state of mind is not equivalent to mens rea and need not go as far as to give rise to what is known at common law as the tort of deceit" (para 22). However, as noted by Owen J. in *Cameco,* four years later the Supreme Court of Canada held in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 ("*Bruno Appliance*") that the tort of civil fraud has four elements that must be satisfied (para 21):

> From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

[370] Owen J. then concluded that the third and fourth elements were not relevant but that the first and second elements of civil fraud were indistinguishable from the requirements under the doctrine of sham. He noted that (para 594):

> (…) The second element of civil fraud arguably establishes a lower bar than the doctrine of sham in that the mental element in civil fraud requires only some level of knowl000edge of the falsehood of the representation whether through knowledge or recklessness. The reference to recklessness implies that the parties need only be subjectively aware of the possibility that there is a false representation but proceed in any event.
>
> [My emphasis]

[371] If the Court concludes that there was a sham, the jurisprudence has established that it may re-characterize the transaction to reflect the true reality.

[372] In *Shell Canada Ltd v. Canada*, [1999] 3 S.C.R. 622 ("*Shell Canada*"), McLachlin J. opined that the legal relationships between taxpayers must be respected, unless there is a sham in which case "[r]e-characterization is only possible if the label attached by the taxpayer to the particular transaction does not properly reflect its actual legal effect" (para 39).

[373] More recently, as noted by Noel J.A. in *2529-1915 Québec Inc. v. Canada*, 2008, FCA 398 (aka "*Faraggi*"), "when confronted with this situation, courts will consider the real transaction and disregard the one that was represented as being the real one" (para. *59). See also Gladwin Realty Corporation v. The Queen, 2019 TCC 62 ("Gladwin*") (para 80).

Analysis and Conclusion

[374] The Court has already concluded that the Income Funds were not a "mutual fund trust" because they failed to satisfy the prescribed conditions and more specifically failed to complete "a lawful distribution" in accordance with the securities legislation, the OME and the OM. The Court has indicated that the Income Funds likely existed as ordinary trusts but not as a "mutual fund trust", as defined in the *Act*. The issue is whether there was a sham.

[375] The difficulty with this particular analysis, as noted by Estey J. in *Stubart* (p. 572) is that "there has been an unwitting confusion between the incomplete transaction test and the sham test". As noted in a *Continental Bank, supra*, "the determination of whether a sham exists (…) is distinct from the correct legal

characterization of a transaction". This was restated by Owen J. in *Cameco*, *supra*, where he indicated that "a sham does not exist if the parties present the legal rights and obligations to the outside world in a factually accurate manner (…) but identify the legal character of the transaction incorrectly" (para. 598).

[376] In this instance, the Appellant has admitted that he sought to establish the Income Funds because he intended "to broaden his RRSP investment horizon". He intended from the beginning that once the Income Funds were established, the RRSP Trust would acquire units and he would assume an active role in the management of those funds including the selection of investments or businesses. That was his tax plan but as noted by Owen J., taking steps to "effect a tax plan is not the perpetration of a sham" and "a tax motivation does not transform the arrangements (…) into a sham." (Lee and Cameco, supra). The fact that the Appellant intended to assume multiple roles in the Income Fund structure or that "he was on both sides of every transaction", as alleged by the Respondent, would also not constitute a sham.

[377] The Court accepts the submissions of the Respondent as to the various misrepresentations made by the Appellant, including those made to prospective unitholders in the OM (that the units would be distributed in accordance with the terms of the OME and OM), those contained in the Reports to the securities commission, those contained in the Trustee Certificates attached to the Legal Opinions, those made to the CIBC as plan administrator and finally, those made to the Minister on an annual basis in the T3 returns that the Income Funds were mutual fund trusts. But such misrepresentations are not sufficient to establish a sham.

[378] The Appellant has admitted that he planned to establish income trusts as investment vehicles relying on the OME and OM. The fact that he was not successful in establishing the Income Funds as a "mutual fund trust" does not lead to the conclusion that there was a "disguised reality" or "an illusion". There was no extraneous evidence to suggest that the Income Funds were something other than investment vehicles. This was confirmed by several of the fact witnesses who had invested in the Income Funds and received income distributions over time.

[379] The Court has found that the Appellant was careless (and perhaps even cavalier) in connection with the implementation of his tax plan and the establishment of the Income Funds and that he misconstrued or misunderstood the requirements of the securities legislation, the OME and the OM. However, the Court has stopped short of finding that the Appellant demonstrated "a reckless and wanton disregard for the securities legislation" as suggested by the Respondent.

[380] I conclude that the Appellant proceeded unwittingly with the implementation of his tax plan "as if" the Income Funds qualified as mutual fund trusts when in reality they did not. But as explained by Owen J, a sham does not exist if a taxpayer identifies "the legal character of the transaction incorrectly." (*Cameco*, para. 598).

[381] The Respondent argues that the Appellant "knew at all times" that the Income Funds were not a mutual fund trust. To quote *Bruno Appliance, supra*, the Court would have to be convinced that the Appellant had "some level of knowledge of the falsehood" or was "subjectively aware of the possibility that there [was] a false representation but [decided] to proceed in any event". In *Cameco* (para 594), Owen J. similarly indicated that "sham requires a level of knowledge of the falsehood (...) whether through knowledge or recklessness". I find that the word "falsehood" is akin to "deceit" but I am not convinced that the Appellant had the requisite knowledge nor am I prepared to equate carelessness with recklessness.

[382] The notion of sham requires that there be "a façade of reality quite different from the disguised reality" or "a transaction conducted with an element of deceit so as to create an illusion."(*Stubart, supra*). While I may have doubts as to the Appellant's characterization of some events or the credibility of his testimony on other issues, I am not convinced on the balance of probabilities that he "knew at all times" or was subjectively aware that the Income Funds had not met the requirements of the *Act* and that they were not a "mutual fund trust". In the end, I find that the evidence falls short of establishing the necessary element of deceit.

C. **Window Dressing**

[383] The Appellant acknowledges that one of the issues to be determined by the Court is whether the Income Funds were 'window dressing'.[55]

[384] The Respondent argues that 'window dressing' is a deception that is not about the legal validity of a transaction, as is the case with sham, but rather is about the taxpayer's intention for entering into the transaction. When addressing the taxpayer's intention, the court must make the determination objectively having regard not only to the taxpayer's stated intention, but to the objective reality of the transactions at issue: *Ludco Enterprises v. Canada*, 2001 SCC 62 ("*Ludco*").

[385] More specifically, the Respondent argues that the creation of the Income Funds and the recruitment of the 171 Investors "was nothing more than window

[55] Appellant Submissions page 2.

dressing undertaken to deceive the Minister into [believing] that there was an intention to make a lawful distribution to the public of the units of the Income Funds". He did so "to gain the tax benefits available to mutual fund trusts that are qualified investments" and to subsequently hold these investments in the RRSP Trust.[56]

[386] The Appellant argues that "there is no stand-alone doctrine of window dressing that can negate the existence of a transaction; rather it is a doctrine under which the Court may disregard self-serving evidence created by the taxpayer to support the filing position". The Appellant states that "window dressing applies where a taxpayer takes an action, or enters into a transaction, that is extraneous to the real transaction in order to disguise the taxpayer's true intentions".

[387] The Appellant adds that the notion of 'window dressing' is an unnecessary embellishment and that there is no difference between window dressing and sham, adding that if there is a distinction, it may be that "window dressing specifically requires a transaction that did, in fact occur, but the doing of it was unnecessary to achieve what the taxpayer actually wanted to accomplish."[57]

[388] The Appellant refers to *Standard Life Assurance Company of Canada v. The Queen*, 2015 TCC 97 ("*Standard Life*"), described in more detail below, where the taxpayer engaged in a number of activities designed to give the appearance that it was carrying on a real insurance business in Bermuda. The Court found that there was no business activity and that the taxpayer had no real intention of conducting such a business. It concluded that the actions of the taxpayer were "window dressing".

[389] The Appellant argues that the "exact opposite is true in this case" and that the "evidence does not suggest that any additional step was taken to obscure the taxpayer's true intention" and that the taxpayer was very clear about his intention "to establish the [Income Funds] as qualified investments with more than 150 unitholders."[58] The Appellant raises much of the same arguments as with sham indicating that the Appellant intended to establish mutual fund trusts whose units would be qualified investments for RRSP purposes. He wanted to do this to broaden

[56] Grenon Appeal, Fresh as Further Amended Reply, paragraphs 61-62 and 73-74 and RRSP Trust Appeal, Fresh as Further Amended Replies, paragraphs 37-38.
[57] Appellant Reply Submissions, page 48.
[58] Appellant Submissions, page 57-58.

the investment horizons of the CIBC RRSP and maximize returns. The 171 Investors in each Income Fund "were (…) not window dressing but (…) were real investors".[59]

The relevant case law

[390] In *Ludco, supra*, the Supreme Court of Canada concluded on the facts of that case, that "the purchase of shares was genuine" and that "there was no sham" such that "the payment of dividends could not be characterized as window dressing" (para 69). Iacobucci J. added that "absent a sham or window dressing or other vitiating circumstances", he was "not concerned with the sufficiency of the income expected or received" (para 69). He did not define the expression 'window dressing' but seemed to equate it with the notion of "vitiating circumstances".

[391] In *Backman, supra,* the issue was whether taxpayers who had purchased an interest in an oil and gas property that ceased production shortly after its acquisition, were entitled to deduct partnership losses. The Supreme Court of Canada agreed with the trial judge that "the transaction at issue was not a sham" (para. 32) but that it was window dressing. The Court noted that (para 32):

> "(…) the trial judge also found that the purchase of the one percent interest in an oil and gas property was "nothing more than window dressing". We take that as a finding that there was no real ancillary profit-making purpose behind the appellant's involvement in the oil and gas property. Like the Federal Court of Appeal, we agree with that finding as well. In coming to this conclusion we do not adopt or employ a quantitative analysis, that is, we do not base our conclusion solely on the amount of the expected profit, although that is a factor to consider. In determining whether there is the necessary "view to profit" the courts must look at all the factors that relate to carrying on business in common with a view to profit.
>
> [My emphasis]

[392] In *Singleton v. Canada*, 2001 SCC 61 ("*Singleton*"), the Supreme Court of Canada considered the "economic realities" jurisprudence, finding that the court "should ask whether the legal relations created by the taxpayer were bona fide". It added that: (para 52):

> (…) This, of course, still requires courts to look beyond the legal instruments used by the taxpayer. It limits such inquiries to those cases where the legal relations were not created *bona fide,* for instance where transactions simply amount to window dressing as in *Backman v. Canada,* [2001] 1 S.C.R. 367, 2001 SCC 10. Since it is

[59] Appellant Reply Submissions, page 5.

> still very much in question whether the legal relations in the case at bar were created *bona fide*, this is an important consideration.

[393] In the Tax Court of Canada decision of *Standard Life*, referenced above, the issue was whether the taxpayer had carried-on "a business in Bermuda" or only gave the "illusion of doing so", as argued by the Minister (para 9). Pizzitelli J. found that the notion of "sham" and "window dressing" were not necessarily synonymous and that the latter could be taken to mean simply that "the taxpayer did not carry on business" (para 80). He continued with a review of the notion of "window dressing" indicating that:

> [158] As the Respondent has argued, the Supreme Court of Canada has distinguished a "sham" from "window dressing", which was recognized in *Ludco Enterprises Ltd. v Canada*, [2001] 2 SCR 1082, 2001 SCC 62, *Backman v Canada*, [2001] 1 SCR 367, 2001 SCC 10 and *Spire Freezers Ltd. v Canada*, [2001] 1 SCR 391, 2001 SCC 11, as a deception that is not about the legal validity of a transaction, as in sham, but about the taxpayer's intention for entering into the transaction. In determining how the Courts should go about identifying whether the stated intention or purpose is present or what standard should be applied, Iacobucci J stated in *Ludco* at paragraph 54:
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> > In the interpretation of the Act, as in other areas of law, where purpose or intention behind actions is to be ascertained, courts should objectively determine the nature of the purpose, guided by both subjective and objective manifestations of such purpose…
>
> […]
>
> [160] Based on an objective review of the entire evidence, I cannot find that the few activities of the Appellant in 2006 and 2007 can suggest a reinsurance business was being carried on in Bermuda. I agree with the Respondent that these activities were designed to give the appearance the Appellant was carrying on such business for profit, when in fact, its only supportable purpose was to obtain a tax benefit. (…)
>
> [161] (…) I find that its actions as such were mere window dressing designed to mislead the Minister into believing that it was carrying on a business in Bermuda for profit, when its true objective was only to obtain a tax benefit.
>
> [My emphasis]

Analysis and conclusion

[394] The Appellant has maintained from the beginning that his intention was simply to create a number of investment vehicles that would be qualified investments allegedly in order to broaden his RRSP investment horizon.

[395] On the one hand, I am inclined to agree with the Respondent that when the evidence is considered objectively, it is apparent that the Income Funds were designed primarily "to obtain a tax benefit" (*Standard Life*, para 161) and to disguise the Appellant's true intention of actively managing businesses and investments using funds from his RRSP but without actually withdrawing funds and triggering the normal tax consequences associated with such a withdrawal.

[396] The preparation of the OM and distribution of units was intended to give the appearance that the Appellant was engaged in a capital-raising endeavor with a distribution of units on a widely-held basis. In reality, the Investors in the Income Funds were the same and the Appellant acquired units himself and several more using various entities owned or controlled by him. The "minimum" investment amount of $750 as set out in the OM was actually the maximum amount permitted for all Investors. None of the Investors (with the exception of Sutherland and MacLennan), were allowed to acquire units using funds from an exempt plan such as an RRSP (or at least none were described as such in the Reports).

[397] Having filed the Reports with the securities commissions, the Appellant then quickly proceeded to implement his tax plan and directed that his self-directed RRSP acquire a substantial number of units in the Income Funds, thus acquiring in excess of 99% of all the units (save and except for two Income Funds where he owned 49% of the units). The amounts transferred from the RRSP Trust to the Income Funds (in exchange for units) were massively disproportionate to the capital raised from the Investors. The Appellant controlled the appointment of trustees for each Income Fund and ensured he had effective control by using entities he owned and controlled as trustees of the venture trusts or as general partners of the various master limited partnerships. Though he might have shared some duties and consulted with Sutherland and MacLennan, he essentially controlled all business activity and investments, extended sizable loans to himself personally or to entities he owned or controlled, and oversaw the distribution of profits, the lion's share of which were returned to the RRSP Trust.

[398] The Appellant's admission that he was not interested in passive investments and that he wanted to be actively involved in his RRSP investments belie his true intentions. When the evidence is considered in its totality, it seems quite apparent that the Income Funds were actually intended to create business vehicles that would

allow him to access the funds held in the RRSP Trust (without triggering any actual withdrawals), operate businesses and return sizable profits to the RRSP, all on a tax-exempt basis. Given this analysis, it is not surprising that the Respondent has referred to the Income Funds as the Appellant's "alter ego".

[399] However, the question for the Court is whether the activities described above meet the definition of "window dressing". As indicated in *Singleton*, the Court must look to the underlying "economic realities" and determine whether "the legal relationships where *bona fide*". It must however, limit "the enquiry to those instances where the legal relations were not created *bona fide*".

[400] In *Standard Life*, Pizzitelli J. made a factual determination that "a reinsurance business" was not "being carried on in Bermuda" and that the company "was designed to give appearances that the taxpayer was carrying on such a business for profit" when it was not. The same cannot be said in this instance.

[401] When the Court considers the "economic realities" of the transactions described above, including the preparation of the OM, the subscriptions (or purported subscriptions) and issuance of units to Investors, the various acquisitions or investments made by the Income Trusts, it is not able to conclude that they were not *bona fide*. As argued by the Appellant, the Investors "were real" and they received distributions over time, as confirmed by several fact witnesses.

[402] In the end, although the case law cited above suggests that "window dressing" is "a deception that is not about the legal validity of a transaction, as in sham, but about the taxpayer's intention for entering into the transaction" (my emphasis), I find that that analysis, as compelling as it may seem in this instance, is circumscribed by the "economic realities" of the transaction(s) at issue and is limited to an enquiry as to whether "the legal relations were *bona fide": Singleton.*

[403] Although the Court has concluded that the Income Funds were not qualified investments for RRSP purposes, and while it certainly finds that the Appellant had ulterior motives in connection with his RRSP, that is not sufficient to reach a finding that the Income Funds were "window dressing".

D. **The Application of Subsection 56(2)**

[404] The Minister has reassessed the Appellant on the basis that a portion of the Distribution Transactions, being the payments made by the Income Funds to the

RRSP Trust in respect to the 2008 and 2009 taxation years, should be included in his personal income relying on subsection 56(2) of the *Act*.

[405] That provision has been considered in numerous decisions, including *Fraser Companies Limited v. The Queen*, 81 DTC 5051 ("*Fraser*"), where the Federal Court - Trial Division considered the application of an identical predecessor provision.[60] It relied on the comments of Cattanach J. in *Murphy (G.A.) v. The Queen (*1980) C.T.C. 386 (F.C.T.D.) ("*Murphy*") and opined that (para. 84):

> (…) the "object and purpose" of this provision is "to cover cases where the taxpayer seeks to avoid what would be income in his hands and to have that amount received by another person when[sic] he wishes to benefit or for his own benefit."

[406] In the Supreme Court of Canada decision of *McClurg v. Minister of National Revenue* (1990) 3 S.C.R. 1020 ("*McClurg*"), discretionary dividends had been declared on a class of shares held by the spouses of two directors but not on the class of shares held by them. The Minister reassessed the directors on the basis that the dividends should have been declared proportionately to all common shareholders. The Supreme Court concluded that the declaration of dividends was normally beyond the scope of subsection 56(2) and Dickson C.J., speaking for the majority indicated that (para 49):

> (…) The purpose of subsection 56(2) is to ensure that payments which otherwise would have been received by the taxpayer are not diverted to a third party as an anti-avoidance technique. (…) Consequently, as a general rule, a dividend payment cannot reasonably be considered a benefit diverted from a taxpayer to a third party within the contemplation of s. 56(2).

[407] In *Outerbridge Estate v. Canada*, (1991) 1 C.T.C. 113 (FCA) para 4 ("*Outerbridge*")[61], the majority shareholder of an investment company caused the corporation to issue shares for less than fair market value to his son-in-law, who was also a shareholder. The Minister reassessed the majority shareholder pursuant to subsection 56(2) for the difference between the issued purchase price for the shares and their fair market value. The taxpayer argued that "this provision could not apply since he did not have an independent right to the shares which were held by the corporation" (para 10). [62]

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[60] Subsection 16(1) of the *Income Tax Act*, RSC 1952, c 148.
[61] Aka *Winter v. Canada.*
[62] *Ibid* at paragraph 10.

[408] On appeal, the Federal Court of Appeal held that the real question was whether the taxpayer could direct the corporation to issue the shares at a depressed value and that subsection 56(2) does not require the directing taxpayer to have been initially entitled to the payment or transfer of property made to the third party. Specifically, the FCA held that (para 14):

> It is generally accepted that the provision of subsection 56(2) is rooted in the doctrine of "constructive receipt" and was meant to cover principally cases where a taxpayer seeks to avoid receipt of what in his hands would be income by arranging to have the amount paid to some other person either for his own benefit (for example the extinction of a liability) or for the benefit of that other person … There is no doubt, however, that the wording of the provision does not allow to its being confined to such clear cases of tax-avoidance…the fact is that the language of the provision does not require, for its application, that the taxpayer be initially entitled to the payment or transfer of property made to the third party, only that he would have been subject to tax had the payment or transfer been made to him.

[409] Marceau, J.A. continued, indicating that:

> It seems to me however, that when the doctrine of constructive receipt is not clearly involved, because the taxpayer had no entitlement to the payment being made or the property being transferred, it is fair to infer that subsection 56(2) may receive application only if the benefit conferred is not directly taxable in the hands of the transferee. Indeed, as I see it, a tax-avoidance provision is subsidiary in nature; it exists to prevent the avoidance of a tax payable on a particular transaction, not simply to double the tax normally due nor to give the taxing authorities an administrative discretion to choose between possible taxpayers.
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> [Emphasis added]

[410] This final comment made by Marceau J.A., notably that the taxpayer "would have been subject to tax had the payment or transfer been made to him", has been interpreted to mean that there is a fifth implicit condition (in addition to the four conditions described in *Fraser* and *Murphy* or later in *Neuman, infra)* which provides that where the doctrine of constructive receipt is not clearly engaged, all that needs to be demonstrated by the Minister is that the recipient of the benefit was not subject to tax. As will be seen below, there is some dispute about that conclusion.

[411] In *Smith v. Canada* (1993) FCJ No. 740 (FCA), 2 C.T.C. 257 ("*Smith*"), the issue was the extent to which a taxpayer had to be involved in the attribution of a benefit to a third party to engage subsection 56(2). The Court concluded that "it need not be active" and that:

> "(…) It may well be passive or implicit and can be inferred from all the circumstances, not the least of which being the degree of control which the taxpayer is entitled to exercise over the firm or corporation conferring the benefit."

[412] On the issue of the so-called fifth condition referenced above, Mahoney J.A. noted that the comments made by Marceau J.A. on that issue, were *obiter*. This was later repeated in *Canada v. Neuman* (1997) 1 FC 79 (FCA), where a different panel of the Federal Court of Appeal confirmed that the comment of Marceau J. A. was *obiter* and that there is:

> (…) nothing in subsection 56(2), read in the context of the Act as a whole, which mandates the imposition of a fifth element or pre-condition in a case such as this which is concerned with the declaration of dividends designed solely to reduce the tax payable by the respondent.

[413] In the seminal decision of *Neuman v. Minister of National Revenue*, (1998) SCJ No. 37 ("*Neuman*"), the Supreme Court of Canada restated the four conditions required to engage subsection 56(2), describing them as follows (para 32):

1. The payment must be to a person other than the reassessed taxpayer;
2. The allocation must be at the direction or with the concurrence of the reassessed taxpayer;
3. The payment must be for the benefit of the reassessed taxpayer or for the benefit of another person whom the reassessed taxpayer wished to benefit;
4. The payment would have been included in the reassessed taxpayer's income if it had been received by him or her;

[414] Iacobucci J. found that these four prerequisites provide "an appropriate analytical framework for the interpretation of ss. 56(2)" before concluding that it was not intended to apply to dividend payments made by a corporation to its shareholders, reasoning that "dividend income, by its very nature, cannot satisfy the fourth precondition absent a sham or other subterfuge" (para 33). On the facts of that case, the Court held that ss. 56(2) could not be applied to reattribute dividend income on the basis that a shareholder had not contributed to or participated in the business of the corporation. Iacobucci J. also reviewed and approved of the conclusion of the Federal Court of Appeal in *Outerbridge*, but did not go so far as to confirm the comments made in *obiter* by Marceau J.A. on the existence of the so-called fifth condition recognizing that "the court declined to find that there was a fifth pre-condition to the application of ss. 56(2)." (para 29). This was noted by Jorré J. in

Delso Restoration Ltd. v. The Queen, 2011 TCC 435 (para 33) ("*Delso Restoration*").

[415] The Respondent also relies on the decision of *Hasiuk v. Minister of National Revenue*, (FCA) ("*Hasiuk*"), where the taxpayer's corporation was in the business of building and selling homes. The taxpayer was reassessed on the basis that he directed or concurred in the transfer of the proceeds of sale of a house owned by his corporation to a corporation owned by his sons. On the facts before him, O'Connor J. found that the four conditions had been satisfied "including the fifth condition since there was no conclusive proof that the benefit was 'required' to be included" in the income of the corporation belonging to his two sons. The Court held that there was no evidence of a commercial agreement or that the sons' company had actually built the house in question.

[416] *Hasiuk* was affirmed by the Federal Court of Appeal but Sharlow J.A. noted that the appeal "raised no legal issue" and that the debate was "entirely a factual one" (para 5). In particular, the Court did not consider or discuss whether the fifth condition had been satisfied.

[417] It seems apparent that *Hasiuk* would have been decided differently had the taxpayer been able to demonstrate that the sons' company had a genuine commercial entitlement to the transferred funds. Indeed, as noted by Jorré J. in *Delso Restoration, supra*, commenting on *Outerbridge* and *Smith*, these decisions would have been decided differently had there been "adequate consideration in the context of a legitimate business relationship" (Para 39). The same can be said for *Hasiuk*.

[418] In *Williams v. Minister of National Revenue, 2004 TCC 838 ("Williams")* the Tax Court held that subsection 56(2) could not be applied to attribute benefits from inter-company loan agreements to a taxpayer who operated the group. The Court relied on *Neuman, supra*, for the principle that subsection 56(2) "was intended to cover cases where taxpayers seek to avoid receipt of property which would be income in their hand by seeking to have the amount transferred to a third party" (para 60) and that "where there is a business contract with that person for added consideration there is no benefit" (para 61). The Court refused to apply subsection 56(2).

Position of the Appellant

[419] The Appellant acknowledges that "the whole legal structure was put in place to flow funds from the operating entities" to the Income Funds and then to the RRSP

Trust but that "Mr. Grenon as an individual" was not "part of this chain". It is argued that the units in the Income Funds were acquired by the RRSP Trust using its own funds and that the payments were simply *pro-rata* distributions.

[420] The Appellant argues that as the annuitant of the RRSP Trust, he would have been entitled to withdraw the funds and pay tax accordingly at some future point in time but that this does not suggest that he was otherwise entitled to the income from investments held therein. Similarly, it is argued that even if the Appellant, as the annuitant of a self-directed RRSP, was able to select investments and give directions to the CIBC as the plan administrator, that does not alter the fundamental notion that they were two separate legal entities.

[421] The Appellant adds that by virtue of section. 75(3) of the *Act*, he would not be subject to tax on the income or gains of the RRSP Trust. Subsection 75(2) deals with a revocable or reversionary trusts and seeks to attribute all income or gains to the settlor of those trusts but subsection 75(3) specifically excludes payments made to a RRSP.

Position of the Respondent

[422] The Respondent contends that all four conditions (as well as the fifth condition) listed in the *Neuman* decision have been met, arguing that the first condition is satisfied because payments were made by the Income Funds to the RRSP Trust, being "an entity distinct from the Appellant".[63]

[423] It is argued that the second condition is met because the Appellant "was the controlling trustee" of each of the Income Funds[64] and took an active role in the Distribution Transactions. To the extent that "he was not actively involved in each and every decision to distribute funds" he implicitly agreed to the payments, relying on *Smith, supra* (para 17).

[424] It is argued that the third condition is also satisfied because the Appellant beneficially owned all the property held by the RRSP Trust. He was its sole annuitant and all payments made by the Income Funds were intended for the RRSP Trust, being the "person whom the reassessed taxpayer wished to benefit."[65]

[63] Crown Submissions, page 85.
[64] Crown Submissions, page 85.
[65] Crown Submissions, page 85.

[425] The Respondent maintains that the fourth condition was also met in that "had the distributions been made directly from the Income Funds" to the Appellant, "they would have been included in his income pursuant to sections 3 and 9 of the Act". The Minister adds that the Appellant "owned one unit of each of the" Income Funds directly, such that any amounts transferred to him directly would have been income from his investments in the [Income Funds].[66]

[426] Finally, the Respondent argues that the fifth condition was also met in that either the Appellant had "an entitlement to the amount transferred" to the Income Funds or in the alternative, the benefit conferred was "not directly taxable in the hands of the transferee"[67]. The Minister relies on *Outerbridge and Hasiuk, supra.* The Respondent also relies on the doctrines of sham and window dressing.

Analysis and conclusion

[427] To begin with, I note that subsection 75(2) raised by the Appellant deals with revocable and reversionary trusts. It seeks to reattribute all income back to the settlor of such trusts while clarifying in paragraph 75(3)(a) that this does not apply to income or gains that have accrued in an RRSP. I agree with the Respondent that this provision is not relevant to the application of subsection 56(2) in this context.

[428] It is apparent that that subsection 56(2) is an anti-avoidance provision that is rooted in the doctrine of constructive receipt. It is intended for situations where a taxpayer seeks to avoid what would be income in his or her hands by having the amount received by a third party whom he or she wished to benefit (*Fraser* and *Outerbridge, supra*). A long line of decisions have established that all four conditions, as restated in *Neuman*, must be satisfied to effectively engage subsection 56(2).

[429] In connection with the first condition, it is not disputed that the Appellant and the RRSP Trust are distinct legal entities and that payments were made to someone "other than the reassessed taxpayer", i.e. to the RRSP Trust. However, the application of subsection 56(2) is not without difficulty because we are dealing with a legislative scheme that seeks to ensure that all income earned within the RRSP accrues on a tax-exempt basis. That is the object of the legislation.

[66] Crown Submissions, page 85.
[67] Crown Submissions, page 86.

[430] With respect to the second condition, I have already concluded that the Appellant played an active role in the management of the Income Funds, that he sat at the apex of the chain of command and that he directed and concurred in the distribution of profits to unitholders including the RRSP Trust. Even if he was not at all times the actual trustee of an Income Fund, I find that he would nonetheless determine who would act in that capacity. However, the difficulty once again for the application of subsection 56(2) is that the units of the Income Fund were acquired using funds from the RRSP Trust and thus it had a legal entitlement to the pro-rata distributions. Despite the active role played by the Appellant, I am not convinced that the "allocation" of the income was made at his "direction" or with his "concurrence" within the contemplation of subsection 56(2).

[431] The application of the third condition is also problematic. On the one hand, it can be said that the payments were for the benefit of the Appellant "or for the benefit of another person", being the RRSP Trust, whom he "wished to benefit" and that, were it not for the existence of the RRSP Trust, the payments "would have been included in his income" as the annuitant, had it "been received by him". However the difficulty once again for the application of subsection 56(2) in this context is the fundamental feature of the RRSP regime that all forms of income accrue on a tax-exempt basis for the benefit of the annuitant who is entitled to withdraw funds at a later date and is subject to taxation at that time.

[432] In order to satisfy the fourth condition, the Court would have to be satisfied that income payments would have been included in the Appellant's income, had it been received by him. This is the notion of constructive receipt. As noted above, the Supreme Court of Canada has clarified that the application of subsection 56(2) does not extend to dividend income that, "by its very nature, cannot satisfy the fourth condition, absent a sham or subterfuge" (*McClurg and Neuman, supra*).

[433] In this instance, the Court must similarly conclude that subsection 56(2) cannot extend to income generated by investments held within an RRSP because it is payable to the RRSP and not to the annuitant. The notion of constructive receipt does not arise because an annuitant is not entitled to the income until such time as an actual withdrawal is effected. Moreover, the fact that the Appellant held units of the Income Funds in his personal capacity and received pro-rata distributions accordingly, would not extend the application subsection 56(2) to all income payments made by the Income Funds to the RRSP Trust.

[434] The Court has already concluded in this instance that there was no sham or window dressing. If the Supreme Court of Canada was able to conclude as it did in

Neuman, supra, that "absent a sham or subterfuge", dividend income should not be captured by subsection 56(2), I would similarly be loathe to extend the application of that provision to income generated by investments held within an RRSP.

[435] Though I need not reach a conclusion on the matter, I would opine that the RRSP statutory regime is a complete code for the taxation of all benefits derived therefrom. In particular, as will be seen below, income generated by non-qualified investments is specifically addressed by subsection 146(10.1).

[436] Subject to any further considerations in the context of GAAR, I would allow the appeal in connection with the reassessments made pursuant to subsection 56(2).

E. **The Excess Contributions**

[437] The Minister has assessed the Appellant on the basis that the amounts paid by the Income Funds to the RRSP, described above as the Distribution Transactions made in respect of the 2004 to 2011 taxation years, were over-contributions to his RRSP. In order to provide an analytical framework for this issue, it is necessary to review some of the more relevant concepts of the RRSP regime.

[438] Subsection 146(5) of the *Act* provides that contributions to an RRSP are deductible from a taxpayer's income up to certain dollar limits calculated as 18 per cent of the previous year's "earned income" subject also to an allowable yearly maximum known as the "RRSP dollar limit", both defined terms: 146(1). If a taxpayer participates in a registered pension plan, the deduction limit is reduced accordingly. If a taxpayer does not contribute to an RRSP in any given year or does not contribute the maximum permissible amount, those amounts accumulate from one calendar year to another and may be deducted in later years. Subsection 146(1) provides a detailed definition of "RRSP deduction limit" and "unused RRSP deduction room" but it is not necessary for the purposes hereof to review those concepts in any further detail.

[439] If a taxpayer makes over-contributions to an RRSP, also known as "excess contributions", subsection 204.1(2.1) of Part X.1 of the *Act* provides for a tax of 1% calculated monthly on the "cumulative excess amount", as further defined in subsection 204.2(1.1), until such time as the excess amount is withdrawn. A $2,000 cumulative over-contribution grace amount or "cushion" is excluded from this calculation: 204.2(1.1)D. See *Roy v. The Queen*, 2019 TCC 50. All withdrawals from an RRSP are taxable pursuant to paragraph 56(1)(h) and subsection 146(8) (*Andaluz v. the Queen*, 2015 TCC 165, para. 10) and this includes the withdrawal of un-

deducted over-contributions except that the taxpayer may be entitled to an offsetting deduction if the excess contribution is withdrawn within a prescribed period, as provided for in subsection 146(8.2). See *Vale v. The Queen*, 2004 TCC 107 and *Pelletier v. the Queen*, 2006 TCC 237. Until such time as the excess contributions are withdrawn, the 1 % tax continues to accrue.

[440] Subsection 204.3(1) provides that a taxpayer who has made excess contributions must, within 90 days from the end of each calendar year, file a return in prescribed form estimating the amount of tax payable under Part X.1 "in respect of each month in the year" and pay the tax to the Receiver General. For individuals, the prescribed form is the T1-OVP: *Hall v. The Queen*, 2016 TCC 221 ("*Hall*"). It is not disputed in this instance that the form was not filed by the Appellant.

[441] I will add that subsection 204.1(4) is a relieving provision that allows a taxpayer to seek a waiver of the tax (if assessed) if it is established "to the satisfaction of the Minister" that the "excess amount or cumulative excess amount…arose as a consequence of reasonable error" and "reasonable steps" were taken to eliminate the excess. Subsection 220(3.1) provides for relief against interest and penalties, including penalties payable for failing to file a T1-OVP. Both of these provisions provide the Minister with a form of "discretionary relief": *Connolly v. Canada (National Revenue)*, 2019 FCA 161 (paras.22-24). It is not disputed in this instance that the Appellant did not seek relief under either provision.

[442] The Respondent argues that the steps taken to constitute the Income Funds were not legally effective such that they were not qualified investments for RRSP purposes or alternatively, that they were a sham or window dressing and that the Minister was entitled to re-characterize the Distribution Transactions as excess contributions to the RRSP. The Minister also argues that the Income Fund structure was in fact an attempt to avoid Part X.1 tax on the excess contributions, relying on GAAR (that will be addressed separately).

Position of the Appellant

[443] The Appellant argues that he made annual contributions to the RRSP Trust, that he claimed a corresponding deduction and that he was assessed accordingly for each of the subject taxation years. He claims that these amounts were within his RRSP deduction limit and that at no time was there a "cumulative excess amount" as defined by subsection 204.2(1.1).

[444] Consistent with his argument that the Income Funds were qualified investments, the Appellant argues that the amounts alleged to have been excess contributions to the RRSP Trust, were not the property of the Appellant. They were income generated by investments held by the Income Funds that remained in the RRSP Trust, administered by CIBC Trust, as trustee. The Appellant maintains that he never re-contributed those amounts to the RRSP Trust.[68]

[445] The Appellant also argues that he filed a personal income tax return and was assessed accordingly. He maintains that there is no requirement that he file a separate return known as a T1-OVP for over-contributions. To the extent that this Court has concluded otherwise in *Hall*, *supra* (an appeal heard under the Informal Procedure), the Appellant urges the Court to disregard the decision.

[446] The Appellant also argues that the amount of $136,654,427 assessed for the 2005 taxation year (in connection with the 2003-4 Income Fund) pertained to a reorganization of certain of its investments (…) involving the Foremost Ventures Trust and that this income "was distributed by the TOM 2003-4 Income Fund to the RRSP Trust substantially by a distribution in kind which did not increase the fair market value of the RRSP Trust".[69] The Appellant also argues that the assessment of that amount fails to account for a loss of $129,876,648 suffered by the RRSP Trust on the disposal of the units in 2008.

Analysis and Conclusion

[447] It is apparent that the actual contributions made to the RRSP Trust during the subject taxation years are not really in issue. It is not seriously disputed that the Appellant made contributions within the RRSP deduction limits, that these amounts were deducted from income and that he was assessed accordingly.

[448] The issue to be addressed is whether the Distribution Transactions can be properly characterized as excess contributions or as a "cumulative excess amount".

[449] The Court notes at the outset that there is some confusion as to the quantum of the assessed amount for 2005 since the RRSP Trust subscribed for 3,821,850 units of the 2003-4 Income Fund at $40 per unit for a total subscription amount of $152,874,000, as set out in the table above entitled "Acquisition Transactions". The Appellant argues that this was in fact an exchange or "transfer-in kind", also known

[68] Notice of Appeal, paragraph 31.
[69] Notice of Appeal, paragraph 29.

as a ‘swap’ that did not have the effect of increasing the value of the RRSP Trust. In other words, the Appellant argues that the RRSP Trust subscribed for units of the 2003-4 Income Fund valued at $152,874,000 and that the subscription amount was satisfied by the transfer of the FMO units. Despite this, the Minister has indicated that the amount allegedly contributed to the RRSP as an excess contribution in 2005 was $136,654,427 as set out in the table above entitled “Distribution Transactions”. This discrepancy was not explained but the Court finds that if the Appellant was to be assessed on the basis that there were excess contributions, he would be entitled to the benefit of the lesser amount.

[450] In any event, since the Minister has agreed that FMO was a qualified investment as long as the units were held directly in the RRSP Trust and since the Minister has not suggested that the exchange or swap, as described above, was contrary to the provisions of the *Act*, I find there is good reason to agree with the Appellant that the alleged contribution of $136,654,427 cannot be characterized as an excess contribution.

[451] By the same token, the Appellant cannot claim a credit of $129,876,648 as a result of the loss allegedly suffered by the RRSP Trust on the disposal of the 2003-4 Income Fund units in 2008. Without reaching a conclusion as to whether there was a loss or not, it is apparent that any loss suffered by the RRSP Trust should be entirely disregarded. All losses suffered by an RRSP (for example, investments that are purchased within the RRSP and later disposed of for less than book value) would simply reduce the amount of capital that could be withdrawn or transferred to a Registered Retirement Income Fund at a later date. All such losses are otherwise inconsequential for income tax purposes.

[452] It is also apparent that the Respondent is attempting to re-characterize the Distribution Transactions, being the income generated by the Income Funds as an excess contribution or “cumulative excess amount” relying on sham or window dressing (as well as GAAR that will be reviewed separately). The Supreme Court of Canada has indicated (as cited above), that legal relationships between taxpayers must be respected, unless there is a sham in which case “[r]e-characterization is only possible if the label attached by the taxpayer to the particular transaction does not properly reflect its actual legal effect” (*Shell Canada*, *supra*, para 39).

[453] The Court has already concluded that the Income Funds were not qualified investments but that there was no sham or window dressing. As a result the Court agrees with the Appellant that the amounts described as the Distribution Transactions, cannot casually be re-characterized as excess contributions. As

indicated in the previous section dealing with subsection 56(2), the *Act* sets out a complete code or regime for the taxation of benefits derived from an RRSP including income or gains generated by non-qualified investments.

[454] In the end, having found that there was no sham or window dressing, I find that the Minister was not entitled to assess the Distributions Transaction as excess contributions pursuant to subsection 204.1(2.1). As indicated in the previous section dealing with subsection 56(2), that would be subject to a GAAR analysis.

F. **Statute-Barred Years**

a) The Grenon Appeal

Part I Reassessments

[455] Having concluded that the Minister was not entitled to assess the Appellant pursuant to subsection 56(2), I will nonetheless address the statute-barred issue.

[456] The Part I Reassessments relate to the 2008 and 2009 taxation years and it is not disputed that the Appellant filed T1 income tax returns for those years and that initial notices of assessment were issued by the Minister as follows:

Taxation Year	Notice of Assessment Date
2004	March 29, 2006
2005	May 3, 2006
2006	April 20, 2007
2007	May 27, 2008
2008	July 15, 2009

[457] The Appellant signed a waiver (*Form T2029*) on June 15, 2012 in connection with the 2008 taxation year and on February 28, 2013, the Minister issued the Part I Reassessments with respect to the 2008 and 2009 taxation years, relying on subsection 56(2), as reviewed above. The 2009 taxation year involved a *nil*

assessment and the income inclusion for that year had the effect of reducing a non-capital loss carried back to 2006 by the same amount.

[458] The Appellant has not suggested that this assessment was statue-barred.

Part X.1 Reassessments

[459] Having concluded that the Minister was not entitled to assess the Appellant on the basis that the Distribution Transactions were excess contributions, I will nonetheless address the statute-barred issue.

[460] As summarized above, the Part X.1 Reassessments relate the 2004 to 2011 taxation years and it is not disputed that the Appellant did not file an *Individual Tax Return for RRSP, PRPP and SPP Excess contributions* also known as a "T1-OVP" for those years. The Minister issued T1-OVP assessments on March 1, 2013 that were confirmed on July 24, 2014 but the late filing penalties were deleted.

[461] The issue here is whether the assessments (or reassessments) made pursuant subsection 204.3(2) for the 2004 to 2007 taxation years were statute-barred. It is not disputed that the waiver referenced above did not refer to Part X.1 of the *Act*.

[462] The Appellant alleges that the normal reassessment period for the 2004 to 2007 taxation years expired on May 8, 2011 for the purposes of Part I and that this similarly applies to any assessment pursuant to Part X.1. The Appellant argues further that there has not been a misrepresentation pursuant to subsection 152(4) that would allow the Minister to reassess beyond the normal reassessment period.

[463] The Respondent maintains that subsection 204.1(2.1) imposes a monthly tax of 1 % per month on the "cumulative excess amount" of any contribution to an RRSP and subsection 204.3(1) provides that a taxpayer shall file a prescribed return and pay the tax within "90 days after the end of each year". It is argued that subsection 204.3(2) authorizes the Minister to issue notices of assessment:

> **204.3(2)** Subsections 150(2) and 150(3), sections 152 and 158, subsections 161(1) and 161(11), sections 162 to 167 and Division J of Part I are applicable to this Part with such modifications as the circumstances require.

[464] As a result, the Respondent argues that certain provisions of Part I are incorporated by reference into Part X.1 with such modifications as are necessary under the circumstances. This includes paragraph 152(3.1)(b) which provides that the definition of "normal reassessment period" shall be "the period that ends three

years after the earlier of the sending of a notice of original assessment under this Part (…) or the sending of an original notification that no tax is payable by the taxpayer for the year".

[465] The Respondent argues that there has long been an "interplay between Part 1 of the *Act* and other Parts of the *Act* as it relates to the filing of returns and the power of the Minister to issue assessment or reassessments".[70] In particular, the Respondent relies on the decision of *Hall v. The Queen*, 2016 TCC 221 ("*Hall*") where the taxpayer had made excess contributions to an RRSP and had similarly claimed that the assessment pursuant to subsection 204.3(1) was statute-barred because the Minister had already issued original assessments under Part 1 and had not adduced any evidence to suggest that there had been any kind of a misrepresentation.

[466] In dismissing the appeal, Justice d'Auray explained the issue as follows:

> [16] (…) Mr. Hall was required to file a Return under subsection 204.3(1), which is in Part X.1 of the *Act*. Part X.1 applies when a taxpayer has over contributed to his or her RRSP.
>
> [17] Subsection 204.3(1) of the *Act*, requires a separate return, which is different from the returns filed under Part I. Additionally, the tax payable under Part X.1 is a separate tax from the tax payable under Part I. Subsection 204.3(1) requires a taxpayer to pay the tax payable under this Part (X.1), within 90 days of year end.
>
> [18] Since Part X.1 outlines a separate tax, requiring a separate return from Part I, a return filed under Part I is not applicable to the timing requirements set out in subsection 204.3(1). This approach applies in the same manner to several other parts of the *Act*.
>
> [19] This Court in *Gretillat v Canada*, [1998] TCJ No. 143, 98 DTC 1483, dealt with a similar issue to this appeal, involving Part X.4 of the *Act*, which applies to excess contributions to an RESP. The Court held that:
>
> > [14] The tax payable under Part X.4 of the Act by a subscriber to an RESP on an excess amount as defined in Part X.4 is a separate tax from the tax payable under Part I of the Act.
>
> [20] Further, the Court in *Gretillat*, found that the assessment period applicable to Part X.4 did not begin with the filing of a return under Part I, but rather started when the taxpayer was assessed by the Minister for tax payable under Part X.4.

[70] Written Submissions of the Crown, volume 3 of 3, paragraph 43.

> [21] The respondent cited *Cable Mines & Oils Ltd v Minister of National Revenue*, 61 DTC 641, in support of their position that a return filed under Part I would not begin the assessment period for the tax payable under Part X.1. The Court in *Cable Mines & Oils Ltd* held that:
>
> > [20] ...an assessment issued under the provisions of section 123(10) is an original assessment in respect of withholding tax and is a quite different assessment from any original assessment issued under section 46 in respect of a taxpayer's own income....
>
> (…)
>
> [23] Subsection 204.3(2) states that section 152 of the *Act* applies to Part X.1 of the *Act*, "with such modifications as the circumstances require". As a result of subsection 204.3(2), the limitation periods in subsection 152(3.1) apply to Part X.1, with modification. The three year assessment period begins on the sending of a notice of an original assessment.
>
> [My emphasis]

[467] The position taken in *Hall*, *supra*, notably the obligation to file a T1-OVP Return was confirmed by the Federal Court of Appeal in *Connolly v. Canada (National Revenue)*, 2019 FCA 161 (para 20-21).

[468] In the end, the Respondent argues "that several Parts of the Act each outline a separate tax, require a separate return and create separate timing requirements, unaffected by whether a Part I reassessment is statue-barred."[71]

[469] The Respondent also argues that the Minister was authorized to issue the Notices of Reassessment (deleting the late filing penalties) of August 13, 2014 on the basis of subsection 165(3), also incorporated by reference by subsection 204.3(2), since the Appellant had filed Notices of Objection on May 28, 2013 to the initial assessments and the Minister was required to respond.

Analysis and conclusion

[470] I agree with the submissions of the Respondent, as summarized above, and with the conclusions reached in *Hall and Connolly*, *supra*. Subsection 204.3.1(a) requires the filing of a "prescribed form…without notice or demand" that is distinct from the T1 income tax return required to be filed pursuant to Part I.

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[71] Written Submissions of the Crown, volume 3 of 3, paragraph 46.

[471] Secondly, since the Appellant had not filed the T1-OVP return, the Minister had never issued "a notice of original assessment" or "an original notification that no tax is payable" as set out in paragraph 152(3.1)(b), incorporated by reference into Part X1.1, by subsection 204.3(2).

[472] As a result, the Court concludes that the reassessments made pursuant to Part X.I in connection with the 2004 to 2007 taxation years were not statute-barred.

b) The RRSP Appeal

[473] As summarized above, the Part 1 and Part XI.I Assessments were issued on March 6, 2013, in connection with the 2004 to 2009 taxation years, both of which were confirmed on July 24, 2014.

[474] It is not disputed that the RRSP Trust was included in Specimen Plan RSP 322-010 (the "Specimen Plan"), that CIBC Trust filed T3GR forms on a timely basis, that taxes were paid to the Receiver General and finally, that Trust Notices of Assessment were issued by the Minister as follows:

Tax Year	**Trust Notice Assessment Date**	**Tax Assessed**
2004	February 15, 2006	$1,014,654
2005	May 17, 2006	$55,864
2006	June 27, 2007	$31,739
2007	July 16, 2008	$21,354
2008	July 15, 2009	$9,151
2009	June 9, 2010	$8,247

[475] It is also not disputed that the RRSP Trust was not listed as a taxable plan because CIBC Trust was of the view that it was not subject to Part I or Part XI.1 tax.

[476] The Appellants allege that the 2004 to 2008 taxation years are statute-barred.

[477] The Part I Assessments were issued pursuant to subsection 146(10.1) or in the alternative, on the basis of sham, window dressing or GAAR. Subsection 146(10.1) provides that where a trust that is governed by a RRSP holds property that is a non-qualified investment, "a tax is payable (…) on the amount that its taxable income for the year would be if it had no income or losses from sources other than non-qualified investments and no capital gains or losses other than from dispositions of non-qualified investments". In this instance, the Minister has assessed the RRSP Trust for the income paid by the Income Funds to the RRSP Trust, described herein as the Distribution Transactions.

[478] The Part XI.1 Assessments were issued pursuant to subsection 207.1(1) or in the alternative, on the basis of sham, window dressing or GAAR. Subsection 207.1(1) provides that where, at the end of any month, a trust governed by a RRSP "holds property that is" not " a qualified investment (…) the trust shall, in respect of that month, pay a tax equal to 1 % of the fair market value of the property at the time it was acquired by the trust of all such property held by it at the end of the month." In this instance, the RRSP Trust was assessed for the fair market value of the units of the Income Fund acquired by the RRSP Trust, also described herein as the Acquisition transactions.

[479] Paragraph 207.1(1)(a) excludes from the calculation of the 1 % tax, the fair market value of non-qualified investments which have already been included in the income of the annuitant by virtue of subsection 146(10). In this instance, the Appellant was not assessed pursuant to the latter provision, such that the exclusion does not apply.

[480] Subsection 207.2(1) provides that "a taxpayer to whom this Part applies shall (…) file with the Minister a return for the year under this Part in prescribed form and containing the prescribed information, without notice or demand therefor" and "estimate in the return the amount of tax, if any, payable by it under this Part in respect of each month in the year" and pay the amount to the Received General.

[481] Subsection 207.2(2) addresses the liability of the plan administrator or trustee and provides that where "the trustee of a trust that is liable to pay tax under this Part does not remit (…) the amount of the tax within the time specified in subsection 207.2(1), the trustee is personally liable to pay on behalf of the trust the full amount of the tax" and is entitled to recover the amount so paid from the trust.

Position of the Appellants

[482] The Appellants argue that the "Trust Notices of Assessment" issued by the Minister in response to the filing of the T3GR forms by CIBC Trust, as noted above, were all "original assessments" for purposes of the normal reassessment period.

[483] The Appellants have advanced several arguments to support this position.

i) Streamlined Reporting Process for RRSP Income

[484] It is argued that under the *Act* and the *Regulations*, the T3GR is a prescribed form that is intended to meet the filing requirements pursuant to paragraph 150(1)(c), subsection 207.2(1) of the *Act*, and section 204 of the *Regulations.*

[485] Paragraph 150(1)(c) dealing with "trusts and estates" provides as follows:

> **150 (1)** Subject to subsection (1.1), a return of income that is in prescribed form and that contains prescribed information shall be filed with the Minister, without notice or demand for the return, for each taxation year of a taxpayer,
>
> (…)
>
> **(c)** in the case of an estate or trust, within 90 days from the end of the year;

[486] Subsections 204(1) and (2) of the *Regulations*[72] provide as follows:

> **204 (1)** Every person having the control of, or receiving income, gains or profits in a fiduciary capacity, or in a capacity analogous to a fiduciary capacity, shall make a return in prescribed form in respect thereof.
>
> **(2)** The return required under this section shall be filed within 90 days from the end of the taxation year and shall be in respect of the taxation year.
>
> (…)

[487] CIBC argues that the Minister has made a policy choice and that since it administers "hundreds of thousands, or even millions, of RRSPs (…) it would be unduly onerous" for both trustees and the Minister to consider individual returns and that to avoid this, the Minister "has adopted a practical scheme to facilitate tax reporting" that involves a "straightforward 'group' reporting procedure." It allows trustees that administer a specimen plan "to use the same methodology and information to make any determinations about any tax payable" and having "mandated such a system", it is argued that it would be manifestly unfair for CRA

[72] *Income Tax Regulations, C.R.C., c. 945.*

to be permitted "to deny taxpayers the rights that would have been preserved (…) if CRA had adopted a different system".[73]

ii) Guidance from the Minister regarding RRSP Tax Filings

[488] It is argued that the Minister "has published guidance regarding the filing of the T3GR form indicating that it was meant for RRSPs to report nil income under Parts I and XI.I" and that this "process promotes efficiency in the manner in which RRSPs report" any tax liability pursuant to Part I and Part XI.[74]

[489] CIBC refers to Information Circular 78-14R3 dated April 1, 2001 and Information Circular 78-14R4 dated July 1, 2006 (the "Circulars") and argues that the earlier versions referred to the T3G form (later replaced by the T3GR form) and instructed trust companies to file a single return for RRSPs under a specific specimen that would inform CRA "that a group of trusts ha[s] no tax liability" and more specifically, that it could be used to "inform CRA that the group of trusts has no tax liability, or has a tax liability of less than $2.00." In the prior versions of the Circular, if the RRSP was liable to tax in excess of $2.00, the T3G form could not be used alone and a form T3IND was also required. If the T3G form was not filed within 90 days of the year-end, CRA could demand that a T3IND be filed "for each RRSP, RRIF, or RESP in the group that would have been included in the T3GR form." In a later version of the Circulars ("CRA Filing Circular Version 4"), it was stated that the T3GR form was the prescribed return for RRSPs under for paragraph 150(1)(c), subsection 207.1(1) and 207.2(1) of the *Act* and section 204 of the *Regulations.*

[490] CIBC argues that the T3GR did "not change in any material way from 2004 to 2009" and that a "T3 form is required only where the trust has Part I income to report".

iii) Purpose of Limitation Periods in Tax Matters

[491] The Appellants argue that the *Act* sets out a three-step framework for limitation periods that involves i) the filing of a return ii) the requirement to assess that return with all due dispatch and finally iii) a reassessment by the Minister

[73] Written Submissions of the Appellant, CIBC Trust Corporation, page 29-31.
[74] Written Submissions of the Appellant, CIBC Trust Corporation, page 31-34.

provided she does so within the normal reassessment period of three years as set out in subsections 152(3.1)(b) and (4).

[492] The Appellants argue that the Supreme Court of Canada has emphasized that "the purpose of limitation periods is generally to preclude claims where evidence has grown stale, to promote certainty (…) and ensure that individuals are secure in their reasonable expectations" that they will not "be held to account for ancient obligations", relying on *Markevich v. Canada*, 2003 SCC 9, para. 19 and *Produits Forestiers St-Armand Inc., The Queen*, 2003 TCC 696, para 59.

[493] CIBC argues that the Respondent's suggestion that only T3 returns are "original assessments" for purposes of the limitation period is contrary to the jurisprudence noted above and "would give rise to a continuous and unpredictable assessment period for millions of RRSPs in Canada that report nil income."[75]

iv) The T3GR Forms Included the RRSP Trust

[494] CIBC argues that the uncontradicted evidence at the hearing was that a T3GR form that included the RRSP Trust as part of the Specimen Plan, had been filed for each subject taxation years because it did not hold non-qualified investments and was not a taxable RRSP. It is argued again that this form was intended to confirm that a RRSP has "no liability for Part I and Part XI.1 tax" and that "a taxpayer is entitled under the Act to file a return where none is required to obtain an assessment and 'start the clock' under subsection 152(3.1)."[76]

v) Acceptance of T3GR Forms by the Minister

[495] CIBC argues that section 152 of the *Act* requires that the Minister assess returns with all due dispatch and that she did so in this instance by "issuing Original Assessments", as noted above. It is argued that these assessments were mailed to CIBC Trust offices in Toronto and not to an individual plan holder. It is argued further that it is incorrect for the Respondent to assert that the T3GR only assessed "taxable accounts" and that it was intended to assess all RRSPs included in the specimen plan, including the RRSP Trust, "thus triggering the start of the three year reassessment period under subsection 152(3.1)", relying on *Provincial Paper Ltd. v. MNR*, [1954] C.T.C. 367, paras 11-12 (Exch. Ct. Can).[77]

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[75] Written Submissions of Appellant, CIBC Trust Corporation, page 35-35.
[76] CIBC Submissions, page 35-36.
[77] CIBC, page 36.

vi) The CRA had full notice of the RRSPs in the Specimen Plan

[496] As described by the fact witnesses, "CIBC submitted with each T3GR a list of all taxable accounts, including the annuitant's name, SIN, amount of tax payable, and the reason for the tax" and "for RRSPS that were not taxable, CIBC World Markets maintained information that would be available to CRA upon request."

[497] It is argued that the "T3GR specify that information about non-taxable RRSPs must be kept (…) and presented to the Minister upon request". Since the Minister had knowledge of the RRSPs under the Specimen Plan, it was able to "audit the trustee's books and records" but it did not do so in connection with the RRSP Trust.[78]

vii) The Part 1 Assessment and Part XI.I Reassessments are Statue-Barred

[498] CIBC reiterates that the "Original Assessments" confirm that the RRSP Trust was not liable for Part I and Part XI.1 tax for each of the 2004 to 2008 taxation years and that the normal reassessment period ended three years later and as a result, they are statute-barred. It is argued that the Minister designed and issued the T3GR form and related tax reporting process through which RRSP trusts report Part I and Part XI.1 tax and that the 'group nature' of the process should not prevent individual RRSP account holders from receiving the benefit of the limitation period.

[499] It is asserted that CIBC Trust "scrupulously" followed the CRA reporting requirements, that the Minister had all the information on hand and "could have audited and reassessed sooner but elected not to do so" and the Minister's attempt to reassess the RRSP Trust "is the very mischief that limitation periods are designed to prevent".[79]

viii) There was no Misrepresentation Attributable to Neglect, Carelessness or Wilful Default

[500] CIBC denies that there was a misrepresentation at the time the T3GR forms were filed in connection with the RRSP Trust and that the "Minister cannot allege a misrepresentation by the taxpayer involving propositions of law or mixed law and fact - provided the taxpayer's position is reasonable."

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[78] CIBC, page 37.
[79] CIBC, page 38-39.

[501] In the alternative, if there was a misrepresentation, it was not "attributable to neglect, carelessness or wilful default" since "CIBC Trust's filing position was at all times thoughtfully considered and reasonably held" and this was "evident from (…) the due diligence undertaken by CIBC Trust". This included the fact that the declaration of trust stipulated that the annuitant had sole responsibility to determine what investments were qualified under the *Act* but also that CIBC Trust undertook appropriate due diligence steps in connection with private placements including a review of the relevant documentation and reliance on the Legal Opinions. CIBC Trust argues that "[r]eliance by a taxpayer on professional opinions is reasonable and prudent behavior that precludes the Minister from reassessing beyond the normal reassessment period".

[502] In the end, CIBC Trust argues that a taxpayer "does not have to make up for any inadequacies of the ministerial assessment process, but has merely to file a return according to the provisions of the Act": *Regina Shoppers Mall Ltd. v. R.* [1991] 1 C.T.C. 297 (F.C.A.) (para 18), and that CIBC did precisely that.[80]

Position of the Respondent

[503] The Respondent points to the testimony of CIBC fact witness Kerri Calhoun and her agreement on cross-examinations that "there was a distinction between a tax return and an information return" and that "at no point" did CIBC Trust receive "a notice that [the RRSP Trust] had no tax payable under Part I or Part XI.1 of the *Act*".

[504] According to the Respondent, Ms. Calhoun also agreed that the Minister had "assessed based on the information in the T3GR Returns as filed by CIBC" and that had there been "income (…) from non-qualified investments, then CIBC would have to file a T3 Return of Income".[81]

Part 1 Assessments

[505] The Respondent argues that subsection 150(1) of the *Act* imposes an obligation on trusts to file a tax return and that the prescribed form is the T3 Trust Return. However, subsection 150(1.1) provides that the obligation to file a return does not arise where no Part I tax is payable by certain individuals and since subsection 104(2) deems a trust to be an individual for purposes of the *Act*, there is no filing obligation for an RRSP trust unless it has Part I tax liability.

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[80] CIBC, page 39-43.
[81] Written Submissions of the Crown, volume 3 of 3, page 12.

[506] In this instance, it is argued that the tax liability arose by virtue of subsection 146(10.1) which seeks to tax income from a source that is not a qualified investment.

[507] The Respondent argues that the Part I Assessments were "original" assessments for the 2004 to 2009 taxation years because the RRSP Trust had not filed a T3 Return. As well, the RRSP Trust had not previously been assessed and had not been notified by the Minister that no tax was payable by it pursuant to Part I. Accordingly, it is argued that "the issuance of the respective original assessments commenced the time period by which the Minister was required to issue any reassessments within the normal reassessment period."[82]

[508] The Respondent argues that the Appellants' position that the limitation period commenced with the issuance of the Trust Notices of Assessment is mistaken since the CIBC Trust was under an obligation to self-assess and "the T3GR Return was the prescribed tax and information return in respect of the Part X.1 tax liability but not the Part I tax liability which required the filing of a T3." The Respondent argues moreover that the T3GR Returns filed by CIBC Trust were assessed as filed and tax was paid in respect of the plans listed therein but not the RRSP Trust.

[509] The Respondent reiterates, relying on *Hall, supra*, that "different Parts of the *Act* impose separate taxes, require separate returns and create separate timing requirements" and that the tax liability pursuant to subsection 146(10.1) is different from the tax liability arising from subsection 207.1(1).

Part X.I Reassessments

[510] The Respondent reiterates that Part XI.I is a separate tax requiring a separate return, as explained in *Hall, supra*. Although CIBC Trust filed a T3GR Return on a timely basis and Trust Notices of Assessment were issued accordingly, those assessments have "no legal effect on the computation of the normal reassessment period for the Grenon RRSP Trust" because it was not listed as a taxable RRSP.

[511] The Respondent argues that "the entire premise of the (…) statute-barred submissions is based on the false notion that the *Act* treats the filing of the T3GR Returns and an ensuing notice of assessment as fixing the tax liability of the specimen plan as a whole as if it was a separate taxpayer" but "a group of trusts under a specimen plan are not a separate taxpayer under the Act."

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[82] Written Submissions of Respondent, volume 3 of 3, page 26.

[512] Although the Respondent acknowledges that the prescribed form for Part XI.1 is the T3GR Return, she argues that that Act prevails "over the regulations" and that the Court must seek an interpretation that reconciles "any tension or conflict between the two", as explained by the Supreme Court of Canada in *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 ("*Oldman River*"). In that decision, it was held that "an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation" and "there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments".

[513] The Respondent indicates that the subject Specimen Plan included between "364,506 exempt plans in 2004 and 241,403 in 2009" and that in "the same period" CIBC Trust "reported taxable plans that ranged from 160 in 2004 to 45 in 2009". The Respondent argues that it would be absurd to conclude that the Minister "would effectively forego its statutory duty to audit and assess tax to RRSPs composed millions of taxpayers in a specimen plan, of which only a small percentage, as low as 1-2%, are reported as taxable trusts. The Respondent also argues that it would be absurd to think that the normal reassessment period that applies to taxable trusts listed on the T3GR upon receipt of the Trust Notices of Assessment, would also apply to non-taxable trusts, "which represent the vast majority of trusts under a specimen plan." It is argued that Parliament could not have intended this result by "allowing the Governor in Council to make regulations that would impose (…) an obligation that is not otherwise provided for in the *Act*."

[514] The Respondent indicates that the "T3GR Return is both a tax and information return". The "tax" portion relates to the taxable trusts but the "information" portion relates to the non-taxable trusts and "this information includes the aggregate assets being held by the specimen plan as well as the number of exempt plans (…)." For these plans, the Respondent indicates that all that was required was that the CIBC, as trustee, maintain and make available upon request, a list of the names of each annuitant or subscriber and their social insurance number."

[515] The Respondent agrees with the CIBC that "for reasons of efficiency in the Minister's administration and enforcement of the RRSP regime (…) the filing of the T3GR group returns have developed to cover RRSPs in a specimen plan" involving "hundreds of thousands, if not, millions of RRSPs in a specimen plan" but that "absent the CRA's practice of accepting T3GR Returns for ease of administration, the Act itself requires individual filing of trust returns." But it is argued that CRA's objective of providing for a "streamlined reporting process" and the publication of "Information Circulars are not determinative of the proper interpretation and

application of the interplay between the *Act* and the *Regulations* in relation to the legal effect of" the Trust Notices of Assessment.

[516] The Respondent concludes by indicating that the issuance of the Trust Notices of Assessment, as noted above, did not have the effect of commencing the statutory period for the Minister to assess Part I or Part XI.I tax.

Was there a Misrepresentation?

[517] The Respondent argues in the alternative that there was a "misrepresentation attributable to neglect, carelessness or willful default" that would allow the Minister to assess the RRSP Trust beyond the normal reassessment period.

[518] The Respondent argues that CIBC Trust should have known that the Income Funds were not qualified investments for RRSP purposes, that they "blindly accepted" the Appellant's "representations as the controlling trustee" of the Income Funds and his "opinion that a lawful distribution" had been completed.

[519] The Respondent alleges that CIBC did so "without any scrutiny" and that it "made no attempt to confirm the veracity of the legal opinions on which they relied" and did not consider that the Trustee's Certificate was signed by the annuitant of the Grenon RRSP Trust nor consider that the Appellant's conflict of interest "as, *qua* trustee and controlling unitholder" of the Income Funds he sought to promote and "*qua* annuitant of the Grenon RRSP Trust".

[520] The Respondent states that reliance on legal opinions or professionals does not allow a taxpayer to "declare it was not negligent." The Respondent relies on *Snowball v. The Queen* [1996] 2 CTC 2513, cited with approval in *Vine Estate v. The Queen*, 2015 FCA 125, where it was held that "negligence in the preparation of an income tax return retains its consequences under subparagraph 152(4)(a)(i) whether it be the negligence of the taxpayer personally or that of the accountant or other tax return preparer who is his or her agent." The Respondent claims that he authorities "collectively stand for the proposition" that CIBC Trust could not "blindly rely on professionals to assert it acted with due diligence and expect this to protect it from" being reassessed beyond the normal reassessment period."

[521] The Respondent argues finally that the CIBC Trust cannot shift away its burden or responsibility to ensure that investments are qualified investments by claiming that the RRSP Trust was self-directed and the annuitant was contractually responsible to determine whether an investment was in fact a qualified investment.

Analysis and Conclusion

[522] On the one hand, I agree with the Appellants that the T3GR Return was the prescribed form intended by CRA to meet the filing requirements of RRSP trustees pursuant to paragraph 150(1)(c) and subsection 207.2(1) of the *Act* and section 204 of the *Regulations* and that it was intended as a streamlined process for the reporting of group RRSPs involving hundreds of thousands of plans under one specimen plan.

[523] It is also not in dispute that CRA published guidance in the form of Information Circulars for the completion of the T3GR Return. The form is entitled "*Group Income Tax and Information Return for RRSP, RRIF (…) or RDSP Trusts*" and the pre-printed portion instructs trustees to "attach a list of all taxable RRSPs (…) registered under this specimen plan" and that "a comparable list of RRSPs that are not taxable must be available upon request." The form also specified that "to report taxable income (…) trustees must complete a T3 Trust Income Tax and Information Return".

[524] As helpful as the information noted above may be, it is well-established that CRA administrative practices or guidelines "are not the determinative factor" and that the Court "must turn to the statute itself" for the application of the *Act*: *Imperial Oil v. the Queen*, 2006 SCC 46, para 59.

[525] As noted by the Respondent, the number of taxable RRSPs reported during the subject taxation years was a mere fraction of the total number included as part of the Specimen Plan. Since the fact witnesses confirmed that CIBC managed "hundreds of thousands, if not millions" of RRSP plans within different specimen plans, it can be assumed that other specimen plans would also similarly include only a small fraction of taxable plans. In that context, it seems apparent that the T3GR Returns were accepted by CRA as "group" returns for administrative purposes only. Since the provisions of the *Act* must prevail over subordinate legislation (*Oldman River, supra*), I find that the T3GR Returns were not intended to override a trustee's other reporting obligations arising from the *Act*, notably the obligation to file a T3 Return pursuant to paragraph 150(1)(c) or to report taxable income arising from subsection 146(10.1). I note that the trustee's reporting obligations were specified on face of the pre-printed form.

[526] The "streamlined" administrative process, as described above, placed the onus on CIBC Trust, as trustee, to identify RRSPs within the Specimen Plan that held non-qualified investments, an obligation that reflects the notion that "the process of

tax collection relies primarily upon taxpayer self-assessment and self-reporting": *R. v. Jarvis*, 2002 SCC 73, para 49.

[527] The filing of the T3GR Return in accordance with subsection 207.2(1) triggered the Minister's obligation to "examine the return" in accordance with subsection 152(1) and "send a notice of assessment" to CIBC Trust being "the person by whom the return was filed" pursuant to subsection 152(2).

[528] Subsection 152(3) clarifies that "liability for tax (…) is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made" (My emphasis).

[529] In accordance with subsection 152(4), the Minister could then "at any time make an assessment, reassessment or additional assessment" as long as she did so within the "normal reassessment period" as defined in paragraph 152(3.1)(b) being the earlier of three years from "the sending of an original notice of assessment" or "an original notification that no tax is payable by the taxpayer for the year."

[530] The issue before the Court is whether the "normal reassessment period" that applied to "taxable plans" that had been "assessed", should be extended to the non-taxable plans listed in the T3GR Return including the RRSP Trust.

[531] CIBC urges the Court to conclude that the limitation period extends to non-taxable plans because, *inter alia*, it "scrupulously" followed CRA administrative guidelines and the minister issued "original" Trust Notices of Assessment. It is also argued that it would be "manifestly unfair" to taxpayers who held non-taxable plans and who might have otherwise taken steps to preserve their rights.

[532] I do not agree and conclude that the Appellants' position should be rejected.

[533] I find that the Minister fulfilled her statutory obligations when she examined the T3GR Returns for each of the subject taxation years and issued the Trust Notices of Assessment. However, I must conclude that she did so only in connection with the taxable plans and not in connection with the non-taxable plans that were listed for information purposes only, including the RRSP Trust.

[534] As noted above, subsection 152(3) provides that "liability for tax" is not affected "by the fact that no assessment has been made." That provision, when read with the definition of the "normal reassessment period" and the requirement that there be an "original notice of assessment" or an "original notification that no tax is

payable", leads me to conclude that the Trust Notices of Assessment did not have the effect of commencing the "normal reassessment period" for the non-taxable plans listed in the Specimen Plan including the RRSP Trust.

[535] Consequently, I agree with the Respondent that the filing of the T3GR Returns and the ensuing Trust Notices of Assessment could not "fix the liability of the specimen plan as a whole as if it was a separate taxpayer" and I must therefore conclude that the limitation period could not extend to the non-taxable trusts included in the Specimen Plan and listed as part of the "Information" portion of the T3GR Return unless or until a T3 Return had been filed and assessed.

[536] It follows that I must reject the Appellants' submission that the Trust Notices of Assessment issued in connection with the Specimen Plan were "original" assessments for all non-taxable plans including the RRSP Trust. I therefore conclude that the Part 1 Assessments and the Part XI.I Reassessments were not statute-barred.

[537] Having reached that conclusion, it is not necessary to address the Respondent's alternative argument that there was a "misrepresentation" that was "attributable to neglect, carelessness or wilful default" pursuant to subsection 152(4) such that the Minister could reassess beyond the "normal reassessment period". That said, I will say that I have some reservations about the administrative steps described by the CIBC fact witnesses and question whether they were sufficiently robust in a context where the RRSP Trust was acquiring millions of dollars of units in a private placement for which the annuitant was also the trustee and promoter, putting him in an obvious conflict of interest for all information provided including the selection of outside legal counsel who delivered the Legal Opinions. Moreover, I find that the Legal Opinions relied upon by CIBC Trust suggest that an independent investigation was not in fact carried out and that these were in fact "qualified opinions" inasmuch as they relied on information set out in the Trustee Certificates signed by the annuitant. They also specified that they had "relied on the facts represented (…) by James T. Grenon" and that, if the facts differed "from those presented" the opinion might not be valid.

[538] In the end, I am not convinced that legal counsel and, by extension CIBC Trust, undertook the level of due diligence that would have been expected or required to conclude that the Income Funds were in fact qualified investments under the *Act* and in particular, whether a "lawful distribution" had actually taken place.

G. **The application of GAAR**

[539] GAAR is an argument of last resort that assumes that a taxpayer has otherwise complied with the provisions of the *Act*. If this Court has wrongly concluded that the Income Funds were not qualified investments, then this analysis must assume that they were qualified investments and the question is whether there was an avoidance transaction that was contrary to the GAAR.

[540] Pursuant to subsection 245(4), a taxpayer will be denied a tax benefit resulting from an avoidance transaction if that result can be considered abusive tax avoidance. In the seminal decision of *Canada Trustco*, *supra*, the Supreme Court of Canada provided some background on the enactment of GAAR:

> 16. The GAAR draws a line between legitimate tax minimization and abusive tax avoidance. The line is far from bright. The GAAR's purpose is to deny the tax benefits of certain arrangements that comply with a literal interpretation of the provisions of the Act, but amount to an abuse of the provisions of the Act. (…)

[541] The Supreme Court summarized the analytical framework as follows: (para 66):

> 1. Three requirements must be established to permit application of the GAAR:
>
> (1) A tax benefit resulting from a transaction or part of a series of transactions (s. 245(1) and (2));
>
> (2) that the transaction is an avoidance transaction in the sense that it cannot be said to have been reasonably undertaken or arranged primarily for a bona fide purpose other than to obtain a tax benefit; and
>
> (3) that there was abusive tax avoidance in the sense that it cannot be reasonably concluded that a tax benefit would be consistent with the object, spirit or purpose of the provisions relied upon by the taxpayer.
>
> 2. The burden is on the taxpayer to refute (1) and (2), and on the Minister to establish (3).
>
> 3. If the existence of abusive tax avoidance is unclear, the benefit of the doubt goes to the taxpayer.
>
> 4. The courts proceed by conducting a unified textual, contextual and purposive analysis of the provisions giving rise to the tax benefit in order to determine why they were put in place and why the benefit was conferred. The goal is to arrive at a purposive interpretation that is harmonious with the provisions of the *Act* that confer the tax benefit, read in the context of the whole *Act.*

> 5. Whether the transactions were motivated by any economic, commercial, family or other non-tax purpose may form part of the factual context that the courts may consider in the analysis of abusive tax avoidance allegations under s. 245(4). However, any finding in this respect would form only one part of the underlying facts of a case, and would be insufficient by itself to establish abusive tax avoidance. The central issue is the proper interpretation of the relevant provisions in light of their context and purpose.
>
> 6. Abusive tax avoidance may be found where the relationships and transactions as expressed in the relevant documentation lack a proper basis relative to the object, spirit or purpose of the provisions that are purported to confer the tax benefit, or where they are wholly dissimilar to the relationships or transactions that are contemplated by the provisions.
>
> 7. Where the Tax Court judge has proceeded on a proper construction of the provisions of the Income Tax *Act* and on findings supported by the evidence, appellate tribunals should not interfere, absent a palpable and overriding error.

a) Was there a tax benefit?

[542] The onus is on the Appellants to convince the Court of the absence of a « tax benefit" that is defined at subsection 245(1) as "a reduction, avoidance or deferral of tax or other amount payable under this Act (…)"

[543] Determining if there was a tax benefit "involves a factual determination" but "the magnitude of the tax benefit is not relevant at this stage"[83]. As explained by the Supreme Court, "[i]f a deduction against taxable income is claimed, the existence of a tax benefit is clear, since a deduction results in a reduction of tax" but in other situations "the existence of a tax benefit might only be established upon a comparison between alternative arrangements (…)"[84]. It was later clarified that such an "alternative arrangement must be one that might reasonably have been carried out but for the existence of the tax benefit": *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63 ("*Copthorne*"), para 35.

[544] The Appellants argue that the various investments made by the RRSP Trust did not result in a tax benefit "any more than the investments made by anyone else's registered retirement savings plan would be a tax benefit to them". It is argued that it cannot be said that the Appellant made "unlimited, indirect, tax-free contributions

[83] *Canada Trustco*, paragraph 19.
[84] *Canada Trustco*, paragraph 20.

to the Grenon RRSP Trust", as alleged by the Respondent, since the investments were made by the RRSP Trust and it was entitled to the returns.

[545] The Appellants also submit that there was no tax benefit to the RRSP Trust because a taxpayer cannot receive a tax benefit by avoiding a consequence that would never have occurred. It is argued that the RRSP Trust would never have deliberately invested in non-qualified investments and that complying with the provisions of the *Act* to avoid being subject to tax, notably Part XI.1 tax, is not a tax benefit. Fundamentally, the Appellants argue broadly that tax planning by itself is not a justification for the application of the GAAR.

[546] In summary, the Respondent argues that Appellant established an elaborate scheme to take advantage of the RRSP regime and ensure that income generated from investments that he directly or indirectly controlled would accrue on a tax-exempt basis and that he would directly or indirectly be able to make contributions to the RRSP Trust in excess of the permissible amounts.

[547] I find that there was a "tax benefit" as that term is defined.

[548] Parliament has recognized that many legislative "schemes" described in the *Act* provide valuable tax benefits, including the RRSP regime[85].

[549] The most obvious benefits associated with an RRSP are the deduction of contributions and the accrual of income and gains on a tax-exempt basis with the possibility of withdrawing funds upon retirement when the taxpayer is potentially subject to a lower tax rate. Taxpayers are required to select from a long list of "qualified investments" and to avoid "non-qualified investments" as well as elaborate strategies to withdraw funds without paying tax, also known as RRSP-stripping transactions. See for example: *Chiasson v. The Queen*, 2016 TCC 95.

[550] By complying with the *Act*, taxpayers are entitled to valuable tax benefits. If there are tax consequences for not complying with the *Act*, that does not lead to the conclusion that RRSPs do not provide a tax benefit. The suggestion that the RRSP regime does not provide a tax benefit would surprise ordinary Canadians. I find that Parliament clearly intended it as a tax benefit for all taxpayers.

[551] At first blush, it can be said that the Appellant's objectives were typical of any annuitant of a self-directed RRSP who assumes responsibility for the selection of

[85] *Canada Trustco*, paragraph 34.

investments and plays an active role in the acquisition and disposition of such investments. But the Appellant wanted more. He wanted to select investments 'and' manage them in a way that was not normally possible for investments held in an RRSP. His intention was to assume an active role in the day-to-day management of the underlying businesses or investments acquired by the RRSP Trust.

[552] Since a taxpayer's decision to contribute to an RRSP results in a tax benefit, I agree with the Respondent that it is not necessary to consider a comparison with an alternative arrangement that might reasonably have been undertaken by the Appellant. However, it is relevant to note that the Appellant was not interested in the acquisition of passive investments or in a portfolio of publicly-traded securities that were at arm's length from him. He had no interest in such investments as this would not have allowed him to achieve his dual objective of selecting investments and assuming an active role in their management.

[553] It is obvious to the Court, as it certainly must have been for the Appellant at the time, that he could have withdrawn funds from the RRSP Trust to acquire and manage those investments. However, he understood that such a withdrawal would have triggered a substantial tax liability. By establishing the Income Funds, the Appellant was able to avoid any tax liability associated with a withdrawal and all profits generated by the Income Funds and the underlying investments would continue to accrue in the RRSP Trust on a tax-exempt basis. This arrangement was beneficial to him. It was a tax benefit within the meaning of subsection 245(1).

b) Was there an avoidance transaction?

[554] As noted in *Canada Trustco*, the second requirement for GAAR is that "the transaction giving rise to the tax benefit be an avoidance transaction" within the meaning of subsection 245(3) and that "the function of this requirement is to remove from the ambit of GAAR transactions (…) that may reasonably be considered to have been undertaken or arranged primarily for a non-tax purpose" (para 21).

[555] The Supreme Court has explained that the expression "series of transactions" generally refers to a number of transactions that are "pre-ordained in order to produce a given result" with "no practical likelihood that the pre-planned events would not take place in the order ordained", quoting from *Craven v. White*, [1989] A.C. 398, at p. 514, a decision of the House of Lords also cited with approval by the Federal Court of Appeal in *OSFC Holdings Ltd. v. Canada*, 2001 FCA 260 ("*OSFC*").

[556] As further explained in *Canada Trustco*, subsection 245(3) provides that GAAR does not apply to a transaction that "may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit" and that "if there are both tax and non-tax purposes to a transaction, it must be determined whether it was reasonable to conclude that the non-tax purpose was primary. If so, the GAAR cannot be applied to deny the tax benefit" (para 27).

[557] The Supreme Court explained that this involves a "factual analysis" and contemplates "an objective assessment of the relative importance of the driving forces of the transaction" (para 28). The "taxpayer cannot avoid the application of GAAR by merely stating that the transaction was undertaken or arranged primarily for a non-tax purpose" and "the trial judge must weigh the evidence and determine if it is reasonable to conclude that the transaction was not undertaken or arranged primarily for a non-tax purpose" (para 29). The Court then noted as follows:

> 31. (…) Parliament recognized the Duke of Westminster principle "that tax planning — arranging one's affairs so as to attract the least amount of tax — is a legitimate and accepted part of Canadian tax law" (p. 464). Despite Parliament's intention to address abusive tax avoidance by enacting the GAAR, Parliament nonetheless intended to preserve predictability, certainty and fairness in Canadian tax law. Parliament intends taxpayers to take full advantage of the provisions of the *Income Tax Act* that confer tax benefits. Indeed, achieving the various policies that the *Income Tax Act* seeks to promote is dependent on taxpayers doing so.
>
> 32. Section 245(3) merely removes from the ambit of the GAAR transactions that may reasonably be considered to have been undertaken or arranged primarily for a non-tax purpose. Parliament did not intend s. 245(3) to operate simply as a business purpose test, which would have considered transactions that lacked an independent *bona fide* business purpose to be invalid.

[558] The Supreme Court noted that "transactions (…) undertaken or arranged primarily for family or investment purposes would be immune from the GAAR under s. 245(3)" noting that "Registered Retirement Savings Plans (RRSPs) are one example" and that "Parliament recognized that many provisions of the *Act* confer legitimate tax benefits notwithstanding the lack of a real business purpose" (para 34).

[559] As noted by the Supreme Court (para 66, *infra*), the Appellants have the onus of convincing the Court of the absence of an avoidance transaction.

[560] It is argued that by establishing the Income Funds, the Appellant was merely attempting to broaden his RRSP investment horizon and that by investing in those

funds, he "achieved the same purposes as would any investment in the wide universe of mutual fund trusts, income funds and public companies that owned subsidiary entities that carried on businesses." The Appellants argue that "[m]any income funds and public corporations are in fact wholly-owned entities that carry on business, acquire shares of private companies, own partnership interests, own non-mutual fund trust units or invest in debt of such entities" and "the *Act* does not restrict them from owning any such investments" and the "shares or units of such corporations or mutual fund trusts are (...) qualified investments for any RRSP." It is argued that the "use of mutual fund trusts as investment entities is widespread in Canada" and that they are often structured as qualified investments to attract funds held in RRSPs.

[561] It is also argued that "[c]omparing a direct investment by an RRSP in a private operating business with an investment in a mutual fund trust that owns an operating business is not an appropriate comparison to determine if there is a tax benefit" as "an RRSP would not invest directly in such business" as "it is not permitted" to do so. It is argued that "if it desired to earn investment return from a business, it would need to invest in a mutual fund trust or public corporation to achieve it". It is argued finally that "offering units in the Income Funds to investors to raise capital is also not an avoidance transaction."

[562] In the end, it is argued that the primary purpose of acquiring units in the Income Funds was to generate a return on investment for the RRSP Trust and that this was not an avoidance transaction because it was made based on a "primary *bona fide* non-tax purpose".[86]

[563] I disagree and find that there was an "avoidance transaction".

[564] As noted above, the Supreme Court has recognized (*Canada Trustco*, para 34) that the RRSP regime as a whole gives rise "directly or directly" to a tax benefit albeit a legitimate one that is part of a broad legislative scheme that Parliament has sought to encourage and promote but within certain limits.

[565] The Appellant states that he was merely seeking to broaden his RRSP investment horizon and generate a return on investment. He argues that he was "primarily motivated by a *bona fide* non-tax purpose" so that the GAAR should not apply.

[86] Written submissions of CIBC Trust – paragraph 270-281.

[566] I do not agree and find that the Appellant's mere assertion that he was primarily motivated by a non-tax purpose is of limited probative value. The assertion is also self-serving and should be given little weight.

[567] When determining whether there was an avoidance transaction as contemplated by subsection 245(3), the Court must weigh the evidence and consider the "relative importance of the driving forces of the transaction." (*Canada Trustco*, para 28).

[568] Having considered the evidence in this instance, I find that the steps undertaken by the Appellant to constitute and establish the Income Funds as qualified investments were calculated and deliberate. By his own admission, he undertook an exempt distribution of securities relying on the OM and OME with the intention of meeting or exceeding the minimum requirements of the *Act*, notably of the definition of a mutual fund trust as set out in *Regulation* 4801. In other words, his primary motivation was to ensure technical compliance with the *Act* and not to raise capital. In fact I have already concluded that the Appellant was not genuinely interested in raising capital from a wide array of investors and that, given the actual amount of capital raised per Income Fund, it seems apparent that the Investors were mere pawns in the entire scheme as contemplated by the Appellant. Moreover, the RRSP Trust already had substantial financial assets and no plausible explanation was provided to the Court as to why the Appellant sought to complete a distribution of securities in this instance other than to establish what was intended to be a qualified investment for RRSP purposes. I find that the primary purpose of so doing was to create vehicles that he would control using funds from the RRSP Trust. The Appellant personally acquired a fraction of a percentage point of units in the initial distribution and shortly thereafter directed that the RRSP Trust (and other Insiders) acquire as much as 99% of the units. I find that these steps were "pre-ordained in order to produce a given result" with no likelihood that the remaining "pre-planned events would not take place in the order ordained".

[569] In the end, I find that all of these steps were avoidance transactions because the Appellant's primary motivation was to establish the Income Funds to avoid the normal tax consequences associated with a withdrawal of funds from an RRSP or the acquisition of non-qualified investments that would have resulted in taxable income. I conclude that there was "an avoidance transaction" and that it cannot be said that the impugned transactions were undertaken "primarily for *bona fide* purposes other than to obtain a tax benefit" as set out in paragraph 245(3)(a).

c) If so, was the avoidance transaction 'abusive'?

[570] As noted in *Canada Trustco*, the "third requirement for the application of the GAAR is that the avoidance transaction giving rise to a tax benefit be abusive. The mere existence of an avoidance transaction is not enough to permit the GAAR to be applied. It must also be shown to be *abusive* under s. 245(4)."

[571] As explained by the Supreme Court, it is "for the Minister who seeks to rely on the GAAR to identify the object, spirit or purpose of the provisions that are claimed to have been frustrated or defeated, when the provisions of the Act are interpreted in a textual, contextual and purposive manner" (*Canada Trustco*, para 65).

[572] The Supreme Court indicated that "the analysis of the misuse of the provisions and the analysis of the abuse having regard to the provisions of the *Act* read as a whole are inseparable" thus agreeing with the trial judge[87] and that "the central question is, having regard to the text, context and purpose of the provisions on which the taxpayer relies, whether the transaction frustrates or defeats the object, spirit or purpose of those provisions"[88]. The Supreme Court emphasized the importance of a "unified interpretive approach" and indicated as follows:

> 44. The heart of the analysis under s. 245(4) lies in a contextual and purposive interpretation of the provisions of the Act that are relied on by the taxpayer, and the application of the properly interpreted provisions to the facts of a given case. The first task is to interpret the provisions giving rise to the tax benefit to determine their object, spirit and purpose. The next task is to determine whether the transaction falls within or frustrates that purpose. The overall inquiry thus involves a mixed question of fact and law. The textual, contextual and purposive interpretation of specific provisions of the *Income Tax Act* is essentially a question of law but the application of these provisions to the facts of a case is necessarily fact-intensive.
>
> 45. This analysis will lead to a finding of abusive tax avoidance when a taxpayer relies on specific provisions of the *Income Tax Act* in order to achieve an outcome that those provisions seek to prevent. As well, abusive tax avoidance will occur when a transaction defeats the underlying rationale of the provisions that are relied upon. An abuse may also result from an arrangement that circumvents the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or defeats the object, spirit or purpose of those provisions. By contrast, abuse is not established where it is reasonable to conclude that an

[87] Paragraph 39.
[88] Paragraph 49.

> avoidance transaction under s. 245(3) was within the object, spirit or purpose of the provisions that confer the tax benefit.

[573] As further summarized by Rothstein J.,[89] there will be "a finding of abusive tax avoidance; 1) where the transaction achieves an outcome the statutory provision was intended to prevent; 2) where the transaction defeats the underlying rational of the provision or; 3) where the transaction circumvents the provision in a manner that frustrates or defeats its object, spirit or purpose", relying on *Canada Trustco* (para 45) and *Lipson v. Canada*, 2009 SCC 1 ("*Lipson*") (para 40).

Position of the Respondent

[574] The Respondent contends broadly that the "RRSP provisions (…) operate as a complete code" intended to provide an incentive for taxpayers to save for retirement and that "it includes rules designed to ensure that taxpayers can only invest in certain types of property (…)" The Respondent argues that the RRSP provisions must be considered as a whole, relying on *Copthorne, supra*, para 91, where Rothstein J. indicated that "relevant provisions are related "because they are grouped together" or because they "work together to give effect to a plausible and coherent plan" (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 361 and 364)."

[575] Those provisions include subsection 146(4) that provides that "no tax is payable (…) by a trust on the taxable income of the trust for a taxation year (…) if the trust was governed by a registered retirement savings plan" unless, as set out in paragraph 146(4)(b) "the trust has carried on any business or business in the year." Specifically excluded from the ambit of this provision, is income from non-qualified investments that is taxable pursuant to subsection 146(10.1).

[576] The Respondent argues that an RRSP can only invest in a detailed list of "qualified investments" described in the *Act* and the *Regulations* most of which seek to ensure, directly or indirectly, that investments are at arm's length from the annuitant and that there is no opportunity for self-dealing. If a taxpayer acquires a non-qualified investment, all forms of income derived from that investment is subject to tax pursuant to subsection 146(10.1). The annuitant is also subject to tax on the fair market value of the investment at the time it was acquired pursuant to subjection 146(10) (as that provision existed during the Relevant Period) or

[89] *Copthorne Holdings*, paragraph 72.

alternatively, to a tax of 1% calculated monthly pursuant to subsection 207.1(1) until such time as the non-qualified investment has been removed from the RRSP.

[577] The Respondent argues that Parliament has always intended that investments made by an RRSP should be at arm's length from the annuitant and that this was clarified in the May 23, 1985 Federal Budget when the Minister of Finance outlined a plan to permit an RRSP to invest in small businesses, notably Canadian- controlled private corporations ("CCPCs") and limited partnerships. However, the Minister of Finance noted as follows:

> To ensure that such investments are limited to genuine arm's-length situations, an investment in a corporation by an RRSP of a significant shareholder of the corporation, will be considered not to be at arm's length. Similarly, a member of a partnership or an employee of a corporation will be considered not to deal at arm's length with the corporation if it is controlled by him alone or together with other partners or employees.[90]

[578] The RRSP regime also includes various provisions to establish a monetary limit on the quantum of contributions to an RRSP. It does so by providing that a taxpayer may make deductible contributions up to the "RRSP dollar limit" or "unused RRSP room" as defined. If those limits are exceeded, the taxpayer will, subject to certain limited exceptions, be subject to a tax of 1 % calculated monthly pursuant to subsection 204(2.1).

Position of the Appellant

[579] As previously noted, the Appellant argues that all Income Funds met the definition of a "mutual fund trust", as defined, i.e. that there were at least 150 investors who had each acquired units for proceeds of at least $500.

[580] The Appellant argues that there are no provisions in the *Act* that prevent taxpayers from controlling businesses held in an RRSP or from investing in an entity that is not at arm's length from the annuitant or where the annuitant acts as promoter. It is argued that the object and spirit of the subject tax provisions "was to permit RRSPs to invest in mutual fund trusts and public company shares without any restriction on the type of business (…) and without regard for the arm's length dealing in the underlying investments" as long as they provided "*bona fide* commercial investment returns". It is argued that the *Act* "imposes tax consequences" to ensure that an annuitant does not "obtain the personal use of the

[90] Canada, Department of Finance Canada, Securing Economic Renewal budget papers (Ottawa: Department of Finance, 1985).

assets of the RRSP and "cannot over-contribute". It does so by providing that any benefit or withdrawal must be included in income pursuant to subsection 146(8) and any over-contribution is subject to a penalty of 1 % per month under Part X.I. It is argued that the overall purpose of the RRSP rules is to permit tax-free accumulation of income (…) from bona fide investments" and "this is what occurred in this case".

[581] With respect to the nature of qualified investments, the Appellants argue that the object and spirt of the legislative scheme "is to restrict them to investments in certain types of property" as described in the *Act* and *Regulations*. It is argued that the "list of qualified investments is long and precise", that "millions of taxpayers rely on these rules as the consequences of holding non-qualified investments are severe" and as such the "provisions are intended to clearly specify exactly what is permitted".

[582] The Appellants argue that there are no restrictions from holding units of publicly traded mutual fund trusts or shares of publicly traded companies but acknowledges that certain limitations do exist. For example, it is noted that "debt of a public corporation or a subsidiary qualifies, but general debt of a private corporation does not". As well, "mortgages qualify, but only if they are fully secured by real estate situated in Canada and the debtor is an arm's length person."

[583] For private company shares, the Appellants note that Parliament has enacted a "connected shareholder test" effectively restricting ownership by an RRSP to 10% of the shares. However, it is argued that there is no suggestion of a similar restriction for units of a mutual fund trust and there is "no foundation for the assertion that a mutual fund trust must raise capital in equal or *pro rata* fashion." All that is required is that there be a minimum of "150 investors holding at least a block of units", being a "minimum investment threshold".

[584] It is argued that the Appellant "should not be denied the tax exemption ordinarily applicable to income earned by RRSPs simply because the annuitant was the promoter of the Income Funds" and "the RRSP was the largest investor" or that "the annuitant exercised day to day operations" of the Income Fund's "commercial businesses and property." It is argued finally that "no provision or policy of the Act supports a denial of the application of subsection 146(4) in this case".

[585] The Appellants also refer to an amendment made pursuant to the March 2011 federal budget that introduced the concept of a "prohibited investment" thus extending the anti-avoidance rules already in force for tax-free savings accounts. As explained by the Appellants, as a result of the amendment, ownership of 10% or

more of the units of a mutual fund trust became a "prohibited investment" subject to the grandfathering provisions.

[586] It is argued that in light of the "new imposition of new taxes on annuitants and the grandfathering rules, among other things, these 2011 amendments constituted changes to the law and not merely clarifications". The Appellants rely on *Canada v. Oxford Properties Group Inc.*, 2018 FCA 30 ("*Oxford Properties*"), a decision of the Federal Court of Appeal that provided as follows:

> [86] Whether an amendment clarifies the prior law or alters it turns on the construction of the prior law and the amendment itself. As explained, the *Interpretation Act* prevents any conclusion from being drawn as to the legal effect of a new enactment on the prior law on the sole basis that Parliament adopted it. Keeping this limitation in mind, the only way to assess the impact of a subsequent amendment on the prior law is to first determine the legal effect of the law as it stood beforehand and then determine whether the subsequent amendment alters it or clarifies it.

Analysis and conclusion

[587] I find that there is good reason to conclude that the requirements of subsection 245(4) have been met and that the avoidance transactions were abusive.

[588] A review of subsection 146(4) leads me to conclude that Parliament intended that income from investments made by an RRSP would not be taxable subject to two important limitations, being (a) that the trust has not "borrowed money" or (b) that it has not "carried on any business or businesses in the year". In the latter case, the RRSP is subject to taxation on the realized business profits (including 100% of capital gains). Income from non-qualified investments taxable pursuant to subsection 146(10.1) is also specifically excluded.

[589] A textual, contextual and purposive analysis of subsection 146(4) leads me to conclude that it is one of the foundational provisions of the RRSP regime. Having set out the broad proposition that "no tax is payable (…) by a trust on the taxable income of the trust for a taxation year", it provides that the tax-exempt status of income earned in an RRSP will not apply if it has "carried on any business or businesses". What is the meaning of that phrase?

[590] Since the RRSP regime provides that annuitants may invest in a long list of qualified investments, typically units, shares or debt instruments of publicly-traded mutual fund trusts or publicly-traded companies that will necessarily be involved in

commercial activities, I find that the exclusion of income derived from "any business or businesses" must be taken to refer to a business that is somehow associated with or not at arm's length with the annuitant.

[591] The notion that qualified investments must not be controlled by an annuitant and must be at arm's length is supported by the comments made by the Minister of Finance in the May 23, 1985 Federal Budget, as noted above.

[592] As such, I find that the object, spirit and purpose of subsection 146(4) is to prevent an annuitant from making tax deductible contributions (at great cost to the public treasury, at least in the short term) and then using those funds for business purposes and thus take advantage of the tax-exempt status of the plan.

[593] Although the administration of an RRSP involves a plan administrator or trustee, I find that the subject provision is primarily directed at the annuitant. It must be taken to mean that income earned from qualified investments, being investments that are not "non-qualified investments", will accrue on a tax-exempt basis but not so if the annuitant has somehow managed to use the contributions or accumulated assets in the RRSP to operate a business that is not at arm's length.

[594] I find that the notion that investments held by a RRSP must generally be at arm's length is the only plausible interpretation for the exclusion of income derived from "any business or businesses". It seems apparent that the provision seeks to, eliminate or avoid the mischief associated with self-dealing by annuitants in pension-like assets. This analysis becomes more obvious with a review of the permissible investments described in the *Act* and the *Regulations* that are intended as an exhaustive list of permissible investments.

[595] The Appellant is correct in stating that units of publicly-traded mutual fund trusts or limited partnerships or shares of publicly-traded companies are permissible investments and that there are no restrictions on the percentage of units or shares that may be held by an annuitant. I find that Parliament has so provided because they are typically at arm's length from an annuitant or at least are subject to a minimum level of regulatory oversight according to the securities legislation. Similarly, "annuities" must be are acquired "from a licensed annuities provider" and "a bond, debenture or note" must be issued by a "credit union" or "cooperative corporation" or by several recognized international development banks, for example. All of these "issuers" are subject to some form of regulatory oversight.

[596] The list of permissible investments includes gold and silver coins or bullion that are produced by the "Royal Canadian Mint" and are acquired by the RRSP plan "directly from the Royal Canadian Mint" or from "a specified corporation."

[597] There are numerous other examples where Parliament was evidently satisfied that there was a sufficient level of regulatory oversight that it did not matter if an annuitant was associated with or not at arm's length with the issuer.

[598] As noted by the Appellant, there are other instances where Parliament has used different language and has specifically referred to the notion of an arm's length relationship with the annuitant. For example, mortgages are permissible investments for RRSPs as long as the debtor or any person not at arm's length with the debtor, is not the annuitant. If the debtor is the annuitant or a person not at arm's length with the annuitant, the loan must be insured by an accredited or recognized insurer. Also, as recognized by the Appellant, there is nothing to prevent an annuitant from acquiring a substantial position including a control position of publicly traded mutual fund trusts or corporations but in other instances, such as private company shares or limited partnerships, Parliament has restricted the RRSP from acquiring more than 10% of the shares or units.

[599] I turn to the paragraph (d) of *Regulation* 4801 that sets out the definition of a "mutual fund trust". I have already concluded that it should be read conjunctively such that it required a lawful distribution of units according to the laws of the provinces to no less than 150 investors with a minimum investment of $500.

[600] The Appellant is correct in stating that there is nothing in the statutory language to suggest that all investors had to invest the same amount (subject to the minimum amount set out in the OM) or that one or several investors could not acquire a control position in the mutual fund trust as part of the lawful distribution. Of course, as the Court has already noted, none of the Investors in this instance actually acquired more that the minimum number of units in any of the Income Funds. However, since the units of the mutual fund trust would, as defined, would not be publicly traded and thus would be subject to limited regulatory over-sight, if any, I find that the object, spirit and purpose of the provision was to ensure that there would be a wide dispersal of ownership amongst at least 150 investors or in other words that it would be "widely-held". Although the provision does not specifically address the issue of control by one or more investors or establish a bright-line test, I find that the acquisition by the RRSP Trust of 99% of the units of the Income Funds defeated the object, spirit and purpose of the provision and was contrary to the Parliament intention that a mutual fund trust was to be widely held. It was certainly

not within the contemplation of Parliament that a mutual fund trust that was a qualified investment for RRSP purposes would effectively become one investor's *alter ego*.

[601] With respect to the amendments made in 2011, I do not agree with the Appellant's assertion that they established new law or that the Minister was trying to apply them on a retroactive basis in this instance. I find that the legislation merely clarifies and bring a certain amount of specificity to the existing RRSP provisions, notably the number or percentage ownership that an RRSP can hold in various qualified investments. Fundamentally, it does not address or modify the basic notion in subsection 146(4) that funds held in an RRSP cannot be used to carry on a business that is associated with or not at arm's length with the annuitant.

[602] I thus have no difficulty in concluding that the Appellant sought to abuse the RRSP regime and the provisions of the *Act* by establishing the Income Funds and that this was contrary to subsection 245(4) of the *Act*.

[603] The Appellant did so by initially taking steps to meet the minimum technical requirements of the *Regulation* 4801. Once the Income Funds were constituted and in his capacity as the annuitant of the self-directed RRSP Trust, he directed that it acquire in excess of 99% of the units of each Income Fund (alone or with the other Insiders). I find that he sought to achieve an outcome that the provisions of the *Act* were intended to prevent. I find that this defeated the object, spirit and purpose of subsection 146(4) and the definition of a mutual fund trust that Parliament intended would be widely-held.

[604] Secondly, as the annuitant of the RRSP Trust, the Appellant was also the promoter of the Income Funds. He acted as trustee or determined who would be appointed in that capacity and assumed the day-to-day management of the Income Funds including the underlying businesses or investments, the purchase of which were essentially financed in all instances (except those involving the other Insiders) by assets held in the RRSP Trust. I find that this defeated the object, spirit and purpose of subsection 146(4) that seeks to exclude income generated by "any business or businesses" that are not at arm's length with the annuitant.

[605] Moreover, it is apparent that the Appellant was able to directly or indirectly access funds from the RRSP Trust in the form of loans from the Income Funds to himself personally or to legal entities that he owned or controlled. I find that this is the very mischief that Parliament intended to guard against when it provided that income generated from investments being "any business or businesses" that were

associated with or not at arm's length from the annuitant, would not accrue on a tax exempt basis within the RRSP but would be subject to taxation. This was contrary to subsection 146(4).

[606] I thus have no difficulty in concluding that the scheme established by the Appellant was an avoidance transaction that resulted in an abuse of the provisions of the *Act* and the *Income tax Regulations* and that it "would result directly or indirectly in an abuse having regard to those provisions (…) read as a whole" as contemplated in subsection 245(4).

[607] To paraphrase Rothstein J, in *Copthorne Holdings*, I find that the avoidance transactions undertaken by the Appellant 1) achieved an outcome the statutory provisions were intended to prevent 2) defeated the underlying rational of the provisions and 3) circumvented the provisions in a manner that frustrated or defeated its object, spirit and purpose.

[608] I find that it would not be reasonable to conclude that the avoidance transactions undertaken by the Appellant were within the object, spirit and purpose of *Regulation 4801* or subsection 146(4) that sought to confer a benefit.

d) Determination of tax consequences

[609] Having concluded that the tax avoidance transactions undertaken by the Appellant were abusive, the next step is to determine the tax consequences. This matter was succinctly addressed in *Lipson* where the Supreme Court of Canada indicated that:

> [51] When considering the application of s. 245(5), a court must be satisfied that there is an avoidance transaction that satisfies the requirements of s. 245(4), that s. 245(5) provides for the tax consequences and that the tax benefits that would flow from the abusive transactions should accordingly be denied. The court must then determine whether these tax consequences are reasonable in the circumstances. (…)

[610] Subsection 245(5) provides that (a) "any deduction, exemption or exclusion in computing income (…) may be allowed or disallowed in whole or in part" or (b) "may be allocated to any person" or (c) "the nature of any payment or other amount may be recharacterized, and" (d) "the tax effects that would otherwise result from the application of other provisions of this Act may be ignored" and the Court may consider any of (a) to (d) "in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, result from an avoidance transaction."

The position of the Appellants

[611] CIBC Trust argues that if the GAAR applies, the RRSP Trust "should not be taxed under Part I and Part XI.I in order to deny the tax benefit that would otherwise result" and that the Minister should have assessed "Mr. Grenon directly under any of subsections 146(8) or 146(10) to obviate the tax benefit".

[612] It is argued that the Minister "should not be able to sustain recovery under the GAAR" against the RRSP Trust where the Minister "elected not to assess using available sections of the Act that would have eliminated the potential tax benefits alleged by the Crown."

[613] CIBC Trust argues that subsection 146(8) applies where an annuitant has received a benefit from an RRSP, though the existence of a benefit in this instance is denied. In addition, it is argued that if the Minister determined that the Income Funds were non-qualified investments, Mr. Grenon should have been assessed directly pursuant to subsection 146(10) (as it read during the Relevant Period) and had this been done, an assessment pursuant to subsection 201.7 of Part XI.I would not have been required.

[614] Further and in the alternative, it is argued that the GAAR should not apply to tax the value of the units of FMO (held in the RRSP Trust prior to the Relevant Period) that were transferred to the 2003-4 Income Fund in exchange for units thereof of equivalent value. It is argued that this transaction did not give rise to an increase in the value of the RRSP Trust and thus should not be subject to the GAAR.

[615] It is also argued that although subsection 207.1 (2) uses the word "tax", it is really "a penalty designed to discourage annuitants from keeping non-qualified investments within an RRSP." It is argued that the Court "must look through the label given to a compulsory payment to determine its true character" and that "a tax is designed to raise revenue while a penalty is designed to deter behaviour". Since subsection 207.1(1) "imposes sanctions for behaviour that is intended to be discouraged," it bears the "fundamental characteristic of a penalty."

[616] In support of that proposition, the Appellants rely on *Copthorne Holdings Ltd. v. The Queen*, 2007 TCC 481 (affirmed on other grounds, 2009 FCA 163) which involved the assessment of a 10 % penalty under subsection 227(8) for the taxpayer's "failure to deduct or withhold tax". It was argued that "a penalty should not be imposed as a consequence of the successful application of GAAR (…) since a taxpayer can never file or pay anything on the basis that GAAR applies, without the

Minister first initiating the application of GAAR." The Tax Court agreed finding that "a successful GAAR assessment prevents the Minister from applying penalties under subsection 227(8)."[91] Justice Campbell indicated as follows:

> [77] It is only because of the application of GAAR that the liability to pay the withholding tax arises. The question therefore is whether the Appellant becomes liable to pay a penalty under subsection 227(8) when it was not technically required to withhold tax under the relevant provisions of the *Act*. I do not think that a GAAR assessment can give rise to penalties for non-compliance with the technical sections of the *Act*. First, the GAAR is not a penalty provision. If a transaction, or series of transactions, runs afowl *(sic*) of GAAR, the remedy specified in subsection 245(2) is that tax consequences will be determined that are reasonable in the circumstances in order to deny a tax benefit that would otherwise result from the transaction. Subsection 245(2) does not indicate that a successful GAAR assessment will cure the deficiency in the scheme of the *Act* but merely that the tax benefit resulting from the technical application of the section will be denied.

e) Analysis and Conclusion

[617] As noted by the majority of the Supreme Court of Canada in *Lipson*, the application of the GAAR may create uncertainty for taxpayers but it cannot be ignored:

> 52. (…) To the extent that it may not always be obvious whether the purpose of a provision is frustrated by an avoidance transaction, the GAAR may introduce a degree of uncertainty into tax planning, but such uncertainty is inherent in all situations in which the law must be applied to unique facts. The GAAR is neither a penal provision nor a hammer to pound taxpayers into submission. It is designed, in the complex context of the *ITA*, to restrain abusive tax avoidance and to make sure that the fairness of the tax system is preserved. A desire to avoid uncertainty cannot justify ignoring a provision of the *ITA* that is clearly intended to apply to transactions that would otherwise be valid on their face.
>
> [My emphasis]

[618] The notion that the GAAR involves some uncertainty and that a taxpayer cannot self-assess for the GAAR was addressed in *Quinco Financial Inc. v. The Queen*, 2016 TCC 190, where Bocock J. noted that "a tax benefit and avoidance transaction remain the purview of the taxpayer who authors, executes, and bears the onus at trial of disproving. These are within the taxpayer's records, affairs and viewscape" (para 32).

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[91] Paragraph 78.

[619] In this instance, Mr. Grenon must be taken to have known and understood that he was assuming certain risks that were inherent in the tax scheme that he chose to implement. In particular, the OM cautioned all prospective investors that if the units in the proposed fund were acquired in an exempt plan and it was later determined that the units were not a "qualified investment", the investors would be required to pay tax on the income and pay a tax of 1% calculated monthly on the value of the units acquired until they were removed from the exempt plan. In find that this is a direct reference to the Part XI.I tax that the Appellants now argue is a penalty tax.

[620] As indicated above, when a taxpayer acquires a non-qualified investment in an RRSP, the Minister is (or was during the Relevant Period) given the choice between assessing the annuitant based on the fair make value of the non-qualified investment at the time it was acquired pursuant to subsection 146(10). Alternatively, where the Minister had not done so, the RRSP Trust was required to file a prescribed form and pay a tax of 1 % calculated monthly on the value of the non-qualified investment until such time as it was removed from the RRSP. The Appellants have not argued that the tax arising pursuant to subsection 146(10) is a penalty and I see no reason to conclude that the tax that may be assessed *in lieu* thereof, by virtue of Part X.I, should be characterized as a penalty. Furthermore, I do not accept the Appellants' argument that the Minister could have "avoided" the Part XI.I tax on the RRSP Trust had she assessed the annuitant directly pursuant to subsection 146(10). The Minister may choose one or the other.

[621] I turn to the "tax consequences" based on a finding that the GAAR applies.

[622] With respect to the reassessment made in the Grenon Appeal pursuant to subsection 56(2), it is apparent that the amounts paid by the Income Funds to the RRSP Trust during the 2008 and 2009 taxation years can best be characterized as income from non-qualified investments described as the Distribution Transactions.

[623] Although I have already concluded that subsection 56(2) would not normally extend to income generated by non-qualified investments, I find that the Minister would have been entitled to "recharacterize" the "nature of the payment" pursuant to paragraph 245(5)(a) and as a result, were it not for the assessments made in the RRSP Trust Appeal, I would have upheld the reassessment made on the basis of the GAAR. However, since the amounts that the Minister has sought to tax pursuant to subsection 56(2) form part of the Distribution Transactions, I find that this would result in a duplication of the tax which the Minister has also sought to impose on the RRSP Trust pursuant to subsection 146(10.1). I find that this cannot be considered "reasonable in the circumstances" as contemplated in subsection 245(5) and thus

conclude that the Minister could only assess the Distribution Transactions pursuant to either subsection 56(2) or subsection 146(10.1), but not both. The Respondent has also conceded this point.

[624] With respect to the reassessment made in the Grenon Appeal pursuant to subsection 204.2(1) of the *Act*, being the Part X.I Assessment, it is again apparent that the amounts paid by the Income Funds to the RRSP Trust in respect of the 2004 to 2011 taxation years, constituted income from non-qualified investments described herein as the Distribution Transactions that are subject to an assessment made pursuant to subsection 146(10.1) in the RRSP Trust Appeal. Although it might have been possible to conclude that the Minister was entitled to "recharacterize" the "nature of the payment" made as an "excess contributions" pursuant to paragraph 245(5)(a), I find that this cannot be considered "reasonable in the circumstances" as contemplated in subsection 245(5) since the Minister has assessed the RRSP Trust for the same amounts pursuant to subsection 146(10.1).

[625] With respect to the assessments made against the RRSP Trust pursuant to subsection 146(10.1) whereby the Minister has assessed the payments described as the Distribution Transactions, I find that the Minister would have been entitled to "recharacterize" the "nature of the payment" made as income or gains from non-qualified investments pursuant to paragraph 245(5)(a). As a result, subject to the foregoing, I would have upheld the reassessment made pursuant to the GAAR.

[626] Having concluded as such, I would again agree with the Appellants that the RRSP Trust would be entitled to a credit in the amount of $136,654,427 that the Minister has included as part of the Distribution transactions for the 2005 taxation year since that amount represented the value of the units issued by the 2003-4 Income Fund in exchange for the units of FMO. The amount should thus be excluded from the calculation as it reflected an exchange transaction that did not actually increase the value of the RRSP Trust and was not income.

[627] With respect to the reassessments made pursuant to subsection 207.1(2), being the Part XI.I Reassessments, having concluded that the tax avoidance transactions undertaken by the Appellant were abusive and contrary to the GAAR, I find that the Minister was entitled to assess the RRSP Trust for a tax of 1 % calculated monthly "on the fair market value of the non-qualified investments at the time they were acquired" (described herein as the Acquisition Transactions), being the normal tax consequences that apply to non-qualified investments where the Minister chooses not to assess the annuitant pursuant to subsection 146(10).

[628] With respect to the late filing penalties, I would have adopted the reasoning of Campbell J. in *Copthorne*, 2007 TCC 481, and deleted those penalties.

[629] For greater clarity, I would add that the assessment made pursuant to subsection 207.1(2) would include the sum of $152,874,000 described as part of the Acquisition Transactions, being the fair market value of the FMO units transferred from the RRSP Trust to the 2003-4 Income Fund in November 2005.

[630] As a publicly traded mutual fund trust, FMO was a qualified investment for RRSP purposes as long as it remained in the RRSP Trust but not so once the FMO units were transferred to the Income Fund in exchange for units therein.

[631] I would also reject the argument that the RRSP Trust should be entitled to a credit for the loss allegedly suffered by the RRSP Trust in 2008 in connection with the disposition of the units acquired from the 2003-4 Income Fund, as described above. I reach this conclusion because and the RRSP regime does not contemplate the deduction of losses suffered within an RRSP. Moreover, subsection 207.1(1) contemplates a tax of 1% calculated monthly based on the fair market value of the non-qualified investment "at the time it was acquired by the trust". This would include all the units of the 2003-4 Income Fund.

VIII. **CONCLUSION**

[632] The Court has concluded that the steps undertaken by the Appellant to establish the Income Funds were not legally effective such that they were not qualified investments for RRSP purposes. I now turn to the various assessments, reflecting the fact that these assessments were heard together on common evidence.

Grenon Appeal

[633] The Court has already concluded that absent a sham, subterfuge or other vitiating circumstances (*Neuman*, para 33 and *Ludco*, para 69), the application of subsection 56(2) should not extend to income generated by investments held in an RRSP, even if the conclusion is that they are non-qualified investments. For reasons set out above, I find that an assessment pursuant to the GAAR would not be "reasonable in the circumstances" as contemplated in subsection 245(5). I would thus allow the appeal from the reassessments made pursuant to subsection 56(2).

[634] The Court has similarly concluded that absent a sham, subterfuge or other vitiating circumstances, income generated by investments held in an RRSP should

not be characterized as "excess contributions" and be subject to an assessment pursuant to subsection 204.1(2.1). For reasons set out above, I find that an assessment pursuant to the GAAR would not be "reasonable in the circumstances" as contemplated in subsection 245(5). I would thus allow the appeal from the assessment made pursuant to subsection 204.1(2.1).

RRSP Appeal

[635] Since the Court has concluded that the Income Funds were not qualified investments for RRSP purposes, it follows that the Minister was entitled to assess the RRSP Trust on the income generated by the Income Funds pursuant subsection 146(10.1) with the applicable late filing penalties.

[636] As noted above in the context of GAAR, this would exclude the sum of $136,654,427 (the amount described by the Respondent as part of the Distribution Transactions for the 2005 taxation year) since that amount resulted from the transfer of the FMO units held in the RRSP Trust to the 2003-4 Income Fund and thus did not constitute income from a non-qualified investment. I would thus allow the appeal from the assessment made pursuant to subsection 146(10.1) and refer the matter back to the Minister for reconsideration and reassessment in light of this finding.

[637] Finally, since the Court has concluded that the Income Funds were not qualified investments, it follows that the Minister was entitled to assess the RRSP Trust pursuant to subsection 207.1(1) and 207.2(3). For greater clarity, this would include the units of the 2003-4 Income Fund acquired by the RRSP Trust during the 2005 taxation years valued at $152,874,000 in exchange for the FMO units. I would thus dismiss the appeal from the reassessment made pursuant to these provisions.

[638] The parties will have 60 days from the date of hereof to provide written submissions regarding costs. Such submissions shall not exceed 15 pages for each party.

These Further Amended Reasons for Judgment are issued in substitution for the Amended Reasons for Judgment dated April 27, 2021 to correct typographical errors.

Signed at Ottawa, Canada, this 1st day of June 2021.

"Guy R. Smith"

Smith J.

Appendix A – The Read-ins

[1] As noted in the above Reasons for Judgment, the Court ordered that the parties submit written submissions on the issue of contextual read-ins arsing as a result of subsection 100(1) of the Rules which provides as follows:

> 100 (1) At the hearing, a party may read into evidence as part of that party's own case, after that party has adduced all of that party's other evidence in chief, any part of the evidence given on the examination for discovery of
>
> (a) the adverse party, or
>
> (b) a person examined for discovery on behalf of or in place of, or in addition to the adverse party, unless the judge directs otherwise,
>
> if the evidence is otherwise admissible, whether the party or person has already given evidence or not.
>
> (…)
>
> (3) Where only part of the evidence given on an examination for discovery is read into or used in evidence, at the request of an adverse party the judge may direct the introduction of any other part of the evidence that qualifies or explains the part first introduced.

[2] Tax Court of Canada Practice Note 8, titled "Use of Discovery/Undertakings", July 19, 2001 ("*Practice Note 8*") which governs the use of examinations for discovery and undertakings as evidence at trial provides as follows:[92]

> i. Each party intending to read in discovery evidence must serve a notice in writing on any other party no later than four days before the commencement of the hearing. This notice must indicate each page number and the lines of the transcript of the undertaking and part of the answer that the party intends to read into evidence.
>
> ii. If an adverse party intends to request the judge allow for the introduction of evidence given in discovery that qualifies or explains the other party's read-ins pursuant to subsection 100(3) of the *Rules,* that party must serve a similar notice in writing not less than two days before the commencement of the hearing.

Position of the Appellant

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[92] Tax Court of Canada Practice Note No. 8 (amended), *Use of Discovery/Undertakings,* July 19, 2001.

[3] In written submission, the Appellant has identified 19 contextual read-ins to the Minister`s reduced in trial read-ins.[93] The Appellant submits that either (i) the Minister should be required to read-in the original full list of proposed read-ins provided prior to trial, in which case the Appellant's original contextual read-ins ought to be allowed or (ii) if the Minister is permitted to read-in only the reduced list provided at trial, then the Appellant ought to be permitted to read-in the revised contextual read-ins identified for this reduced list.[94]

[4] The Appellant contends that neither section 100 of the *Rules* nor *Practice Note 8* permit or contemplate a party narrowing its read-ins between the pre-trial notice and the date the read-ins are submitted to the Court.[95] Such action would run counter to the purpose of *Practice Note 8* which is intended to (i) avoid surprise at trial and (ii) avoid misuse of the discovery transcript by requiring advance notice and allowing an adverse party to review and seek additional read-ins for context.[96] The Appellant submits that the proposed contextual read-ins are appropriate, proportional, and that they give context by way of explanation, amplification, contradiction, or qualification.[97]

[5] Further, the Appellant rejects the Minister's argument that certain of their proposed contextual read-ins are inadmissible as hearsay on the basis that the Minister cannot argue that a portion of her own evidence is hearsay.[98]Specifically, the Appellant argues that the read-ins are the Minister's evidence such that if any of her read-in depends for their context on hearsay evidence, then the whole read-in is hearsay not just the contextualization. The Appellant argues that the Minister's position would allow it to "cherry-pick the transcript, omitting certain parts providing context, and then argu[ing] that the Court should take in the evidence context-free because to do otherwise would render such evidence inadmissible."[99]

Position of the Minister

[6] The Minister submits that it was entirely appropriate for her to tender a reduced portion of the identified read-ins on the basis that those read-ins not tendered

[93] Court File 2014-3401(IT)G, Letter from the Appellants regarding read-ins, March 4, 2019 at tab 2.
[94] Court File 2014-3401(IT)G, Letter from the Appellants regarding read-ins, March 4, 2019 at para 16.
[95] Court File 2014-3401(IT)G, Letter from the Appellants regarding read-ins, March 4, 2019 at para 12.
[96] Court File 2014-3401(IT)G, Letter from the Appellants regarding read-ins, March 4, 2019 at para 10.
[97] Court File 2014-3401(IT)G, Letter from the Appellants regarding read-ins, March 4, 2019 at para 19.
[98] Court File 2014-3401(IT)G, Letter from the Appellants regarding read-ins, March 29, 2019.
[99] Court File 2014-3401(IT)G, Letter from the Appellants regarding read-ins, March 29, 2019.

only restated evidence already introduced in either direct or cross-examination of the Appellant's witnesses.[100]

[7] Regarding the Appellant's contextual read-ins proposed pursuant to subsection 100(3) of the *Rules*, the Minister argues that subsection 100(3) provides no absolute right for the Appellant to introduce contextual read-ins.[101] The Minister opposes four of the Appellant's proposed contextual read-ins on the basis that they are oath-helping, constitute hearsay evidence, or do not qualify or explain the Minister's read-in.[102] The contested proposed contextual read-ins are as follows:[103]

	Respondent Read-Ins		**Appellant's Contextual Read-Ins[104]**		**Respondent's objection**
	Witness	**Question**	**Witness**	**Question**	
1.	**Mr. Grenon**	979-981	Mr. Grenon	973	Does not contextualize or explain the Minister's read-in; the witness Mr. Grenon should have testified to the content of the additional read-in at trial; and to the extent that he did, the proposed read-in amounts to an attempt to introduce prior consistent statements or oath-helping.
2.	**Mr. Grenon**	309-330	Mr. Grenon based on information provided by Devon Wagner, a representative of Grant Thornton	U/T #5A	The proposed read-in is hearsay and the appellants' have not provided evidence that an exception to the rule against hearsay applies.
3.	**Mr. Grenon**	2090-2099	Mr. Grenon	U/T #85	The last sentence of the read-in is hearsay and does not reference the source of the information such that

[100] Court File 2014-3401(IT)G, Letter from the Respondent regarding read-ins, March 13, 2019.
[101] Court File 2014-3401(IT)G, Letter from the Respondent regarding read-ins, March 13, 2019.
[102] Court File 2014-3401(IT)G, Letter from the Respondent regarding read-ins, March 13, 2019.
[103] Court File 2014-3401(IT)G, Letter from the Respondent regarding read-ins, March 13, 2019.
[104] Court File 2014-3401(IT)G, Letter from the Appellants regarding read-ins, March 4, 2019 at Tab 2.

					the Court cannot evaluate if an exception to the rule against hearsay may apply.
4.	Mr. Grenon	76-83	Mr. Grenon	84-87	Does not qualify or explain the Minister's read-in which stands on its own as self-contained evidence.

Analysis

[8] In tendering a reduced list of read-ins at trial, the Minister relies on this Court's holding in *Envision Credit Union v R, 2010 TCC 353*[105] *("Envision")* in which Justice Webb (as he then was) considered the application of section 100 of the *Rules.* He held that a party seeking to read-in questions from discoveries ought to edit the list so that the read-ins only deal with questions not asked of the witness during the hearing.[106] Specifically, he held that to "read in questions that are the same questions as were asked at the hearing with the same answers being given is not (…) appropriate. Such questions and answers would not be admissible as they simply repeat the evidence of the witness and therefore would be excluded as prior consistent statements." (para 34)

[9] As such, the Minister argues that it was appropriate for her to edit her list of read-ins following the examination and cross-examinations at hearing so as to remove any portions dealing with evidence already adduced at trial.[107]

[10] In essence, subsection 100(3) permits a party, other than the party reading in part of the discovery, to request that the Court allow additional portions of the discovery to give context to the proposed read-ins. As was confirmed by Justice Campbell in *Blackmore v R, 2012 TCC 108, ("Blackmore"),*[108] subsection 100(3) grants the judge discretion to allow the introduction of additional portions of the discovery evidence and does not grant an absolute right to an adverse party to have additional portions of the examination introduced into evidence.

[11] In *GlaxoSmithKline Inc. v R.*, 2008 TCC 324 ("GlaxoSmithKline"), Chief Justice Rip outlined a detailed approach to determining whether contextual read-ins should be permitted by a trial judge. He[109] likened subsection 100(3) of the *Rules* to

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[105] *Envision Credit Union v R,* 2010 TCC 353.
[106] *Envision Credit Union v R,* 2010 TCC 353 at para 34.
[107] Court File 2014-3401(IT)G, Letter from the Respondent regarding read-ins, March 13, 2019.
[108] *Blackmore v R,* 2012 TCC 108 at para 4.
[109] *GlaxoSmithKline Inc v R,* 2008 TCC 324 at Appendix I.

section 289 of the *Federal Court Rules*, which the Federal Court in *Canada (Minister of Citizenship & Immigration) v. Odynsky, [1999} FCJ No 1389 (Fed T.D.) ("Odynsky")*[110] held had the purpose of ensuring "that evidence from a transcript of examination for discovery which is read in as evidence at trial is placed in proper context so that it is seen and read fairly, without prejudice to another party that might arise if only a portion of the content relevant at to a fair understanding of the evidence read in is given".

[12] In determining whether proposed read-ins qualified or explained evidence such that the Court is not mislead by one party leaving out a relevant portion of the evidence, Justice Rip considered (i) the continuity of thought or subject matter; (ii) the purpose of introducing the evidence in the first instance and whether it can stand on its own; (iii) fairness in the sense that evidence should, so far as possible, represent the complete answer of the witness on the subject-matter of the inquiry so far as the witness has expressed it in the answers he has given on his examination for discovery and finally (iv) whether the material is truly connected to the [opposing party's] read-ins or whether it amounts to evidence which should have been entered in the [party's] witnesses' testimony.

[13] Justice Boyle followed this approach in *Morguard Corporation v. R. 2012 TCC 55 ("Morguard") (at Appendix 1, para. 8),*[111] in which the Minister chose not to read-in all of the passages it had originally notified the Appellant it would be reading in. The Appellant sought to read-in the remaining passages which the Minister had originally proposed to read-in, but the Minister objected. Justice Boyle summarized Justice Rip's approach as follows:

> 1) whether the desired additional read-ins share continuity of thought or subject matter addressed by the deponent in the portions of the discovery read in by the adverse party;
>
> 2) whether the portion read in by the adverse party can stand on its own and fulfill the purpose for which the adverse party read them into evidence; put another way, would the additional read-ins either advance or complete, or discredit or frustrate, the adverse party's purpose?
>
> 3) whether the desired additional read-ins provide the Court with the opportunity to arrive at a more complete understanding of what the deponent said on the

[110] *Canada (Minister of Citizenship & Immigration) v Odynsky*¸ [1999] FCJ No 1389 (Fed T.D.).
[111] *Morguard Corporation v R,* 2012 TCC 55 at Appendix 1 at para 8.

> particular subject matter in question in the totality of the answers given in his or her examination for discovery and reflect fairness to both parties.

[14] Justice Boyle also noted that the appropriate "scope of the search for completeness should be having regard to the deponent's 'answers' on discovery on the 'subject matter' and not to the deponent's specific answer to the specific question being asked and which was read-in by the adverse party."[112]

[15] In *Blackmore*, Justice Campbell held that, to the extent Justice Boyle's decision in *Morguard* is to be interpreted to allow additional read-ins for clarification, not only with respect to the specific answers given to a specific question, but also to the subject matter of the proceeding generally, such an interpretation would grant too broad a meaning to subsection 100(3) and would permit parties to use read-ins to get in evidence 'by the back door.' (para. 10).[113] Instead, Justice Campbell suggested that Justice Boyle was referring to the subject matter of the deponent's answer(s) at discovery. However, Justice Campbell held that this interpretation would still allow for a much broader interpretation of subsection 100(3) than courts had previously followed. As such, Justice Campbell relied on the reasoning in *GlaxoSmithKline* in applying the following approach to the proposed contextual read-ins (para 12):[114]

> "Whether the Court could be mislead by the omission of this portion of the examination for discovery; whether the additional read-ins amounted to evidence that should have been addressed through the Appellant's testimony during the hearing; and, whether the evidence fairly represented the entire response of the witness on the subject matter of that response to the Respondent's read-ins given during the discovery proceedings".

[16] In my view, Justice Boyle's comments that subsection 100(3) "is not narrowly restricted and limited to the completeness of the deponent's answer to the specific question read-in but can extend to all of the deponent's answers to questions on the particular subject matter in appropriate circumstances" appropriately restricts the Court to permit only those read-ins which provide context to the questions being read-in by an opposing party. This interpretation allows enough flexibility to ensure the Court is not mislead by questions being read-in by one party without the appropriate context while being narrow enough to ensure parties cannot use contextual read-ins to enter evidence which ought to have been tendered through

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[112] *Morguard Corporation v R*, 2012 TCC 55 at Appendix 1 at para 9.
[113] Blackmore v R, 2012 TCC 108 at para 10.
[114] Blackmore v R, 2012 TCC 108 at para 12.

examination at trial. As such, in determining whether to permit the Appellant to introduce the contested read-ins, the Court should consider:

> -whether the proposed contextual read-in shares continuity of thought or subject matter addressed by the deponent in the portions of the discovery read-in by the adverse party;
>
> -whether the proposed contextual read-in would allow the Court with the opportunity to gain a complete understanding of what the deponent said on the subject matter addressed by the read-in the addition proposes to contextualize;
>
> -whether the Court would be mislead as to what the deponent said on a subject matter by the omission of the proposed contextual read-in; and
>
> -whether the portion read-in by the adverse party stands on its own.

[17] I now turn the remaining proposed contextual read-ins.

Contextual Read-in #8

[18] The Minister's read-in of questions 979 to 981 from the discovery of Mr. Grenon deals with the interaction between the TOM Capital 2003-1 VT and external corporations owned directly or indirectly by him. In particular, the read-in contains an admission from Mr. Grenon that there was a loan from TOM 2003-1 VT to Colborne Capital, a company owned directly or indirectly by Mr. Grenon.

[19] The Appellants' proposed contextual read-in appears to be directed at Mr. Grenon's position that the businesses were structured for *bona fide* business reasons, both within and outside the Income Fund structure, and that the loans were legally effective, legitimate transactions at arm's length rates.[115]

[20] The Minister's position is that the Appellant's proposed contextual read-in does not contextualize or explain the Crown's read-in. There is minimal continuity of thought between the read-in and the contextual read-in, the read-in fairly presents Mr. Grenon's evidence, and the Court would not be misled by the exclusion of the contextual read-in.

[21] I find that contextual read-in #8 is admissible. There is continuity of subject matter between the Minister's read-in and the Appellant's contextual read-in, namely with respect to Mr. Grenon's intentions in structuring the Income Funds and

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[115] Court File 2014-3401(IT)G, Letter from the Appellants regarding read-ins, March 4, 2019 at tab 2:8.

their relationship to entities outside the structure. The read-in concerns Mr. Grenon's answers from a mere six pages earlier in the discovery transcript. The Appellant's contextual read-in clarifies the admission as to the loan found in the Minister's read-in.

Contextual Read-in # 10

[22] This items relates to the Corporate Appeals but I will nonetheless deal with it here.

[23] The Minister's read-in of questions 309 to 330 of Mr. Grenon's examination for discovery concerns Grant Thornton's valuation of the TOM Capital 2003-4 Income Fund units at the time of the Foremost Reorganization.[116] Specifically, at questions 327 to 330, there is a discussion of whether the valuators mistakenly identified the transaction as arm's length. Included in the read-in is the Minister's request for an undertaking as to the Appellant's position going to trial as to whether Mr. Grenon's characterization as being 'arm's length' in the Grant Thornton valuation was an error.

[24] The Appellant's proposed contextual read-in is the fulfilment of his undertaking to provide their position going to trial. The answer provides that "Mr. Grenon's understanding from talking to Devon Wagner at Grant Thornton is that this term was used correctly in the valuation and it refers to the bulk of the unitholders of [Tom Capital 2003-4] before the subscription being arm's length to him."[117]

[25] The Minister's position is that this is inadmissible as hearsay and is an out of court statement adduced for the truth of its contents that should have been provided by Mr. Wagner himself on oral testimony.

[26] In find that contextual read-in #10 is admissible. It shares the same subject matter and provides the Court with the necessary information to fully understand the evidence adduced by the Minister's read-in. The answer is a response to a question asked by counsel for the Minister on the same subject and the Minister's read-in contains the very question to which the Appellant s' contextual read-in provides an answer. The contextual read-in concerns Mr. Grenon's position and is not evidence of the truth of the statement.

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[116] Court File No. 2014-3401(IT)G, Crown's Book of Read Ins, February 22, 2019 at tab 13.
[117] Court File 2014-3401(IT)G, Letter from the Appellants regarding read-ins, March 4, 2019 at tab 2:10.

Contextual Read-in #16

[27] The Minister's read-in of questions 2090 to 2099 of Mr. Grenon's examination for discovery concerns certain payments made by Century Services and other payers on behalf of the Income Fund subscribers.[118] The Appellant's contextual read-in is a response to an undertaking to identify which company Century Services is in relation to the Income Fund structure. The Appellant's contextual read-in identifies the corporation as the general partner of Century Services LP in which the sole limited partner is TOM Capital 2003-2 Venture Trust.[119] However, the answer goes further, stating that "Mr. Grenon is advised that Ms. Bruce repaid [Century Services] for the subscription funds shortly thereafter." The Minister's position is that the contextual read-in is inadmissible on the basis of hearsay.

[28] Contextual read-in #16 is admissible for the purpose of providing context as to how Century Services fits into the mutual fund structure. However, contextual read-in #16 is not admissible on the basis of hearsay for the purpose of proving as a fact that Ms. Bruce repaid Century Services for the subscription funds. As the statement is an out of court statement adduced for the truth of its contents, it is hearsay. No exception to the hearsay rule applies. The contextual read-in must be "otherwise admissible" for the purpose of section 100 of the *Rules*.

Contextual Read-in #18

[29] This item also relates to the Corporate Appeals.

[30] The Minister's read-in of questions 76 to 83 of Mr. Grenon's examination for discovery deals with the reasoning for the Foremost Reorganization. Specifically, it includes an admission from Mr. Grenon that the corporate appellant purchased units in the Foremost Reorganization, at least in part, due to the opportunity to benefit from a tax perspective through ending up with a capital dividend account.[120]

[31] The Appellant's contextual read-in canvasses the questions asked immediately after those contained in the Minister's read-in.[121] The Appellant's contextual read-in concern the scope of the Foremost Reorganization and that, to Mr. Grenon, the steps involving the Corporate Appellants were not part of the

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[118] Court File No. 2014-3401(IT)G, Crown's Book of Read Ins, February 22, 2019 at tab 48.
[119] Court File 2014-3401(IT)G, Letter from the Appellants regarding read-ins, March 4, 2019 at tab 2:16.
[120] Court File No. 2014-3401(IT)G, Crown's Book of Read Ins, February 22, 2019 at tab 61.
[121] Court File 2014-3401(IT)G, Letter from the Appellants regarding read-ins, March 4, 2019 at tab 2:18.

Foremost Reorganization. The Appellant's contextual read-in also concern the tax perspective and how the capital dividend account was intended to be created.

[32] The Minister's position is that the Appellant's contextual read-in is inadmissible because it does not qualify or explain the Minister's read-in.

[33] Contextual read-in #18 is admissible. The Appellant's contextual read-in further explains the Minister's read-in concerning the tax perspective of certain steps in the Foremost Reorganization. The Appellant's contextual read-in contains follow-up questions to the Minister's read-in, concerns the same subject, fulfills the purpose of demonstrating Mr. Grenon's understanding and intention in the transaction, and provides for a more complete understanding of the subject.

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PLACE OF HEARING:	Ottawa, Ontario
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