Docket: 2010-1473(IT)G

BETWEEN:

CHARLES ROSS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Evidence heard on October 15 and 16, 2012, at Toronto, Ontario
Argument heard January 28, 2013, at Toronto, Ontario

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Eric Fournie Oleg M. Roslak
Counsel for the Respondent:	Justine Malone

JUDGMENT

In accordance with the Consolidated Reasons for Judgment delivered in respect of this matter along with those of Susanne E. Greenhalgh and John W. Martiniuk, the Appeal of Charles Ross with respect to a reassessment made under the *Income Tax Act* (the "*Act*") for the 2001 taxation year is allowed on the basis that the Minister of National Revenue ("the Minister") has not proven on balance that a misrepresentation was made by the Appellant in the context of information supplied under the *Act* relevant to the taxation year reassessed.

The reassessment is referred back to the Minister for reconsideration and reassessment.

Costs are awarded to the Appellant.

Signed at Ottawa, Ontario, this 23rd day of October 2013.

"R.S. Bocock"

Bocock J.

Docket: 2010-1474(IT)G

BETWEEN:

SUSANNE E. GREENHALGH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Evidence heard on October 15 and 16, 2012, at Toronto, Ontario
Argument heard January 28, 2013, at Toronto, Ontario

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Eric Fournie Oleg M. Roslak
Counsel for the Respondent:	Justine Malone

JUDGMENT

In accordance with the Consolidated Reasons for Judgment delivered in respect of this matter along with those of Charles Ross and John W. Martiniuk, the Appeal of Susanne E. Greenhalgh with respect to a reassessment made under the *Income Tax Act* (the "*Act*") for the 2000 taxation year is allowed on the basis that the Minister of National Revenue ("the Minister") has not proven on balance that a misrepresentation was made by the Appellant in the context of information supplied under the *Act* relevant to the taxation year reassessed.

The reassessment is referred back to the Minister for reconsideration and reassessment.

Costs are awarded to the Appellant.

Signed at Ottawa, Ontario, this 23rd day of October 2013.

"R.S. Bocock"

Bocock J.

Docket: 2010-1475(IT)G

BETWEEN:

JOHN W. MARTINIUK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Evidence heard on October 15 and 16, 2012, at Toronto, Ontario
Argument heard January 28, 2013, at Toronto, Ontario

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

Counsel for the Appellant:	Eric Fournie Oleg M. Roslak
Counsel for the Respondent:	Justine Malone

JUDGMENT

In accordance with the Consolidated Reasons for Judgment delivered in respect of this matter along with those of Charles Ross and Susanne E. Greenhalgh, the Appeal of John W. Martiniuk with respect to a reassessment made under the *Income Tax Act* (the "*Act*") for the 2000 taxation year is allowed on the basis that the Minister of National Revenue ("the Minister") has not proven on balance that a misrepresentation was made by the Appellant in the context of information supplied under the *Act* relevant to the taxation year reassessed.

The reassessment is referred back to the Minister for reconsideration and reassessment.

Costs are awarded to the Appellant.

Signed at Ottawa, Ontario, this 23rd day of October 2013.

"R.S. Bocock"

Bocock J.

Citation: 2013 TCC 333
Date: 20131023
Docket: 2010-1473(IT)G

BETWEEN:

CHARLES ROSS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2010-1474(IT)G

AND BETWEEN:

SUSANNE E. GREENHALGH,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2010-1475(IT)G

AND BETWEEN:

JOHN W. MARTINIUK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

CONSOLIDATED REASONS FOR JUDGMENT

Bocock J.

I. Introduction and Partial Agreed Facts

a) Background

[1] Each Appeal involves an Appellant who, after working some three decades, retired from a public service. At the time of retirement, each was a contributing member of either the Ontario Municipal Employees Retirement System ("OMERS") or the Ontario Teachers' Pension Plan (the "Teachers' Plan"). Following professional advice regarding pension planning, business ventures and retirement, each Appellant incorporated a personally owned limited liability company. Each respective company received the individual's commuted pension plan benefits as a transfer under section 147.3 of the *Income Tax Act* ("*Act*"). In each case, the Appellant was the only member of the plan and each also received a surplus distribution from the plan pursuant to the requisite actuarial opinion. The Minister of National Revenue ("the Minister") eventually revoked each Appellant's own plan. The Minister asserts that the tax immune pension funds reverted into income retroactively in the year each plan was otherwise created through the combined effect of subsections 56(1), 56(2) and Regulation 8502 of the *Act*. Each Appellant was then reassessed to include such income in the taxation year in which each personal pension plan was registered. Although not relevant to the matters before this Court, collateral judicial review applications were launched challenging the Minister's revocation decisions and the applications were dismissed in the case of each Appellant.

b) Procedure at Hearing

[2] The foregoing Appeals were not heard on a consolidated basis, but were heard one immediately after the other. Although they were not heard on the basis of common facts, there are certain facts which are materially common to each. The legal issues were sufficiently common to the Appeals to justify these consolidated reasons for judgment. However, the reasons, where warranted, identify the different facts among each of the otherwise completely unrelated and unassociated Appellants.

II. <u>Three Appeals – Similar, but Not Identical</u>

a) Common Basis for Reassessment

[3] In each case the reassessments were outside the normal statutory period for reassessment. In each case, the Minister alleged misrepresentation attributable to neglect, carelessness or wilful default in supplying information under the *Act*. The Minister contends these misrepresentations bring the reassessments within the ambit

of subparagraph 152(4)(*a*)(i) of the *Act* and permits reassessment beyond the normal assessment period.

[4] The Minister's position is that misrepresentations were made in the course of the supply by each Appellant or their advisors of information relating to the registration and audit of the plan: as to the primary purpose of the plan, the level of remuneration and the employment relationship of each Appellant with their plan administrator (the limited company).

[5] The Minister contends that the misrepresentations had a causal relationship with the registration of the plans in the first instance. This initial registration of the plans precluded inclusion into income of the transferred assets at the time of transfer and during the registration period. The misrepresentations supported the plan registration and shielded each Appellant from tax otherwise payable. Respondent's counsel summarized the issue as to whether each Appellant "misrepresented to CRA facts upon which the registration of the plans rested and gave untrue, misleading or inaccurate responses to questions from CRA regarding those same facts." (Respondent's written submissions at paragraph 2).

b) Distinguishing Facts

[6] The specific facts regarding the alleged misrepresentations (the "Misrepresentation Issue") in each matter are different. Therefore, the following facts relevant to the Misrepresentation Issue, as among each Appeal, are individually summarized as follows.

(i) Ross Appeal

A. Agreed Facts

[7] Mr. Ross was a police officer of 28 years when he retired and transferred the commuted value of his OMERS pension, $674,513.00, to Jordan Financial Inc. ("JFI"). JFI administered the new pension plan (the "JFI Plan") registered effective November 1, 2000 ("Registration Date"), in respect of which Mr. Ross was the sole member. Ultimately the JFI Plan was revoked on May 9, 2008 retroactively to the Registration Date.

B. Testimony at Trial

[8] In providing evidence at trial surrounding the Misrepresentation Issue, Mr. Ross testified forthrightly and credibly. Factually, Mr. Ross had no intention to cease working at the time of retirement from policing. He avidly sought to become a mutual fund advisor. This evidence is relevant to the determination of the primary purpose, status of employment and expectation of salary in the new endeavour.

[9] His new endeavour would be as an employee of Jordan Financial Inc. ("JFI"), which in turn would contract its services with a local mutual fund investment brokerage. Coincidentally, Mr. Ross would market financial plans for retiring police officers and firefighters not unlike his own. He laid out a business plan, promoted the structures and ultimately became a registered mutual fund advisor. He transferred the sum of $754,513.00 being the committed value of his pension benefits from OMERS to the JFI Plan. Regrettably, the business, like any number of other new ventures, was not successful.

[10] To the issue of primary purpose, the Canada Revenue Agency ("CRA") required Mr. Ross to estimate his expected annual income, describe his relationship with JFI and the nature of the business.

[11] The representations within a letter dated December 28, 2000 stated JFI would enter into various business relationships in order to generate profits whereby Mr. Ross would be paid expected annual earnings of not less than $66,500.00 (being an approximation of his final year's salary as a police officer). The application also identified the expected difficulty of projecting revenue which would determine salary, but since this was a requirement of the CRA, Mr. Ross, nonetheless, attempted to comply when establishing the JFI Plan.

[12] Subsequently and beginning in 2001, CRA began to express "concern surrounding the establishment of this plan and the potential consequences that could arise." Some two years later, notice of an audit was delivered by the CRA. Mr. Ross, through his advisor, responded confirming Mr. Ross received salary equal to compensation received from the previous employer and advising CRA that Mr. Ross had to take an unpaid leave of absence. When provided at that time, such facts were incorrect.

[13] In 2004, an actuarial valuation dated as of January 1, 2003 was filed indicating annualized pensionable earnings of $65,000.00. This was also an incorrect statement concerning 2003. In addition, Mr. Ross testified that he did not report all of his income in his T-1 tax returns. Although he wished to receive this income in his capacity as an employee of JFI, it was instead received directly from the mutual fund

dealer. Mr. Ross filed an amended tax return correcting this error. The Minister does not allege otherwise.

[14] After its audit, in November 2004 (the "2004 Preliminary Opinion"), the CRA preliminarily stated that the "primary purpose" had not been met since the JFI Plan failed to provide lifetime retirement benefits to "employee(s) in respect of their service with the employer."

[15] Mr. Ross testified that he received a surplus payment from the JFI plan of $80,000.00 in 2001 which Mr. Ross appropriately included in income. This ultimately drew the ire of CRA, as reflected in the 2004 Preliminary Opinion in which the agency stated that the apparent purpose of the Plan was to shelter previous pension benefits in order to avoid the transfer rules and to access the funds at will. Mr. Ross testified that, although a surplus payment was received, he learned of such a mechanism during the transfer period. Factually, although an intention and plan to receive employment income from JFI existed, it was not entirely clear from the evidence that any was received by Mr. Ross in that capacity. The Responded led no contradicting evidence regarding the valuations of the surplus distributions in the JFI Plan or any of the other plans relevant to the other appeals.

(ii) Greenhalgh Appeal

A. Agreed Facts

[16] Ms. Greenhalgh was a teacher for approximately 30 years before retiring. During her employment she was a member of the Ontario Teachers' Pension Plan ("Teachers' Plan). She is also the only member of the Pension Plan for the presidents of 1346687 Ontario Inc. (the "1346687 Plan"). On January 20, 2000 the sum of $564,478.00 was transferred from the Ontario Teachers Superannuation Fund to the 1346687 Plan. She did not report the amount she transferred and reported a surplus payment from the 1346687 Plan in the amount of $14,478.00 on her tax return in that year.

B. Testimony at Trial

[17] Prior to retiring, Ms. Greenhalgh had a vision of entering into the craft vinegar business. She resides in the Niagara Peninsula where a proximate supply of a necessary ingredient, surplus grapes, exists.

[18] In response to promotional materials, she met with financial planners and learnt of a structure which would allow her to transfer her pension benefits to a company, develop her new business as an employee of that new company and recoup the profits in the form of income and enhanced contributions to the 1346687 Plan.

[19] The 1346687 Plan was established; Ms. Greenhalgh retired from teaching, transferred her commuted pension benefits and began her new life in the vinegar production business in October of 1999. In her application to register the 1346687 Plan, she projected income of $65,000.00 per annum which she testified she believed she could earn through dedication, effort and strategy. Instead, she ultimately reflected only three months income which she recorded as income and upon which she paid tax. As with most such entries, she could not identify these funds as having been received in the commonly understood method of cash or cheque as opposed to accrual.

[20] Within 12 months, the CRA requested evidence of a primary purpose to generate pension benefits, a bona fide employer/employee relationship and expected comparable earnings. The letter was not received by Ms. Greenhalgh, but was responded to in June, 2001 by her advisors. Although the letter contained expectational assertions, it also contained some misstatements of fact. Subsequent submissions in 2003 and 2004 also contained incorrect information regarding annualized pensionable earnings, subsequent employment status and employment income.

[21] Previously, in early 2002, Ms. Greenhalgh's business suffered irrevocable set backs. Her husband and co-venturer in the business had a stroke, never really recovered and the two separated. Notwithstanding attempts to continue, she effectively wound the business up in early 2004, whereafter she retired and began drawing her pension benefits from the 1346687 Plan.

(iii) Martiniuk Appeal

A. Agreed Facts

[22] Mr. Martiniuk was a police officer for approximately 30 years when he retired, during which time he was a member of the OMERS. He was also the only member of the pension plan for the presidents of 1354339 Ontario Inc. doing business as Excalibur (the "Excalibur Plan"). On February 8, 2000 Mr. Martiniuk transferred $546,913.00 from the OMERS to the Excalibur Plan. He did not report the amount he transferred as income. However during 2000 Mr. Martiniuk received a series of

surplus payments from the Plan in the aggregate amount of $38,881.80 which he reported in his tax return for that year.

B. Testimony at Trial

[23] In 1999, as a soon to be retired police officer, Mr. Martiniuk chose to train and ultimately become a paralegal in the area of defending *Highway Traffic Act* charges. In August of 1999, his advisors submitted the application to register the Excalibur Plan. As with the two other Plans, Mr. Martiniuk indicated the new entity had no earnings record and salaries would be contingent upon revenue, both items of which were then unknown. Although Mr. Martiniuk found it “ridiculous” to be asked to say with certainty what the revenue of his new company would be, he nonetheless stated strongly that it had “great” earning potential. To learn the trade, in early 2000 he shadowed a then working paralegal, opened a bank account, acquired certain assets for the purposes of undertaking the endeavour.

[24] In June 2000, CRA expressed its concerns regarding the Excalibur Plan and the consequences which could arise. Mr. Martiniuk’s advisors submitted that the earnings potential was sizeable with Mr. Martiniuk as its sole employee.

[25] Correspondence and the supply of information ensued between CRA and Mr. Martiniuk between 2002 and 2008. During that period, certain misstatements as to then current facts were made in the content of information supplied: current remuneration and plan contributions. In 2008, the Excalibur Plan was revoked and Mr. Martiniuk was reassessed in his 2000 taxation year for income equal to the value of the original assets transferred from the OMERS Plan to the Excalibur Plan.

[26] As to his business, Mr. Martiniuk pursued his new career, but experienced very slow growth. He wished to draw pension benefits, which he did in 2001, but recorded nominal income from Excalibur to himself for three months in early 2000 prior to drawing pension benefits. Ultimately, Mr. Martiniuk gave up his business and in 2005 joined the City of Durham as a provincial offences prosecutor. At that time, the assets in the Excalibur Plan were transferred and thereby returned to OMERS as trustee, from which to this day Mr. Martiniuk draws pension benefits.

III. <u>The Issues Before The Court</u>

a) Misrepresentation Issue

[27] The first ground upon which the Appellants pursue this Appeal is that the Respondent has not established that the information supplied by each Appellant under the *Act* does not in the first instance constitute a misrepresentation in the supply of information under the *Act* (the "Misrepresentation Issue"). This factual ground of Appeal stands quite apart from the legal issues (described below as the "Interpretation Issues"). On the Misrepresentation Issue, each Appellant's respective facts will be determinative to any finding of this Court as to whether a "misrepresentation in supplying of information under the *Act*" has occurred relative to the grounds alleged.

b) Interpretation Issues

(i) "Information Supplied" relates only to Fraud

[28] Although the determination of whether a misrepresentation attributable to neglect, carelessness or wilful default has occurred depends on the factual record, the reliance by the Minister on subparagraph 152(4)(*a*)(i) is the common basis for reaching beyond the normal reassessment period and back to the year of registration. In the Replies, each reassessment is limited to the issue of misrepresentation in the supply of information under the *Act* and does not rely upon any allegation of fraud or any misrepresentation in filing the return. The relevant subparagraph permitting reassessment beyond the normal period provides as follows [emphasis added]:

> **152(4)** The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if
>
> (*a*) the taxpayer or person filing the return
>
> (i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or
>
> […]

[29] Central to the issue is whether misrepresentation committed solely in respect of supplying information under the *Act* is sufficient to allow the Minister to reopen the assessment beyond the normal reassessment period for the relevant year.

[30] In each Appeal, the parties agree that there is no misrepresentation in filing the return nor is there any fraud (in the return or in information supplied). The Appellants assert that since there was no misrepresentation contained within the return, subparagraph 152(4)(*a*)(i) of the *Act* does not permit reassessment outside the normal reassessment period (where misrepresentation in filing the return is not alleged) unless or until a taxpayer has committed "fraud in filing the return or in supplying any information under the *Act*." Based upon the wording of the subparagraphs, the Appellants state that the commission of misrepresentation attributable to neglect, carelessness or wilful default as a precondition to assessment outside the normal period must have occurred in filing the return. The Appellants assert it is insufficient if misrepresentation only occurred within information supplied under the *Act*.

[31] The Respondent takes the position that subsection 152(4) permits reassessment outside the normal reassessment period where misrepresentation attributable to neglect, carelessness or wilful default has occurred in supplying any information under the *Act*. Once a taxpayer has committed such a misrepresentation, then the Minister by virtue of subparagraph 152(4)(*a*)(i) is permitted to reassess, and in these specific matters, require the taxpayers to include in income, in the year of the transfer (usually the year of registration), the entire amount transferred from the public pension plan to the private pension plan pursuant to the combined effect of subsections 56(1) and 56(2) and Regulation 8502 of the *Act*. In effect, that revocation retroactively removes the relief afforded by subsection 147.3(9) from including into income (by deeming the transfer a contribution) the transfer of assets from one registered plan to another registered plan.

[32] As regards this fraud only issue, assuming there is a primary finding of misrepresentation of information supplied under the *Act*; each Appellant's case succeeds or fails on the result of the interpretation of this issue, subject only to the issue below.

(ii) Timing and Transfer Issues

[33] A separate issue exists in relation to retroactivity and timing of the transfer made pursuant to subsection 147.3(9) of the *Act* which provides as follows:

> 147.3(9) Where an amount is transferred in accordance with any of subsections 147.3(1) to (8),
>
> (*a*) the amount shall not, by reason only of that transfer, be included by reason of subparagraph 56(1)(*a*)(i) in computing the income of any taxpayer; and

(*b*) no deduction may be made under any provision of this Act in respect of the amount in computing the income of any taxpayer.

[34] Each Appellant argues that at the time of the transfer the plan was registered and therefore any transfer is not taxable during that year. The retroactive effect of revocation of the plan affects only the plan and subsequent returns the pension plan and taxpayer must file. Each Appellant argues that he or she is entitled to have his or her income assessed on the basis of the facts as they existed at the time that each individual tax return was filed ("Timing Issue").

[35] As a second alternative argument within the context of whether an amount was received, Appellants' counsel submits that the transferred funds, even after revocation of the plans, were neither directly destined to, nor permitted to be held by, the Appellants. Although the transferred property was effected by the trustee, pursuant to the direction of the taxpayer, such transfer was made directly to a substitute plan with a different trustee, but for the same taxpayer/beneficial owner. This prevented the application of the constructive receipt concept contained with subsection 56(2) of the *Act*. Accordingly, the taxpayer/beneficial owner was not at that time seized of any then current entitlement to receive those funds given the prohibition under the terms of the trust agreement. The terms prevented the benefits from being paid to the taxpayer, save and except in accordance with the terms of the pension plan and relevant pension legislation (the "Transfer Issue"). It is upon the occurrence of this permitted payment that each Appellant would become liable for tax under subsection 56(2).

IV. Analysis

a) Misrepresentation Issue "Supplying any Information" under the Act

[36] In respect of asserting a misrepresentation in supplying any information of the *Act*, different factual assessments and assertions were made by the Minister in respect of each of the three Appeals.

[37] It is established law that the Respondent must prove that each Appellant, or his or her advisors, made misrepresentations to the Minister in accordance with those pleaded in the Reply relevant to "facts upon which the registration rested."

(i) Ross Appeal

[38] In the Ross Appeal, subparagraphs 11(a), (b) and (c) and (d) of the Reply provide the basis for the allegations of misrepresentations, namely:

> 11. In determining that the appellant made misrepresentations attributable to neglect, carelessness or wilful default in filing his return or in supplying information under the *Act*, the Minister relied on the following facts:
>
> a) The appellant was advised by the Canada Revenue Agency ("CRA") as early as at the time of the registration of the Plan that its primary purpose may not be compliant with paragraph 8502(a) of the *Regulations* and that the Plan may be in a revocable position.
>
> b) In the course of the audit of the Plan, the appellant made multiple misrepresentations to the CRA in respect of his status as an employee of Jordan Financial Limited and the purpose of the Plan.
>
> c) The appellant misrepresented to the CRA the nature of his employment relationship with Jordan Financial Limited and the amount of employment remuneration received or to be received by Jordan Financial Limited.
>
> d) The appellant misrepresented to the CRA the primary purpose of the Plan when he stated that its primary purpose was to provide lifetime retirement benefits to him in respect of his services as an employee.

[39] Counsel mutually agree these paragraphs embody the three concepts of primary purpose, employee status and remuneration.

[40] Appellant's counsel made nuanced reference to Mr. Ross being unaware of certain CRA requests or assertions and of his advisor's responses. The Court does not accept such an allusion as a softening agent with respect to any misrepresentation made. Subsection 152(4) is clear on this point. To the extent Mr. Ross hired an advisor and such advisor provided information in Mr. Ross' name in furtherance of any retainer, then Mr. Ross must live with same to the extent misrepresentations were made on his own behalf and not on behalf of the plan or any other entity. This conclusion also holds for the other Appellants in relation to any similar argument.

[41] With respect to the allegation of misrepresentation on primary purpose, reference must be had to information submitted and Mr. Ross' business intentions, both at the time of initial registration and during the audit process in respect of the facts upon which the registration was originally based.

[42] Since the Respondent bears the onus on this issue, it must establish a misrepresentation as to "primary" purpose: that Mr. Ross made misrepresentations by providing or withholding information concerning contrary intention or actions relevant to primarily providing lifetime retirement benefits as defined in Regulations 8502 and 8504 (the "Lifetime Benefit Purpose").

[43] Evidence exists that other purposes, either directly referenced or subsequently undertaken existed: the ability to devolve residual pension benefits to his children upon death, the ability to pay surplus benefits, the ability to domicile all pension benefits in one vehicle and the ability to ultimately pay pension benefits through a more proximate plan. Mr. Ross recognized each of these possibilities and acknowledged them, along with the Minister, as goals or purposes. The question remains however: has the Minister introduced evidence as a misrepresentation which elevates any one of these purposes to a "primary purpose" which topples the Lifetime Benefit Purpose from the highest pedestal?

[44] The Court is not satisfied that the presence of the purposes related to surplus benefit distribution and succession benefits have done so. The surplus benefit distribution is allowed at law and has occurred in many registered pension plans, including potentially the OMERS plan from which the commuted benefits were initially transferred. It cannot be suggested that such a distribution is supercedeous to the primary purpose, when the very calculation undertaken to determine whether a surplus distribution may be made is whether sufficient assets will remain to satisfy the Lifetime Benefits Purpose. Not dissimilarly, succession planning with respect to the assets is completely compatible with the Lifetime Benefit Purpose, since succession rights only become choate upon the pensioner's death, after which time the Lifetime Benefit Purpose has logically expired. These disclosed facts, when coupled with the sincere and definitive testimony of Mr. Ross that his pension and its goal of a Lifetime Benefit Purpose were not only primary, but paramount, shows that the primary purpose (albeit coupled with other subordinate purposes), remained the provision of lifetime retirement benefits to Mr. Ross in respect of his service as an employee.

[45] The Minister's reasonable conclusions (as held on judicial review) related to these other purposes, while relevant to the decision regarding the revocation of the JFI Plan, are neither determinative to nor binding on the issue before this Court as to whether misrepresentations were made to permit reassessment outside the normal period.

[46] As to remuneration and employee status, the Respondent asserts that the comparatively small income generated by JFI and paid to Mr. Ross, the lack of long term existance of a business and the non-existing expressed leave of absence constitute misrepresentations of his status as employee and level of remuneration.

[47] Aside from the plain fact that the Minister was never confused by any such assertions, the question remains as to whether these factual references can constitute misrepresentations at all in the context of information supplied under the Act relevant to the 2001 registration and the "facts upon which the registration rested."

[48] The comparatively small income generated and the short life of the business relate to the fact that the business failed. This fact was not misrepresented, nor was the Minister confused. There were reasons for its failure -- sluggish financial markets after the 9/11 attacks, the delay in Mr. Ross' accreditation or lack of attractiveness of the financial products he attempted to sell – but none amount to a misrepresentation as to the reasonably held belief regarding Mr. Ross' projected income. Factually, based upon Mr. Ross' evidence and the Minister's absence of evidence suggesting otherwise, it was reasonable for Mr. Ross to conclude that his remuneration would approximate his previous income if the business were successful. The Minister has not asserted she did not know of the embryonic nature of the enterprise. Instead, the JFI Plan was registered on the basis of both parties understanding the inherent business risk. As with each Appellant, the Minister, not the Appellant, chose to certify the JFI Plan in the company's start-up phase. Similarly, the Minister chose to delay revocation and reassessment beyond the normal assessment period.

[49] Moreover, on the basis of *Taylor v Minister of National Revenue*, 88 DTC 1571, Justice Rip, as he then was, concluded that the receipt of remuneration is not essential to the finding at law that an officer is an employee. Additionally, in the present case, Mr. Ross on balance likely did receive a salary and, if so, the determination by the Federal Court of Appeal in *Scott v Canada*, [1994] FCJ No. 3 (QL), would not be necessary. Mr. Ross was an employee within the ordinary and legal sense of the word based upon the facts before the Court and his unshakeable reasonably held belief.

[50] As to employee status, Mr. Ross was an employee of the enterprise, likely earned and was allocated T-4 income and certainly accrued it and paid tax on it. This subsequent affirming conduct, while not to the extent of his expectations, or to the Minister's for the matter, demonstrated he was an employee of the enterprise within the ordinary sense and meaning of the words. The proffered "window dressing" argument is relevant to the Minister's decision to revoke the registration not to the

factual issue of whether misrepresentation has occurred in connection with that fact. As to the factual error regarding the leave of absence, the Minister was not in the least misled by it, nor frankly at the stage it arose did it assuage, dissuade, expedite or delay the Minister's audit, conclusions, revocation or reassessment. It was simply an incorrect statement and not germane to the onus the Minister has to show a misrepresentation surrounding remuneration or status of relationship in information supplied relevant to the basis for the registration of the JFI Plan and the ability to reassess in the 2001 taxation year. This is demonstrated by the complete non-effect it had on the process, arising when it did, in 2003.

[51] As to the issue of reasonableness of belief and the clearly differing view, interpretation and emphasis placed by each of Mr. Ross and the Minister on the issue of employment status and expectation of comparable income, the Court references Justice Lamarre in the case of *Petric v Canada*, 2006 TCC 306, [2006] TCJ No. 230 (QL). Although the matters before the Court in *Petric* dealt with fair market value rather than employment status and projected income, the following conclusions are helpful in describing the degree of ministerial reliance upon the alleged misrepresentation. Specifically at paragraph 38 and a portion of paragraph 40 as follows:

> 38 […] The matter of fair market value is a controversial issue, to be settled on the basis of the interpretation of the facts in evidence, as is the question of whether proceeds of disposition should be characterized as income or as a capital gain (*Regina Shoppers Mall Limited*) or of whether corporations are associated (*1056 Enterprises Ltd.*). The mathematical error in *Nesbitt*, by contrast, is a clear-cut issue, which even the taxpayer in that case conceded to be non-controversial.
>
> 40 […] Although fair market value is ultimately a question of fact to be resolved by the trier of fact, it is mostly a question of opinion answered by analysing different methodological approaches. Certainly the Minister is entitled to disagree with a taxpayer's view of fair market value and can reassess, within the limitation period, on the basis of his own evaluation. However, where the issue is whether the Minister should be allowed the benefit of an exception to the application of the limitation period, it must be shown that the taxpayer made a misrepresentation in filing his or its tax return. In the case at bar, I am of the view that unless it can be said that the appellants' view of fair market value was so unreasonable that it could not have been honestly held, there was no real misstatement. […] Besides, even if the Minister was of the opinion that there was misrepresentation, the fact is that he did not rely on the misstatement as he obtained his own appraisal, knowing of the existence of the emphyteutic lease, and even reassessed the appellants on the basis of that appraisal in 2000, within the limitation period. At that point, there was no further reliance on any representation made by the appellants in filing their tax returns.

[52] While Mr. Ross was not ultimately correct as to the level of comparable remuneration he obtained, the longevity of his tenure as an employee or the future accretions to the JFI Plan of pension benefits, his view in 2000 and 2001 was sufficiently bona fide when compared to the evidence which must be tendered by the Minister to prove misrepresentation in information supplied relevant to that period and the "facts upon which the registration rested." Information supplied in 2003 about income in 2003 was incorrect, but unless it can be said that Mr. Ross' view of the primary purpose, his employment status and expected income at the time of, and as the basis for, registration could not be honestly held during the time such statements were relevant, then there is no material misrepresentation relative to the return or, as is relevant in this matter, the information supplied under the *Act* relative to primary purpose, remuneration and employee status.

[53] Logically and legally, one might ask why should any misrepresentation in information supplied be tethered temporally to the registration of the JFI Plan. Logically, just as a 2003 misrepresentation on a return cannot reopen a 2001 tax return (with certain exceptions), information supplied, dated and reflective of a 2003 state of affairs should not impact, as misrepresentations, the registration process where the misrepresentations are otherwise unrelated in substance and time to the "facts upon which the registration rested." Legally, the 2001 tax year in question is outside the normal reassessment period. To allow the Minister to utilize information supplied, dated and reflective of a 2003 state of affairs (as a misrepresentation) where the misrepresentation is not contrary to the "facts upon which the registration rested" would enhance reassessment rights outside the normal reassessment period beyond those afforded the Minister where a 2003 return contained a then current misrepresentation, but a previous year, which contained none, is beyond the normal reassessment period.

[54] Subsection 152(4.01) of the *Act* [with emphasis added] likely provides some instruction in this regard.

> 152(4.01) Notwithstanding subsections (4) and (5), an assessment, reassessment or additional assessment to which paragraph (4)(*a*), (*b*) or (*c*) applies in respect of a taxpayer for a taxation year may be made after the taxpayer's normal reassessment period <u>in respect of the year to the extent that, but only to the extent that, it can reasonably be regarded as relating to</u>,
>
> (*a*) where paragraph 152(4)(*a*) applies to the assessment, reassessment or additional assessment,

> (i) any misrepresentation made by the taxpayer or a person who filed the taxpayer's return of income for the year that is attributable to neglect, carelessness or wilful default or any fraud committed by the taxpayer or that person in filing the return or supplying any information under this Act, or
>
> (ii) a matter specified in a waiver filed with the Minister in respect of the year; and

[55] In *Hans v Canada*, 2003 TCC 576, 2003 DTC 1065 at paragraph 8, Justice Bowie expands, by analogy, upon this point;

> 8 In my view, the approach that was taken by Mr. Mutch and Mr. Bozyk does not give proper effect to subparagraph 152(4.01)(*a*)(i) of the Act. Generally, a taxpayer becomes immune to reassessment by the Minister for any taxation year when three years have passed since the initial assessment for that year. Subparagraph 152(4)(*a*)(i) creates an exception to permit reassessment in those cases in which the taxpayer has misled the Minister. Subparagraph 152(4.01)(*a*)(i) was enacted to ensure that the effect of any such reassessment is confined to those matters as to which the taxpayer had misled the Minister. In other words, proof that the taxpayer misled the Minister as to one category of expense does not become a licence for the Minister to disallow some or all of the expenses of another category that were allowed in arriving at the previous assessment, and require that the taxpayer discharge the onus of proving each one of them on appeal. Proof of misrepresentation of a fact relating to the computation of the taxpayer's automobile expenses will reopen for the Minister all the elements that make up the claim for automobile expenses in the year, and she may reassess accordingly, but it will not permit her to revise the previously allowed expenses in other categories such as rent or utilities.

[56] Although the reference is again to misrepresentation in filing the return it is easily applicable and analogous to information dated, supplied and relevant after the time in question. By analogy, proof that a taxpayer incorrectly stated a fact referable to and dated in a subsequent period does not license the Minister to reopen the assessment in a previous taxation year to which the later dated misrepresentation does not temporally relate or misrepresent the "facts upon which the registration rested."

[57] Stated slightly differently, the misrepresentation (whether in a return or in the supply of information) affording a reassessment beyond the normal reassessment period must reasonably be regarded as relating to a return or information applicable to the reassessed tax year. Misrepresentations reasonably related to a period subsequent cannot be regarded as extending, by virtue of the limitation in subsection

152(4.01) of the *Act*, reassessment rights to a previous taxation year otherwise beyond normal reassessment where such facts do not relate to the basis upon which registration rested.

[58] In conclusion, the evidentiary onus for opening a reassessment beyond the normal period has not been met factually by the Minister in the Ross Appeal. That hurdle is embedded in the requirement to establish a misrepresentation material in scope and time to the reassessment in question: the primary purpose of the JFI Plan, the status as employee or the level of remuneration all upon which registration of the JFI Plan rested. To do otherwise creates a "time machine" effect where then current statements about facts in 2003 may be applied to years and bases for decisions which are outside the normal reassessment periods notwithstanding that reasonable beliefs held and facts available in 2001 had not yet been blessed with the corrective certainty of the fullness of time. Accordingly, reassessment of the taxpayer was indeed afforded to the Minister in respect of Mr. Ross for taxation year 2001, just not outside the usual period given the timing and facts of the pleaded misrepresentations within information supplied under the *Act* which do not relate to the "facts upon which the registration rested."

(ii) Greenhalgh Appeal

[59] In the Greenhalgh Appeal, subparagraphs 11(a), (b), (c) and (d) of the Reply also contain the assertions of facts related to the basis for reassessment. Such assertions are materially identical to those contained in the Ross Appeal.

[60] Evidence certainly exists through admissions that Ms. Greenhalgh had other purposes in mind other than the Lifetime Benefit Purpose in establishing the 1346687 Plan and transferring the assets from the Teacher's Pension Plan to it. Nonetheless, the question remains: did these additional purposes supplant, through Ms. Greenhalgh's conduct, the pre-eminent Lifetime Benefits Purpose? On the basis of the evidence summarized previously in these reasons and heard at the hearing of this Appeal, the Minister has not discharged this onus and the primary Lifetime Benefit Purpose has not been dislodged.

[61] As to the issue of misrepresentation as to employee status and remuneration, it is also reasonable for the Court to conclude the following facts:

a) the craft vinegar business did employ Ms. Greenhalgh to the extent she worked aggressively and diligently for her company in the sincere hope and anticipation of being paid from revenue;

b) the business failed, not because of lack of effort, but unforeseen personal circumstances: her spouse/business partner had a stroke, her marriage ultimately dissolved and the economy was not robust during that period;

c) the Minister appreciated the novelty of the business and its inherent risk and controlled the registration, revocation and reassessment process;

d) employment income, albeit notional and perhaps unrecognizable, was accrued and tax was paid thereon by Ms. Greenhalgh;

e) all businesses must commence at some point in a vacuum of historical financial data and the presence of a real possibility of failure; and

f) whatever the relatively minor misstatements filed by the plan administrator, these were quickly corrected (for example, the suggestion of a leave of absence within 60 days) and came at a point when their effect was *de minimis* as to the employee status and remuneration paid in 2000 and 2001 and as to the “facts upon which the registration rested.”

[62] It is not necessary to repeat the extracts from the authorities cited above, but each of *Taylor* and *Petric* support the Court’s finding that the lack of income, business failure and lack of benefits paid into the 1346687 Plan do not dislodge Ms. Greenhalgh’s bona fide belief and tangible actions that she was, during the relevant years at the outset of the venture, an employee of the Company who would have been, but for the business failure, reasonably remunerated for her services. A misrepresentation as to primary purpose has not been established.

[63] Similarly, a review of the materials supplied in 2003 and beyond do not purport to misrepresent salary or status in the relevant period to the “facts upon which the registration rested.” To that extent, and for the reasons referenced above, facts asserted and dated in 2003 related to 2003 cannot be retroactively utilized as a misrepresentation in supplying information relevant to a process and decision whose factual bases were not altered.

[64] If in 2003, a statement made regarding a period or the “facts upon which the registration rested” constituted a misrepresentation, this would be an entirely different matter, but this Court finds such is not the case. Therefore, the reassessment

of the taxpayer is statute-barred on the basis of no misrepresentation having been made in supplying information under the *Act* relevant to the decision of registration and the related basis upon which it rested.

(iii) Martiniuk Appeal

[65] Likewise in the Martiniuk Appeal, identical factual assertions were made by the Respondent in subparagraphs 11(b), (c) and (d) of the Reply regarding misrepresentations regarding employee status, primary purpose and remuneration.

[66] Similar to the other two appeals, there is ample evidence that Mr. Martiniuk was pleased to learn of additional collateral benefits possibly conferred by establishing the Excalibur Plan: succession benefits, surplus funds distribution and more proximate financial decision making. Again, the Court asks, did these additional benefits dislodge, on the basis of conduct and reasonable belief of Mr. Martiniuk at the time of formation, the paramountly of the Lifetime Benefit Purpose. The direct testimony of Mr. Martiniuk and his overall actions at the time as described above lead the Court to the balanced conclusion that Mr. Martiniuk did not misrepresent the primary nature of the Lifetime Benefits Purpose.

[67] In assessing the evidence of Mr. Martiniuk regarding employee status, and remuneration, the following conclusive summary may be made:

a) Mr. Martiniuk pursued and worked at his new employment as a paralegal, firstly with another paralegal service provider and then as an employee of Excalibur.

b) Mr. Martiniuk accepted cases and otherwise undertook the usual steps of beginning the business in June of 2000.

c) As a result of the business' slow progression, Mr. Martiniuk began drawing his pension in 2001, declared same as pension income and paid the tax; he paid tax on his small salary attributed to him during a similar reporting period.

d) After resuming work for another public body in 2005, Mr. Martiniuk transferred his pension back into OMERS from which he drew a pension which he has done continuously since 2001.

e) The business, which factually operated, never achieved the anticipated level of income nor general success, but it did operate.

f) Minor misstatements and errors made in subsequent communications never departed from the consistent view of the primary Lifetime Benefits Purpose of the Excalibur Plan and Mr. Martiniuk's view of his status as an employee.

g) Mr. Martiniuk's record of his being an employee and his anticipated and desired level of future earnings existed and were documented, all of which bear the hallmarks of credibility and consistency.

[68] In fact, Mr. Martiniuk's credibility was enhanced by his balanced view of the possibility of doing well against the "ridiculous" clairvoyant exercise of predicting income for a new start up business. The Respondent suggests this is evidence of a lack of consistency and commerciality. Factually, based upon Mr. Martiniuk's demeanour and evidence on the point, the Court finds the opposite.

[69] As with the other appeals, the facts contained in any information dated and supplied in 2003 and beyond related to then current or subsequent periods and were not referable to the relevant earlier periods or basis of registration in respect of which the reassessment is now sought. No misrepresentation was made in respect of the supply information relative to the reassessed taxation year nor to the basis upon which the registration rested. Accordingly, based upon the facts and the onus which the Respondent bears and has not discharged, the reassessment is not permitted beyond the normal reassessment period.

b) Interpretation Issues

(i) Fraud Only Issue

A. Alternative views of subparagraph 152(4)(*a*)(i)

[70] In light of the factual findings above, the Fraud Only Issue will not determine the outcome of these appeals. However, given the genuine legal dispute related to the subparagraph in question and the amount of time allocated by the parties on this issue, the Court feels bound to make some general observations. The Appellants' joint position is that misrepresentations made in supplying information under the *Act* do not, in the absence of misrepresentations in the return, allow the Minister to reassess outside the normal period. Unsurprisingly, the Respondent argues the plain

wording of the section allows reassessment outside the normal period where misrepresentation occurs only in respect of information supplied. Presently, this singular issue has not been directly considered by any Canadian court.

B. Absence of Clear Legal Authority

[71] The implications of these two positions highlight two different standards of conduct for taxpayers. Aside from minor authority in *obiter dicta*, courts have not considered whether paragraph 152(4)(*a*) requires fraud or only misrepresentation in the supply of information under the *Act* : *Cooper v Canada*, [1998] TCJ No. 919 (QL), [1999] 1 CTC 2312, and *Ridge Run Developments Inc. v Canada*, 2007 TCC 68, 2007 DTC 734. Therefore, the consequences of such an interpretation ought to be examined to see if the object, spirit, and purpose of the provision are complied with. If the Appellant's interpretation is correct, there is a different standard of conduct for the taxpayer in filing the return, as opposed to supplying information outside the return. Mere misrepresentations (due to neglect, carelessness, or wilful default) are only sufficient to reassess outside the normal period if those misrepresentations are made in the return. The consequence of this interpretation is that taxpayers may be neglectful, careless, or even commit wilful default in representations made to the Minister (provided same are not made within the return) without triggering the unlimited period for reassessment allowed in subparagraph 152(4)(*a*)(i).

[72] On the other hand, the tax system must encourage candour on the part of taxpayers in dealing with the Minister, if the Minister subsequently decides to audit the taxpayer's filing. According to the Respondent's interpretation, paragraph 152(4)(*a*) provides such a mechanism. The Minister's ability to accurately administer and enforce the Act may be seriously impeded if the Minister's right to reassess outside the normal period is removed where the Minister's officers have been misled by the taxpayer's misrepresentations in supplying information during the audit or appeals process.

C. Textual, Contextual and Purposive Analysis

[73] The Appellants' position is that the Minister never had the inceptive right to reassess outside the normal period in such circumstances. The Appellants' interpretation of paragraph 152(4)(*a*) requires that misrepresentations made outside the return must rise to the level of fraud before the unlimited period for reassessment is triggered. Similarly, a taxpayer might reasonably rely on the provision, as currently drafted, to apply a higher standard to information provided in filing a return, as opposed to information supplied in registering a pension. This interpretation is

possibly supported in the context of pension registrations, since the pension registrations require taxpayers to estimate future earnings. Other less formal representations might be made verbally to CRA officials upon questioning, in which case the taxpayer might not have documentation to verify the verbal representation at hand. Tax returns, by contrast, require a taxpayer to report known amounts from the past tax reporting period.

[74] It is at least arguable that a taxpayer, in reporting known amounts in filing a return, should be held to a high standard of accuracy and care, such that a mere misrepresentation (attributable to neglect, carelessness or wilful default) in a return supports reassessment outside the normal period. The estimation of possible future amounts and collateral information, such as estimates made in a pension registration or in verbal representations to CRA officials, might reasonably allow for a more lenient standard. Paragraph 152(4)(*a*) as presently read may provide for such distinct standards.

[75] The Respondent's submissions are that a textual, contextual and purposive analysis supports the Crown's interpretation of paragraph 152(4)(*a*). In re-formatting the subsection for clarity, the Respondent argues that "the Minister may reassess beyond the normal reassessment period in cases where a taxpayer";

> a) has made any misrepresentation that is attributable to neglect, carelessness or wilful default in filing the return or in supplying any information under the *Act*; or
>
> b) has committed any fraud in filing the return or in supplying information under the *Act*" [paragraphing added for clarity].

[76] The Respondent's submissions state that one of the purposes of paragraph 152(4)(*a*) is to promote candour in taxpayer as in *Cooper*. However, if the purpose of the provision were to apply the same standard of candour to information supplied in the return as to information supplied outside the return, the provision ought to have been worded unambiguously to apply that standard uniformly (as reflected by the necessary re-ordering of the subsection above for the purpose of illustration and precision). The provision, as currently drafted, can be read to support different standards of candour. The Respondent's submission reflected by the proposed wording above is itself indicative of the type of unambiguous wording that might have been enacted in order to give effect to a uniform standard.

D. Conclusion

[77] A purposive interpretation of paragraph 152(4)(*a*) may lead to the conclusion that there is no appreciable difference in the context of information supplied within or outside a return sufficient to justify different standards of conduct for providing the two types of information. The primary question is not whether different standards should or should not be applied; the question is whether or not the Appellants' reading of the statute can be supported or refuted by the longstanding principles of statutory interpretation. In the present case, there is ambiguity in the wording of the *Act* that cannot be resolved by applicable principles of statutory interpretation alone. Where there is such ambiguity in the wording of tax legislation, the benefit of the ambiguity goes to the taxpayer: *Placer Dome Canada Ltd v Ontario,* 2006 SCC 20 at paragraph 23. Applying that logic, if it were necessary to determine in this matter, the Minister would not be entitled to reassess outside the normal period under paragraph 152(4) where the taxpayers' only misrepresentations were made outside the returns and occurred solely in supplying information under the *Act*.

(ii) Timing and Transfer Issues

A. Timing Issue

[78] On the issue of the non-retroactivity of the deemed receipt by the taxpayer as asserted by the Appellant, the Appellant could not have succeeded for the following reasons. In both *Astorino v Canada,* 2010 TCC 144, 2010 DTC 1112, and *Bonavia v Canada,* 2009 TCC 289, 2009 DTC 1167, this Court and the Federal Court of Appeal have stated that a revoked registered pension plan will create a taxable income inclusion to the taxpayer retroactive to the year of transfer, subject to the different periods of reassessment described in detail above. It is noted that each taxpayer has conceded that he or she directed the transfer. Given the Court's findings on different grounds above, this point is moot.

B. Transfer Issue

[79] Again, and although no longer relevant to the outcome of these Appeals, the Supreme Court of Canada in *Neuman v Canada*, [1998] 1 SCR 770, has established that the beneficial receipt of the property in the hands of a trustee is sufficient for the purposes of subsection 56(2) (deemed receipt) provided that:

a) the funds constitute a payment or transfer made to a person other than the beneficiary;

b) the beneficiary directed or concurred with the transfer;

c) the payments were for the benefit of the beneficiary;

d) had payment been made directly to the beneficiary, such payments would have been taxable under subparagraph 56(1)(*a*)(i) of the *Act*.

[80] Factually, all of these criteria have been met in these Appeals since, respectively,

a) funds were transferred from one plan to another;

b) the Appellants directed the transfer;

c) no other persons were in the plans and therefore only the Appellants could be beneficiaries; and

d) if paid directly (as were the surplus payments) same would have been taxable,

Therefore the Appellant would not have otherwise succeeded on these grounds.

V. <u>Summary</u>

[81] For the reasons above, the Appeals are allowed on the basis that the Minister has not proven on balance that misrepresentations were made by any of the respective Appellants, in the context of information supplied under the *Act*, relevant to the taxation years reassessed or to the factual basis upon which the plan registrations rested. The Appellants are awarded their costs in accordance with Schedule II of the Tax Court Rules (*General Procedure)* on a party and party basis.

Signed at Ottawa, Ontario, this 23rd day of October 2013.

"R.S. Bocock"

Bocock J.

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COURT FILE NOS.:	2010-1473(IT)G 2010-1474(IT)G 2010-1475(IT)G
STYLES OF CAUSE:	CHARLES ROSS v. HER MAJESTY THE QUEEN; SUSANNE E. GREENHALGH v. HER MAJESTY THE QUEEN; and JOHN W. MARTINIUK v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
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