Docket: 2005-96(IT)I

BETWEEN:

MARIO BOILY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard September 7, 2007, at Chicoutimi, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

Agent for the Appellant:	Yvan Tremblay
Counsel for the Respondent:	Janie Payette

AMENDED JUDGMENT

The appeal from the reassessment established under the *Income Tax Act* for the 1999 taxation year is dismissed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 21st day of January 2008.

"Paul Bédard"

Bédard J.

Translation certified true
on this 17th day of June 2008.
Elizabeth Tan, Translator

Citation: 2007TCC603
Date: 20080121
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AMENDED REASONS FOR JUDGMENT

Bédard J.

[1] This appeal, heard under the informal procedure, is from a reassessment established for the Appellant, in which the Minister of National Revenue (the "Minister") added $35,000 in income from a registered retirement savings plan ("RRSP") to the Appellant's income for the 1999 taxation year, in accordance with subsection 146(10) of the *Income Tax Act* (the "Act"). With this reassessment, the Minister also established the goods and services tax credit and the heating allowance at nil.

Preliminary observations

[2] The Appellant was represented by his accountant, Yvan Tremblay. I note that only Michel Leduc, an investigator for the Canada Customs and Revenue Agency, testified in this case. I also note that the agent for the Appellant admitted that the company 9063-3223 Québec Inc., for which the legal name was Services financiers Mackenzie ("SFM") in 1998 and 1999, never granted a loan to his client, and that the company Fiducie MRS, a trust governed by an RRSP, never used any

property from the Appellant's RRSP as security for a loan or allowed such a use. Once these admissions were made, counsel for the Respondent amended, with my approval, the Reply to the Amended Notice of Appeal to withdraw all charges by the Respondent regarding a loan that was allegedly granted by SFM to the Appellant and the Appellant's RRSP property allegedly used as security for a loan. As a result, counsel for the Respondent amended the Reply to the Amended Notice of Appeal so that it no longer relied on the provisions set out at paragraphs 146(10)(*b*) and (*d*) of the Act.

The facts

[3] In 1998, the Appellant held a locked-in RRSP with the Royal Bank of Canada. On October 25, 1998, the Appellant transferred his RRSP to Fiducie MRS.

[4] On December 1, 1998, the Appellant signed a letter (Exhibit I-1, Tab 1) addressed to Fiducie MRS, pursuant to which he asked them to immediately acquire 34,500 class "B" shares of Les Immeubles R.V. (1986) Inc. ("RV") for $1.00 each, to issue a $34,500 cheque to RV and send it to him. On December 1, 1998, the Appellant signed an offer to purchase shares (Exhibit I-1, Tab 4) addressed to RV, pursuant to which he offered to purchase 34,500 class "B" shares for $1.00 a share. He points out that RV's signature does not appear on this offer. Again on December 1, 1998, the Appellant signed a sale contract (Exhibit I-1, Tab 5), pursuant to which he acquired 34,500 class "B" shares of RV for $1.00 a share. I note that the contract was not signed by RV, the other party to this sale contract. On December 1, 1998, Lucie Lauzon signed a letter (Exhibit I-1, Tab 7) addressed to Fiducie MRS, in which she stated that the shares of RV were a "qualified investment" within the meaning of the Act. On December 1, 1998, the Appellant signed a bond of indemnity (Exhibit I-1, Tab 8) drafted by Fiducie MRS, the relevant part of which states:

> [TRANSLATION]
> In accordance with the terms of the self-directed retirement savings plan number 6043947 and the definition in the trust declaration of the 417-013 type plan, the annuitant hereby claims that the investment of 34,500 shares in Immeubles RV is in accordance with the regulations of the *Income Tax Act (Canada)* and its amendments. The annuitant acknowledges that he ordered MRS to make the payment for the property of the small business before receiving a certificate, and he is the sole person in charge of delivery of the certificate to MRS at the desired time. The annuitant disengages the trustee from all responsibility in case of loss, fees, commissions and expenses of any kind that the

> annuitant or his successors, executors, administrators and dependents may bear or have to pay because of this investment in Immeubles RV, and of all taxes or additional penalties required under the *Income Tax Act (Canada)* or any other applicable tax legislation.

On December 1, 1998, RV issued a share certificate (Exhibit A-3) certifying that Fiducie MRS, trustee for Mario Boily's RRSP #6043947, held 34,500 class "B" shares of RV. I must note that the certificate states the shares are subject to a unanimous shareholder agreement. Moreover, the stub of the share certificate (Exhibit I-1, Tab 6) indicates that the certificate was issued to the Appellant and to Fiducie MRS. This stub shows that the share certificate was delivered to the Appellant on December 1, 1998. Lastly, on December 1, 1998, the Appellant signed RV's unanimous shareholder agreement (Exhibit I-2, Tab 3), which was not signed by Lisette Lalancette, the other party to theagreement.

[5] On January 19, 1999, the Appellant signed a letter addressed to MRS Trust (Exhibit I-1, Tab 9) which stated:

> [TRANSLATION]
> I ask that upon receiving this letter, you send a cheque to Les Immeubles R.V. (1986 inc.) for $34,500.00 to the following address: 1174 Boul. Sacré-Cœur, St-Félicien G8B 2R2. This will be in exchange for share certificates in the company for $34,500.00 of class B shares.
>
> For more information, please contact my agent.
>
> Thank you for your attention to this matter.
>
> Mario Boily
> 915 Robert Jean
> Alma
> G8B 7J6

On January 25, 1999, Fiducie MRS drew a $34,500 cheque payable to RV (Exhibit I-1, Tab 10). On February 3, 1999, the Appellant received an $18,360 cheque (Exhibit I-3, Tab 2) issued by SFM. On or around September 9, 2007, Fiducie MRS sent the Appellant the share certificate representing the 34,500 class "B" shares of RV issued to Fiducie MRS. Lastly, it must be noted that RV was struck off ex officio on August 5, 1999 (Exhibit I-2, Tab 2).

Testimony of Mr. Leduc

[6] Mr. Leduc's testimony and Exhibits I-2, Tab 3; I-2, Tab 4; I-4; I-5; I-6; I-7; I-8 and I-9, submitted to evidence in support of his testimony, shows:

(i) Jacques Gagné and SFM, whose main shareholder was General Ventures Capital Management and whose address at the time was in the Bahamas, and that also had an institution in St. Hubert, were the main artisans and promoters of an RRSP strip scheme that benefited this group and many annuitants including the Appellant. The purpose of this RRSP strip scheme was to allow RRSP annuitants to receive money from their RRSP without any tax consequences;

(ii) SFM allowed $681,400 to be removed from these RRSPs in this way. Mr. Leduc explained that he found deposits in RV bank accounts that came from annuitants' RRSPs totalling $681,400. This amount was paid for alleged subscriptions in RV shares. Mr. Leduc added that for the most part, information came from documents the Minister seized at Mr. Gagné's residence;

(iii) RV issued $659,998 to SFM, close to 97% of the amount RV collected from RRSP annuitants;

(iv) RV did not produce income tax returns for the years following its 1996 taxation year;

(v) RV did not produce financial statements in 1998 and on. I restate that RV was struck off ex officio on May 8, 1999;

(vi) Cheques totalling $355,399 payable to the RRSP annuitants (including a $18,630 cheque payable to the Appellant) were drawn on SFM bank accounts. Mr. Leduc explained that the RRSP annuitants thus received around 54% of the amounts invested in their RRSP tax free (if not for the assessments the Minister subsequently established). Moreover, Mr. Leduc added he did not find any documents showing that $355,399 was paid by SFM to the annuitants of these RRSPs under loans allegedly granted by SFM;

(vii) SFM's income statement to May 31, 1999, does not show any income, only expenses for $48,073, for a loss of $48,073. As for the balance

sheet to that date, its total assets indicated amount to $116,269 and its liabilities, $162,242. The only capital stock indicated is $100. Therefore, there is no trace of the $659,998 RV paid to SFM that would reflect an investment by RV in SFM.

[7] In June 2007, the Court received an Amended Notice of Appeal, which states:

[TRANSLATION]

INFORMAL PROCEDURE
AMENDED NOTICE OF APPEAL-CDN COURT

Upon reading the judgments rendered in Lisette Lalancette and Her Majesty the Queen, and Don Nunn and Her Majesty the Queen, and upon examining the documents requested in our September 26, 2002 letter, we understand it would be difficult to continue supporting the eligibility of the investment in shares of the company Les Immeubles R.V. (1986) Inc (RV) by the Compagnie de Fiducie MRS in 1999.

However, one question has yet to be answered, and that is the way Mr. Boily is to deal with his loss fiscally, which we shall call "commission paid to the facilitator," following a transfer by the annuitant of funds held in a locked-in retirement savings plan to use as security for a benefit/loan from Service financiers Mackenzie (SFM).

The documents regarding the "strategy" clearly show that the $34,500 transferred from MRS to RV was deposited to RV's bank account and then transferred entirely to SFM. A cheque for $18,630 was then given to Mr. Boily by SFM.

The share certificate representing $34,500 given as compensation to MRS thus had a zero value as soon as it was received by MRS because RV was an inactive business, RV had no assets that would justify a $1/share worth, the $34,500 was not retained by RV but was returned in its entirety to SFM for which there was no account receivable, RV’s minutes do not make any mention of issuing these shares, etc… Paragraphs 12 and 13 of Mr. Archambault's judgment are ample evidence of the preceding and the intent was never to make the funds grow by purchasing a viable investment; this was not the purpose.

In our opinion, the disbursement of the $34,500 was indirectly carried out to get $18,630 for a "commission" of $15,670 and not for the purchase of an investment, whether admissible or not. Because the $34,500 was used as security, it is automatically deregistered, the trust ceases to exist and Mr. Boily must include the $34,500 in his income for 1999.

> Since the funds were not used to purchase a non-allowable investment, subsection 146(10) does not apply. It would be subsection 146(7) that should apply, and Mr. Boily, according to this provision, must be allowed to reduce the additional income of $34,500 by $15,670 as a loss regarding the security provided to SFM or as "commission paid to the facilitator."
>
> We therefore ask the Tax Court of Canada to rule on the eligibility of the reduction of $15,670 from the income of $34,500 in 1999.

At the end of April 1997, the Court received another Amended Notice of Appeal, which states:

> [TRANSLATION]
> INFORMAL PROCEDURE
> AMENDED NOTICE OF APPEAL-AMENDED-TAX COURT CDA
>
> NOTE TO READER: Read this notice as if the entire text was underlined to indicate the changes in relation to the Amended Notice of Appeal dated April 17, 2007.
>
> The purchase of 34,500 B shares in Les immeubles R.V. (1986) Inc (RV) by the Compagnie de fiducie MRS (MRS), trustee of the annuitant Mario Boily's locked-in/self-directed RRSP and the $18,630 loan granted to Mario Boily by Services financiers Mackenzie (SFM) are two transactions that must be analyzed separately.

First, at Mario Boily's request, MRS acquired 34,500 B shares of RV at $1 each. The share certificate is numbered B017 and was issued by RV on December 1, 1998. The annuitant acknowledged receipt and sent the certificate to MRS through his investment advisor. On January 25, 1999, MRS addressed a $34,500 cheque to RV for full payment of the certificates. The share certificate is still being held by MRS according to the December 2006 statement of account, but has not been subject to any annual trust fees since 2002.

Following receipt of the cheque from MRS, RV invested the entire amount of its sale of B shares, $34,500, in some investment fund with SFM. The accounting records in the RV books might state:

		$	$
Cash		34,500	
	Capital- B stock		34,500
Investment with SFM		34,500	
Cash			34,500

and the accounting records in the SFM books might be:

Cash		34,500	
	Funds held in trust for RV		34,500

Aside from the fact that the investment was disallowed for the purposes of a locked-in/self-directed RRSP, the accounting entries above, which should normally have appeared in RV and SFM's books, show a normal situation and no income results from these transactions. Therefore, the annuitant did not have a loss, as we claimed earlier.

Second, SFM granted an $18,630 loan to Mario Boily on February 3, 1999, in the course of regular activities as the financial intermediary for RV. The loan appears to have been granted interest-free and with no repayment schedule or security; we have nothing in our possession to state the contrary.

The letter addressed to Mario Boily by the Canada Customs and Revenue Agency (CCRA) on August 2, 2002, includes the following reason for including the $34,500 in the 1999 income: [TRANSLATION] "…to the extent that this loan exists, that the property of your RRSP was security on a loan."

As previously stated, RV could invest the proceeds of the sale of B shares as it saw fit, even if the CRA considered the funds held in a locked-in/self-directed RRSP used to acquire an investment in RV were security for the loan granted to Mario Boily.

We also know that the certificate for the B017 shares is still being held by MRS to this date, and as a result, Mario Boily did not transfer this certificate to SFM; the space provided for this purpose was not filled in and MRS did not send Mario Boily a T4RSP in 1999. Therefore, the B shares certificate held in Mario Boily's locked-in/self-directed RRSP was not used as security for the loan granted by SFM since it was attributed during SFM's regular activities. The only reason Mario Boily must include $34,500 in additional income in his 1999 income is because the funds from the locked-in/self-directed RRSP were used to acquire an investment found to be inadmissible, and not because the B shares certificate was used to guarantee a loan.

Originally, the locked-in/self-directed RRSP was for $34,986.35 according to MRS's December 1999 statement of accounts. The account was composed of an investment in RV ($34,500) and cash ($486.35). Over the years, the annuitant withdrew annual trust fees of $187.25 from this account, meaning that as early as 2002, the cash was completely depleted, leaving only the investment in RV. In January 2004, the MRS's statement of accounts showed only a devaluation of the investment in RV at zero.

It is reasonable to believe that the trust governing the account in question ceased to exist in 2002 when the cash was completely used up to pay for the annual trustee fees. In our opinion, this is not the case for the trust governing the investment in RV. We claim that the trust governing the investment in RV ceased to exist as soon as the investment became inadmissible in 1999, leading to its deregistration and the annuitant's being taxed.

From the time the investment became inadmissible, the annuitant was to pay tax on the $34,500 according to subsection 146(10) ITA and remove his locked-in/self-directed RRSP from his inadmissible investment himself. According to subsection 146(7) ITA, Mario Boily could have returned the proceeds of disposition of his investment in RV and gotten a tax credit for the same amount. However, since these were shares in a small business, there was no market available for transactions, and RV was insolvent, Mario Boily was not able to sell these B shares.

We therefore consider the investment deregistered in 1999 as income to that date, a business investment eligible for the deduction of a loss in that respect under the election set out at subsection 50(1) ITA. Under thiselection, the 34,5000 [*sic*] B shares of RV are deemed to have been sold for nil proceeds of disposition, that the small business was insolvent at the end of the taxation year, and that neither the company nor a company it controlled was operating a business. A letter signed by Mario Boily, attached to this Amended Amended Notice of Appeal, confirms the election set out in subsection 50(1) ITA.

In conclusion, we ask the Tax Court of Canada to make a ruling on the admissibility of the part of the $34,500 that, under subsection 50(1), is recognized

> as a deductible loss as an allowable business investment loss (ABIL) in 1999. Should this be recognized by the Court, we ask that this ABIL be applied in its entirety against the additional income for 1999.

[8] During his submissions, the Agent for the Appellant restated part of the arguments raised in the two Amended Notices of Appeal and also relied on the application of subsection 146(12) of the Act. As we can see, the Appellant's position may have changed over time. Without knowing what side the Agent was on at the time of his submissions, I will address the arguments presented by the Appellant in his two Amended Notices of Appeal and the additional arguments raised by the Agent for the Appellant during his submissions. Lastly, I will address paragraphs 146(10)(*b*) and (*d*) and subsection 146(7) of the Act even if the Agent for the Appellant admitted that SFM did not loan his client $18,630.

Analysis and conclusion

[9] The relevant provisions of section 146 of the Act state:

> **146(1) "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,
>
> (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,
>
> (c.1) a contract for an annuity issued by a licensed annuities provider where
>
> (i) the trust is the only person who, disregarding any subsequent transfer of the contract by the trust, is or may become entitled to any annuity payments under the contract, and

(ii) the holder of the contract has a right to surrender the contract at any time for an amount that would, if reasonable sales and administration charges were ignored, approximate the value of funds that could otherwise be applied to fund future periodic payments under the contract,

(c.2) a contract for an annuity issued by a licensed annuities provider where

(i) annual or more frequent periodic payments are or may be made under the contract to the holder of the contract,

(ii) the trust is the only person who, disregarding any subsequent transfer of the contract by the trust, is or may become entitled to any annuity payments under the contract,

(iii) neither the time nor the amount of any payment under the contract may vary because of the length of any life, other than the life of the annuitant under the plan (in this definition referred to as the "RRSP annuitant"),

(iv) the day on which the periodic payments began or are to begin (in this paragraph referred to as the "start date") is not later than the end of the year in which the RRSP annuitant attains 70 years of age,

(v) either

(A) the periodic payments are payable for the life of the RRSP annuitant and either there is no guaranteed period under the contract or there is a guaranteed period that begins at the start date and does not exceed a term equal to 90 years minus the lesser of
(I) the age in whole years at the start date of the RRSP annuitant (determined on the assumption that the RRSP annuitant is alive at the start date), and

(II) the age in whole years at the start date of a spouse or common-law partner of the RRSP annuitant (determined on the assumption that a spouse or common-law partner of the RRSP annuitant at the time the contract was acquired is a spouse or common-law partner of the RRSP annuitant at the start date), or

(B) the periodic payments are payable for a term equal to

(I) 90 years minus the age described in subclause 146(1) "qualified investment" (c.2)(v)(A)(I), or

(II) 90 years minus the age described in subclause 146(1) "qualified investment" (c.2)(v)(A)(II), and

(vi) the periodic payments

(A) are equal, or

(B) are not equal solely because of one or more adjustments that would, if the contract were an annuity under a retirement savings plan, be in accordance with subparagraphs 146(3)(b)(iii) to 146(3)(b)(v) or that arise because of a uniform reduction in the entitlement to the periodic payments as a consequence of a partial surrender of rights to the periodic payments, and

(d) such other investments as may be prescribed by regulations of the Governor in Council made on the recommendation of the Minister of Finance;

146(1) **"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.

Regulation 4900(6) **[Small business investment]** -- Subject to subsections (8) and (9), 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 and paragraph (c) of the definition "qualified investment" in subsection 146.3(1) of the Act, a property is prescribed as a qualified investment for a trust governed by a registered retirement savings plan, a registered education savings plan and a registered retirement income fund at any time if at that time the property is

(a) a share of the capital stock of an eligible corporation (within the meaning assigned by subsection 5100(1)), unless a person who is an annuitant, a beneficiary or a subscriber under the plan or fund is a designated shareholder of the corporation;

…

4900(12) **[Small business corporation]** -- 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 and paragraph (c) of the definition "qualified investment" in subsection 146.3(1) of the Act, a property is prescribed as a qualified investment for a trust governed by a registered

retirement savings plan, a registered education savings plan or a registered retirement income fund at any time if, at the time the property was acquired by the trust,

(a) the property was a share of the capital stock of a corporation (other than a cooperative corporation) that would, at that time or at the end of the last taxation year of the corporation ending before that time, be a small business corporation if the expression "Canadian-controlled private corporation" in the definition "small business corporation" in subsection 248(1) of the Act were read as "Canadian corporation (other than a corporation controlled at that time, directly or indirectly in any manner whatever, by one or more non-resident persons)",

...

and, immediately after the time the property was acquired by the trust, each person who is an annuitant, a beneficiary or a subscriber under the plan or fund at that time was not a connected shareholder of the corporation.

5100(1) **"qualifying active business"**, at any time, means any business carried on primarily in Canada by a corporation, but does not include

(a) a business (other than a business of leasing property other than real property) the principal purpose of which is to derive income from property (including interest, dividends, rent and royalties),

...

5100(1) "eligible corporation", at any time, means

(a) a particular corporation that is a taxable Canadian corporation all or substantially all of the property of which is at that time

(i) used in a qualifying active business carried on by the particular corporation or by a corporation controlled by it,

(ii) shares of the capital stock of one or more eligible corporations that are related to the particular corporation, or debt obligations issued by those eligible corporations, or

(iii) any combination of the properties described in subparagraphs (i) and (ii),

…

146(6) Disposition of non-qualified investment -- 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 respect of the acquisition of that property, and

(b) the proceeds of disposition of the property.

146(7) Recovery of property used as security – Where in a taxation year a loan, for which a trust governed by a registered retirement savings plan has used or permitted to be used trust property as security, ceases to be extant, and the fair market value of the property so used was included by virtue of subsection 146(10) in computing the income of the taxpayer who is the annuitant under the plan, there may be deducted, in computing the income of the taxpayer for the taxation year, an amount equal to the amount, if any, remaining when

(a) the net loss (exclusive of payments by the trust as or on account of interest) sustained by the trust in consequence of its using the property, or permitting it to be used, as security for the loan and not as a result of a change in the fair market value of the property

is deducted from

(b) the amount so included in computing the income of the taxpayer in consequence of the trust's using the property, or permitting it to be used, as security for the loan.

146(9) Where disposition of property by trust – Where in a taxation year a trust governed by a registered retirement savings plan

(a) disposes of property for a consideration less than the fair market value of the property at the time of the disposition, or for no consideration, or

(b) acquires property for a consideration greater than the fair market value of the property at the time of the acquisition,

the difference between the fair market value and the consideration, if any, shall be included in computing the income for the taxation year of the annuitant under the plan.

146(10) Where acquisition of non-qualified investment by trust – 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,

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.

146(12) Change in plan after registration – Where, on any day after a retirement savings plan has been accepted by the Minister for registration for the purposes of this Act, the plan is revised or amended or a new plan is substituted for it, and the plan as revised or amended or the new plan, as the case may be (in this subsection referred to as the "amended plan"), does not comply with the requirements of this section for its acceptance by the Minister for registration for the purposes of this Act, subject to subsection 146(13.1), the following rules apply:

(a) the amended plan shall be deemed, for the purposes of this Act, not to be a registered retirement savings plan; and

(b) the taxpayer who was the annuitant under the plan before it became an amended plan shall, in computing the taxpayer's income for the taxation year that includes that day, include as income

> received at that time an amount equal to the fair market value of all the property of the plan immediately before that time.

[10] First, in light of the evidence, I find that by subscribing to 34,500 class "B" shares of RV, Fiducie MRS (a trust governed by an RRSP) acquired a non-qualified investment as defined under subsection 146(1) of the Act. In fact, the evidence showed beyond any doubt that RV did not operate a business and that it did not hold any interest in a company operating a business or any debt instrument issued by such a company.

[11] Paragraphs 146(10)(*a*) and (*c*) of the Act set out that if, in a given taxation year, a trust governed by an RRSP acquires a non-qualified investment, the annuitant of that RRSP must include the fair market value (FMV) at the time of acquisition of the non-qualified investment in his or her income for that year. Therefore, the Appellant was to include the FMV of the 34,500 class "B" shares at the time of their acquisition in the calculation of his income. We will return to the issue of whether these shares were acquired in 1998 or 1990 later.

[12] What was the FMV of the 34,500 class "B" shares of RV at the time they were acquired by Fiducie MRS? In its Response to the Amended Notice of Appeal, the Respondent claims that the shares were acquired in 1999 and their FMV was $34,500 at the time they were acquired. I note that the Appellant's evidence regarding the FMV of these shares was non-existent. As a result, I find that the FMV of these shares at the time they were acquired was $34,500. At any rate, I must state that the provisions set out at subsection 146(9) of the Act make any discussion about the FMV of the shares at the time they were acquired theoretical, for all intents and purposes. Subsection 146(9) of the Act states that if a trust governed by an RRSP disposes of property in a given year in exchange for a consideration with a value inferior to the FMV of this property at the time of the disposition or for no consideration, any difference between this FMV and the consideration must be included in the calculation of that year's income for the annuitant beneficiary of the RRSP. If the FMV of the 34,500 class "B" shares was nil at the time of their acquisition, the $34,500 should still be included in the Appellant's income calculation for the taxation year in which they were acquired, not in accordance with paragraphs 146(10)(*a*) and (*c*) of the Act, but rather in accordance with subsection 146(9) of the Act.

[13] However, when, in a given taxation year, a trust governed by an RRSP disposes of property that was a non-qualified investment at the time it was

acquired, subsection 146(6) of the Act sets out that in calculating the income for that taxation year, the annuitant can deduct the lower of the proceeds of disposition of property or the amount that, under subsection 146(10), was included in the calculation of the annuitant's income regarding the acquisition of this non-qualified investment. Did Fiducie MRS dispose of the 34,500 class "B" shares of RV? In this case, the evidence shows that, in 2007, Fiducie MRS gave the Appellant the share certificate issued by RV on December 1, 1998, stating that Fiducie MRS held 34,500 class "B" shares of RV. The evidence also showed that RV was struck off ex officio on May 8, 1999. The questions to ask now are: did issuing the share certificate in 2007 constitute a disposition in 2007, and if we allow that a person can dispose of and acquire shares in a company that does not have a legal existence, what were the proceeds of disposition for Fiducie MRS and the acquisition price for the Appellant? In my opinion, issuing a share certificate in 2007 does not constitute a disposition in this case. Moreover, if I erroneously found that issuing a certificate in 2007 did not constitute a disposition, it would still hold true that the proceeds of disposition and the acquisition price for the Appellant were nil in this case and the Appellant could therefore not deduct any amount as a loss in the calculation of his income under subsection 146(6) of the Act.

[14] The agent for the Appellant also claimed that subsection 146(7) of the Act applied in this case. I feel that subsection 146(7) of the Act does not apply in this case because the Appellant did not show that a loan existed, that Fiducie MRS used or allow to be used the 34,500 class "B" shares of RV as security for a loan and that the loan ceased to exist. I will restate that, at the hearing, the Agent for the Appellant admitted that SFM did not grant a loan to the Appellant and that Fiducie MRS did not give the 34,500 class "B" shares to RV as security for the repayment of a loan.

[15] Lastly, the Agent for the Appellant claimed that, because of the acquisition of a non-qualified investment by Fiducie MRS, the RRSP no longer met the registration conditions set out at section 146 of the Act. He claimed that in such a case, under subsection 146(12) of the Act:

(i) the plan is no longer considered an RRSP. The Agent for the Appellant explained that, from that time on, all the property of the RRSP is considered to have been subject to a disposition in exchange for consideration equal to its FMV and the annuitant is therefore deemed to have acquired it at a cost equal to its FMV at the time. As a result, the Agent for the Appellant claimed that his client was deemed to have acquired the 34,500 class "B"

shares of RV at a cost of $34,500, the FMV of the shares at the time the plan ceased to be an RRSP;

(ii) the annuitant must add an amount equal to the FMV of all the property in the plan immediately before the plan is no longer considered to be an RRSP to his income for the year the plan is no longer considered to be an RRSP.

[16] The Agent for the Appellant claimed that his client could deduct a business investment loss because RV is insolvent, no longer operates a company and was struck off ex officio.

[17] In my opinion, the reasoning by the Agent for the Appellant in terms of applying subsection 146(12) of the Act to this case is not valid. Paragraphs 146(10)(*a*) and (*c*) of the Act apply when a trust governed by an RRSP acquires a non-qualified investment and subsection 146(6) of the Act applies when that trust disposes of that non-qualified investment.

[18] Lastly, in light of *Nunn*,[1] I do not see how I could find that a mock document existed and, therefore, it is not appropriate in this case to apply subsection 146(10) of the Act; rather, subsection 146(8) of the Act should apply and the actual amount received from the Appellant's RRSP, $18,630, should be added to his income.

[19] To summarize, I feel that by subscribing to 34,500 class "B" shares of RV, Fiducie MRS acquired a non-qualified investment with an FMV of $34,500 at the time of subscription, and that the Appellant should have added $34,500 to his income for the taxation year the shares were so acquired, in accordance with paragraphs 146(10)(*a*) and (*c*) of the Act. I also feel that, in this case, the Appellant could not and will not be able to deduct any loss whatsoever from his income with regard to these shares.

[20] However, one question remains: did Fiducie MRS acquire the 34,500 class "B" shares of RV in 1998 or in 1999? This question seems important to me because, if I find that they were acquired in 1998, I will have no other choice but to allow the appeal.

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[1] *Nunn v. Canada*, 2006 FCA No. 1852.

[21] In my opinion, the date the shares in RV were acquired by Fiducie MRS must be re-examined in light of the corporate law that applies in this case. Martel defines the contract to purchase shares as[2]:

> [TRANSLATION]
> A contract consisting of a commitment by a person to acquire shares in a company (called subscription) and the acceptance of this commitment by the company (called issuance and distribution) delivered to this person.

[22] Therefore, for shares to have been acquired, three elements must be present. The first element of an acquisition contract is the offer by a person to acquire shares in the company. The offer may be made orally or in writing. The second element is the issuance of the shares subject to the subscription. This second element is generally simultaneous to the conclusion of the first, with directors proceeding with the issuance and distribution of the shares at the same time they decide to accept a subscription. Issuance means that the shares are taken from the capital stock to be given to someone. Distribution means the shares issued are assigned and granted to persons. It must be noted that the subscriber can ask that those shares be distributed to another person. Moreover, there is a distinction between the issuance of shares and the issuance of share certificates. Also, the company's board of directors usually carries out the issuance and distribution of shares, whether the certificates are issued or not. However, a subscriber or the person to whom the shares are distributed, accordingly, does not become the owner of the shares unless that person is advised of the issuance. I would add that once the shares are issued and the subscriber or the person to whom the shares are distributed is advised of the issuance, they become the property of the subscriber or the person, regardless of whether the subscriber or person has paid for them.

[23] The first question to ask in this case is: who was the subscriber, or in other words, who made the offer to purchase the shares in RV? The December 1, 1998, letter (Exhibit I-1, Tab 1) and the issuance of the share certificate (Exhibit A-3) attesting that on December 1, 1998, Fiducie MRS held 34,500 class "B" shares, without more compelling evidence, lead me to believe that the subscriber was Fiducie MRS. The issuance of the share certificate also leads me to believe, without more compelling evidence, that the offer by Fiducie MRS to purchase shares was accepted by RV on December 1, 1998. However, counsel for the Respondent claimed that Fiducie MRS did not become the owner of the shares in 1998 because there is nothing in the evidence submitted indicating that Fiducie MRS was advised of such an issuance in 1998. Counsel for the Respondent claimed that a subscriber does not become the owner of the shares even if the offer

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[2] *Précis de droit sur les compagnies au Québec*, Edition 2000, Paul Martel, Wilson & Lafleur.

was accepted by the company unless and until the subscriber is advised that there was issuance, meaning the purchase offer was accepted. Counsel for the Respondent claimed that the only evidence submitted showing that Fiducie MRS was advised there had been issuance of the 34,500 class "B" shares of RV and that RV had accepted its offer to purchase shares was when RV collected the price of the subscribed shares by Fiducie MRS in 1999. As a result, I find that Fiducie MRS acquired a non-qualified investment in 1999, in this case, 34,500 class "B" shares in RV, for which the FMV at the time of acquisition was $34,500 and, therefore, the Appellant must add $34,500 to his income for the 1999 taxation year in accordance with paragraphs 146(10)(*a*) and (*c*) of the Act.

[24] For all these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 21st day of January 2008.

"Paul Bédard"

Bédard J.

Translation certified true
on this 17th day of June 2008.

Elizabeth Tan, Translator

CITATION:	2007TCC603
COURT FILE No.:	2005-96(IT)I
STYLE OF CAUSE:	Mario Boily and Her Majesty the Queen
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	September 7, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	January 21, 2008

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