

Docket: 2018-1782(IT)G

BETWEEN:

JONATHAN DUHAMEL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 1, 2, 3, 4, 5, 22, 23, 24, 25 and 26, 2021,
at Montreal, Quebec and on December 14, 2021, at Ottawa, Canada

Presiding: The Honourable Justice Dominique Lafleur

Appearances:

Counsel for the
appellant:

Yves Ouellette
Guy Régimbald
Tristan Joanette

Counsel for the
respondent:

Grégoire Cadieux
Sonia Bédard
Julien Wohlhuter (November 22 and 23, 2021)

JUDGMENT

In accordance with the attached reasons, appeals from reassessments made under the *Income Tax Act* (the Act) for the 2010, 2011 and 2012 taxation years are allowed, with costs to the appellant, and the reassessments are referred to the Minister of National Revenue for reconsideration and reassessment on the understanding that the net earnings from Mr. Duhamel's poker gambling activities should not be included in computing his income under sections 3 and 9 of the Act for the 2010, 2011 and 2012 taxation years.

The parties have until July 22, 2022, to reach an agreement on costs. If an agreement is not reached within this period, the parties must file their written submissions of no more than 10 pages with the Court no later than August 26, 2022.

Signed at Montreal, Quebec, this 21st day of June 2022.

“Dominique Lafleur”

Lafleur J.

Translation certified true
on this 19th day of January 2024.
François Brunet, Revisor

Citation: 2022 TCC 66
Date: 20220621
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REASONS FOR JUDGMENT

Lafleur J.

I. BACKGROUND

[1] The appellant, Jonathan Duhamel, won the No-Limit Texas Hold'em Poker Tournament at the World Series of Poker (WSOP) Main Event held in Las Vegas in July and November 2010, pocketing millions of dollars, when he was 23 years old. Mr. Duhamel was crowned poker world champion. Over the next several years, Mr. Duhamel continued to play poker and make net gains from his poker gambling activities.

[2] Following Mr. Duhamel's victory in the WSOP Main Event, Rational Entertainment Enterprises Limited, doing business as PokerStars (PokerStars), entered into an agreement (the PokerStars Agreement) under which it agreed to pay US\$1 million to Jonathan Duhamel Consulting Inc. (JD Co.) incorporated by Mr. Duhamel in October 2010. As consideration for payment of this amount to JD Co., Mr. Duhamel agreed to act as a spokesperson for PokerStars and participate in promotional events as well as a number of online and in-person tournaments. This sponsorship agreement was renewed annually until 2015, for smaller amounts paid by PokerStars.

[3] The Minister of National Revenue (the Minister) concluded that Mr. Duhamel was carrying on a business through his poker gambling activities and issued notices

of reassessment under the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) (the Act). Therefore, the Minister added the following amounts as business income in computing Mr. Duhamel's income, for the 2010, 2011 and 2012 taxation years: \$4,867,138, \$568,017 and \$849,788, respectively. According to the Minister, these amounts reflected the net gains from the poker tournaments in which Mr. Duhamel participated during the years at issue.

[4] At the beginning of the hearing, the parties filed a consent to judgment dated November 1, 2021, pursuant to which they agreed to the amount of net poker gains earned by Mr. Duhamel during the taxation years at issue, i.e., \$4,866,117 for the 2010 taxation year; \$383,916 for 2011 and \$106,775 for 2012. The amount of net poker gains is not at issue before the Court. The parties therefore agreed that if the Court found that Mr. Duhamel's poker gambling activities constituted a source of business income for the purposes of the Act, then, in computing his income, he must include the net gains derived from poker gambling activities as indicated in the consent to judgment.

[5] Mr. Duhamel testified at the hearing, as did his accountant and the Canada Revenue Agency auditor responsible for auditing Mr. Duhamel's records. The respondent called journalists as well as a friend of Mr. Duhamel to testify.

[6] The parties also called experts to testify on whether No-Limit Texas Hold'em poker is a game of chance or skill.

[7] The expert called by the appellant was Professor Matthieu Dufour, PhD (Mathematics), ASA (Associate of the Society of Actuaries) and professor of actuarial science in the Department of Mathematics at the Université du Québec à Montréal (Mr. Dufour). The Court recognized Mr. Dufour as an expert in mathematics, actuarial science and game theory.

[8] The expert called by the respondent was Randal D. Heeb, PhD (Economics), a consulting economist and partner at Bates White LLC, an economic consulting firm. The Court recognized Mr. Heeb as an expert in economics and game theory.

[9] In these reasons, when the Court refers to poker, it is referring to No-Limit Texas Hold'em poker. Also, any statutory provision referred to in these reasons is a provision of the Act.

II. ISSUE

[10] The sole issue before the Court is whether the net gains from Mr. Duhamel's poker gambling activities should be included as business income in computing his income under sections 3 and 9, for the 2010, 2011 and 2012 taxation years.

[11] As noted above, the amount of net gains from Mr. Duhamel's poker gambling activities is not at issue before the Court. Also, JD Co.'s earnings, including amounts paid by PokerStars under the PokerStars Agreement, as well as amounts paid by JD Co. to Mr. Duhamel as dividends or otherwise, are not in dispute before the Court.

III. POSITIONS OF THE PARTIES

3.1 Appellant

[12] According to the appellant, since poker is a game of chance, gains from poker gambling activities are not taxable under the Act because a business was not being carried on, even if it had been demonstrated that Mr. Duhamel had a serious business plan and was using strategies to minimize his risks. The Court does not have to determine whether chance prevails over skill in poker. It simply needs to establish that there is an element of chance in poker.

[13] In addition, while the Court finds that poker gambling activities may constitute the carrying on of a business despite the element of chance inherent in this game, playing poker was a hobby and a leisure activity for Mr. Duhamel. Thus, Mr. Duhamel's gains from this game should not be taxed as income from carrying on a business.

[14] In such a case, given the factors propounded by the Supreme Court of Canada in *Stewart v. Canada*, 2002 SCC 46 (*Stewart*), as well as the principles flowing from *Cohen v. The Queen*, 2011 TCC 262 (*Cohen*), *Luprypa v. The Queen*, [1997] 3 CTC 2363, [1997] TCJ No. 469 (TCC) (*Luprypa*), *Leblanc v. The Queen*, 2006 TCC 680 (*Leblanc*) and *Radonjic v. Canada (Revenue Agency)*, 2013 FC 916 (*Radonjic*), gains from Mr. Duhamel's poker gambling activities should only be considered business income if his predominant intention was to make a profit from this activity and that this activity was carried out in accordance with objective standards of businesslike behaviour.

[15] According to the appellant, an examination of these factors indicates that Mr. Duhamel was not carrying on a business by engaging in poker gambling activities. He had no training in this game. He did not have a plan and had not devised

a system for beating the odds in poker. He did not use any particular strategy and did not have any insider information allowing him to win and thus beat the odds at poker. He did not devise a system for skewing the odds or minimizing risk. In addition, engaging in this type of gambling activity does not give rise to any expectation of profit in the medium or long term.

[16] Thus, according to the appellant, net gains from Mr. Duhamel's poker gambling activities should not be included in the computation of his income for the purposes of the Act.

3.2 Respondent

[17] According to the respondent, the two-stage approach described by the Supreme Court of Canada in *Stewart* should be used to determine whether Mr. Duhamel carried on a business by engaging in poker gambling activities during the years at issue.

[18] According to the respondent, an examination of factors propounded in *Stewart* indicates that Mr. Duhamel was carrying on a poker gambling business during the years at issue. The *Stewart* intention test must be based on objective factors, namely objective standards of businesslike behaviour. The Court must also come to this conclusion even if it were to hold that poker is not a game of skill but a game in which chance prevails over skill.

[19] Thus, according to the respondent, the evidence indicates that Mr. Duhamel used strategies to minimize his risks and implemented strategies to improve his technique, in particular by studying how his opponents played. Furthermore, based on the evidence, there is a reasonable expectation of profit from poker gambling activities because skill can affect poker gambling outcomes. The issue of whether poker is a game of chance or a game of skill is relevant in considering this factor. Although the respondent also acknowledged that chance played a decisive role in Mr. Duhamel's victory in the 2010 WSOP Main Event tournament, the issue of the impact of chance and skill in poker must nevertheless be examined over a long period. According to Mr. Heeb, it is true that chance prevails in the first few hands of poker, but in the long run, skill prevails over chance.

[20] The respondent also submits that when examining the issue, the Court must consider financial motivation from another source related to gambling activities. The respondent argues that the Court must therefore consider Mr. Duhamel's financial

motivation from the sponsorship revenue paid by PokerStars to JD Co. under the PokerStars Agreement.

[21] Other factors akin to objective standards of businesslike behaviour must also be taken into account. These include the existence of records, retaining the services of an agent to negotiate sponsorship contracts, drafting profit-sharing agreements following Mr. Duhamel's qualification for the final table of the WSOP Main Event and the profitability analysis of the online poker gambling business conducted after the PokerStars Agreement ended in 2015.

[22] The respondent maintained that Mr. Duhamel's poker gambling activities went well beyond mere entertainment. They constituted a concern in the nature of trade corresponding to the concept of an undertaking, particularly following the termination of the PokerStars Agreement pursuant to which Mr. Duhamel was required to participate in many tournaments in order to ensure that his corporation made money.

[23] According to the respondent, all these factors indicate that Mr. Duhamel carried on a poker gambling business during the years at issue. Thus, according to the respondent, the net gains from Mr. Duhamel's poker gambling activities should be included as business income in computing his taxable income for the years at issue.

IV. THE ACT AND APPLICABLE LAW

[24] Subsection 3(a) provides that, in computing their income, taxpayers must include income from a source inside or outside Canada, including income from a business. Subsection 9(1) provides that a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year. Also, subsection 248(1) provides that the word "business" includes any concern in the nature of trade.

The relevant provisions of the Act read as follows:

3 The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:	3 Pour déterminer le revenu d'un contribuable pour une année d'imposition, pour l'application de la présente partie, les calculs suivants sont à effectuer :
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(a) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property.

[Emphasis added]

9 (1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.

[Emphasis added]

248(1) *business*

Includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(c), section 54.2, subsection 95(1) and paragraph 110.6(14)(f), an adventure or concern in the nature of trade but does not include an office or employment. (*commerce*)

[Emphasis added]

a) le calcul du total des sommes qui constituent chacune le revenu du contribuable pour l'année (autre qu'un gain en capital imposable résultant de la disposition d'un bien) dont la source se situe au Canada ou à l'étranger, y compris, sans que soit limitée la portée générale de ce qui précède, le revenu tiré de chaque charge, emploi, entreprise et bien;

[Non souligné dans l'original]

9(1) Sous réserve des autres dispositions de la présente partie, le revenu qu'un contribuable tire d'une entreprise ou d'un bien pour une année d'imposition est le bénéfice qu'il en tire pour cette année.

[Non souligné dans l'original]

248(1) *entreprise*

Sont compris parmi les entreprises les professions, métiers, commerces, industries ou activités de quelque genre que ce soit et, sauf pour l'application de l'alinéa 18(2)c), de l'article 54.2, du paragraphe 95(1) et de l'alinéa 110.6(14)f), les projets comportant un risque ou les affaires de caractère commercial, à l'exclusion toutefois d'une charge ou d'un emploi. (*business*)

[Non souligné dans l'original]

[25] Whether poker is a game of chance or skill, or a game in which either chance or skill prevails, net gains from poker gambling activities will be included in computing Mr. Duhamel's income, if such activities constitute a source of business income for the purposes of the Act.

[26] In *Stewart*, the Supreme Court of Canada set out the general principles for determining whether a taxpayer's activities constituted a source of business or

property income for the purposes of the Act. The Court set out a two-stage approach for making this determination (*Stewart*, paragraph 50):

- 1- Is the activity of the taxpayer undertaken in pursuit of profit, or is it a personal endeavour?
- 2- If it is not a personal endeavour, is the source of the income a business or property?

[27] In this case, since the issue is whether Mr. Duhamel's net gains from poker gambling activities constitute a source of income that is a business for the purposes of the Act, the second approach is not relevant.

[28] The purpose of the first approach is to distinguish between a taxpayer's commercial and personal activities. It should be analyzed only in cases where the activities at issue involve a personal or hobby element (*Stewart*, paragraphs 54 to 55), such as poker gambling activities. In such a case, the first stage of the test was restated as follows: (*Stewart*, paragraph 54):

“Does the taxpayer intend to carry on an activity for profit and is there evidence to support that intention?”

[29] Ascertaining the intention to make a profit is both subjective and objective: first, the Court must determine whether the taxpayer's predominant subjective intention is to make a profit. Secondly, it must determine whether this intention is corroborated by a variety of commercial factors (*Stewart*, paragraph 54).

[30] Indeed, a venture undertaken in a sufficiently commercial manner constitutes a source of income for the purposes of the Act. (*Stewart*, paragraph 52). To find that there is a source of income, the evidence must show that the activity at issue was carried out in accordance with objective standards of businesslike behaviour. The Court must make an overall assessment of whether the taxpayer is carrying on the activity in a commercial manner. Its role here is not to assess the taxpayer's business acumen (*Stewart*, paragraph 55).

[31] To support the taxpayer's subjective intention to make a profit, the following objective factors propounded by the Supreme Court of Canada in *Moldowan v. The Queen*, [1978] 1 SCR 480 (page 486) (*Moldowan*), were cited in *Stewart* (at paragraph 55):

- the profit and loss experience in past years;
- the taxpayer's training;

- the taxpayer's intended course of action; and
- the capability of the venture to show a profit.

[32] However, this list of factors is not exhaustive. These factors may differ with the nature and extent of the activities at issue. Also, the years at issue as well as subsequent years may be considered in examining these factors (see *Moldowan*, pages 483 to 484).

[33] The Supreme Court of Canada specified that one of the factors to be considered in determining whether activities have been carried out in accordance with objective standards of businesslike behaviour is the reasonable expectation of profit. However, this factor was not conclusive in the analysis (*Stewart*, at paragraph 55).

[34] More recently, the Federal Court of Appeal held that the factors propounded in *Stewart* were indeed relevant in determining the deductibility of gambling losses and expenses incurred by the taxpayer in connection with his gambling activities (which included horse racing, slots, casinos and lotteries). Such was the approach taken by our Court at first instance (*Tarascio v. The Queen*, 2012 FCA 30 (*Tarascio*). According to the Federal Court of Appeal, the trial judge applied the appropriate legal test by determining whether the activity “was conducted in a sufficiently commercial manner, that is, with the subjective intention of making a profit and objective evidence of business-like behaviour” (*Tarascio*, at paragraph 3).

[35] However, given the nature of gambling activities, such as poker, the intention to make a profit is not a determining factor in the examination of the commerciality of this type of activity because all players are motivated by the pursuit of profit.¹

[36] Hence, the case law has developed additional factors that must be considered to determine whether gambling activities are carried on in a sufficiently commercial manner to constitute a source of income for the purposes of the Act.

¹ *Balanko v. M.N.R.*, [1981] CTC 2977, 1981 CarswellNat 436 (Tax Review Board) (*Balanko*), at paragraph 9 (affirmed on appeal in *The Queen v. Balanko*, [1988] 1 CTC 317, 1988 CarswellNat 282 (Federal Court Trial Division), at paragraph 16; *Leblanc*, at paragraph 36.

[37] First, the management or minimization of risk must be examined to answer the question at hand. Indeed, this factor characterizes the carrying on of a business (*Balanko*, at paragraph 10). The absence of an organized risk management or mitigation system supports the absence of a source of business income.

[38] This risk management or minimization factor was subsequently considered in *Luprypa* (at paragraphs 10 to 14) and *Leblanc* (at paragraphs 33, 36, 43 and 48). More recently, our Court specified that this risk mitigation strategy must also be consistent and demonstrate that the taxpayer takes a serious approach to gambling (*Cohen*, at paragraph 44).

[39] Furthermore, the analysis of a gambling activity's commerciality must take into account the taxpayer's abilities, knowledge, skills and discipline. However, the frequency of gambling activities is of little relevance (*Radonjic*, at paragraph 52; *Cohen*, at paragraph 47; *Leblanc*, at paragraphs 28, 29, 46).

V. PRELIMINARY QUESTIONS

[40] At the hearing, documents marked as Exhibits I-16, I-17 and I-18 were filed into the Court record subject to the Court's decision regarding the appellant's objections to their being filed as evidence. The appellant also objected to the testimony of Martin Fournier-Giguère, one of the respondent's witnesses.

[41] The Court's decision on this matter must be based on the laws of evidence in force in Quebec, in particular the rules found in Book Seven of the *Civil Code of Québec* (C.C.Q.).²

5.1 Mr. Fournier-Giguère's testimony and document filed as Exhibit I-16

[42] The document filed as Exhibit I-16 is Martin Fournier-Giguère's November 12, 2010, blog posted on the BlueFire Poker site. Since the respondent agreed to withdraw this document from evidence before the close of the hearing, the Court will not rule on the merits of the objection raised by the appellant. Furthermore, since the appellant has withdrawn his objection to Mr. Fournier-Giguère's testimony, this testimony will be part of the evidence.

Section 40 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5; *Canada (National Revenue) v. Hardy*, 2018 FCA 103, at paragraph 13.

5.2 Documents filed as Exhibits I-17 and I-18

[43] The Court must rule on the objections raised by the appellant regarding the documents filed as Exhibits I-17 – an article by Jean François Boily published in the spring 2011 edition of Magazine HOMME entitled “Un champion comme vous et moi” and I-18 – an article written by Guillaume Cloutier published in Le Courrier du Sud on August 4, 2010, entitled “‘All-In’ avec Jonathan Duhamel”.

[44] The respondent seeks to have previous statements by Mr. Duhamel reported in these articles by Mr. Boily and Mr. Cloutier admitted into evidence as testimony. The purpose is not to impugn Mr. Duhamel’s credibility or contradict previous statements that he does not recall.

[45] The statements appear in quotation marks in the article written by Mr. Boily (Exhibit I-17). With respect to Mr. Cloutier’s article (Exhibit I-18), the respondent seeks to enter into evidence Mr. Duhamel’s answers to the various issues raised in the story.

Discussion:

[46] For the following reasons, the objections raised by the appellant regarding the documents filed as Exhibits I-17 and I-18 are upheld because the reliability of Mr. Duhamel’s previous statements reported by the journalists is not sufficiently guaranteed pursuant to article 2871 of the C.C.Q. Even if these previous statements had been admissible as testimony under article 2871 of the C.C.Q., the conditions found in the second paragraph of article 2873 C.C.Q. were not met, which means that Mr. Duhamel’s previous statements cannot be entered into evidence by filing these press articles. The documents marked as Exhibits I-17 and I-18 will therefore not be filed into the Court record as evidence of the content of Mr. Duhamel’s previous statements.

[47] As the appellant did not consent to the production of the articles at issue and Mr. Duhamel was appearing as a witness, Mr. Duhamel's out-of court statements reported in these press articles may only be admitted as testimony if the reliability test set out in article 2871 of the C.C.Q. is satisfied.

[48] Article 2871 of the C.C.Q. reads as follows:

2871. Previous statements by a person who appears as a witness, concerning facts to which he may legally testify, are admissible as testimony if their reliability is sufficiently guaranteed.

2871. Lorsqu'une personne comparait comme témoin, ses déclarations antérieures sur des faits au sujet desquels elle peut légalement déposer peuvent être admises à titre de témoignage, si elles présentent des garanties suffisamment sérieuses pour pouvoir s'y fier.

[49] After finding that the reliability of a previous statement is sufficiently guaranteed and is therefore admissible as testimony, the Court must determine how the statement can be proved by referring to sections 2872 to 2874 of the C.C.Q. In this case, only article 2873 of the C.C.Q. is relevant. Mr. Duhamel's previous statements could therefore be proved by producing the press articles, if the conditions found in article 2873 C.C.Q. are satisfied.

[50] Article 2873 of the C.C.Q. reads as follows:

2873. A statement recorded in writing by a person other than the declarant may be proved by producing the writing if the declarant has acknowledged that the writing faithfully reproduces his statement.

The same rule applies where the writing was drawn up at the request of the declarant or by a person acting in the performance of his duties, if there is reason to presume, having regard to the circumstances, that the writing faithfully reproduces the statement.

[Emphasis added]

2873. La déclaration, consignée dans un écrit par une personne autre que celle qui l'a faite, peut être prouvée par la production de cet écrit lorsque le déclarant a reconnu qu'il reproduisait fidèlement sa déclaration.

Il en est de même lorsque l'écrit a été rédigé à la demande de celui qui a fait la déclaration ou par une personne agissant dans l'exercice de ses fonctions, s'il y a lieu de présumer, eu égard aux circonstances, que l'écrit reproduit fidèlement la déclaration.

[Non souligné dans l'original]

[51] According to the respondent, Mr. Duhamel's previous statements as reported by the journalists provides a better guarantee of reliability than the testimony that Mr. Duhamel gave 10 years later. Based on Mr. Boily's testimony, the Court can accept as a matter of course that the press article faithfully reproduced Mr. Duhamel's previous statements. Similarly, Mr. Cloutier's testimony regarding the circumstances of the interview, the audio recording of the interview and the written notes taken during the interview are evidence of the reliability of Mr. Duhamel's previous statements reported in the article.

[52] The Court does not accept the respondent's arguments and concludes that the reliability test set out in article 2871 of the C.C.Q. is not satisfied in this case.

[53] First of all, I would note that article 2871 of the C.C.Q. includes previous consistent statements as well as previous inconsistent statements.³

[54] The Court must ascertain whether the circumstances surrounding the statements ensure that their reliability is sufficiently guaranteed. A statement is reliable if it "is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken . . . (*R. v. Smith*, [1992] 2 SCR 915, page 933). Although those comments were made in a criminal law case, they also apply in the context of the Quebec civil law.⁴

[55] The interview with Mr. Boily took place when JD Co. and PokerStars had already entered into the PokerStars Agreement, to which Mr. Duhamel was a party. The evidence indicates that Mr. Duhamel was required to promote PokerStars, and more specifically, to promote the PokerStars online poker gambling site to encourage poker players to play there. Mr. Duhamel was also hired to assert that it was possible to make a living playing poker by practising and playing on the PokerStars online poker gambling site. Mr. Duhamel had already taken public relations training provided by the PokerStars team to learn to convey the message he was required to deliver to meet his obligations to PokerStars.

[56] Mr. Cloutier interviewed Mr. Duhamel after he qualified for the final table of the WSOP Main Event, but before he won the tournament. The PokerStars Agreement had therefore not yet been signed. However, the evidence indicates that,

³ *Promutuel Drummond Société Mutuelle d'Assurance Générale c. Gestion Centre du Québec Inc.*, [2002] RRA 695, 2002 CanLII 41139 (QC CA), at paragraph 46.

⁴ *Arcand c. Cayer*, [2004] JQ no 12126 (CQ), at paragraphs 72 to 75; see also *Taperek c. Taperek*, 2016 QCCS 5101, at paragraph 134; *Nadeau c. Nadeau*, [2005] RL 454, 2005 CanLII 24701 (QC CS), at paragraphs 4 to 5, 8; *Hardy c. Industrielle Alliance*, [2002] RRA 1018, 2002 CanLII 512 (QC CS), at paragraphs 43, 47.

after he qualified for the final table, Mr. Duhamel was approached by PokerStars representatives who advised him to give good interviews and speak highly of PokerStars.

[57] The evidence shows that Mr. Duhamel was promoting the interests of PokerStars and sticking to talking points that favoured PokerStars' interests. As a result, the reliability of the statements in Exhibits I-17 and I-18 cannot be assured.

[58] However, even if the Court had held that the statements were admissible as testimony pursuant to article 2871 of the C.C.Q., the press articles could not be produced to prove Mr. Duhamel's previous statements, because the conditions set out in the second paragraph of article 2873 of the C.C.Q. are not satisfied. The Court finds that "there is [no] reason to presume, having regard to the circumstances, that the writing faithfully reproduces the statement."

[59] First, both Mr. Boily and Mr. Cloutier testified that they did not recall the content of their press articles. They had to rely on the content of their articles to answer questions at the hearing.

[60] Mr. Boily testified that Mr. Duhamel was interviewed at the Montreal Casino about two months before the magazine was published. Mr. Boily showed up alone for the interview, with a notepad. However, he no longer has this notepad. It was a casual interview. He was always careful to note the statements made during the interview. However, Mr. Boily testified that he had chosen the parts of the statements to be included in his article because the goal was to attract the target audience's (men) attention and that everything had to meet the publisher's commercial requirements.

[61] In his testimony, Mr. Cloutier told the Court that when Mr. Duhamel returned from Las Vegas after qualifying for the final table of the WSOP Main Event in July 2010, he met with Mr. Duhamel at a Tim Hortons restaurant on Montreal's South Shore. Mr. Cloutier conducted a question and answer interview. He had a recorder and a notepad to record Mr. Duhamel's words. However, he was unable to produce this recording and the notepad at the hearing. He did not keep any notes, transcripts or audio recordings of the interview. Mr. Cloutier also testified that most of the topics discussed during the interview were reported in the article, but some parts may have been removed because they were deemed irrelevant. According to Mr. Cloutier, a press article must meet a word count requirement, and that article, in particular, was abridged.

[62] Although the Court does not doubt the journalistic ethics and professional integrity of the authors of the press articles at issue, it finds that the requirements set out in the second paragraph of article 2873 of the C.C.Q providing that the writing faithfully reproduce the previous statements are not satisfied. The evidence shows that editorial choices were made in the writing of press articles to provide a product that met various commercial criteria. As indicated above, Mr. Boily's article was written to attract the target readership (men) and all the foregoing had to meet the publisher's commercial requirements. Mr. Boily cannot confirm the accuracy of the statements reported in his article, and Mr. Cloutier's article was abridged to meet the editor's word count requirement. Also, Mr. Cloutier did not remember the content of Mr. Duhamel's statements. Furthermore, at the hearing, neither author was able to produce the notes and recordings made at the time.

VI. THE CREDIBILITY OF MR. DUHAMEL'S TESTIMONY AND THE BOOK ENTITLED "Cartes sur table: Champion du monde de poker 2010"

6.1 Credibility of Mr. Duhamel's testimony

[63] The Court is of the view that Mr. Duhamel's testimony at the hearing was generally reliable, consistent and credible. Several aspects of his testimony were corroborated by the documentary evidence, as well as by the testimony provided by Mr. Fournier-Giguère. Other parts of Mr. Duhamel's testimony, when considered with common sense, are entirely plausible.

[64] First, Mr. Fournier-Giguère is a friend of Mr. Duhamel whom he met during web forum discussions. Mr. Fournier-Giguère was called to testify at the hearing for the respondent. He confirmed several aspects of Mr. Duhamel's testimony, including the fact that during the years at issue, Mr. Duhamel partied heavily.

[65] Mr. Fournier-Giguère was also part of the group of Quebec friends who rented a house in Las Vegas in July 2010 at the time of the WSOP Main Event, but he did not stay at Mr. Duhamel's house. Mr. Fournier-Giguère participated in the WSOP Main Event but did not qualify for the final table. He had signed a gain-sharing agreement with Mr. Duhamel and received 5% of Mr. Duhamel's prize. According to Mr. Fournier-Giguère, he and his friends, including Mr. Duhamel, threw big parties, gambled and bet large amounts of money on golf and went out a lot. Mr. Fournier-Giguère also said that Mr. Duhamel partied even more than he did.

[66] Mr. Fournier-Giguère returned to Las Vegas in November 2010 to encourage Mr. Duhamel when he qualified for the final table of the WSOP Main Event. This

supports Mr. Duhamel's testimony regarding his state of mind and the reason for signing sharing agreements, which was to create team spirit among the signatories.

[67] Also, Mr. Duhamel's testimony regarding the PokerStars Agreement was consistent with the content of the sharing agreements. The Court will return to this later.

[68] However, the respondent was of the view that Mr. Duhamel's credibility was tainted by his inability to recall the number of online poker game accounts he opened and the approximate dates on which they were opened, when he represented PokerStars between late November 2010 and 2015. Similarly, he did not recall the number of tournaments he played abroad in 2009 and the time of year when he acquired his condominium in 2009.

[69] According to the Court, it is quite plausible that Mr. Duhamel did not remember the exact dates on which he opened his online gambling accounts, even though he represented PokerStars for several years, nor was it surprising that he did not recall the number of online poker game accounts he had in his early adulthood. Mr. Duhamel said he did not remember when he started playing online poker because you can play for fun or money as an adult. He testified that, after being sponsored by PokerStars, he only played on the PokerStars online poker gambling site, as required under the PokerStars Agreement.

[70] Mr. Duhamel also testified that he recorded all his in-person tournament results on an Excel file. When the audit for the 2010 and 2011 taxation years started, he prepared a clearer document to be sent to the auditor. However, since the 2009 taxation year was not at issue, he did not prepare a clearer document for that year. The evidence indicates that the auditor did not ask Mr. Duhamel any questions regarding the years prior to 2010 and admitted that he did not request any information from Mr. Duhamel regarding the 2008 and 2009 taxation years. Mr. Duhamel therefore cannot submit a similar document or verify the information for 2009 because the data were not saved.

[71] The Court is of the view that although Mr. Duhamel had difficulty remembering the time of year when he purchased his condominium, this did not undermine the credibility of his testimony. On the contrary, Mr. Duhamel gave an approximate purchase price for the condominium that was very close to the price paid, which showed he was willing to answer the Court's questions frankly.

[72] The respondent also argues that Mr. Duhamel's credibility was tainted because he found it difficult to calculate the years when he was 15, 16 or 18 years of age, whereas he was able to perform more complicated calculations such as probability calculations based on "outs" or percentages and other additions/subtractions in poker.

[73] However, the evidence indicates that the calculations to which the respondent referred were quite simple, given that the probabilities involved are calculated approximately by multiplying by a factor of 2 or 4, and the various percentages are based on a denominator of 10. Mr. Duhamel's credibility was therefore not tainted by these elements.

6.2 Statements by Mr. Duhamel cited in the Book entitled "Cartes sur table : Champion du monde de poker 2010"

[74] A book on Mr. Duhamel entitled "Cartes sur table : Champion du monde de poker 2010" was published in 2011 (the Book) and was entered into evidence at the hearing.

[75] During the hearing, the respondent sought to elicit evidence of Mr. Duhamel's state of mind by cross-examining him on certain statements in the Book. The respondent sought to provide evidence of the skills demonstrated by Mr. Duhamel in poker, including his use of various playing strategies.

[76] According to Mr. Duhamel, some parts of the Book accurately reflected the facts as well as his thoughts and state of mind, while other parts were included in response to requests from his sponsor, PokerStars. Given this answer and the other elements raised in the previous section, the respondent asked the Court to infer that Mr. Duhamel was a person who considered himself entitled to mislead his readers and distort the truth, as consideration for a lucrative sponsorship contract. According to the respondent, the Court should therefore not find Mr. Duhamel's testimony credible.

[77] For the following reasons, the Court cannot draw the inference suggested by the respondent because very little probative value should be given to previous statements made by Mr. Duhamel that were included in the Book.

[78] The evidence indicates that friends of Mr. Duhamel suggested that he write a book. Since PokerStars was sponsoring Mr. Duhamel at the time, he had to obtain his sponsor's permission to undertake this project. He therefore held discussions with PokerStars on the message that the Book would convey. PokerStars and Mr. Duhamel established a plan in this regard. A ghostwriter wrote all 18 chapters of the Book. Mr. Duhamel reviewed the material written by the ghostwriter and provided his approval. However, PokerStars did not review the contents of the Book.

[79] It seems likely that Mr. Duhamel had an altogether minor involvement in the drafting of the Book because it contained obvious errors. For instance, the Book stated that Mr. Duhamel took finance courses at university, but he actually took administration courses. According to the Book, the WSOP Main Event started in May 2010, but it started in July 2010; Mr. Duhamel took a sabbatical year after his second year of university, but he actually took the sabbatical year after his first year of university studies.

[80] The Book also stated that Mr. Duhamel researched his opponents and used applications or software that provided statistics on poker players. However, the evidence shows that, in tournaments, players do not know who their opponents will be and cannot choose their gambling table. It also indicates that Mr. Duhamel did not use such applications or software because he found them rather disturbing, and that interfered with his concentration.

[81] As Mr. Dufour said, the Book was autobiographical. The Book included basic general principles: discipline, self-control, maintaining your passion for poker, concentration, etc., but did not reveal any structured and serious method likely to help the player win a tournament.

[82] While the evidence indicates that Mr. Duhamel reviewed the contents of the Book, it was written while Mr. Duhamel was a spokesperson for PokerStars. One of the purposes of the Book was to encourage people to play on the PokerStars online poker gambling site. Mr. Duhamel testified that he consulted PokerStars before starting this project. PokerStars approved the message to be conveyed in the Book. In addition, the author thanked PokerStars in the last pages of the Book. Several statements in the Book showed the image that Mr. Duhamel had to project for sponsorship purposes: to become a world champion in poker, a player must practice online and study the game; the more a player practices, the more successful he will be; a player must read treatises on poker. These statements were included in the Book to satisfy PokerStars' requirements and convey the message that Mr. Duhamel was supposed to deliver.

[83] Also, testimony provided at the hearing contradicted some statements in the Book. For example, according to the Book, a player must maintain a healthy lifestyle to win at poker, whereas Mr. Duhamel clearly testified that he partied and did not maintain this type of lifestyle. As noted above, Mr. Fournier-Giguère's testimony corroborated Mr. Duhamel's testimony in this regard.

[84] In addition, according to the Book, Mr. Duhamel read books on poker written in English to improve his game. Contrary to what the Book said, the evidence indicates that Mr. Duhamel did not learn poker theory before he started playing. He learned how to play from a friend's older brother when Mr. Duhamel was a teenager. Mr. Duhamel also said he probably did not read these books and that this information was included in the Book to satisfy PokerStars' requirements because he was a PokerStars ambassador.

VII. Discussion

[85] According to the principles developed by the case law cited above, and in particular in *Stewart*, the Court must make an overall assessment of whether Mr. Duhamel's poker gambling activities were exercised in a sufficiently commercial manner to constitute a source of business income for the purposes of the Act or whether they were more of a hobby or leisure activity. It is the commercial nature of the activity that must be assessed, not Mr. Duhamel's business acumen.

[86] According to the evidence, Mr. Duhamel participates in poker tournaments and not in cash games. It is clear that cash games do not usually have a predetermined end time and that players can get into the game whenever they want (when authorized) and can leave any time after a hand is over (or by losing all the money in the pot if they leave the table during a hand) because the chips can be cashed in. However, in tournaments, only the last 10% of players in the game win a prize. Play continues until only one player is left. This player is the tournament winner. The chips have no monetary value outside the tournament. A player must pay an entry fee to participate in a poker tournament.

[87] The Court will begin its discussion by examining the various objective commerciality factors propounded by the case law, in order to determine whether Mr. Duhamel had the predominant subjective intention to profit from his poker gambling activities and whether he conducted his activities in accordance with objective standards of businesslike behaviour.

[88] The Court will consider the following objective commerciality factors:

- i) Mr. Duhamel's training (including abilities, knowledge and skills);
- ii) The avenue that Mr. Duhamel intends to take (and other relevant factors);
- iii) Profit and loss statement;
- iv) Mr. Duhamel's ability to make a profit from his poker gambling activities;
and
- v) The existence of a risk management or mitigation system.

[89] The Court will then make an overall assessment as to whether these factors show that Mr. Duhamel's poker gambling activities were carried on in a sufficiently commercial manner to constitute a source of business income.

[90] For the following reasons, the Court finds that, on a balance of probabilities, Mr. Duhamel's poker gambling activities were not carried on in a sufficiently commercial manner to constitute a source of business income for the purposes of the Act, and consequently, the net gains from such activities must not be included in the computation of Mr. Duhamel's income under sections 3 and 9 of the Act for the years at issue.

7.1 Mr. Duhamel's training

[91] According to the respondent, the statements in the Book demonstrate that Mr. Duhamel read serious books on poker and spent hours researching poker strategies. Similarly, according to the statements in the Book, Mr. Duhamel analyzed the hands he had played after each tournament, spending at least one hour a day on analysis. He also used applications or software that provided information and statistics on his opponents' gambling habits.

[92] For the following reasons, the Court finds that, on a balance of probabilities, Mr. Duhamel's training was not a factor that demonstrated the commerciality of his poker gambling activities.

[93] The Court rejects the respondent's argument because the evidence adduced at the hearing and accepted by the Court does not point in that direction. As noted above, the Court found Mr. Duhamel's testimony reliable and credible and that very little probative value should be given to Mr. Duhamel's previous statements in the Book.

[94] First of all, given the evidence, we note that Mr. Duhamel had no specific poker training likely to give him an edge over his opponents and provide him with any kind of advantage. Mr. Duhamel did not take any poker courses. He started playing at around 15 to 16 years of age, when he was introduced to poker by a friend's older brother, and he did not learn any poker theory.

[95] After obtaining a certificate in administration from UQAM in the spring of 2008, Mr. Duhamel decided to take a sabbatical year. In 2008 and 2009, Mr. Duhamel had fun, travelled and participated in poker tournaments. He did not become world famous until 2010 when he won the WSOP Main Event and was crowned world poker champion.

[96] Although Mr. Duhamel studied administration and is an experienced player who has participated in poker tournaments, these facts are not sufficient to provide any indication of commerciality in Mr. Duhamel's poker gambling activities. Mr. Duhamel sometimes viewed the RDS poker information site and YouTube videos, but this was not sufficient to qualify as poker training.

[97] Although the Book indicates that he read treatises on poker, Mr. Duhamel specified during his testimony that he read books on poker for entertainment, but did not recall having read treatises on poker to improve his strategies. Since these treatises on poker are written in English, it would be surprising and unlikely that he read these works given his limited knowledge of the English language at that time. The Court accepts Mr. Duhamel's testimony that the passage in the Book indicating that he read various treatises gave him credibility as a spokesperson for PokerStars.

[98] Mr. Duhamel also indicates that he did not use applications or software that provided information and statistics on players participating in online tournaments because it interfered with his concentration. Since seating at the various gambling tables is assigned randomly at in-person tournaments, it follows that Mr. Duhamel could not study his opponents' games in advance.

[99] Given the evidence, it is also clear that the mathematical knowledge needed to enhance poker skills is not complicated.

[100] Finally, the evidence shows that Mr. Duhamel does not teach poker courses or lead poker seminars.

7.2 The avenue that Mr. Duhamel intends to take (and other relevant factors)

Occupation, sources of income of Mr. Duhamel and JD Co.:

From 2008 to July 2010:

[101] According to the respondent, poker gambling was Mr. Duhamel's only income-generating activity between 2008 and 2010. Ever since Mr. Duhamel realized a gain in the tournament held in Prague in December 2008 during his sabbatical year, he has made his living playing poker. Even the condominium purchase contract that he entered into in 2009 indicated that Mr. Duhamel was a poker player.

[102] For the following reasons, the Court finds that, on a balance of probabilities, Mr. Duhamel's occupation and sources of income from 2008 to July 2010 were not factors that demonstrated the commerciality of Mr. Duhamel's poker gambling activities.

[103] First of all, although Mr. Duhamel defined himself as a poker player in the condominium purchase contract that he entered into in 2009, the Court finds that this does not provide a basis for concluding that poker gambling activities constitute a source of business income for the purposes of the Act.

[104] The Court recognizes that, given the evidence, poker gambling activities were Mr. Duhamel's only income-generating activity from the end of spring 2008 until July 2010. However, it has also been established that Mr. Duhamel has always worked ever since he could and that he was probably able to build a financial cushion allowing him to travel during his sabbatical year, which he extended after he realized a gain in the poker tournament held in Prague in December 2008. In addition, he spent few days on his poker gambling activities. This tends to lend credibility to Mr. Duhamel's testimony that he had no set or predefined schedule for playing poker and that he travelled and partied extensively during this period.

[105] In the spring of 2008, after completing a year of studies at UQAM, Mr. Duhamel obtained a certificate in administration. At the end of spring 2008, at age 21, Mr. Duhamel decided to take a year off from his studies to determine the field of study he wanted to pursue. He intended to have fun, travel and party with his friends. Since he started working at age 13 as a strawberry picker and had kept working throughout his studies, he had a small financial cushion that would allow him to travel. That is what he did in the months that followed.

[106] In 2008, Mr. Duhamel visited Europe for the first time in his life. He travelled to Prague, Munich, Amsterdam and Berlin. He placed 10th in a poker tournament held in Prague in December 2008 and won \$70,000. Given this gain, Mr. Duhamel did not think he needed to re-enroll at university right away. He therefore decided to extend his sabbatical year and took the opportunity to continue to travel, see his friends and have fun.

[107] The number of tournaments in which Mr. Duhamel participated in 2008 has not been established. We do know that he participated in a tournament held in Prague in December 2008. Since he was a student for half of 2008, it is likely that his main occupation was studying, at least for the first part of the year.

[108] In 2009, in addition to participating in online tournaments on various poker sites, including PokerStars, Mr. Duhamel participated in the WSOP Main Event, but was not successful. However, he was unable to provide details on the tournaments in which he participated because he could not track down the information. However, he indicates that he had participated in about 20 online tournaments on the PokerStars site from May to December 2009.

[109] In 2010, Mr. Duhamel was still taking a year off from his studies. It is established that he took the opportunity to travel, see his friends and party. In July 2010, Mr. Duhamel and some friends rented two houses in Las Vegas and partied there. He was 22 years old and single at the time. Mr. Duhamel again entered the WSOP Main Event held in July 2010. The evidence indicates that he made no special preparations for this tournament.

[110] A total of 7,319 players entered the WSOP Main Event in 2010. There were about 800 tables. Seating at the various tables was assigned randomly. This tournament lasted eight days until there were nine players left who qualified for the final table. All tournament participants could sign a contract with PokerStars that included a trip to the Bahamas and entry into a tournament for players who won a prize. Players had to wear PokerStars badges on their sweaters. Mr. Duhamel signed such a contract. Players could enter into similar contracts with Fulton Poker.

[111] In 2010, before he qualified for the final table of the WSOP Main Event and throughout the month of July, Mr. Duhamel participated in 18 in-person tournaments (14 of which were held the same day). Between January and May 2010, he did not participate in any online tournaments and from the end of May 2010 until June 2010, he participated in 14 online tournaments.

After qualifying for the final table of the WSOP Main Event in July 2010:

[112] The respondent also argues that, from 2010 to 2012, poker gambling was Mr. Duhamel's main occupation: Mr. Duhamel played poker full time, he had no other occupations and had no other sources of income. The respondent also submitted that the number of poker tournaments in which Mr. Duhamel participated from 2010 to 2012 was an indication that he wanted to earn a living by playing poker.

[113] For the following reasons, the Court cannot find that, on a balance of probabilities, the evidence points in that direction. Rather, it is established that Mr. Duhamel had sources of income other than poker tournament gains: he received dividends and other amounts from JD Co. and income from his investment portfolio totalling approximately \$5 million acquired in part from the gain he realized in 2010 at the WSOP Main Event. It has been established that in 2011 and 2012, Mr. Duhamel did in fact receive interest income and dividends: approximately \$20,000 and \$60,000 in interest in 2011 and 2012, respectively, and \$300,000 in dividends for 2011 and \$300,000 in dividends for 2012.

[114] In addition, from late 2010 until 2015, Mr. Duhamel participated in poker tournaments and was also a spokesperson for PokerStars. As a spokesperson, in particular, he had to represent PokerStars throughout the world, attend certain events sponsored by PokerStars and participate in certain tournaments sponsored by PokerStars, at which he was to wear clothing bearing PokerStars logos and encourage others to play on the PokerStars online poker gambling site. Although Mr. Duhamel participated in many poker tournaments starting in 2011, he performed tasks other than playing poker.

[115] Since Mr. Duhamel was a spokesperson for PokerStars and had certain representational obligations under the PokerStars Agreement, the Court is not persuaded that, on a balance of probabilities, Mr. Duhamel's poker gambling activities were his sole or even main occupation. However, even if the evidence had indicated that Mr. Duhamel's poker playing activities were his main occupation, which is not the case, how often he participates in tournaments is hardly a relevant factor in analyzing the commerciality of a gambling activity (*Radonjic*, at paragraph 52; *Cohen*, at paragraph 47; *Leblanc*, at paragraphs 28, 29, 46).

[116] The Court accepts the evidence below.

[117] After qualifying for the final table of the WSOP Main Event in July 2010, Mr. Duhamel received US\$900,000 from the organizers, as did all the other players who qualified for the final table. Mr. Duhamel felt like a star then, and this feeling was even stronger when he was crowned world champion of poker after winning this tournament in November 2010.

[118] After he qualified for the final table and following his historic victory in November 2010, Mr. Duhamel was caught up in a media frenzy. Mr. Duhamel became a public figure overnight. Mr. Duhamel testified that he was overwhelmed by the events. We must bear in mind that he was only 23 years old at the time.

[119] Mr. Duhamel was then invited to join a group of poker players to play in private games. The group included some well-known members of Quebec and international society. One of the ground rules of the private games in which Mr. Duhamel played was that a player could not leave the table before the end of the evening. These games, which featured fine food and wines, were held at the residence of various members of the group. Large amounts of money were at stake. After meeting people at these private games, Mr. Duhamel became involved in the One Drop Foundation. From 2010 to 2018, Mr. Duhamel participated in approximately 81 private games, about 10 per year.

[120] To manage the media frenzy that unfolded after he qualified for the final table, Mr. Duhamel hired two people, who were also friends. The evidence indicates that Mr. Duhamel conducted numerous interviews. These two people, who were paid for their services, handled requests for interviews and media relations. However, they were not involved in managing Mr. Duhamel's poker gambling activities. Mr. Duhamel looked after entering the various tournaments and organizing his trips.

[121] The evidence indicates that Mr. Duhamel spent a great deal of his time doing interviews during this period. Also, it is established that PokerStars was already involved with Mr. Duhamel and provided him with advice on the message to be delivered during interviews, even before the PokerStars Agreement had been finalized.

[122] After a four-month hiatus, the Main Event tournament resumed on November 6, 2010. The final game between the last two players was played on November 8, 2010. Approximately 2,000 spectators attended the final table on November 6, 2010. November 7, 2010, was a day off from the tournament during which Mr. Duhamel again gave several interviews.

[123] The first PokerStars Agreement between PokerStars and JD Co., in which Mr. Duhamel was personally involved, came into effect on November 25, 2010, for a period of one year. Under the Agreement, JD Co. agreed that Mr. Duhamel would provide PokerStars with various services as consideration for US\$1 million, payable as follows:

- i) US\$280,000 as entry fees for various in-person tournaments;
- ii) US\$120,000 as entry fees for various online tournaments on the PokerStars site;
- iii) US\$120,000 for expenses incurred by JD Co. for services provided by Mr. Duhamel;
- iv) US\$480,000 for annual fees;
- v) US\$4,000 to be donated to a charity chosen by JD Co.

[124] Specifically, under the PokerStars Agreement, Mr. Duhamel agreed to promote PokerStars poker gambling websites in the media (including interviews, books, CDs, blogs, etc.) and at public events in which Mr. Duhamel participated and PokerStars sites were promoted. The PokerStars Agreement stipulated that Mr. Duhamel was required to work with PokerStars public relations firms to promote himself and "Team PokerStars Pro" (section 2.4). In addition, Mr. Duhamel took the training provided by PokerStars to learn how to convey the right message for PokerStars and present a good image of himself.

[125] Regarding his image, Mr. Duhamel testified that he had to act like the rock star of poker players. For instance, he signed autographs at events sponsored by PokerStars. In order to fulfill his commitments to PokerStars, Mr. Duhamel had to deliver the following message: "Poker is like a sport. The more you practice, the better you get, and you win. Do what I did. I practised on the PokerStars site, and now I'm the world champion of poker!" The ultimate goal was to get players to play poker on PokerStars online platforms.

[126] Mr. Duhamel was also required to participate in certain online poker tournaments exclusively on the PokerStars site (at least 50 hours per month on average) and in certain in-person poker tournaments. There is no evidence as to the number of tournaments in which Mr. Duhamel was required to participate pursuant to the PokerStars Agreement and the number of the tournaments in which he played because he wanted to. However, it is established that Mr. Duhamel played less than 50 hours per month in online tournaments.

[127] All of Mr. Duhamel's public appearances during this period were on behalf of PokerStars. However, Mr. Duhamel was unable to determine the percentage of the time he spent on representing PokerStars and the percentage of the time he spent on poker gambling activities. He did not keep timesheets. He did not have to provide PokerStars with reports on the time he spent playing online or the time he spent representing PokerStars.

[128] Payments made by PokerStars provided income for JD Co. and enabled Mr. Duhamel to participate in poker tournaments around the world, while representing PokerStars. The PokerStars Agreement was renewed annually until the beginning of 2015, for smaller amounts.

[129] In May 2011, JD Co. also signed an agreement with Refund Management Services. Pursuant to this agreement, Mr. Duhamel undertook to wear a badge on his sleeve representing Refund Management Services during in-person tournaments, for a \$1,000 payment upon signature and a \$2,000 monthly payment for a period of one year. JD Co. also signed an agreement with Stardust Poker Mansion in effect from August 1, 2011, to July 30, 2013. The agreement provided for the payment of \$50,000 over two years, in particular to allow Stardust Poker Mansion to name a private room after Mr. Duhamel and to use his image.

[130] In 2010, Mr. Duhamel participated in 23 in-person tournaments (29 if the tournaments that he re-entered after being eliminated are included), 126 online tournaments and one private game. Mr. Heeb, the respondent's expert, estimated that this number of tournaments represented 30 days of in-person tournaments and 19 days of online tournaments, for a total of 49 days (Heeb Reply (Exhibit I-4), paragraph 83).

[131] Mr. Duhamel entered the WSOP Main Event again in 2011, 2012, 2013, and 2014, but failed to win anything. In 2015 he ranked 565th and in 2018 409th and therefore still won some money.

[132] In 2011, Mr. Duhamel participated in 81 in-person tournaments, 377 online tournaments and 16 private games: the equivalent of 89 days of in-person tournaments and 41 days of online tournaments, for a total of 130 days of play , excluding the 16 private games (Heeb Reply (Exhibit I-4), paragraph 83).

[133] In 2012, Mr. Duhamel participated in 111 in-person tournaments, 271 online tournaments and 14 private games: the equivalent of 128 days of in-person

tournaments and 28 days of online tournaments, for a total of 156 days of play (Heeb Reply (Exhibit I-4), paragraph 83).

[134] From 2013 to 2015, Mr. Duhamel participated in many online tournaments: 128 tournaments in 2013, 356 tournaments in 2014 and finally, 57 tournaments in 2015. When his obligations to PokerStars ended in 2015, Mr. Duhamel also stopped participating in online tournaments. It therefore appears that Mr. Duhamel participated in online tournaments in part to fulfill his obligations to his PokerStars sponsor.

[135] He participated in the following number of in-person tournaments from 2013 to 2018: 102 tournaments in 2013, 90 tournaments in 2014, 82 tournaments in 2015, 40 tournaments in 2016, 26 tournaments in 2017 and 35 tournaments in 2018.

[136] After winning the 2010 WSOP Main Event, Mr. Duhamel had the luxury of not having to work to support himself. He could spend a lot of his time playing poker if he wanted to. According to his testimony, he could satisfy his gambling passion. Also, he benefited from the sponsorship income that JD Co. received from PokerStars and could participate in poker tournaments around the world.

[137] During this period, Mr. Duhamel also became involved with the One Drop Foundation and played a few in-person poker tournaments for the benefit of this foundation. In 2015, he won \$2.5 million at one of these tournaments.

JD Co.'s existence:

[138] According to the respondent, as of 2011, since Mr. Duhamel had to play poker to generate significant income for JD Co., Mr. Duhamel's poker gambling activities could no longer be characterized as simple entertainment. They became strictly commercial. JD Co.'s income was intrinsically tied to Mr. Duhamel's obligation to participate in many tournaments, and PokerStars reimbursed JD Co. for tournament fees pursuant to the PokerStars Agreement. Therefore, the sponsorship income paid to JD Co. and the dividend income that Mr. Duhamel received from JD Co. were sufficiently related to Mr. Duhamel's gambling activities for the Court to consider them in assessing the commercial nature of Mr. Duhamel's poker gambling activities.

[139] In support of her position, the respondent submitted that the Court's examination must consider an objective factor of commerciality described by the respondent as [TRANSLATION] "financial motivation derived from another source of

income related to the taxpayer's activities" and that this factor is important in this case.

[140] The respondent relies on the Supreme Court of Canada's comments in *Stewart* that an anticipated capital gain may be considered in determining whether the taxpayer's activities are commercial in nature: "an anticipated gain may be a factor in assessing the commerciality of the taxpayer's overall course of conduct" (at paragraph 68).

[141] For the following reasons, the Court concludes that JD Co.'s existence is not relevant in assessing the commerciality of Mr. Duhamel's poker gambling activities.

[142] The respondent is essentially asking the Court to find that Mr. Duhamel's poker gambling activities were commercial and that Mr. Duhamel therefore carried on a gambling business, given that Mr. Duhamel is the representative of a corporation carrying on a business. However, JD Co.'s activities must not be confused with those of Mr. Duhamel because JD Co. and Mr. Duhamel are two separate entities (section 309 of the C.C.Q.). Mr. Duhamel's financial motivation to act as a representative of JD Co., in the best interests of JD Co., to potentially increase his income from dividends, salaries or otherwise, is only related to the relationship between JD Co. and Mr. Duhamel, and this relationship is not at issue. It has been established that Mr. Duhamel incorporated JD Co. to create a legal separation between the marketing/advertising business operated by JD Co. and Mr. Duhamel's personal poker gambling activities.

[143] As indicated above, under the PokerStars Agreement, Mr. Duhamel not only agreed to participate in (online and in-person) tournaments sponsored by PokerStars, but he was also required to act as a spokesperson for PokerStars and promote PokerStars' interests. He was required to be available to represent PokerStars at various events. PokerStars thus ensured that it could take advantage of the fact that Mr. Duhamel was crowned world champion of poker in November 2010 to increase attendance at its online and in-person tournaments. Not only was Mr. Duhamel required to participate in tournaments for PokerStars, but he was also required to promote PokerStars. PokerStars therefore paid JD Co. for Mr. Duhamel's participation in various tournaments and for promotional activities that Mr. Duhamel carried out on behalf of JD Co.

[144] As indicated above, the evidence shows that JD Co. also entered into agreements with Refund Management Services and Stardust Poker Mansion entitling these companies to exploit Mr. Duhamel's fame. The purpose of these

agreements was not to administer Mr. Duhamel's personal poker gambling activities.

[145] The Supreme Court of Canada's comments in *Stewart* were not as broad in scope as the respondent argues and must be read in context. According to the Supreme Court of Canada, in order to assess the commerciality of a taxpayer's overall course of conduct with regard to holding property, the Court can consider the possibility that this taxpayer may realize a gain later on when he sells this property. This objective factor of commerciality must be considered in similar situations. In this case, the respondent is asking the Court to consider the income paid to JD Co. in assessing the commerciality of Mr. Duhamel's personal gambling activities because he would be financially motivated to ensure JD Co's commercial success. This situation is completely different from the one at issue in *Stewart*.

Other indicia of commerciality to consider:

[146] The evidence indicates that Mr. Duhamel did not prepare a business plan. Mr. Duhamel does not teach poker courses or lead poker seminars. He did not open separate bank accounts for his gambling business or apply for separate credit cards.

[147] The evidence also indicates that Mr. Duhamel did not verify the payments made by PokerStars in his online account as a serious businessman would. He did not keep records of his gains and losses, except for in-person tournaments, and he did not keep any accounting records with respect to his poker gambling activities: he used Excel files to note his in-person tournament results since 2009. Mr. Duhamel did not change his approach when the PokerStars Agreement and other sponsorship agreements ended.

[148] However, after the 2013 audit began, he took more careful notes of tournament results. Since the audit covered 2010 and subsequent years, he took careful notes for these years but not for 2009 and 2008.

[149] Also, Mr. Duhamel did not prepare himself carefully before tournaments. On the contrary, it is established that he partied heavily. In addition, he played tournaments with high entry fees.

[150] Although it has been demonstrated that Mr. Duhamel had written documents prepared that reflected the profit-sharing agreements entered into with the other participants in the WSOP Main Event, this is not sufficient to infer that the gambling activities at issue were of a commercial nature.

7.3 Profit and loss statement

2008 and 2009:

[151] Profit and loss statements of Mr. Duhamel's poker gambling activities were not created for 2008 and 2009. However, the respondent asked the Court to infer from the following facts that Mr. Duhamel's poker gambling activities were profitable in 2008 and 2009 and that these gambling gains enabled him to support himself. In May 2009, Mr. Duhamel purchased a condominium for \$229,000 and assumed the mortgage payments alone. As of June 30, 2010, Mr. Duhamel had \$75,928 in cash and available funds, and he had \$70,000 of equity in the condominium. The balance in Mr. Duhamel's PokerStars account was \$15,089 on January 1, 2010, compared to \$4,529 on January 4, 2009. As of June 30, 2010, the balance in Mr. Duhamel's PokerStars account was \$19,837, and the balance in other online poker gambling accounts was \$41,451.

[152] For the following reasons, the Court concludes that, on a balance of probabilities, it cannot infer from the above facts that Mr. Duhamel's poker gambling activities in 2008 and 2009 were profitable and that he was able to meet his needs with his gambling gains. Indeed, the evidence shows that Mr. Duhamel worked throughout his studies, which enabled him to build a modest financial cushion.

[153] Other than the \$70,000 gain that he realized in the tournament held in Prague in December 2008, there is no evidence as to whether Mr. Duhamel realized any other gains or losses from his poker gambling activities in 2008. Although the evidence indicates that he played in bar and casino tournaments in 2008, he was a student during the first part of 2008. Therefore, he probably did not have much time to play poker before the end of spring 2008. Mr. Duhamel began his sabbatical year in late spring 2008 and subsequently travelled and partied extensively.

[154] The evidence indicates that in 2009, he lost \$1,403 playing in 20 PokerStars online tournaments. In July 2009, he also participated in the WSOP Main Event, but did not win anything. There is no evidence as to Mr. Duhamel's gains or losses in other tournaments in which he played in 2009.

[155] In 2009, Mr. Duhamel was living in an apartment with one of his friends. In May 2009, he bought a condominium for which his father had to co-sign the mortgage and provide part of the down payment. Therefore, in all likelihood,

Mr. Duhamel did not have the financial capacity to borrow in his own name and had to ask his father to co-sign the mortgage loan.

2010 and subsequent years:

[156] Although the amount of the gains is not at issue in this case, Philippe Renaud, Mr. Duhamel's accountant, provided testimony that established the reliability of the financial information compiled by Mr. Duhamel on the various in-person and online tournaments and private games in which he participated. Mr. Renaud used specified techniques (sampling) to conduct the audit.

[157] For the following reasons, the Court finds that, on a balance of probabilities, the profit and loss statement is not a factor that demonstrates the commerciality of Mr. Duhamel's poker gambling activities.

[158] A review of the financial information shows that there was no consistency or progression in gains from Mr. Duhamel's poker gambling activities from 2010 to 2018. He always played at a loss in online tournaments and decided to stop in 2015 after PokerStars stopped making sponsorship payments. He also incurred losses at in-person tournaments (except in 2010, 2015 and 2017). He realized most of his gains in private poker games with friends.

[159] In 2010, Mr. Duhamel did not have any net income from online tournaments; he incurred a total loss of \$1,294. He realized a gain of \$4,924,307 at in-person tournaments. However, excluding the \$4,969,333 gain that he realized in the WSOP Main Event, Mr. Duhamel incurred a loss of \$45,026 at in-person tournaments.

[160] In 2011, Mr. Duhamel incurred a loss of \$19,025 in online tournaments and a loss of \$127,433 at in-person tournaments.

[161] In 2012, Mr. Duhamel incurred a loss of \$7,081 in online tournaments but realized a gain of \$1,262 at in-person tournaments.

[162] In addition to the gain he realized at the 2010 WSOP Main Event, Mr. Duhamel also realized gains in private games in 2011 and 2012: \$530,374 and \$112,594, respectively. However, he incurred a loss of \$56,896 in 2010.

[163] In 2013 and 2014, Mr. Duhamel incurred losses in online and in-person tournaments, and in the private games in which he participated. He testified that he lost a great deal of money in 2013 (\$1,622,946) and 2014 (\$569,970).

[164] In 2015, he realized a large gain of \$3,055,224 in an in-person tournament held for the One Drop Foundation. He incurred a loss in online tournaments and realized a gain of \$247,227 in private games. In 2015, when he was no longer sponsored by PokerStars, Mr. Duhamel decided to stop playing in online tournaments because he had been losing money in them since 2010.

[165] In 2016, 2017 and 2018, Mr. Duhamel only played in in-person tournaments and a few private games. In 2016, he incurred a loss of \$194,308; in 2018, he incurred a loss of \$290,317, and in 2017, he realized a gain of \$286,339.

[166] The evidence indicates that, excluding his gains in the November 2010 WSOP Main Event and the 2015 One Drop Foundation tournament gains, from 2010 to 2018, Mr. Duhamel incurred a total loss of \$1,364,771 at in-person tournaments. Similarly, Mr. Duhamel incurred a total loss of \$114,176 in online tournaments. However, during the same period, he realized gains totalling \$295,705 in private games.

7.4 Mr. Duhamel's ability to make a profit from his poker gambling activities

[167] According to the appellant, Mr. Dufour's expert report demonstrated that the ability to win at poker is unpredictable and unstable. Chance clearly prevails over skill in poker because it would take an unusually large number of hands for skill to prevail over chance. It is not possible to control outcomes and, in the end, winning in poker is attributable to chance. All of Mr. Duhamel's gambling activities must be examined, starting in 2009 and 2010. In Mr. Duhamel's case, his poker results indicates that chance clearly prevails over skill, given the order in which the tournaments were played. According to Mr. Dufour's analysis, Mr. Duhamel had an 87% chance of being bankrupted by his poker gambling activities if the order of the tournaments in which he participated had been switched. Therefore, Mr. Duhamel's success was only due to the fact that the WSOP Main Event was one of the first tournaments that he won, which enabled him to keep playing poker. Thus, Mr. Duhamel's poker gambling activities do not reveal any ability to generate profits.

[168] According to the respondent, given the principles laid down by the Supreme Court of Canada in *Stewart*, this Court should not assess Mr. Duhamel's business acumen in examining this test but Mr. Duhamel's ability to make a profit from his poker gambling activities. Poker gains, as compiled by Mr. Duhamel and his accountant (Exhibit A-29), are therefore not relevant to the examination of this factor (*Leblanc*, at paragraph 42). The examination must cover all of Mr. Duhamel's

poker playing activities over several years, regardless of whether his victory at the 2010 WSOP Main Event was due to chance. Mr. Heeb said that generally speaking, in the long run, skill prevails over chance in poker in cash games and in online or in-person tournaments. Although experts agree that poker is a game of chance and skill, Mr. Duhamel's skill gives him an advantage that increases over the long term. In addition, Mr. Duhamel demonstrates an above average level of skill at in-person tournaments. However, Mr. Heeb performed a likelihood of bankruptcy analysis and found that Mr. Duhamel would have had a 50% chance of becoming bankrupt if the order of his tournaments had been switched.

[169] The respondent also said that even if the Court were to find that poker is a game in which chance prevails over skill, it must still find that, given their scope and character, Mr. Duhamel's poker gambling activities constitute a source of income that is a business, as opposed to a hobby or leisure activity.

[170] For the following reasons, the Court finds that, on a balance of probabilities, given the expert evidence that it accepted, chance plays a very important role in the outcome of a poker game. However, none of the experts persuaded the Court that either chance or skill generally prevailed in the outcome of a poker game, although the opinions expressed by Mr. Dufour were more credible and had more probative value than the views expressed by Mr. Heeb, including with respect to the issue at hand. In addition, the Court accepts the idea that poker is a negative expectation game, as demonstrated by Mr. Dufour. Furthermore, in Mr. Duhamel's case, given Mr. Dufour's likelihood of bankruptcy analysis, which was accepted by the Court (except with regard to the percentage of probability as such), it is demonstrated that Mr. Duhamel's poker results are primarily due to the random distribution of poker gains and losses. For these reasons, the Court finds that Mr. Duhamel could not have had the ability to make a profit from his poker gambling activities, in accordance with the objective indicator of commerciality propounded by the Supreme Court of Canada (*Stewart*).

Expert reports submitted by the respondent and consequences of the destruction of the data underlying the Heeb Report:

Expert reports submitted by the respondent:

[171] Mr. Heeb's December 16, 2020, expert report was filed as Exhibit I-2 (Heeb Report); Mr. Heeb's response to Mr. Dufour's January 19, 2021, expert report was filed as Exhibit I-3 (Heeb Response), and Mr. Heeb's reply to Mr. Dufour's response dated February 18, 2021, was filed as Exhibit I-4 (Heeb Reply).

[172] Mr. Heeb received a mandate from the respondent to prepare the Heeb Report, which involved summarizing and elaborating on the opinions he had previously expressed in 2012 in the course of proceedings in the United States (*United States v. Dicristina*, United States District Court of the Eastern District of New York, 2012 U.S. Dist. LEXIS 118037), regarding whether skill prevailed over chance in cash games of No-Limit Texas Hold'em online poker.

[173] After reviewing and analyzing data provided by PokerStars on 415 million hands of cash games of No-Limit Texas Hold'em online poker played on the PokerStars site (PokerStars Data), in connection with the case litigated in the United States, Mr. Heeb issued a report dated July 5, 2012 (attached to the Heeb Report as Exhibit A), a supplemental report dated August 13, 2012 (attached to the Heeb Report as Exhibit B) and a statement dated August 20, 2012 (attached to the Heeb Report as Appendix C).

[174] The Heeb Report summarized the findings previously issued by Mr. Heeb in 2012, and contained a new section in which Mr. Heeb reported on more recent academic literature relating to skill and chance in poker.

[175] Mr. Heeb believes, just as he did in 2012, that skill prevails over chance in poker. According to Mr. Heeb, poker is a game that involves a considerable number of complex decisions, and players can perfect their skills. Poker is a game where skillful players make their living by playing poker, and this is an independent test indicating that skill prevails over chance in poker. However, Mr. Heeb, did not cite any studies that supported this point; the Court therefore finds that this constitutes an unsubstantiated opinion, which has no probative value.

[176] After analyzing the PokerStars Data, Mr. Heeb found that the top 10 players (by amounts won over the year) won consistently. In analyzing the PokerStars Data, Mr. Heeb made the following findings in support of his conclusion that skill prevails over chance in poker:

- i) According to the analysis of the 169 possible starting poker hands, skilled players win more often than unskilled players with the same starting hands. Top ranked players (based on gains from each hand) perform better than lowest ranked players. Additionally, players tend to stay in their original group regardless of their starting hand;
- ii) Using various methods of statistical analysis (regression analysis), Mr. Heeb found that a player's skill level is a good predictor of subsequent outcomes (i.e., the amount of gains per hand played). This result supported

his view that skill prevails over chance in poker. Also, players in the top 50% of the skill index have a higher win rate for each type of hand than players in the bottom 50% of the skill index; and

- iii) Mr. Heeb performed a simulation of gambling at the Monte Carlo Casino and found that it took a player in the most highly skilled group 1,399 hands to have a 95% chance of beating a player in the least skilled group.

Destruction of PokerStars Data:

[177] Mr. Heeb confirmed that the PokerStars Data used to analyze issues considered in the Heeb Report, and more specifically in Exhibits A, B and C attached to the Heeb Report, were destroyed in accordance with his employer's practices and therefore could not be delivered to Mr. Dufour for this appeal. According to Mr. Heeb, these data were of unparalleled quality in that they gave him access to information on hole cards (i.e., the two cards dealt to the players at the start of the game), whereas data were usually only available on community cards. He was therefore able to perform much more detailed analyses.

[178] The information available on hole cards provided Mr. Heeb with information on the players' strategy, which differed with the player's skill level. This enabled him to rank players much more accurately and quickly as more skilled or less skilled players. Since he had a great deal of data covering a one-year period (April 2010 to March 2011), he was more confident in his results.

[179] The only data to which Mr. Dufour had access were from the HandHQ site. They provided information on 170 million of the 415 million hands in PokerStars Data. However these data did not include players' hole cards.

Consequences of the destruction of PokerStars Data:

[180] According to the respondent, a detailed report supported by analyses survived (i.e., the reports filed in Appendices A, B and C attached to the Heeb Report) along with more than 170 million HandHQ hands that were given to Mr. Dufour, and the appellant did not make any additional requests. The respondent therefore argues that it would be wrong for the Court to exclude the Heeb Report, which would be in compliance with the provisions of the *Tax Court of Canada Rules (General Procedure)* (the Rules) and the *Code of Conduct for Expert Witnesses* (Schedule III of the Rules; the Code of Conduct). According to the respondent, the high quality of the PokerStars Data only affects the degree of accuracy of Mr. Heeb's opinions, and

the destruction of the data did not affect Mr. Heeb's ability to explain the facts and assumptions supporting his opinion. Also according to the respondent, the appendices to the Heeb Report dating from 2012 were admissible and had as much weight as the subsequent reports prepared for this appeal.

[181] The respondent also argues that since Mr. Heeb was an expert in the 2012 matter litigated in the United States, it would be an error in this case to exclude the Heeb Report for breach of the Rules and the Code of Conduct (*1168760 Ontario Inc. v. 6706037 Canada Inc.*, 2017 ONSC 2211 (*1168760 Ontario*)). The Code of Conduct would apply only to the extent that the expert would be called upon to extend his opinion for the purposes of litigation.

[182] For the following reasons, the Court finds that Mr. Heeb is not a participant expert, a non-party expert, nor a litigant expert, but that he qualifies as an independent expert, and, accordingly, the Heeb Report must comply with the Rules and the Code of Conduct. Since the data underlying the Heeb Report, i.e., the PokerStars Data, are not attached to the Heeb Report, this report does not comply with rule 145 and the Code of Conduct. Mr. Heeb's opinions as well as the parts of the Heeb Report based on PokerStars Data are therefore not admitted into evidence. The same applies to the parts of the Heeb Response and Heeb Reply based on PokerStars Data. However, Mr. Heeb's opinions as well as the parts of the Heeb Report, Heeb Response and Heeb Reply that are not based on PokerStars Data are admitted into evidence, even though some opinions expressed by Mr. Heeb referred to generalized studies and not to the specific case involving Mr. Duhamel.

[183] This Court has already held that there are four types of witnesses with expertise who can testify before it, namely the independent expert, the participant expert, the non-party expert and the litigant expert (*Kaul v. The Queen*, 2017 TCC 55, at paragraphs 26 to 32 (*Kaul*)). What distinguishes the independent expert from the three other types of experts is that independent experts base their opinions on their personal observation of the facts at issue for a purpose other than litigation (*Kaul*, at paragraph 33; see also *St. Marthe v. O'Connor*, 2021 ONCA 790, at paragraphs 26 and 28; *Westerhof v. Gee Estate*, 2015 ONCA 206, at paragraphs 62, 79 and 86). Essentially, participant experts, non-party experts and litigant experts are fact witnesses. On the other hand, an independent expert is an expert witness whose services are retained by a party for a proceeding who did not participate in the events at issue. He must be willing and able to give the court independent, objective and impartial opinions concerning the issue without pleading a party's case. An independent expert must comply with the rules applicable to expert witnesses (i.e., rule 145 and the Code of Conduct) (*Kaul*, at paragraph 39).

[184] The Court concludes that Mr. Heeb cannot be characterized as a participant expert, non-party expert or litigant expert who would be permitted to testify in Court without complying with the provisions of the Rules applicable to expert witnesses and the Code of Conduct. Mr. Heeb cannot be characterized as a participant expert because he did not participate in the facts giving rise to this case. Also, Mr. Heeb cannot be characterized as a non-party expert because it cannot reasonably be argued that he observed the facts and events at issue prior to litigation and that he had prepared his report summarizing his opinions on these facts contemporaneously with his involvement. Finally, Mr. Heeb cannot be characterized as a litigant expert since he is not a party to these proceedings.

[185] In this case, Mr. Heeb is an independent expert. The respondent hired him to summarize and develop the opinions he expressed in *Dicristina* and provide testimony on them before the Court for the purposes of this litigation. In addition, Mr. Heeb signed the certificate in Form 145(2) of the Rules acknowledging that he had read the Code of Conduct; the Heeb Report was accompanied by the certificate of counsel under rule 145(1)(b) of the Rules and was served on the appellant pursuant to rule 145 of the Rules.

[186] Further, under rule 145(2)(a) and (c), the expert report shall “set out in full the evidence of the expert” and shall be accompanied by a certificate acknowledging that the expert witness has read the Code of Conduct and agrees to be bound by it. Under paragraphs 3(d) and 3(h) of the Code of Conduct, the expert report shall include “the facts and assumptions on which the opinions in the report are based” as well as “any literature or other materials specifically relied on in support of the opinions”.

[187] In *Bekesinski v. The Queen*, 2014 TCC 35 (*Bekesinski*), although the earlier version of the rules applicable to expert opinion evidence applied, this Court found it plain and obvious that the underlying data, quantitative analysis and ratios calculated to support the expert’s opinion had to be included in the expert report, because the old rules required “a full statement of [the] proposed evidence in chief [of the expert]” (former rule 145(2)(b)). This requirement maintained procedural fairness. This Court held that in the absence of this data, the opposing party was at a distinct disadvantage and excluded the expert report.

[188] In *Gerbro Holdings Company v. Canada*, 2016 TCC 173 (at paragraph 142), this Court also held that the requirements described in *Bekesinski* were still relevant under the new rules, considering rules 3(d) and 3(h) of the Code of Conduct as well as rule 145(2)(a).

[189] With respect to *1168760 Ontario*, cited by the respondent, the Ontario Superior Court of Justice allowed an expert to give expert evidence even though the data on which his report was based had been destroyed and that it was therefore impossible to produce them, as well as the notes or other relevant documents, because at least a summary of them remained, and because the opposing party failed to contend that there was a problem, in a timely manner. However, this decision cannot be usefully cited in this case. First, the expert then at issue was not an independent expert. In addition, the court allowed him to testify because when the evidence was disclosed prior to the trial, the opposing party could have requested a copy of the documents prepared during the events relevant to the case. This is not the case here.

[190] In the case of the Heeb Report, not only was the Code of Conduct not complied with, but the Report also failed to comply with the provisions of the Rules providing that the expert report shall set out in full the evidence of the expert. The Court cannot allow the filing of an expert report that only included 40% of the data used to prepare the report, because these data were also different from the initial data on which the report was based since there were no data on hole cards.

[191] The general purpose of the provisions of rule 145 is to ensure procedural fairness by allowing the parties to prepare properly. The appellant was disadvantaged by the destruction of the PokerStars Data, and Mr. Dufour's access to HandHQ Data did not restore procedural fairness. Indeed, Mr. Dufour indicates that he could not verify the probability measurements obtained by Mr. Heeb because he did not have access to the data on which the calculations were based (Dufour Response, at paragraphs 38, 40 and 48). Also, Mr. Heeb indicates that if he had not had access to the hole cards, the players could have been misclassified. Although Mr. Dufour was able to provide a response to the Heeb Report, some of his analyses or verifications could not be completed. Mr. Dufour was therefore unable to verify the value of the Heeb Report and its appendices.

[192] As the Court explained in *Bekesinski* with regard to the data underlying the expert report and the analyses: "Such information must be stated and included in the report, otherwise the opinion is simply that: an unsupported opinion." (At paragraph 30).

Probative value of opinions and expert reports based on PokerStars Data:

[193] However, even if the Court had allowed Mr. Heeb's opinions, portions of the Heeb Report, Heeb Response, and Heeb Reply based on the PokerStars Data to be

entered into evidence, for the following reasons, it must be concluded that these opinions would have had little probative value.

[194] The opinions expressed by Mr. Heeb based on the PokerStars Data involved cash game data, whereas the evidence has established material differences between cash games and tournaments, which tends to reduce the probative value of these opinions for poker tournaments.

[195] Also, in tournaments, players try to maximize their profits throughout the tournament, whereas in cash games, players try to maximize their gains in every hand they play. According to Mr. Heeb, identical hands can be played very differently in cash games versus tournaments. There are significant differences in tournament and cash game strategies, particularly at certain crucial moments. Given the significant differences between cash games and tournaments, the Court would have given little probative value to Mr. Heeb's finding regarding cash games had this expert report been admitted into evidence in this case.

[196] In spite of the significant differences between these games, Mr. Heeb asserted that, given his experience as a poker player and econometrician, his finding that skill prevails over chance in cash games would also apply to in-person and online poker tournaments. However, Mr. Heeb admitted that he had never analyzed online poker tournaments. Similarly, Mr. Heeb relied heavily on his personal experience as a poker player to make or substantiate some of his findings, which diminished their probative value.

[197] Furthermore, the evidence indicates that Mr. Heeb never specifically analyzed Mr. Duhamel's results when drafting the Heeb Report, because he had been mandated to analyze the contribution of skill to poker in general. Mr. Heeb confirmed that he did not have the financial information regarding the tournaments in which Mr. Duhamel participated when he prepared the Heeb Report.

[198] The sampling used by Mr. Heeb raised additional issues that reduce the probative value of his findings. The socio-economic profile of players on the PokerStars online poker site is unknown. This site is very large, and it is probably safe to assume that many players do not really know the basic strategies of the game. Mr. Heeb divided the players in the sample into two categories, i.e., the top 50% were the best players and the bottom 50% were the worst. He found that a player tended to stay in their group of best players or worst players, and that consequently, the persistence of group membership revealed that poker is a game of skill.

[199] The Court accepts Mr. Dufour's credible declarations: the tests that Mr. Heeb performed, i.e., the starting hand test, regression analysis (skill index) and Monte Carlo simulation, led to the same finding: in the long run, a member of the group of best players will probably win against a member of the group of worst players. However, this finding cannot be used to measure or distinguish between the impact of skill and chance on the outcome of a poker game. At most, it demonstrates that poker is not just a game of chance, but it did not demonstrate that skill prevails over chance.

Analysis of the expert evidence submitted:

[200] Mr. Dufour's November 5, 2020, expert report was filed as Exhibit A-33 (Dufour Report); Mr. Dufour's response to the Heeb Report dated January 14, 2021, was filed as Exhibit A-34 (Dufour Response), and Mr. Dufour's reply to the Heeb Response dated February 15, 2021, was filed as Exhibit A-35 (Dufour Reply).

[201] For the purposes of his expert report, Mr. Dufour analyzed the results of poker gambling activities as prepared by Mr. Duhamel (Exhibits A-20, A-21, A-22 and A-23) for the years 2010 to 2018, which were verified by Mr. Renaud, Mr. Duhamel's accountant. Mr. Dufour's mandate was to assess the sources of chance in poker and determine their contribution to the financial results of a No-Limit Texas Hold'em poker tournament and whether the game can be played with a positive long-term expectation of gain. Mr. Dufour was instructed to prepare a response to the Heeb Report and a reply to the Heeb Response.

[202] According to Mr. Dufour, skill and chance each have an impact on the outcome of a poker game. Several aspects of mathematical game theory and artificial intelligence strongly support the conclusion that chance has a much larger effect on the results.

[203] Mr. Dufour mentions three sources of chance in poker: the deal, the player's decisions and the distribution of gains over time. According to Mr. Dufour, the solution of the game is a vector of probabilities in which chance is a preponderant and determinative factor. If a poker player is successful, it is impossible to infer that this player has a particular talent in this field, because the role of chance is primordial and decisive.

The deal:

[204] According to the two experts, chance is an intrinsic part of poker, given the random way in which the cards are dealt. Not only are the two first cards dealt at random, so are the community cards. However, the importance of this source of chance decreases as the number of hands increases. However, Mr. Dufour and Mr. Heeb disagreed on the number of hands required for this source of chance to become negligible.

[205] According to Mr. Dufour, since it took Pluribus (the artificial intelligence program developed by Facebook) 5,000 to 10,000 hands to establish its superiority in a gambling experiment against human players, this risk remains significant in tournament results because a player plays about 200 hands a day. The WSOP Main Event is usually the biggest tournament. Mr. Duhamel participated in the 2010 event and said he played about 1,850 hands at the tournament, while Mr. Heeb estimated that he played 3,000.

[206] According to Mr. Heeb, chance is a major factor in any single hand. Accordingly, chance still prevails over skill after 60 hands. However, according to Mr. Heeb, it is necessary to examine the number of hands played per year, not only the number of hands played during a poker tournament to make this finding. Given the Pluribus experiment, and given that Mr. Duhamel plays an average of 20,240 hands per year at in-person tournaments and an average of 38,829 hands in online tournaments, the risk attributable to the deal is diversified and therefore becomes negligible for him.

[207] Since the evidence shows that poker tournament players try to maximize their gains at each tournament, and not in each hand they play as is the case in cash games, the Court concludes that it is more appropriate to analyze the number of hands needed to make the risk of the deal diversifiable by tournament rather than by year. Mr. Dufour's opinion is therefore more persuasive. Accordingly, the Court finds that the deal constitutes an important and substantial component of chance in poker.

Players' decisions:

[208] According to Mr. Dufour, if mathematical game theory is applied, and assuming that each player is playing rationally, optimal poker strategies are ultimately based on pure chance. Also, according to mathematical game theory, player decisions are mostly made at random, and bluffing is no longer part of the game. In the real world, since players are not exemplars of rational behaviour, the component of chance is all the greater. According to Mr. Dufour, the artificial

intelligence program never makes calculations to determine whether the opponent is bluffing. Rather, it uses an optimal random game matrix.

[209] Mr. Heeb agreed with Mr. Dufour's explanation of mathematical game theory. However, according to him, this only applies if the players play optimally, which is not the case in the real world. According to Mr. Heeb, the players' decision-making process is precisely what introduces an element of skill into poker, and one of those skills is bluffing or knowing how to tell whether your opponent is bluffing.

[210] The Court accepts the idea that mathematical game theory demonstrates that skill plays no role in poker when each player uses optimal strategies. However, the evidence indicates that these optimal poker strategies for games involving more than two players are not yet known. As poker players are unlikely to actually use optimal strategies, Mr. Dufour's game theory findings remain theoretical. Therefore, the Court cannot use this element to determine the role of chance or skill in poker outcomes when humans play this game. Nevertheless, it leads to the conclusion that this increases the importance of chance in poker outcomes.

Distribution of gains and probability of bankruptcy:

[211] According to Mr. Dufour, the most important source of chance in Mr. Duhamel's poker results was in the distribution of his gains and losses over time.

[212] For the following reasons, the Court finds that the opinions expressed by Mr. Dufour in this regard were compelling and credible. He demonstrated that Mr. Duhamel's success was primarily attributable to randomness in the distribution of poker gains and losses and that there was a very high probability that he would go bankrupt in 2010 by engaging in poker gambling activities. However, considering the opinions expressed by Mr. Heeb in this regard, the Court further finds that the probability of Mr. Duhamel's bankruptcy was lower than the 87% rate calculated by Mr. Dufour, but much higher than the 50% rate calculated by Mr. Heeb.

[213] First of all, the analysis of Mr. Duhamel's results over the years indicates that they were highly asymmetrical. Mr. Duhamel always played at a loss in 1,335 online tournaments from 2010 to 2015. Excluding the November 2010 WSOP Main Event win and the June 2015 One Drop High Roller tournament win, Mr. Duhamel played at a loss in 577 in-person tournaments from 2010 to 2018. However, he won in private games in 2011, 2012, 2015 and 2017.

[214] According to the actuarial theory of ruin and the Monte Carlo simulation where the order of the tournaments was switched, Mr. Dufour found that there was an approximately 87% to 89% probability that Mr. Duhamel would go bankrupt. Mr. Dufour therefore found that chance played a material role in Mr. Duhamel's poker results. Were he to do it again, there would be an 87% probability that Mr. Duhamel would go bankrupt and have to stop playing, with \$100,000 of cumulative losses.

[215] Mr. Dufour is also of the view that the probability of bankruptcy indicated above was undoubtedly grossly underestimated because in reality, poker is a negative expectation game. In poker tournaments, it is extremely unlikely that a player has a positive expectation of winning, even if he makes an optimal decision in each hand, because the total prize (total entry fees) is reduced by 8 to 13% for dealer tips and casino fees. Rather, Mr. Heeb was of the view that skillful players had a positive expectation of winning.

[216] Thus, according to Mr. Dufour, Mr. Duhamel was lucky to have won a large amount at the start of his poker activities, and this contributed to his success. Mr. Heeb also recognized the impact of winning big early in one's gambling career and the importance of calculating the probability of bankruptcy. He recommends that the Court consider this factor in its decision.

[217] Although Mr. Heeb believes that Mr. Dufour's calculations were mathematically accurate, he argues that these results were unrealistic because they were based on the assumption that a player would intentionally go bankrupt to enter a tournament in which he did not have the financial means to participate. There are several ways in which a player can mitigate his poker risks.

[218] Mr. Heeb also performed a Monte Carlo simulation, using a financial management strategy based on the assumption that a player would not enter a tournament with entry fees exceeding 2% (conservative strategy), 3% (slightly more aggressive strategy) or 5% (aggressive strategy) of the value of his available funds. The probability of bankruptcy was then 21%, 32% and 50%, respectively, depending on the money management strategy (2%, 3% or 5%) used over the same nine-year playing period.

[219] Mr. Heeb also described various money management strategies:

- i) Enter into entry fee cost-sharing agreements;
- ii) Increase available funds through other sources of income (by playing in online poker tournaments, for example);
- iii) Avoid entering tournaments that are too expensive, and enter tournaments with lower entry fees instead.

[220] Although the Court accepts the idea that a player can mitigate poker risks in these various ways, the evidence nevertheless indicates that Mr. Duhamel did not follow such money management strategies. Accordingly, the Court finds that Mr. Heeb's probability of bankruptcy calculations were not representative of Mr. Duhamel's situation.

[221] First, the evidence shows that Mr. Duhamel entered more than 1,900 tournaments, but only entered into approximately five entry fee cost-sharing agreements. It was also shown that, absent such agreements, Mr. Duhamel still entered tournaments (except with respect to some One Drop Foundation tournaments).

[222] The strategy of playing online tournaments to increase a player's available funds was unfortunately not a winning strategy for Mr. Duhamel because the evidence showed that he played at a loss in online tournaments. When the results of online tournaments were included in Mr. Dufour's probability of bankruptcy analysis, the probability of bankruptcy increased.

[223] Finally, with respect to the third strategy, on a balance of probabilities, the evidence shows that Mr. Duhamel did not practice this type of risk management. First, Mr. Duhamel testified that he preferred to enter tournaments with high entry fees because playing in them was more fun. It is established that, for the two in-person tournaments for which there was proof of the entry fees, and which Mr. Duhamel entered prior to the November 2010 WSOP Main Event, the entry fees cost him more than 10% of his available funds. Finally, the US\$10,000 entry fee paid for entering the WSOP Main Event also accounted for more than 10% of his cash. After winning this tournament, Mr. Duhamel probably no longer had any significant cash limitations. However, given his behaviour prior to the WSOP Main Event, he likely would have continued to spend significant portions of his cash to enter tournaments.

[224] Mr. Heeb's probability of bankruptcy analysis was based on the assumption that the player will scrupulously adhere to the proposed strategy; if this strategy is not followed, the probability of bankruptcy increases.

[225] Although Mr. Heeb's criticism that Mr. Duhamel did not spend all his funds to enter a tournament was valid, the evidence shows that Mr. Duhamel did not follow the money management strategies described by Mr. Heeb. The Court therefore finds that Mr. Dufour's probability of bankruptcy analysis had more weight with regard to Mr. Duhamel's specific situation.

Return on investment:

[226] By analyzing the results of 23 in-person tournaments held by the WSOP in 2011 and 2012, and using a method developed based on the literature (authors Levitt & Miles), Mr. Heeb calculated the return on investment (ROI) of the group of most skilled players and the ROI of the group of least skilled players. According to his analyses, the group of most skilled players obtained a 37% return on investment while the group of least skilled players obtained a negative return on investment of 10%. For all players, the average ROI was negative 7%. Mr. Heeb said his analyses measured the return on investment for a group of players, not the actual performance of an individual player.

[227] By studying the results of in-person tournaments that Mr. Duhamel entered from 2010 to 2018, Mr. Heeb found that Mr. Duhamel was a highly skilled poker tournament player. More specifically, over this nine-year period, he made profits of over \$6 million, which was equivalent to his expected return, while a typical poker player would have had an expected loss of \$159,800.

[228] However, Mr. Heeb's analysis did not consider Mr. Duhamel's online tournaments and private games and therefore could not demonstrate that Mr. Duhamel was a skilled player more generally. As previously demonstrated, Mr. Duhamel's positive tournament performance was solely attributable to his success in two tournaments, including the WSOP Main Event that he won in 2010.

[229] Given the evidence, I also note that Mr. Duhamel did not obtain this 37% return on investment when all the results of his gambling activities are considered. Since this analysis measured the performance of a group of players, it does not help the Court resolve the issue under consideration. However, it does lend more weight to Mr. Dufour's finding that poker players have a negative expectation

of gain because Mr. Heeb's analysis demonstrated that, on average, poker players have a negative return on investment of 7%.

Skill measurement formula developed by Mr. Heeb:

[230] In *Dicristina*, Mr. Heeb created a formula for measuring skill in poker, not the skill of any player in particular:

$$\text{Skill} = 2 (\text{probability that the more skillful player wins} - 0.5)$$

Using this formula, Mr. Heeb measured, in particular, the impact of skill in 653 in-person poker tournaments (approximately equivalent to the number of in-person tournaments in which Mr. Duhamel participated over a nine-year period). According to Mr. Heeb, skill accounted for 65% of in-person poker tournament results, and chance accounted for 35% after 653 tournaments.

[231] However, for the following reasons, the Court is of the view that this formula simply does not work, as Mr. Dufour explained.

[232] First of all, this formula will only work when a skilled player plays against an unskilled player. The two experts agreed that the more equally skilled players are, the more winning is decided by chance, to the point where in the case of two equally skilled players, skill no longer plays any role in poker results.

[233] In the Heeb Report, Mr. Heeb had previously expressed the opinion that in-person poker tournaments are all the more a game where skill prevails because, unlike in online gambling, a player can guess what cards his opponent is holding by considering his behaviour. However, using this measurement, Mr. Heeb calculated a 65% skill rate after 653 in-person tournaments, whereas he had measured an 81% skill rate for online cash games after 500 hands. It should be noted that, according to Mr. Heeb, up to 3,000 hands can be played in a single tournament.

[234] As Mr. Dufour indicates in the Dufour Response (at paragraph 57), [TRANSLATION] “[t]he issue of the ‘*percentage of skill and chance in the probability of winning in poker*’ cannot be resolved, because it is basically very ill-defined and greatly depends on the context, and in particular, the number of hands played . . . and the opponents’ strength . . .”.

[235] Mr. Heeb successfully demonstrated that poker was not a game of pure chance but was unable to demonstrate that skill prevailed.

[236] When faced with a problem that could affect the validity of his theory, Mr. Heeb seemed to adjust his theory to confirm his findings rather than acknowledging that his findings might not be valid. Specifically, in the Heeb Response, Mr. Heeb asserted that his measurement was only approximate and underestimated the skill component because the ideal version of the measurement must compare the best player in the world to the worst. However, this explanation does not appear anywhere in the Heeb Report. It is odd that the first mention of such a fundamental component of Mr. Heeb's theory was in response to Mr. Dufour's criticisms. This affects the reliability of Mr. Heeb's formula. As Mr. Dufour put it: "The scientific method . . . is effective, but somewhat cruel and unforgiving. When a theory or measurement produces an illogical result, it must be abandoned."⁵

7.5 Existence of a risk management or mitigation system.

[237] According to the appellant, the existence of a risk management or mitigation system is the key criterion in determining the issue of the commerciality of Mr. Duhamel's poker gambling activities. In this case, it is argued that the evidence does not demonstrate that Mr. Duhamel used any system to manage or minimize his risks.

[238] According to the respondent, the evidence indicates that Mr. Duhamel carefully managed his tournament choices based on entry fee costs and that PokerStars reimbursed JD Co. for many tournament entry fees. This demonstrates that Mr. Duhamel managed and minimized his risk of loss. Also, Mr. Duhamel managed the risks related to his poker gambling activities by entering into gain-sharing agreements and by selling shares of the gains from certain poker tournaments.

[239] For the following reasons, the Court finds that, on a balance of probabilities, Mr. Duhamel did not use any risk management or mitigation system or strategy in connection with his poker gambling activities. The evidence clearly indicates that Mr. Duhamel did not conduct his poker gambling activities in a businesslike manner.

[240] First, the Court finds that it has not been demonstrated that Mr. Duhamel put in place systematic and serious processes to win tournaments. Mr. Duhamel did not use a method to collect information on his gambling opponents. Mr. Duhamel testified that he did not use any player statistics programs (Holdem Manager or PokerTracker). He indicated that, although he tried to use them, it bothered him and

⁵ November 5, 2021, transcript, page 141, lines 7 to 11.

interfered with his concentration. It should also be noted that these programs can only be used in online tournaments. Also, unless you know the usernames of the players in online tournaments, you cannot find out who your opponent is.

[241] Since seating at the various tournament tables is assigned at random, you cannot find out who your opponents are in advance or choose them based on their strengths or weaknesses. Mr. Duhamel could therefore not choose or avoid a particular player in tournaments. As a result, there would have been no advantage in preparing for a tournament by studying past games of potential opponents. Furthermore, the evidence clearly indicates that Mr. Duhamel did not study the games of his potential opponents.

[242] The evidence also demonstrated that Mr. Duhamel played in poker tournaments and not in cash games where he could have stopped playing as soon as he won or lost a large amount. It was also shown that Mr. Duhamel could not really withdraw from private games before the end of the evening.

[243] It was established that, during the years at issue, 2010, 2011 and 2012, Mr. Duhamel partied very often and was sometimes hung over when he arrived at various tournaments the next day. As indicated above, Mr. Fournier-Giguère confirmed that this part of Mr. Duhamel's testimony was credible. It is therefore clear that Mr. Duhamel was not acting in a businesslike manner and was not taking any particular steps to perform well in the various tournaments.

[244] The evidence also indicates that Mr. Duhamel did not make any special preparations for the WSOP Main Event, the tournament in which he made his biggest poker gains. The private games featured copious amounts of fine food and wines, and it is established that Mr. Duhamel took full advantage of both.

[245] Mr. Duhamel very seldom entered into entry fee cost-sharing agreements or gain-sharing agreements. Mr. Duhamel only entered into three entry fee cost-sharing agreements, for the One Drop Foundation tournaments held in 2012, 2015 and 2018. Also in 2011, he sold a 17% share of his gains from the WCOOP 61 tournament held on September 25, 2011, for \$1,700. He also sold a 17.2% share of his gains in the PCA tournament in Nassau held on January 5, 2012, for \$17,200.

[246] Mr. Duhamel also entered into tournament gain-sharing agreements with some friends who participated in the WSOP Main Event in 2010. Thus, Mr. Duhamel and his friends agreed that they would share 46% of their gains. The evidence indicates that Mr. Duhamel in fact distributed 46% of his gains in this

tournament, in accordance with the sharing agreements, and he also received 5% of another participant's gains. In July 2010, the parties had entered into a verbal agreement. After Mr. Duhamel qualified for the final table, these agreements were put in writing.

[247] The number of entry fee cost-sharing and gain-sharing agreements is therefore minimal compared to the total number of in-person and online tournaments in which Mr. Duhamel played. Since he participated in 577 in-person tournaments and 1,335 online tournaments from 2010 to 2018, these agreements cannot be considered part of a risk management or mitigation strategy put in place by Mr. Duhamel in connection with his poker gambling activities.

[248] In addition, although risk management was one of the reasons that Mr. Duhamel entered into gain-sharing agreements with other participants, the Court also considers his testimony that such agreements were entered into to create team spirit, and not to minimize the potential for losses. Mr. Fournier-Giguère, who signed such an agreement with Mr. Duhamel, provided testimony that tended to confirm the purpose of these agreements because Mr. Fournier-Giguère returned to Las Vegas in November 2010 to attend the final table after losing in the first days of the tournament, which started in July 2010.

[249] The evidence clearly indicates that Mr. Duhamel did not use financial management strategies, as Mr. Heeb argues. As mentioned above, the Court accepts Mr. Duhamel's testimony that he prefers to play tournaments with high entry fees because it makes playing poker more fun. Also, it is established that Mr. Duhamel sometimes spent more than 10% of his cash on entry fees.

7.6 Overall assessment and subjective intention

[250] Considering the various objective factors of commerciality, the Court finds that, on a balance of probabilities, Mr. Duhamel did not pursue his poker gambling activities in a businesslike manner. This tends to confirm the plausibility of Mr. Duhamel's testimony that poker is a hobby or entertainment, that he plays because he is addicted to gambling and that he had no intention of earning a living by playing poker.

[251] Although Mr. Duhamel does not play poker to lose, and like any player, whether playing recreationally or for business purposes, he plays to win and therefore, to make a profit (*Leblanc*, at paragraph 29), the Court accepts Mr. Duhamel's testimony that he never intended to make a living playing poker,

either before or after winning the WSOP Main Event in 2010 and after he signed the PokerStars Agreement that allowed him to travel around the world while promoting PokerStars.

[252] Since he won the WSOP Main Event, and considering, among other things, the sponsorship income that PokerStars paid JD Co., Mr. Duhamel does not need gainful employment and can support himself. Mr. Duhamel therefore testified that he could continue to play poker because he was addicted to gambling. At the time of the hearing, he was unemployed and taking care of his two young children, while his spouse worked as a teacher.

[253] Since the evidence clearly indicates that chance played a very important role in poker results; that Mr. Duhamel's poker gambling activities did not demonstrate an ability to generate profits; that the probability that Mr. Duhamel's poker gambling business would go bankrupt was well above 50% (but less than 87%); that Mr. Duhamel did not conduct his poker gambling activities in a businesslike manner; that Mr. Duhamel did not develop any risk management or mitigation system in connection with his poker gambling activities; and that the financial results of his tournaments did not show any consistency or progression, the Court finds that, on a balance of probabilities, Mr. Duhamel's poker gambling activities were not conducted in a sufficiently commercial manner to constitute a source of business income for the purposes of the Act. Accordingly, the net gains from Mr. Duhamel's poker gambling activities are not to be included in computing his income under sections 3 and 9 for the 2010, 2011 and 2012 taxation years.

VIII. CONCLUSION

[254] For these reasons, the appeals from the reassessments made under the Act for the 2010, 2011 and 2012 taxation years are allowed, with costs to the appellant. The net gains from Mr. Duhamel's poker gambling activities are not to be included in computing his income under sections 3 and 9 for the 2010, 2011 and 2012 taxation years.

[255] The parties have until July 22, 2022, to reach an agreement on costs. If an agreement is not reached within this period, the parties must file their written submissions of no more than 10 pages with the Court no later than August 26, 2022.

Signed at Montreal, Quebec, this 21st day of June 2022.

“Dominique Lafleur”

Lafleur J.

Translation certified true
on this 19th day of January 2024.
François Brunet, Revisor

CITATION: 2022 TCC 66

COURT FILE NO.: 2018-1782(IT)G

STYLE OF CAUSE: JONATHAN DUHAMEL AND
HER MAJESTY THE QUEEN

PLACE OF HEARING: Montreal, Quebec:
November 1, 2, 3, 4, 5, 22, 23, 24, 25 and
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DATE OF HEARING: November 1, 2, 3, 4, 5, 22, 23, 24, 25 and
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REASONS FOR JUDGMENT BY: The Honourable
Justice Dominique Lafleur

DATE OF JUDGMENT: June 21, 2022

APPEARANCES:

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