Docket: 2018-686(IT)G

BETWEEN:

ROBERT DE PELLEGRIN,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 11, 12, 13, 27 and 28, 2024 at Montréal, Quebec.

Before: The Honourable Justice Dominique Lafleur.

Appearances:

Counsel for the Appellant:	Christopher R. Mostovac
Counsel for the Respondent:	Katherine Savoie Marie-Aimée Cantin

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JUDGMENT

In accordance with the attached Reasons for Judgment:

1. The appeals from the assessments made under the *Income Tax Act* (the "Act") for the 2002 and 2009 taxation years are dismissed;

2. The appeal from the assessment made under the Act for the 2007 taxation year is quashed;

3. The appeals from the assessments made under the Act for the 2003, 2004, 2005, 2006 and 2008 taxation years are allowed, and the assessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the following basis:

a) The calculation of the amount to include in the Appellant's income under subsection 15(2) of the Act for these taxation years as the Appellant's debt to 3682510 Canada Inc. must consider that the shareholder account's opening balance on November 1, 2001, was $36,302 for the benefit of the Appellant, and not nil; that $127,538.08 must be credited to the shareholder account for the benefit of the Appellant on December 1, 2005, representing a contribution by the Appellant using the net proceeds from the sale of the residence located at 244 Bruyère Street, Ottawa; and that an amount of $45,000 must be credited to the shareholder account for the benefit of the Appellant on July 28, 2006, representing his contribution using funds from his mother;

b) For the 2006 taxation year, the amount to include in the Appellant's income as unreported income under subsection 9(1) of the Act is reduced by $32,235 to $5,183;

c) For the 2006 taxation year, the amount to include in the Appellant's income under subsection 15(1) of the Act is reduced by $1,207.76 to $54,840;

d) For the 2006 taxation year, the penalties assessed under subsection 163(2) of the Act are quashed;

e) For the 2005 taxation year, given the concession made by the Respondent at the hearing, an additional deduction of $2,800 must be granted in computing the Appellant's income under paragraph 20(1)(j) of the Act.

Given the outcome of the appeals, no costs will be awarded.

Signed at Ottawa, Ontario, this 15th day of January 2025.

"Dominique Lafleur"

Lafleur J.

Translation certified true
on this 15th day of January 2025.

Melissa Paquette, Senior Jurilinguist

Citation: 2025 TCC 7
Date: 20250115
Docket: 2018-686(IT)G

BETWEEN:

ROBERT DE PELLEGRIN,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Lafleur J.

I. THE APPEALS

[1] Mr. Robert De Pellegrin (the "Appellant" or "Mr. De Pellegrin") is appealing to this Court from assessments made by the Minister of National Revenue (the "Minister") under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "Act") for the 2002 to 2009 taxation years.

[2] In these assessments, various amounts were added to Mr. De Pellegrin's income as:

(i) a benefit conferred by 3682510 Canada Inc. ("Horizon") on him as a shareholder for appropriation of funds;

(ii) unreported income;

(iii) debts Mr. De Pellegrin owed to Horizon;

(iv) reimbursement of the balance of the Home Buyers' Plan (the "HBP");

(v) income from business activities.

[3] In addition, for the 2006 taxation year only, the Minister assessed penalties under subsection 163(2) of the Act in respect of unreported income and the amount

of the benefit conferred by Horizon on Mr. De Pellegrin as a shareholder under subsection 15(1) of the Act.

[4] Mr. De Pellegrin testified at the hearing, as did Mr. Siradiou Barry, senior analyst in the risk assessment section and auditor at the Canada Revenue Agency ("CRA"), and Mr. Gregory Silas, forensic accountant.

[5] After holding a *voir dire* and hearing the parties' submissions, the Court qualified Mr. Silas as an expert in forensic accounting and determined that he could testify in that capacity at the trial, but only on limited matters. Accordingly, Mr. Silas's expert testimony concerned solely the determination of the opening balance of the shareholder loan account (in these reasons, the "shareholder account") entered in Horizon's General Ledger on October 31, 2002, and errors in the debits and credits to that account, as the case may be. Similarly, the Court admitted into evidence only specific portions of Mr. Silas's expert report dated February 24, 2021, including the list of exhibits and the list of schedules, filed as Exhibit A-11: Chapter 8 up to paragraph j., Chapter 9 excluding paragraph e., Chapter 10 excluding paragraph i., and Chapter 11 concerning the relevant assumptions (the "Expert Report").

[6] Unless otherwise indicated, any statutory provision referred to in these reasons is a provision of the Act. Similarly, unless otherwise indicated, any dollar amounts mentioned in these reasons refer to legal tender in Canada.

II. BACKGROUND

[7] Mr. De Pellegrin is a businessperson. He began a program in business administration at Queen's University before studying at Concordia University, although he never obtained a university degree. From 1996 to 2000, he worked as a consultant for several government departments. In 1998 and 1999, Mr. De Pellegrin worked nearly every day, earning approximately $800 to $1,000 a day.

[8] In November 1999, Mr. De Pellegrin incorporated the Horizon company, of which he was the sole shareholder, primarily to provide online video streaming and chat. Mr. De Pellegrin did not take care of the company's everyday operations, as the brothers Nick Saphos and Costa Saphos were in charge of overseeing the

business. It was understood that Mr. De Pellegrin would finance the company's operations by investing his own funds in Horizon's capital.

[9] According to Mr. De Pellegrin, the company was highly profitable in its first years. This is apparent from the documents filed in a bundle as Exhibit R-11 (identification and additional information concerning Horizon). Clients paid for services by the minute, and Horizon received a percentage of those fees. The company ceased operations in 2009.

[10] Mr. De Pellegrin acknowledges that, over the years, he used Horizon's bank accounts as though they were his own.

[11] In 2003, he personally purchased the residence at 244 Bruyère Street, Ottawa (the "residence"), which Horizon had been renting and using to carry on its operations. Mr. De Pellegrin sold the residence in 2005, earning net sale proceeds of $127,538.08, after paying the mortgage loan and covering selling costs (Exhibit R-1, Respondent's Book of Documents, tab 38).

[12] After the death of his father in 2003, Mr. De Pellegrin became disconnected from Horizon's operations. He had a difficult few years. After that, around 2005, he approached the owners of some 1-800-GOT-JUNK franchises with a view to acquiring exclusive rights in the Quebec market, but he was turned down. About a year later, the franchisor contacted Mr. De Pellegrin and the two parties entered into an agreement by which the franchisor awarded franchises to Mr. De Pellegrin.

[13] The company 9172-2470 Québec inc. ("QuébecCo") was incorporated on July 31, 2006, to purchase the franchises. The sole shareholder of QuébecCo is Fiducie Robert de Pellegrin (the "Trust"), created on August 4, 2006. The company purchased two franchises, each covering four territories (in the western part of Montréal), for a total cost of $120,840, excluding the purchase costs for the trucks (Exhibit R-1, Respondent's Book of Documents, tab 55).

[14] Subsequently, QuébecCo purchased other franchises covering the eastern part of Montréal, as well as the Laurentians and Lanaudière. In 2006, QuébecCo had four employees; it now has between 75 and 80.

[15] Mr. De Pellegrin also testified that, at a certain point in 2007, he wanted to rectify his own tax situation as well as Horizon's, since no income tax returns had been filed for the 2002 to 2005 taxation years. He hired the professional services of a firm called Tax Defenders and initiated voluntary disclosure procedures for the

2002 to 2005 taxation years. Time periods were extended given the documents sought by the tax authorities, and the 2007 to 2009 taxation years were included in the voluntary disclosure. The evidence shows that voluntary disclosure began in September 2009. In July 2010, Mr. De Pellegrin and Horizon's income tax returns were filed for the 2002 to 2009 taxation years.

[16] In January 2012, the CRA put an end to the voluntary disclosure process because, among other things, tax returns for Mr. De Pellegrin's 2009 taxation year indicating different salaries had apparently been filed with the tax authorities.

[17] Mr. De Pellegrin's tax file was therefore audited. This audit, which began in 2013, led to the assessments currently under appeal.

[18] Mr. De Pellegrin testified that, during the audit performed by CRA auditor Mr. Barry, he had given the auditor all the documents he needed and that he had provided about 20 boxes of documents.

III. CONCESSIONS OF THE PARTIES AND ISSUES

[19] At the beginning of the hearing, the Respondent conceded the deduction of an additional $2,800 under paragraph 20(1)(j) for the 2005 taxation year.

[20] The Appellant agreed that the reimbursement of the HBP balance was no longer in dispute. Accordingly, the matter of the addition of $1,333 to Mr. De Pellegrin's income under paragraph 56(1)(h.1) for each of the 2005, 2006, 2007, 2008 and 2009 taxation years is not in dispute. As a result, since the only issue for the 2009 taxation year concerns the addition of $1,333 to his income as a reimbursement of the HBP balance, the appeal from the assessment in respect of the 2009 taxation year will be dismissed.

[21] The Appellant also stated that he does not contest the addition of various amounts to his income as income from business activities for the 2002, 2003, 2004, 2007, 2008 and 2009 taxation years ($16,373, $60,000, $15,000, $38,000, $37,000 and $20,000, respectively). No additions of this type were made for the 2005 and 2006 taxation years. The Appellant also does not contest the addition of $60,000 as income from a dividend for the 2002 taxation year.

[22] At the start of the hearing, the Appellant agreed that he was no longer appealing the reassessment made by the Minister in respect of the 2002 taxation year on the issue of the deductibility of $20,000 as a registered retirement savings plan

("RRSP") contribution. However, during the course of the hearing, he argued that, given the evidence filed at the hearing, he had to change his position and also appeal from the reassessment in respect of the 2002 taxation year.

[23] The Minister's assessment in respect of the 2007 taxation year shows that Mr. De Pellegrin owes no federal income tax for that year (Exhibit A-8, Notice of Assessment for 2007). Since it is not possible to appeal a notice of assessment indicating that no tax is payable, Mr. De Pellegrin's appeal respecting the 2007 taxation year will be quashed (*Canada v. Interior Savings Credit Union*, 2007 FCA 151 at para. 15).

[24] Therefore, the issues before this Court are:

(i) For the 2003 taxation year: Should the amount of $38,026 be included in computing Mr. De Pellegrin's income under subsection 15(2)?

(ii) For the 2004 taxation year: Should the amount of $42,917 be included in computing Mr. De Pellegrin's income under subsection 15(2)?

(iii) For the 2005 taxation year: Should the amount of $42,520 be included in computing Mr. De Pellegrin's income under subsection 15(2)?

(iv) For the 2006 taxation year: Should the following amounts be included in computing Mr. De Pellegrin's income:

a. $16,364 under subsection 15(2)?

b. $37,418 under subsection 9(1)?

c. $56,048 under subsection 15(1)?

(v) For the 2006 taxation year: Was the Minister justified in assessing penalties under subsection 163(2) for alleged unreported income of $37,418 and a total shareholder benefit of $56,048?

(vi) For the 2008 taxation year: Should the amount of $85,000 be included in computing Mr. De Pellegrin's income under subsection 15(2)?

[25] The Court must also determine whether the issue of the deductibility of $20,000 in RRSP contributions is in dispute for the 2002 and 2003 taxation years

and, if so, whether Mr. De Pellegrin is entitled to a $20,000 deduction for RRSP contributions under paragraph 60(i) in computing his income for the 2002 taxation year or the 2003 taxation year.

IV. CONCLUSION

[26] For the reasons that follow:

1. The appeals from the Minister's assessments for the 2002 and 2009 taxation years are dismissed;

2. The appeal from the Minister's assessment for the 2007 taxation year is quashed;

3. The appeals from the Minister's assessments for the 2003, 2004, 2005, 2006 and 2008 taxation years are allowed, and the assessments are referred back to the Minister for reconsideration and reassessment on the following basis:

    a. The calculation of the amount to include in Mr. De Pellegrin's income under subsection 15(2) for these taxation years as Mr. De Pellegrin's debt to Horizon must consider that the shareholder account's opening balance on November 1, 2001, was $36,302 for the benefit of Mr. De Pellegrin, and not nil; that $127,538.08 must be credited to the shareholder account for the benefit of Mr. De Pellegrin on December 1, 2005, representing his contribution using the net proceeds from the sale of the residence located at 244 Bruyère Street, Ottawa; and that an amount of $45,000 must be credited to the shareholder account for the benefit of Mr. De Pellegrin on July 28, 2006, representing his contribution using funds from his mother;

    b. For the 2006 taxation year, the amount to include in Mr. De Pellegrin's income as unreported income under subsection 9(1) is reduced by $32,235 to $5,183;

    c. For the 2006 taxation year, the amount to include in Mr. De Pellegrin's income under subsection 15(1) is reduced by $1,207.76 to $54,840;

    d. For the 2006 taxation year, the penalties assessed under subsection 163(2) are quashed;

e. For the 2005 taxation year, given the concession made by the Respondent at the hearing, an additional deduction of $2,800 must be granted in computing Mr. De Pellegrin's income under paragraph 20(1)(j).

[27] Given the outcome of the appeals, no costs will be awarded.

V. ANALYSIS

A. 2002 and 2003 taxation years: $20,000 in RRSP contributions

[28] The Minister allowed a $20,000 deduction for RRSP contributions in computing Mr. De Pellegrin's income for the 2002 taxation year under paragraph 60(i). According to the Appellant, the $20,000 deduction should have been allowed for the taxation year of 2003, not 2002. The Respondent submits that the issue of the deductibility of the RRSP contributions was not raised in the Notice of Appeal and that the Court therefore need not decide this issue in these appeals. In the alternative, the Respondent claims that the deduction cannot be allowed for the 2003 taxation year because it was allowed in computing Mr. De Pellegrin's income for the 2002 taxation year.

[29] The relevant provisions of the Act read as follows:

60 There may be deducted in computing a taxpayer's income for a taxation year such of the following amounts as are applicable	**60** Peuvent être déduites dans le calcul du revenu d'un contribuable pour une année d'imposition les sommes suivantes qui sont appropriées :
…	[…]
(i) any amount that is deductible under section 146, 146.3 or 146.6 or subsection 147.3(13.1) or 147.5(19) in computing the income of the taxpayer for the year;	**i)** toute somme qui est déductible, en application des articles 146, 146.3 ou 146.6, ou des paragraphes 147.3(13.1) ou 147.5(19), dans le calcul du revenu du contribuable pour l'année;
146(5) There may be deducted in computing a taxpayer's income for a taxation year such amount as the	**146(5)** Un contribuable peut déduire dans le calcul de son revenu pour une année

taxpayer claims not exceeding the lesser of

> **(a)** the amount, if any, by which the total of all amounts each of which is a premium paid by the taxpayer after 1990 and on or before the day that is 60 days after the end of the year under a registered retirement savings plan under which the taxpayer was the annuitant at the time the premium was paid, other than the portion, if any, of the premium
>
> > **(i)** that was deducted in computing the taxpayer's income for a preceding taxation year,
> >
> > …
> >
> > **(iv.1)** that would be considered to be withdrawn by the taxpayer as an eligible amount (as defined in subsection 146.01(1) or 146.02(1)) less than 90 days after it was paid, if earnings in respect of a registered retirement savings plan were considered to be withdrawn before premiums paid under that plan and premiums were considered to be withdrawn in the order in which they were paid…
>
> **(b)** the amount, if any, by which the taxpayer's RRSP

d'imposition le montant qu'il demande, à concurrence du moins élevé des montants suivants :

> **a)** l'excédent éventuel du total des montants représentant chacun une prime que le contribuable a versée après 1990 et au plus tard le soixantième jour suivant la fin de l'année à un régime enregistré d'épargne-retraite dont il était rentier au moment du versement de la prime, à l'exception :
>
> > **(i)** de la fraction de la prime qu'il a déduite dans le calcul de son revenu pour une année d'imposition antérieure,
> >
> > […]
> >
> > **(iv.1)** de la fraction de la prime qui serait considérée comme retirée par lui à titre de montant admissible, au sens des paragraphes 146.01(1) ou 146.02(1), moins de 90 jours après son versement si les gains relatifs à un régime enregistré d'épargne-retraite étaient considérés comme retirés avant les primes versées dans le cadre de ce régime et si les primes étaient considérées comme retirées suivant l'ordre dans lequel elles ont été versées, […]
>
> **b)** l'excédent de son maximum déductible au titre des REER pour l'année sur le total des cotisations versées par un employeur au cours de l'année dans un régime de pension agréé

deduction limit for the year exceeds the total of all contributions made by an employer in the year to a pooled registered pension plan in respect of the taxpayer.	collectif relativement au contribuable.

[Emphasis added.]

[30] The Court agrees with the Respondent that the deductibility of the RRSP contributions was not raised in the Notice of Appeal and that this issue is consequently not before the Court. The Court also considers the fact that the Appellant agreed by way of undertaking that this issue was not disputed (Exhibit R-8, Responses to Undertakings).

[31] However, if this issue must be decided, the Court finds, for the following reasons, that the $20,000 deduction for RRSP contributions cannot be allowed again in computing Mr. De Pellegrin's income for the 2003 taxation year, because the Minister already allowed this deduction in computing his income for the 2002 taxation year (subparagraph 146(5)(a)(i)). Mr. De Pellegrin's testimony regarding this deduction was rather vague and not credible, as he did not recollect what happened in 2002 in this respect.

[32] In reaching this conclusion, the Court also considers the copy of the cheque for $20,000 dated March 3, 2003, issued by Horizon and made out to Transamerica Life Canada, clearly showing that the cheque was for Mr. De Pellegrin's RRSP contribution for the 2002 taxation year (Exhibit R-1, Respondent's Book of Documents, tab 40). Under subsection 146(5), a taxpayer may make deductions for a given taxation year for contributions made within 60 days after the end of that year. In this case, the 60-day period after the end of the 2002 taxation year expired on a Saturday. Consequently, the first business day after the RRSP contribution deadline for the 2002 taxation year was indeed March 3, 2003, the date of the cheque issued by Horizon making this contribution on Mr. De Pellegrin's behalf.

[33] The Court also takes into account the fact that the evidence establishes that Mr. De Pellegrin used the HBP program to purchase the residence and that he withdrew $20,000 from his RRSP account throughout 2003 for that purchase. Given the existence of specific rules limiting the benefits taxpayers may derive from the HBP if their RRSP contribution is made less than 90 days before the withdrawal (subparagraph 146(5)(a)(iv)), and given that Mr. De Pellegrin does not remember the date the residence was purchased, it is more likely, absent any other relevant

evidence, that the $20,000 contribution was made for the 2002 taxation year, not for the 2003 taxation year as the Appellant claims.

B. **2003, 2004, 2005, 2006 and 2008 taxation years: Horizon shareholder account and application of subsection 15(2)**

(1) ***The Act***

[34] Subsection 15(2) provides that the amount of a shareholder's indebtedness to the corporation must be included in computing the shareholder's income. During the taxation years at issue in these appeals, this subsection read as follows:

15(2) Where a person (other than a corporation resident in Canada) or a partnership (other than a partnership each member of which is a corporation resident in Canada) is **(a)** a shareholder of a particular corporation, **(b)** connected with a shareholder of a particular corporation, or **(c)** a member of a partnership, or a beneficiary of a trust, that is a shareholder of a particular corporation and the person or partnership has in a taxation year received a loan from or has become indebted to the particular corporation, any other corporation related to the particular corporation or a	**15(2)** La personne ou la société de personnes — actionnaire d'une société donnée, personne ou société de personnes rattachée à un tel actionnaire ou associé d'une société de personnes, ou bénéficiaire d'une fiducie, qui est un tel actionnaire — qui, au cours d'une année d'imposition, obtient un prêt ou contracte une dette auprès de la société donnée, d'une autre société liée à celle-ci ou d'une société de personnes dont la société donnée ou une société liée à celle-ci est un associé est tenue d'inclure le montant du prêt ou de la dette dans le calcul de son revenu pour l'année. Le présent paragraphe ne s'applique pas aux sociétés résidant au Canada ni aux sociétés de personnes dont chacun des associés est une société résidant au Canada.

partnership of which the particular corporation or a corporation related to the particular corporation is a member, the amount of the loan or indebtedness is included in computing the income for the year of the person or partnership.

[Emphasis added.]

[35] A deduction from the shareholder's income in the taxation year of the reimbursement of all or part of the loan is provided for in paragraph 20(1)(j):

20(1) Notwithstanding paragraphs 18(1)(a), 18(1)(b) and 18(1)(h), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto

…

(j) such part of any loan or indebtedness repaid by the taxpayer in the year as was by virtue of subsection 15(2) included in computing the taxpayer's income for a preceding taxation year (except to the extent that the amount of the loan or

20(1) Malgré les alinéas 18(1)a), b) et h), sont déductibles dans le calcul du revenu tiré par un contribuable d'une entreprise ou d'un bien pour une année d'imposition celles des sommes suivantes qui se rapportent entièrement à cette source de revenus ou la partie des sommes suivantes qu'il est raisonnable de considérer comme s'y rapportant :

[…]

j) la partie remboursée, au cours de l'année, par le contribuable, de quelque emprunt ou dette et incluse, en vertu du paragraphe 15(2), dans le calcul de son

indebtedness was deductible from the taxpayer's income for the purpose of computing the taxpayer's taxable income for that preceding taxation year), if it is established by subsequent events or otherwise that the repayment was not made as part of a series of loans or other transactions and repayments;	revenu pour une année d'imposition antérieure (sauf dans la mesure où le montant de l'emprunt ou de la dette était déductible du revenu du contribuable pour le calcul de son revenu imposable pour cette année d'imposition antérieure) s'il est établi par des événements postérieurs ou d'une autre façon que le remboursement n'a pas été effectué comme partie d'une série d'emprunts ou d'autres opérations et de remboursements;

[Emphasis added.]

(2) *Positions of the parties*

[36] The parties have agreed that the exceptions in the various subsections of section 15 do not apply in these appeals. Furthermore, given the Respondent's concession at the beginning of the hearing regarding the additional deduction of $2,800 allowed under paragraph 20(1)(j) for the 2005 taxation year, the deductions otherwise allowed by the Minister under paragraph 20(1)(j) are not in dispute.

[37] According to the Appellant, no amount should be included in computing Mr. De Pellegrin's income under subsection 15(2) as a loan or debt owing to Horizon, because at no time did the shareholder account have a negative balance, meaning that Mr. De Pellegrin owed nothing to Horizon.

[38] In this case, the Appellant does not contest the method the auditor used to determine the amount to be included in Mr. De Pellegrin's income under subsection 15(2), which is detailed in tab 24 of the Respondent's Book of Documents (Exhibit R-1). Rather, he contests the fact that the opening balance of the shareholder account on November 1, 2002, that Mr. Barry considered was not the $182,779 established by his expert, Mr. Silas, and that Mr. Barry did not take into account the various credits to be made to the Horizon shareholder account for the benefit of Mr. De Pellegrin. The additional credits that should be taken into account are all the income from business activities (or salaries) for the 2007, 2008

and 2009 taxation years on which Mr. De Pellegrin was taxed, the amount of $127,538.08 from the sale of the residence in 2005, the gift or loan of $45,000 from Mr. De Pellegrin's mother in 2006, the $60,000 dividend paid by Horizon to Mr. De Pellegrin in 2002, and two payments of $2,648 that Mr. De Pellegrin made in November and December 2003 on the balances owing on Horizon's credit cards.

[39] According to the Respondent, the assessments under subsection 15(2) should be upheld, because the evidence shows that the auditor relied on the General Ledger and shareholder account prepared by the Appellant's representatives to establish the amounts to be included in his income under subsection 15(2). The Respondent submits that the Court must consider the Horizon shareholder account as originally established by Mr. De Pellegrin's representatives, not the shareholder account as reconstructed by Mr. Silas. On this point, the Respondent argues that the Court cannot accept the shareholder account prepared by Mr. Silas because of the lack of evidence at trial justifying the various assumptions on which his opinion relies. Furthermore, the various credits the Appellant seeks should not be allowed because the Appellant has not discharged his burden of demonstrating that the amounts were from his own funds. The Respondent asserts that Mr. De Pellegrin received large fund transfers from Horizon's bank accounts, justifying the assessments made by the Minister.

(3) *Discussion*

(a) Opening balance of Horizon shareholder account on November 1, 2001

[40] For the following reasons, the Court finds that, on a balance of probabilities, the opening balance of the Horizon shareholder account on November 1, 2001, was $36,302 for the benefit of Mr. De Pellegrin and not nil, as Mr. Barry asserts.

[41] Mr. Barry considered the opening balance of the shareholder account on November 1, 2001, to be nil. He testified that he had asked the Appellant to provide him with the November 1, 2001 opening balance, but did not obtain the information he needed.

[42] Mr. Silas, for his part, did not make a finding regarding the account's opening balance on November 1, 2001, only one regarding the opening balance on November 1, 2002.

[43] Mr. Barry testified that he audited Horizon's taxation years of 2002 to 2009. The first taxation year began on November 1, 2001, and ended on October 31, 2002. Mr. Barry testified that, in his audit, he used documents provided at the time by the Appellant and his representatives, Tax Defenders, namely, Horizon's General Ledger (including the shareholder account), as well as the company's financial statements and the trial balances. Mr. Barry also relied on certain bank statements, which he used to verify that the deposits entered in the General Ledger were also in the bank statements.

[44] Mr. Barry reproduced the debits from the General Ledger provided by Tax Defenders but did not verify them. With respect to the credits, Mr. Barry requested evidence to establish that the funds were from Mr. De Pellegrin personally. When the Appellant failed to justify the source of the amounts credited, Mr. Barry refused to credit the shareholder account.

[45] Mr. Barry agreed that he was not aware of the funds Mr. De Pellegrin invested in Horizon and that he did not ask Mr. De Pellegrin any questions in this regard.

[46] Mr. Barry testified that, aside from transactions totalling $7,300 from before November 1, 2001, and entered in his analysis, he did not audit any transactions from before that date to determine whether the shareholder account had a positive or negative opening balance on November 1, 2001 (see transcript of hearing of June 11, 2024, at 80). According to Mr. Barry, if he had considered the transactions in the shareholder account prior to November 2001, he would have started his calculations with a negative amount of $7,300, representing the amount Mr. De Pellegrin owed to Horizon (Exhibit R-1, Respondent's Book of Documents, tabs 23 and 24). Because he had not obtained information justifying the transactions, Mr. Barry assumed that the shareholder account had a nil balance on November 1, 2001, the date he started his calculations for the shareholder account.

[47] The copy of the Horizon shareholder account prepared by Mr. De Pellegrin's representatives was submitted at the hearing in the Respondent's Book of Documents (Exhibit R-1) in tab 56 (for taxation years 2005 and following), tab 19 (at 18, General Ledger and shareholder account for the year beginning on November 1, 2001), and tab 16 (shareholder account for the period between November 1, 2001, and October 31, 2002).

[48] Although Mr. Barry testified that he did not receive information about the opening balance of the shareholder account, the Court notes that, at the hearing, the Respondent adduced documents from Mr. De Pellegrin's representatives that had

been sent to Mr. Barry during the audit. First, there is a letter from Tax Defenders, dated April 2, 2014, filed at tab 16 of the Respondent's Book of Documents (Exhibit R-1), in reply to the draft assessments prepared by Mr. Barry. Attached to this letter is the document prepared by Mr. Barry establishing the shareholder account, in which the Appellant's representatives had pointed out duplicate entries and debits for which the order of the days and months was reversed. Also attached to the letter is a copy of the Horizon shareholder account dated December 31, 2002, which includes transactions as of November 2001 and specifically shows that the opening balance of the shareholder account on November 1, 2001, was $36,302.10 (representing an amount owed by Horizon to the shareholder, Mr. De Pellegrin).

[49] In concluding that the opening balance of the shareholder account on November 1, 2001, was $36,302 for the benefit of the Appellant, the Court has also considered the following documents, which were submitted in evidence at the hearing.

[50] First, Horizon's General Ledger at October 31, 2001 (Exhibit R-1, Respondent's Book of Documents, tab 19 at 18) shows a balance of $36,302.10 owing to Mr. De Pellegrin just before November 2001. Horizon's financial statements for the year ending on October 31, 2001, which were reproduced by the CRA (Exhibit R-11, identification and additional information concerning Horizon), also show that an amount of $36,302 was owing to the shareholder.

[51] Moreover, in the Court's view, this conclusion is reasonable, given Mr. De Pellegrin's testimony regarding the investments he made to get Horizon's operations off the ground. As Mr. De Pellegrin stated, Horizon established its first place of business at the residence in November 1999. Horizon rented the house and converted each of its four rooms into studios for its business operations. Each studio contained four computers, cameras and video cards to broadcast videos live. In early 2000, Horizon also opened studios in Montréal.

[52] According to Mr. De Pellegrin, significant funds were needed to purchase computer equipment, since at the time, a computer cost about $2,000 and a video card between $400 and $500. Mr. De Pellegrin testified that he invested approximately $50,000 to $60,000 per property, including the cost of purchasing computers, cameras, video cards and furniture as well as the fees for wiring the properties. According to Mr. De Pellegrin, he invested approximately between $100,000 and $120,000 in the first year alone. The Court also notes that, in November 1999, Mr. De Pellegrin opened a BMO bank account (No. 832) in

Horizon's name with a deposit of $39,799 (Exhibit R-1, Respondent's Book of Documents, tab 57).

(b) Opening balance of Horizon shareholder account on November 1, 2002

[53] For the following reasons, the Court finds that it cannot accept Mr. Silas's conclusion that the opening balance of the Horizon shareholder account was $182,779 on November 1, 2002, because Mr. Silas's opinion regarding Horizon's opening balance sheet and the shareholder account's opening balance on November 1, 2002, has no probative value.

(i) *Mr. Silas's testimony and the Expert Report*

[54] According to Mr. Silas, the opening balance of the Horizon shareholder account on November 1, 2002, was $182,779 (Expert Report, Schedule 10). Mr. Silas reconstructed Horizon's General Ledger from November 1, 2002, to December 31, 2009, including Horizon's opening balance sheet on November 1, 2002. The reconstruction of the opening balance sheet allowed Mr. Silas to estimate the shareholder account's opening balance on November 1, 2002.

[55] Mr. Silas based his reconstruction of Horizon's General Ledger and shareholder account on bank statements from Mr. De Pellegrin and from Horizon and on credit card statements he was provided, among other things. Some of the bank statements were missing, although only a very small number (Expert Report at 32 and 43). Mr. Silas compensated for this by considering the closing balances, verifying the opening balances, and confirming the entries in Horizon's General Ledger and the shareholder account.

[56] In the opening balance sheet, Mr. Silas took into consideration the vehicles, the equipment purchased by Horizon to get its operations off the ground, cash, the accounts receivable and the loans that Horizon had allegedly made to various persons before November 1, 2002.

[57] The total cost of the equipment Horizon needed was $106,083. Mr. Silas accounted for the costs of setting up four studios in each location ($55,000 per location, and Horizon had three locations at the time) and amortized that cost over a few years.

[58] Some of the supporting documentation (mostly emails) concerning various alleged loans that were included in the opening balance sheet as assets is included in Exhibit N of the Expert Report.

[59] The various loans shown in the opening balance sheet prepared by Mr. Silas total approximately $250,000. According to Mr. Silas, the largest amounts were loaned by Horizon to MaxSys Inc. ($110,000) and Dask Truck Lines ($120,000), and the other loans were made to various other persons. Not knowing whether the amounts loaned to persons other than MaxSys Inc. and Dask Truck Lines had been reimbursed by the debtors before November 1, 2002, Mr. Silas included the equivalent of 50% of the amounts of the loans in his calculations.

[60] According to Mr. Silas, Horizon loaned $70,000 and $40,000 to MaxSys Inc. or MaxSys Staffing before November 1, 2002. These were sizeable loans and had a significant impact on the opening balance of the shareholder account on November 1, 2002. Exhibits N1a and N1b attached to the Expert Report contain a letter dated April 17, 2002, sent by fax from Mr. De Pellegrin to BMO, requesting the transfer of $39,997 from Horizon's BMO account (No. 832) to a MaxSys Inc. account, and email exchanges between Mr. De Pellegrin and Bryan Brulotte (Mr. De Pellegrin's brother-in-law and owner of MaxSys Inc.).

[61] Concerning the $120,000 loan Horizon apparently made to Dask Truck Lines, Mr. Silas does not know whether this amount had been reimbursed by November 1, 2002, and he acknowledges that he does not have all the documentation for this loan (Expert Report, Exhibit N2).

[62] Regarding liabilities, Mr. Silas testified that he accounted for Horizon's loans and various debts, but his review of the different bank accounts revealed that Horizon had no debts on November 1, 2002. He therefore concluded that there were no liabilities to enter on Horizon's balance sheet.

[63] Thus, Mr. Silas testified that one of his assumptions in his report was that Horizon had no debts on November 1, 2002, because no payments had been made from the company's bank accounts.

[64] To determine equity, Mr. Silas accounted for retained earnings and share capital.

[65] Considering the various loans and the cost of equipment, and factoring in Horizon's bank account balances on November 1, 2002, Mr. Silas assessed that

Horizon's assets totalled $365,558.18. According to Mr. Silas, half of the $365,558.18 should be allocated to Mr. De Pellegrin's own funds, and the other half to the company's retained earnings. He therefore concluded that, on November 1, 2002, the shareholder account was equal to half of $365,558.18, or $182,779.

(ii) ***Positions of the parties***

[66] According to the Appellant, Mr. Silas relied on valid assumptions and a review of the bank statements, only 2% of which were missing, to determine the shareholder account's opening balance on November 1, 2002. Because Mr. Silas's conclusions are reasonable and sufficient and have not been challenged by another expert, the Court should accept Mr. Silas's opinion unreservedly.

[67] Although, as the Appellant has acknowledged, Mr. Silas did not have access to Mr. De Pellegrin's income tax returns for the 1999 to 2002 taxation years, the expert was able to conclude that several loans Horizon had made over the years had not been properly accounted for in its books and records. The Appellant refers to the document providing identification and additional information concerning Horizon for the taxation year ending on October 31, 2002, filed by the Respondent (Exhibit R-11, identification and additional information concerning Horizon at 5), which shows $50,000 in notes receivable as assets, whereas the expert established them at $250,720. Indeed, the expert's estimate takes into account Horizon's loans to several persons. The document also shows that the cost of furniture and equipment was $94,703, while Mr. Silas had established a cost of $106,083 for Horizon's capital property, which demonstrates the accuracy of the expert's findings.

[68] According to the Respondent, the Court cannot rely on the General Ledger or the shareholder account's opening balance on November 1, 2002, as reconstructed by Mr. Silas, because his opinion is based almost exclusively on facts not proven in court.

[69] The Respondent argues that the facts on which the Expert Report is based must be proven in evidence for the report to be given any probative weight (see *R. v. Lavallée*, [1990] 1 S.C.R. 852 (*Lavallée*) and *R. v. Abbey*, [1982] 2 S.C.R. 24 (*Abbey*)). According to the Respondent, the Appellant has not proved the facts contained in the attachments to the Expert Report. With the exception of Exhibit B (copies of the bank statements), Exhibit O (summary of Mr. De Pellegrin's income tax returns for the 2002 to 2006 taxation years) and Exhibit Q (documents concerning the sale of the residence in 2005), the attachments to the Expert Report were not correctly filed in evidence before the Court.

[70] In particular, no evidence of the loans to which Mr. Silas refers in his report was filed before the Court (Expert Report, Exhibit N). Thus, according to the Respondent, the Expert Report is not reliable on the issue of the existence and terms of the various loans Horizon allegedly made over the years. What is more, no loan agreement has been entered into evidence. The evidence is therefore insufficient to conclude that any loans or accounts receivable existed.

[71] Furthermore, according to the Respondent, regarding the alleged loan to MaxSys Inc., the fact that Mr. Brulotte did not attend the hearing must lead the Court to draw a negative inference that he would have testified that MaxSys Inc. owed no money to anyone.

[72] The Respondent also submits that the evidence is insufficient to conclude that Horizon had no debts. For the taxation year ending on October 31, 2002, Horizon's financial statements show a significant loss of $152,147 (Exhibit R-11, identification and additional information concerning Horizon). This document also shows that Horizon owed nothing to the shareholder on October 31, 2002, contrary to the Appellant's contention.

[73] The Respondent also asks the Court to draw a negative inference from the lack of key witnesses at the hearing who could have testified on the accounting and bookkeeping done contemporaneous with the transactions and during the voluntary disclosure process. In 2007, when Mr. De Pellegrin hired professionals to rectify his tax situation, all the bank statements were available. According to the Respondent, the accountants would have testified that they had relied on the bank statements and the information provided by Mr. De Pellegrin at the time, and that the debits and credits to the shareholder account are therefore correct.

(iii) ***Discussion***

[74] First, the Court considers that no evidence was adduced before the Court for the loans totalling more than $250,000 that Horizon allegedly made before November 1, 2002. Mr. Silas has submitted various documents in Exhibit N of the Expert Report to establish the existence of the loans at issue, but they were not properly entered into evidence, and he did not file copies of any loan agreements between Horizon and the alleged debtors.

[75] The Court heard no testimony from the debtors. Mr. De Pellegrin also did not testify on the loans Horizon allegedly made before November 1, 2002.

Mr. De Pellegrin simply testified that he gave bona fide loans to various persons over the years through Horizon, without offering any further details.

[76] Only Mr. Silas provided more specific testimony on these loans, but this is not sufficient for the Court to conclude that they actually existed, since Mr. Silas was not a party to any of them.

[77] Furthermore, the various documents in Exhibit N attached to the Expert Report are for the most part incomplete.

[78] Specifically, Exhibits N1a and N1b attached to the Expert Report in support of the alleged loans to MaxSys Inc. do not make it possible to determine whether the loan was made by Horizon or by Mr. De Pellegrin. All these documents seem to show is that no repayment had been made and that repayments were planned for 2006 and 2007.

[79] The only document concerning the alleged loan of $120,000 to Dask Truck Lines is a copy of an undated, unsigned and incomplete email attached to the Expert Report as Exhibit N2. It is also not clear from this document whether the debtor is Dask Truck Lines or Horizon.

[80] As the Supreme Court of Canada stated in *Lavallée* (*supra* at 893), citing *Abbey* (*supra*), before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist. In *Lavallée*, the Supreme Court of Canada also made the following remarks (at 893):

> 1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
>
> 2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
>
> 3. …
>
> 4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

[81] Given the absence of reliable evidence of the significant amounts allegedly owed to Horizon on November 1, 2002, and since Mr. Silas's opinion is largely based on the unproven existence of the alleged loans, the Court cannot attach any

probative value to Mr. Silas's opinion regarding Horizon's opening balance sheet or the shareholder account's opening balance on November 1, 2002.

[82] What is more, since Mr. Silas did not know whether the loans to persons other than MaxSys Inc. and Dask Truck Lines had been reimbursed, he made an assumption in his calculations of an amount equivalent to 50% of these loans. Without more convincing evidence, the Court cannot accept this assumption.

[83] There are additional reasons for the Court to conclude that Mr. Silas's findings on Horizon's opening balance sheet and the shareholder account's opening balance on November 1, 2002, have no probative value.

[84] First, regarding the alleged loans totalling over $250,000, in addition to the lack of evidence at trial, the financial statements reproduced in the document providing identification and additional information concerning Horizon (Exhibit R-11) show no significant assets in the form of loans, except for an amount of $50,000 in 2002:

(i) For the taxation year ending on October 31, 2002, the only short-term assets were cash and deposits of $8,753 and notes receivable of $50,000.

(ii) For the taxation year ending on October 31, 2001, the only short-term assets were $477,998 in cash, bank deposits of $29,710 and expenses of $425 paid in advance.

(iii) For the taxation year ending on October 31, 2000, the only short-term assets were cash of $32,000 and bank deposits of $29,170.

[85] For all these years, the other assets consisted of capital property (equipment, furniture, etc.).

[86] In this respect, the Court notes that Mr. De Pellegrin filed Horizon's income tax returns for the taxation years ending on October 31, 2000 and 2001 in July 2002, some months after the end of the years in question. It is therefore appropriate for the Court to give considerable weight to the situation set out in the financial statements reproduced in Exhibit R-11.

[87] The evidence shows that Mr. De Pellegrin also filed Horizon's income tax return for the taxation year ending on October 31, 2002, but that he did not do so until June 2012. Even though the filing took place approximately 10 years after the

end of the year in question, it is also appropriate for the Court to give considerable weight to this return in assessing the evidence, given that Mr. De Pellegrin signed Horizon's tax return.

[88] As the Respondent requests, the Court draws a negative inference from the fact that Mr. Brulotte did not attend the hearing and finds that his testimony would not have been helpful to Mr. De Pellegrin's case and might even have been detrimental to his position on the alleged loans (*Imperial Pacific Greenhouses Ltd. v. The Queen*, 2011 FCA 79 at para. 14). However, the same is not true of the absence at the hearing of Mr. De Pellegrin's representatives in the voluntary disclosure process or of Mr. De Pellegrin's accountants during the period under consideration, and the Court refuses to draw a negative inference.

[89] In his calculations, to find that the opening balance of the shareholder account on November 1, 2002, was $182,779, Mr. Silas allocated 50% of the total assets, namely $365,558.18, to retained earnings ($182,779) and the other 50% to contributions by the shareholder, Mr. De Pellegrin ($182,779). According to Mr. Silas, this allocation is reasonable because in the first few years of a company's operations, the shareholder generally has to inject funds to maintain operations. Mr. Silas acknowledges, however, that he made this assumption because he did not have the information he needed to draw any other conclusion.

[90] The Court rejects this assumption as unfounded in Horizon's case. First, Mr. De Pellegrin testified that Horizon's business was thriving in its early years but that competition became more intense around 2003, so he decided to reduce and then cease Horizon's operations. Mr. De Pellegrin's testimony is supported by the documents filed by the Respondent as Exhibit R-11 (identification and additional information concerning Horizon for the taxation year ending on October 31, 2001), which establish significant income in Horizon's second year of operations. In fact, in addition to $477,998 in cash and $29,710 in deposits, the retained earnings at the end of the year were $273,591, and the net income was $259,357.

[91] These documents also show that, for the taxation year ending on October 31, 2001, Horizon's short-term assets increased considerably in comparison with those of the previous year. In 2001, short-term assets, including $477,998 in cash and $29,710 in bank deposits, totalled $508,000, whereas in 2000, short-term assets totalled $62,000. Retained earnings totalled $14,234 in 2000, but $273,591 in 2001. For the year ending on October 31, 2002, however, these documents show a net loss of $152,147 for Horizon.

[92] Furthermore, as the Respondent argues, the evidence is insufficient to find that Horizon had no liabilities on November 1, 2002.

[93] Mr. Silas also agreed that he did not know that the Notice of Appeal stated that Mr. De Pellegrin had made an initial investment in Horizon totalling $36,302 in 1999 (see para. 22 of the Notice of Appeal).

[94] Finally, the Court has also considered the fact that no amount was owed to the shareholder based on the financial statements reproduced in Exhibit R-11 (identification and additional information concerning Horizon) for the taxation year ending on October 31, 2002.

(c) Calculation of the Horizon shareholder account for the period from 2002 to 2009: debits and credits

[95] Schedule 13 of the Expert Report reproduces the shareholder account reconstructed by Mr. Silas. According to Mr. Silas, at no point between 2002 and 2009 was the balance of the shareholder account negative (Expert Report at 29). As stated above, having found that Mr. Silas's opinion regarding Horizon's opening balance sheet and the shareholder account's opening balance on November 1, 2002, has no probative value, the Court also cannot accept Mr. Silas's opinion in this respect.

[96] However, the Court must decide the issue of the debits and credits to the shareholder account over the period at issue.

(i) *The various debits*

[97] As noted above, Mr. Barry did not audit the debits appearing in the shareholder account. He accepted the debits as they appeared in the books and records prepared by Tax Defenders. Most of the amounts that Mr. Barry considered to be debits received the same treatment from Mr. Silas, except for the ones indicated below.

(1) *Debits of $36,276*

[98] In his review of the books, Mr. Silas noted that some debits totalling $36,276 should not have been considered as such by the auditor since these amounts could not be linked to any amounts in the bank statements or credit card statements (Expert Report, Chapter 9, paragraph d. and Schedule 7):

- For 2003: $4,066;
- For 2004: $12,292;
- For 2005: $8,031; and
- For 2006: $11,887.

[99] Mr. Silas found no debits of this type for 2007, 2008 and 2009.

[100] Mr. Silas produced no evidence showing that these amounts were not for Mr. De Pellegrin's personal benefit, and Mr. De Pellegrin produced no evidence in this regard.

[101] Since Mr. De Pellegrin used Horizon's bank accounts as if they were his own, and since Mr. Silas did not have access to all the bank and credit card statements, the Court finds, on a balance of probabilities, that the adjustments totalling $36,276 required by Mr. Silas cannot be accepted.

(2) ***Debit of $32,550 in June 2007***

[102] According to Mr. Silas, the $32,550 Horizon paid in June 2007 to purchase a truck for the operation of the 1-800-GOT-JUNK franchises should not be debited to the Horizon shareholder account, but should rather be considered a loan between Horizon and QuébecCo. No purchase document was filed in evidence as Mr. Silas relied on the gasoline bills.

[103] The Court notes that the evidence showed that this amount was debited to the shareholder account by the Appellant's representatives (Exhibit R-1, Respondent's Book of Documents, tab 56). The Court also notes that this amount was credited to the account for the loan owing to QuébecCo's director, which increased the amounts QuébecCo owed to Mr. De Pellegrin.

[104] Because no evidence was produced at the hearing regarding any errors made by QuébecCo's accountants in crediting the account for the loan owing to the director or by Horizon's accountants in keeping Horizon's books, the Court finds, on a balance of probabilities, that the $32,550 amount must remain a debit to the Horizon shareholder account.

(3) ***Debits totalling $20,249 for the period from 2004 to 2007***

[105] Mr. Silas stated that categorization errors had been found in Horizon's original General Ledger. On the basis of his analysis, $20,249 was debited to the Horizon shareholder account by Mr. Barry, but that amount actually represented various Horizon business expenses. Mr. Silas relied on a review of the General Ledger, but had no documents to justify his position.

[106] The $20,249 was allocated as follows:

- In 2004: $238 (repairs);
- In 2005: $10,597 (office expenses, postage fees, repairs and utilities);
- In 2006: $6,648 (furniture, loan, office expenses and repairs); and
- In 2007: $2,765 (payment to subcontractor, furniture and insurance).

[107] Because no evidence was produced at the hearing regarding any errors made by Horizon's accountants in keeping its books, and given the lack of evidence adduced by Mr. De Pellegrin in this respect, the Court finds, on a balance of probabilities, that the amounts totalling $20,249 must remain debits to the Horizon shareholder account.

(ii) ***The various credits***

(1) ***Dividend of $60,000 from Horizon in the 2002 taxation year***

[108] According to the Appellant, the Court should agree to credit to the Horizon shareholder account the amount of $60,000, representing a dividend from Horizon on which Mr. De Pellegrin was taxed in 2002, because Mr. De Pellegrin had apparently never received that amount.

[109] Mr. Barry testified that he had not credited the $60,000 dividend for 2002 to the shareholder account because there was no indication of the dividend either in the General Ledger or in the Horizon shareholder account.

[110] Similarly, Mr. Silas testified that he had not taken the dividend into account because that amount did not appear in the shareholder account for 2002 and because that information had not been sent to him.

[111] Mr. De Pellegrin vaguely testified that he did not recall receiving that amount.

[112] As specified by the Respondent, the $60,000 dividend (increased to $75,000) was included in Mr. De Pellegrin's income according to the income tax return he himself had filed in 2003, for the 2002 taxation year. The only amendment made to that return by the Minister during the voluntary disclosure (which is not in dispute in these appeals) was the $16,373 added as income from business activities (director's fees). Thus, the initial notice of assessment dated June 12, 2003 (Exhibit R-10, Mr. De Pellegrin's Option C for 2002) only acknowledged that the dividend had been included in Mr. De Pellegrin's income as reported by him.

[113] Given the evidence produced at the hearing, the Court is not satisfied, on a balance of probabilities, that the shareholder account should be credited in this regard because there is insufficient evidence to conclude that Mr. De Pellegrin had not received that amount. Under the Act, a taxpayer must include in computing his or her income a dividend when it is received (section 82). Thus, on a balance of probabilities, the Court finds that Mr. De Pellegrin received that amount in 2002, and no amount should be credited to the shareholder account in this respect.

(2) ***Income from business activities***

[114] The Appellant alleges that the auditor should have credited to the shareholder account the total amount of income from business activities (commissions) reported by Mr. De Pellegrin for the 2007, 2008 and 2009 taxation years in the voluntary disclosure, as the auditor did for the 2002, 2003 and 2004 taxation years.

[115] According to the Appellant, the amounts of $20,000 in 2007, $30,000 in 2008 and $20,000 in 2009 should be credited to the shareholder account. For the 2007 taxation year, the auditor credited $18,000 to the shareholder account, while Mr. De Pellegrin was taxed on $38,000 in income from business activities. For the 2008 taxation year, the auditor credited $7,000 to the shareholder account, while Mr. De Pellegrin was taxed on $37,000 in income from business activities. For the 2009 taxation year, the auditor did not credit any amount to the shareholder account, while Mr. De Pellegrin was taxed on $20,000 in income from business activities.

[116] According to the Respondent, the additional amounts of income from business activities should not be credited to the shareholder account for the 2007, 2008 and 2009 taxation years since no evidence was produced at the hearing showing that Mr. De Pellegrin had not received the amounts in question. In addition, according to Mr. Barry, all the amounts reported in the voluntary disclosure and, more specifically, the income from business activities were credited to the shareholder account for the Appellant's benefit and, consequently, no additional amounts should be considered a credit.

[117] Indeed, Mr. Barry testified that he had credited the amounts of income from business activities to the shareholder account as they appear in Horizon's books. Thus, for the 2002, 2003 and 2004 taxation years, he credited $16,373, $60,000 and $15,000, respectively. They represent the amounts of commissions included in Mr. De Pellegrin's income as income from business activities, which he reported in his voluntary disclosure and on which he was taxed. For the 2005 and 2006 taxation years, the auditor credited no amount to the shareholder account, and no amount was added to Mr. De Pellegrin's income as income from business activities for those years. Finally, as indicated above, for the 2007, 2008 and 2009 taxation years, Mr. Barry credited $18,000, $7,000 and $0 respectively to the shareholder account, even though Mr. De Pellegrin was taxed on higher amounts as income from business activities for those years.

[118] In his calculations, Mr. Silas credited the same amounts to the shareholder account as Mr. Barry did in this regard. However, at the hearing, Mr. Silas stated that he should have credited the full amount of income reported as such and acknowledged that he had made a mistake. Mr. Silas also testified that no amount had been paid to Mr. De Pellegrin from Horizon's bank accounts as a salary or for another reason. Thus, according to Mr. Silas, it is indeed appropriate to credit to the shareholder account the amounts corresponding to the income from business activities on which Mr. De Pellegrin was taxed.

[119] For the reasons that follow, the Court finds that the auditor credited to the Horizon shareholder account the correct amounts as income from business activities, namely, $18,000 in 2007, $7,000 in 2008 and $0 in 2009. The evidence illustrates that the additional amounts that the Appellant is asking to have credited to the Horizon shareholder account are professional fees from QuébecCo (the corporation that operates the 1-800-GOT-JUNK franchises) and not income from Horizon.

[120] First, it is clearly stated in Mr. Silas's report (Expert Report at 30) that Mr. De Pellegrin reported the following income (in the Expert Report, GotJunk refers to QuébecCo):

- For 2007: $18,000 from Horizon and $20,000 from GotJunk;
- For 2008: $7,000 from Horizon and $30,000 from GotJunk; and
- For 2009: $0 from Horizon and $20,000 from GotJunk.

[121] In addition, according to the income tax returns filed by Mr. De Pellegrin for 2007 to 2009 in the voluntary disclosure and produced in evidence at the hearing (Exhibit R-1, Respondent's Book of Documents, tabs 6, 7 and 8), the Court notes the following: for 2007, Mr. De Pellegrin reported that he had received $18,000 in commissions from a business called 123; for 2008, Mr. De Pellegrin reported that he had received $7,000 in commissions from a business called 123 and $25,000 in professional fees from a business called 1-800-GOT-JUNK; and for 2009, Mr. De Pellegrin reported that he had received only $20,000 in professional fees from a business called 1-800-GOT-JUNK. The Court assumes that 123 refers to Horizon and, of course, that 1-800-GOT-JUNK refers to QuébecCo.

[122] The Court's finding is also based on the fact that Horizon slowed down its operations starting in 2003–2004. Thus, the decrease in income from Horizon is indeed plausible. It is also likely that QuébecCo, which began operating in 2006, paid professional fees to Mr. De Pellegrin afterwards.

(3) ***Deposit of $60,000 into Horizon's bank account in 2006***

[123] According to the Appellant, $60,000 should be credited to the Horizon shareholder account for 2006 because Mr. De Pellegrin deposited that amount into Horizon's BMO bank account (No. 832) on July 28, 2006 (Exhibit R-1, Respondent's Book of Documents, tab 43 at 17). That deposit consisted of $45,000 received from his mother and $15,000 of his own funds. According to Mr. Silas, the $45,000 was a loan made by Mr. De Pellegrin's mother in 2006 to help him acquire the 1-800-GOT-JUNK franchises. Mr. Silas confirmed that this $45,000 had been deposited into Horizon's BMO bank account (No. 832) on July 28, 2006, and was part of a total deposit of $60,000 made that day.

[124] At the hearing, Mr. De Pellegrin testified that the $45,000 from his mother was a loan, not a gift. In addition, according to Mr. De Pellegrin, that amount was

deposited with another amount: $15,000 of his own funds. These two amounts made up the total of $60,000 deposited into Horizon's bank account on July 28, 2006. Mr. De Pellegrin also testified that his mother was elderly and had a serious illness, and that therefore she would not be coming to testify at the hearing.

[125] Mr. Barry testified that, at the initial interview, Mr. De Pellegrin had mentioned that in 2006, he had received a gift of $45,000 from his mother and another gift of $30,000 from his brother-in-law (Mr. Brulotte) (Exhibit R-1, Respondent's Book of Documents, tab 21 at 12). Mr. Barry testified that loans were not discussed at the time of the audit. However, since Mr. Barry was not convinced that Mr. De Pellegrin had received gifts, Mr. Barry did not credit these amounts to the Horizon shareholder account in 2006.

[126] According to the Respondent, no amount should be credited to the shareholder account since no evidence was produced at the hearing showing that the $60,000 in funds came from Mr. De Pellegrin personally. According to the Respondent, the Court must also consider the following facts in order to refuse to credit any amount whatsoever to the shareholder account in this respect. First, Mr. De Pellegrin reported no income in 2005 and 2006. In addition, his version of the facts changed over the years. To begin with, in the proceedings before the Court of Québec on the same issues, Mr. De Pellegrin alleged that the $45,000 from his mother was partially included in a deposit of $30,000, and Mr. Silas had expressed the view that the $45,000 was a gift (Exhibit R-7, Mr. Silas's report filed with the Court of Québec dated April 24, 2020, at 20, 28 and Schedule 10). Before this Court, Mr. Silas opined that the $45,000 had actually been loaned to the Appellant by his mother and was part of a larger deposit of $60,000, while the $30,000 deposit represented the proceeds from a redemption of shares. Furthermore, at the hearing, Mr. De Pellegrin testified that his mother had loaned him $45,000, whereas in the past, he had told Mr. Barry that it had actually been a gift.

[127] For the reasons that follow, the Court finds, on a balance of probabilities, that an amount of $45,000 must be credited to the Horizon shareholder account on July 28, 2006, as a gift or a loan from Ms. De Pellegrin, not the total amount of $60,000 as the Appellant is asking.

[128] In fact, no reliable evidence was presented at the hearing regarding the origin of the $15,000, which is part of the total deposit of $60,000. Mr. De Pellegrin testified that that amount came from his own funds, while Mr. Silas acknowledged not knowing where it came from. This evidence is not sufficiently persuasive for the Court to find, on a balance of probabilities, that the amount came from

Mr. De Pellegrin's own funds and therefore to make it possible to credit the same amount to the Horizon shareholder account.

[129] With respect to the $45,000 from Mr. De Pellegrin's mother, regardless of whether it is a loan or a gift, its tax treatment is the same in this case: this amount must be credited to the shareholder account if the Court is satisfied that it came from Mr. De Pellegrin's mother. Given the evidence produced at the hearing, the Court finds, on a balance of probabilities, that the $45,000 came from Mr. De Pellegrin's mother and that the $45,000 must therefore be credited to the Horizon shareholder account for the reasons that follow.

[130] Mr. De Pellegrin testified that it did not matter to him whether this amount was a loan or a gift and that he had repaid his mother by doing small house repairs for her and helping her in myriad ways over the years. In this respect, the Court notes that, in the context of family relationships, the nature of money transfer transactions may easily be characterized differently by each of the parties. In addition, the lack of formal documentation between the parties is insufficient for the Court to reject the Appellant's statement. On the contrary, the Court found Mr. De Pellegrin's testimony convincing and credible in this respect.

[131] In making this finding, the Court also takes into account the fact that Mr. De Pellegrin had mentioned to Mr. Barry during the audit that he had received a gift from his mother totalling $45,000 in 2006.

[132] According to Mr. Silas, the $45,000 is a loan made to Mr. De Pellegrin by his mother in 2006 to help him acquire 1-800-GOT-JUNK franchises (Expert Report at 21). In the Court's view, since the franchises were acquired in July 2006, it is plausible that Mr. De Pellegrin's mother had agreed to loan or gift such an amount to her son.

[133] In addition, although Mr. De Pellegrin's mother did not testify, considering the reasons Mr. De Pellegrin gave to justify her absence, and given the letter attached to the Expert Report (Exhibit S) in which Ms. De Pellegrin confirmed that she had loaned $45,000 to her son in May 2006, the Court finds that it is likely that such a money transfer took place between mother and son.

(4) ***Deposits of $14,988 and $12,810 in May 2005***

[134] According to the shareholder account prepared by Mr. De Pellegrin's representatives (Exhibit R-1, Respondent's Book of Documents, tab 56), two

deposits of $14,988 and $12,810, made in May 2005, were credited to the shareholder account. In his audit, Mr. Barry asked for explanations regarding the source of these deposits. Having received no response, he did not consider these amounts as credits in calculating the shareholder account.

[135] As for Mr. Silas, he did not consider these sums as amounts to be credited to the shareholder account for 2005.

[136] According to the Respondent, given the lack of evidence regarding the origin of these amounts, the Court should not determine that these amounts must be credited to the Horizon shareholder account.

[137] Given the lack of evidence produced at trial regarding the origin of these amounts, the Court finds that the $14,988 and $12,810 must not be credited to the Horizon shareholder account.

(5) ***Mr. De Pellegrin's sale of the residence: deposit of $127,538.08 in December 2005***

[138] In 2003, Mr. De Pellegrin personally bought the residence for $185,000 (Exhibit R-1, Respondent's Book of Documents, tab 36). In December 2005, Mr. De Pellegrin sold the residence and received a net amount of $127,538.08, after paying the mortgage loan and covering selling costs (Exhibit R-1, Respondent's Book of Documents, tab 38).

[139] The Respondent alleges that the Appellant has not demonstrated that the $127,538.08 deposited in Horizon's BMO bank account (No. 832) on December 1, 2005, represents the net proceeds from the sale of the residence (Exhibit R-1, Respondent's Book of Documents, tab 43 at 0.1). According to the Respondent, given the lack of evidence that these funds exclusively benefited Horizon, no amount should be credited to the shareholder account.

[140] Mr. Barry testified that he had asked Mr. De Pellegrin for information concerning the deposit of $127,538.08 into Horizon's bank account. Having received no information about this and thus not knowing the source of the funds deposited in the account, Mr. Barry concluded that those amounts were unreported income of Horizon. In his testimony, Mr. Barry acknowledged that, had he been informed that these funds were from the sale of the residence, he would not have added them to Horizon's income.

[141] As for Mr. Silas, he is of the view that the shareholder account must be credited the equivalent of $127,538.08 because these funds from the sale of an asset held personally by Mr. De Pellegrin were deposited in Horizon's bank accounts (Expert Report, chapters 9 a. and 10 f.). According to the documents attached to the Expert Report (Exhibit Q1 at 296 and following), the effective date for the sale of the residence was December 1, 2005. The evidence shows that an identical amount of $127,538.08 was deposited into Horizon's BMO bank account (No. 832) on December 1, 2005 (Exhibit R-1, Respondent's Book of Documents, tab 43 at 0.1).

[142] The Court disagrees with the Respondent's position and is rather of the view that the Appellant's position must prevail. For the reasons that follow, the Court finds, on a balance of probabilities, that the evidence demonstrates that the net proceeds from the sale of the residence were deposited into Horizon's BMO bank account (No. 832) on December 1, 2005, the day that the residence was sold. The same amount must be credited to the Horizon shareholder account on that date.

[143] Indeed, as stated by Mr. Silas, the net proceeds from the sale of the residence, which took place on December 1, 2005, totalled $127,538.08, and the same amount was deposited into Horizon's BMO bank account (No. 832) on the same day. Thus, it is plausible that the source of the $127,538.08 deposit into Horizon's bank account is the net proceeds from the sale of the residence totalling $127,538.08. Because the residence and, consequently, the funds of $127,538.08 belonged to Mr. De Pellegrin, an equivalent amount must be credited to the Horizon shareholder account.

[144] The evidence also shows that Horizon was making the mortgage payments and paying the other costs for the residence. In this respect, Mr. Silas and Mr. Barry testified that all the amounts paid by Horizon for the mortgage on the property and all the other costs paid by Horizon for the residence had been debited to the shareholder account.

[145] In addition, it is clear from the evidence and from the Appellant's admission that Mr. De Pellegrin used Horizon's bank accounts as if they were his own. Thus, it is plausible that Mr. De Pellegrin deposited the net proceeds from the sale of the residence into Horizon's bank account.

[146] The Court also notes that Mr. Barry testified that the amount of $127,538.08 had not been credited to the Horizon shareholder account.

(6) ***Credits of $5,296 for payments on Horizon's credit cards***

[147] According to Mr. Silas, the Court should credit to the shareholder account two amounts of $2,648 representing payments made in November 2003 and December 2003 by Mr. De Pellegrin on the balances owing on Horizon's credit cards. However, Mr. Silas agreed at the hearing that he had no documentation to support his position. Mr. De Pellegrin did not testify at the hearing regarding the origin of these funds.

[148] Given the lack of evidence produced at trial regarding the origin of these amounts, the Court finds that the two $2,648 amounts must not be credited to the Horizon shareholder account.

C. **Other issues concerning the 2006 taxation year**

(1) ***Unreported income of $37,418***

[149] According to the audit conducted by Mr. Barry, the following deposits totalling $37,418, appearing in Mr. De Pellegrin's personal account with Toronto-Dominion Bank, remain unexplained (Exhibit R-1, Respondent's Book of Documents, tab 35):

- $80 on January 20, 2006;
- $513.84 on February 15, 2006;
- $32,235 on May 26, 2006;
- $45 on June 6, 2006; and
- $4,544.19 on September 11, 2006.

[150] According to the Respondent, the Appellant produced no evidence showing that these amounts, totalling $37,418, were from a non-taxable source. Thus, since there was no testimony at the hearing and no documents filed in evidence in support of the Appellant's position, the Appellant has not discharged his burden of proof before the Court. Accordingly, the Respondent submits that these amounts must continue to be included in Mr. De Pellegrin's income.

[151] Mr. De Pellegrin did not testify at the hearing regarding the source of the various deposits mentioned above. However, tab 19 of the Respondent's Book of Documents (at 30 and following) contains a copy of a notarial act dated August 23, 2005, concerning an interest-free loan of $32,235 made by Mr. De Pellegrin to Judith Elizabeth Hutton. The loan was secured by a hypothec on an immovable belonging to Ms. Hutton and was repayable on one of the following dates: August 23, 2006, or the date of the sale of the hypothecated immovable, whichever came first.

[152] According to the Notice of Appeal, these amounts resulted from the gain realized when the residence was sold in 2005 and from the repayment of a loan made to a friend (para. 25) and are therefore from non-taxable sources.

[153] The Court finds, on a balance of probabilities, that the Appellant has discharged his burden of showing that the $32,235 stemmed from the repayment of the loan made to Ms. Hutton, given the notarial act produced in evidence and the corresponding dates when the loan was repaid and the deposit was made. Since a loan repayment is a non-taxable source, the $32,235 should not be included in Mr. De Pellegrin's income for tax purposes. However, given the lack of evidence concerning the other deposits appearing in Mr. De Pellegrin's personal bank account, the Court finds that Mr. De Pellegrin must include in computing his income for the 2006 taxation year, under subsection 9(1), the amount of $5,183, representing the balance of the unexplained deposits in his personal bank account.

(2) *Shareholder benefit of $56,048 under subsection 15(1)*

(a) Positions of the parties

[154] According to the Minister, Mr. De Pellegrin received a benefit totalling $56,048 in 2006, the value of which must be included in computing his income under subsection 15(1), because Horizon paid the legal fees of $1,207.76 to set up the Trust and a portion of the costs to purchase the 1-800-GOT-JUNK franchises for $54,840.

[155] According to the Respondent, because the Appellant produced no evidence to demolish the Minister's assumption that that amount of $1,207.76 had been paid to Luc Ménard as legal fees to set up the Trust, Mr. De Pellegrin must add that amount to his income. With respect to Horizon paying a portion of the costs to purchase the 1-800-GOT-JUNK franchises, totalling $54,840, the Respondent alleges that Mr. De Pellegrin appropriated Horizon's funds to invest them in QuébecCo, which

justifies these amounts being considered a benefit to be included in his income under subsection 15(1).

[156] According to the Appellant, the legal fees of $1,207.76 were paid to Mr. Ménard for legal services rendered in the context of operating Horizon, and therefore this amount is not a Horizon shareholder benefit within the meaning of subsection 15(1).

[157] In addition, since the funds totalling $54,840 were used by Mr. De Pellegrin to purchase the 1-800-GOT-JUNK franchises, Mr. De Pellegrin should not be personally taxed on any amount whatsoever under subsection 15(1); that amount should instead be debited to the Horizon shareholder account. Thus, this transaction should fall under subsection 15(2), not subsection 15(1).

[158] The Appellant also claims that this $54,840 was paid from the funds that were part of a $60,000 deposit made the same day into the same Horizon bank account with BMO (No. 832); the latter amount was made up of a $45,000 loan from his mother and $15,000 of his own funds. In addition, according to the Appellant, since Horizon and QuébecCo did not have the same accountants, the Court should accept Mr. Silas's statements that Horizon's accountants erroneously indicated that the fees paid were legal fees. Furthermore, also according to Mr. Silas, the payments of $60,000 (for the first instalment of the costs to purchase the franchises) and of $54,840 (for the balance of the costs to purchase the franchises) should have been indicated in the accounting as loans made by Horizon to QuébecCo, which would not give rise to a benefit conferred on the shareholder within the meaning of subsection 15(1).

(b) Applicable principles

[159] The relevant portions of subsection 15(1) read as follows:

15(1) If, at any time, a benefit is conferred by a corporation on a shareholder of the corporation … then the amount or value of the benefit is to be included in computing the income of the shareholder … for its taxation year that includes the time, except to the extent that the amount or value of the benefit is deemed by section 84	**15(1)** La valeur de l'avantage qu'une société confère, à un moment donné, à son actionnaire … est incluse dans le calcul du revenu de l'actionnaire … pour son année d'imposition qui comprend ce moment, sauf dans la mesure où cette valeur est réputée en vertu de l'article 84 constituer un dividende ou dans la mesure où cet avantage

to be a dividend or that the benefit is conferred on the shareholder …	est conféré à l'actionnaire au moyen de l'une des opérations suivantes …

[Emphasis added.]

[160] The Federal Court of Appeal recently reiterated, in *Laliberté v. Canada* (2020 FCA 97 at para. 33), the analytical framework for determining whether a benefit has been conferred on a shareholder under subsection 15(1). Thus, the Court must conduct this analysis in three steps, as follows:

(i) determining whether a benefit has been conferred on the shareholder *qua* shareholder;

(ii) determining what precisely the benefit is; and

(iii) determining the value of that benefit to the shareholder by asking what the shareholder would have had to pay for it had he or she not been a shareholder.

[161] The Act does not define what constitutes a "benefit" within the meaning of subsection 15(1). The case law has established that the word "benefit" can be aimed at payments, distributions, benefits and advantages that flow from a corporation to a shareholder by some route other than the more orthodox dividend route (*Minister of National Revenue v. Pillsbury Holdings Ltd.*, [1964] C.T.C. 294 (Ex. Ct.) (*Pillsbury*) at para. 18). That determination is purely factual. In *Pillsbury*, the Court found that the word "confer" means "grant" or "bestow".

[162] The case law has also established that it is not always necessary for there to be intent to confer a benefit on a shareholder or even for the shareholder to be aware that a benefit has been conferred for subsection 15(1) to apply (*Canada v. Chopp*, [1997] F.C.J. No. 1551 (F.C.A.) (*Chopp*) at paras. 4–8; *Laliberté*, *supra*, at para. 44). In some cases, however, the intent to confer a benefit is an element to be considered, for example, if the taxpayer alleges that the accounting books contain an error (*Laliberté*, *supra*, at para. 44).

[163] In addition, the case law recognizes that the benefit described in subsection 15(1) cannot stem from an error that is not in accordance with the company's established practices (*Chopp*, *supra*, at para. 8).

(c) Discussion

[164] For the reasons that follow, the Court finds that the amount of $54,840 must be added to Mr. De Pellegrin's income as a benefit conferred on a shareholder under subsection 15(1) for the 2006 taxation year, but that the amount of $1,207.76 paid by Horizon in legal fees must not.

[165] First, the Court agrees with the Respondent that none of the exceptions set out in subsection 15(1) applies in this case.

[166] In addition, the Court notes that it does not agree with the part of the Expert Report dealing with the manner in which these transactions should have been indicated in the accounting, more specifically, with Chapter 8 k. of the Expert Report. As mentioned, according to Mr. Silas, the payments made by Horizon for the 1-800-GOT-JUNK franchises should have been treated as a loan from Horizon to QuébecCo because Horizon paid the franchise costs. Thus, Horizon should have indicated in its books that QuébecCo owed it $54,840, and QuébecCo should have indicated in its books that it owed Horizon $54,840. Mr. Silas also alleges in his report that the $1,207.76 fees paid to Mr. Ménard represent legal fees paid by Horizon in the course of its usual activities.

[167] The evidence shows that, in Horizon's income statement and balance sheet for the taxation year ending on October 31, 2006, Horizon indicated that it had spent $56,048 on legal fees. However, the deduction of these expenses in computing Horizon's income was disallowed during Mr. Barry's audit.

[168] The evidence also establishes that that $56,048 was not debited to the Horizon shareholder account. Mr. Barry was not aware of the transactions with respect to purchasing the 1-800-GOT-JUNK franchises. During the audit, Mr. Barry asked for information about the withdrawals, but received no answer.

[169] At the initial interview with the auditor, Mr. De Pellegrin mentioned that the fees of $56,000 were accounting or professional fees (Exhibit R-1, Respondent's Book of Documents, tab 21 at 5). In addition, Horizon's income tax return for the year ending on October 31, 2006, indicates as expenses legal fees of $56,048 (Exhibit R-1, Respondent's Book of Documents, tab 54).

(i) ***Fees of $1,207.76***

[170] Horizon's General Ledger as well as its bank statements show that the company paid Mr. Ménard legal fees of $1,207.76 by cheque dated February 21, 2006 (Exhibit R-1, Respondent's Book of Documents, tab 60 at 1 and tab 42 at 7). According to the document that created the Trust, Mr. Ménard was its settlor. In addition, the trust document indicates that the Trust would subscribe to some participating shares in a new company that would be operating a franchise known under the trademark 1-800-GOT-JUNK.

[171] The Court finds, on a balance of probabilities, that since the legal fees were paid in February 2006 while the Trust was set up on August 4, 2006, the fees of $1,207.76 were not legal fees paid for setting up the Trust. The Court finds that it is therefore likely that the fees paid to Mr. Ménard in February 2006 were legal fees paid in the course of Horizon's usual operations.

[172] In making this finding, the Court also took into account the fact that Horizon was still operating a business in February 2006, although its activities had slowed down. It was therefore plausible that Horizon had to pay legal fees in operating its business. In addition, the Court took into account the fact that the $1,207.76 amount does not appear in the director's loan account in QuébecCo's books (Exhibit R-1, Respondent's Book of Documents, tab 49) and is therefore not included in the amounts owed by QuébecCo to Mr. De Pellegrin as director of QuébecCo.

(ii) ***Costs of $54,840***

[173] As stated above, the Court does not come to the same conclusion regarding the costs of $54,840 that were paid by Horizon for the purchase of 1-800-GOT-JUNK franchises. For the reasons that follow, the Court finds that Mr. De Pellegrin received a benefit from Horizon totalling $54,840 because Horizon paid the costs to purchase franchises that it does not own and because the benefit was received by Mr. De Pellegrin as a shareholder of Horizon.

[174] Indeed, had Mr. De Pellegrin paid the franchise costs himself, he would have had to pay the same amount to the franchisor from his own funds, which he did not do.

[175] Horizon's General Ledger at July 28, 2006, states that Horizon issued a cheque for $54,840 to the 1-800-GOT-JUNK franchisor, that this amount was paid as a final payment of franchise costs and was included in the legal fees, for which a

deduction is claimed in computing its income (Exhibit R-1, Respondent's Book of Documents, tab 60 at 2 and tab 54). On the same day, Horizon transferred $54,840 from its BMO account (No. 832) to its other BMO account (No. 382). That transfer was followed by a debit via bank draft of $54,840.

[176] According to an email dated July 24, 2006, sent by the franchisor to Mr. De Pellegrin, a payment of $60,000 was made on July 21, 2006, to purchase franchise No. 1, leaving an unpaid balance of $5,720. A bank draft for $60,000 was indeed drawn on Horizon's BMO bank account (No. 832) on July 21, 2006. The cost of purchasing franchise No. 2 was $55,120, and a balance of $49,120 remained owing. The balance owing to the franchisor was therefore $54,840 (Exhibit R-1, Respondent's Book of Documents, tab 55). According to that document, the total cost to purchase the 1-800-GOT-JUNK franchises was therefore $120,840.

[177] As stated above, the total amount of $120,840 is included in the QuébecCo director's loan account and is therefore included in the amounts owed by QuébecCo to Mr. De Pellegrin. The Court also notes that QuébecCo's books show precisely that the total amount of $120,840, including the $54,840, represents the costs of purchasing the 1-800-GOT-JUNK franchises and is therefore an amount owing to its director, Mr. De Pellegrin, and not to Horizon (Exhibit R-1, Respondent's Book of Documents, tab 49).

[178] In addition, in his testimony, Mr. De Pellegrin acknowledged that the amount of $54,840 paid by Horizon represented the balance owing for the costs to purchase the 1-800-GOT-JUNK franchises.

[179] The Appellant alleges that there were some errors in Horizon's bookkeeping, but he produced no evidence to support this allegation. Mr. De Pellegrin's testimony was vague in this regard, and he did not know what the accountants had indicated in the companies' books and records. Horizon's accountants did not testify at the hearing.

[180] For the Court to accept the Appellant's position that there was an error in Horizon's books, which it refuses to do, it would also have to find that there was an error in QuébecCo's bookkeeping and financial statements, which has not been established before it. No evidence was produced to support this argument at the hearing. Mr. De Pellegrin's testimony regarding QuébecCo's books was also vague. In addition, as with Horizon, QuébecCo's accountants did not testify at the hearing.

[181] If a party alleges that there is a bookkeeping error, it must produce reliable and credible evidence in support of it, which the Appellant has not done in this case. Given the lack of evidence regarding the alleged errors in Horizon's books and in QuébecCo's books, the Court cannot accept the arguments raised by the Appellant.

[182] Mr. De Pellegrin testified that he did not know whether an amount of $56,048 was debited to the Horizon shareholder account. He does, however, acknowledge that a total of $120,840 was credited to the QuébecCo director's loan account and that this amount represents the costs to purchase the 1-800-GOT-JUNK franchises (Exhibit R-1, Respondent's Book of Documents, tab 49).

[183] As stated above, the Respondent has asked the Court to draw a negative inference from the absence of the people—the accountants—who could have testified at the hearing about how the books and records were kept and about the companies' accounting at the time when the transactions were made and during the voluntary disclosure. As mentioned, the Court refuses to draw a negative inference from the fact that these professionals did not testify. Indeed, their testimony was not needed for the Court to find as it did.

[184] In addition, in concluding that subsection 15(1) applied, the Court took into account that the evidence produced at the hearing showed the following. Horizon is not a shareholder of QuébecCo; it is rather the Trust that holds all of the shares in the capital of QuébecCo. Therefore, the $54,840 amount cannot be considered a contribution of capital from QuébecCo's shareholder. QuébecCo's financial statements show an amount of $90,000 as other asset—franchise costs, and thus, it is clear that QuébecCo, and not Horizon, is the owner of the 1-800-GOT-JUNK franchises. QuébecCo's books show no amounts owing to Horizon. For the year ending on August 31, 2007, QuébecCo's financial statements rather show an amount owing to the director totalling $138,344 (Exhibit R-1, Respondent's Book of Documents, tab 53).

[185] Finally, the Court does not accept the Appellant's argument that this transaction should be captured by subsection 15(2) rather than subsection 15(1) and that the $54,840 amount should therefore be debited to the Horizon shareholder account. The Minister has assessed Mr. De Pellegrin on the basis of subsection 15(1) and, given that the conditions for that subsection to apply are met in this case, the Court upholds the assessment made by the Minister in this respect.

(iii) *Penalties set out in subsection 163(2)*

(1) ***Positions of the parties***

[186] According to the Appellant, no subsection 163(2) penalty should be assessed against Mr. De Pellegrin for the 2006 taxation year. In 2007, Mr. De Pellegrin decided to hire professionals to make a voluntary disclosure for his 2002 to 2005 taxation years; this disclosure subsequently included his 2006 to 2009 taxation years. Unfortunately for Mr. De Pellegrin, the voluntary disclosure was not accepted by the tax authorities as filed because income tax returns filed by two different accountants indicated different salaries for 2009. Mr. De Pellegrin wanted to get his tax affairs in order after overcoming a difficult period in his life following the death of his father.

[187] According to the Respondent, the penalties should be maintained for the reasons that follow. Mr. De Pellegrin is a repeat non-filer and his conduct shows indifference in terms of compliance with the Act. Mr. De Pellegrin should have been aware that the costs to purchase the 1-800-GOT-JUNK franchises had been paid with Horizon funds. According to the Respondent, Mr. De Pellegrin had to make sure that the various accountants handling Horizon's affairs, on the one hand, and those handling QuébecCo's affairs, on the other hand, had the right information to adequately maintain the companies' books and records. Also, the unexplained deposits remain unexplained after the hearing. Mr. De Pellegrin had to know that he had unreported income. Furthermore, Mr. De Pellegrin had to have kept proper books of account and records, especially after commencing the voluntary disclosure process with the tax authorities.

(2) ***Applicable principles***

[188] Subsection 163(2) provides that:

163(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation	**163(2)** Toute personne qui, sciemment ou dans des circonstances équivalant à faute lourde, fait un faux énoncé ou une omission dans une déclaration, un formulaire, un certificat, un état ou une réponse (appelé « déclaration » au présent article) rempli, produit ou présenté, selon le cas, pour une année d'imposition pour

year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% of the total of …	l'application de la présente loi, ou y participe, y consent ou y acquiesce est passible d'une pénalité égale, sans être inférieure à 100 $, à 50 % du total des montants suivants […]

[Emphasis added.]

[189] Subsection 163(2) provides that every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer, is liable to a penalty.

[190] According to the wording of subsection 163(2), two elements must be present for the penalty set out in this subsection to apply: (1) a mental element—"knowingly, or under circumstances amounting to gross negligence"; and (2) a material element—"has made … a false statement or omission".

[191] The burden of establishing the facts justifying the assessment of the penalties is on the Minister and not on the Appellant (subsection 163(3)).

[192] In *Wynter v. The Queen*, 2017 FCA 195 (*Wynter*), a unanimous decision of the Federal Court of Appeal, Justice Rennie addressed the tests related to the words "knowingly" and "gross negligence" in subsection 163(2):

> [11] When Parliament uses alternative terms, it is assumed that it intended them to have different meanings. Put otherwise, Parliament does not repeat itself: see Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law Inc., 2016) at 43. Section 163 allows the imposition of penalties where the taxpayer has knowledge *or* in circumstances amounting to gross negligence. The section is not conjunctive, and presumptively, these two terms differ in their meaning and content.
>
> [12] The distinction between gross negligence – determined by an objective assessment of the comportment of the taxpayer – and wilful blindness – determined by reference to the taxpayer's subjective state of mind – has a long history. Admittedly, it is, on occasion, a fine distinction and one that is not always clearly drawn. Nonetheless, Parliament is taken to have been cognizant of the distinction.

[Emphasis in the original.]

[193] Gross negligence arises where the taxpayer's conduct is found to fall markedly below what would be expected of a reasonable taxpayer (*Wynter*, *supra*,

at para. 18). In addition, as indicated by the Supreme Court of Canada in *Guindon v. Canada*, 2015 SCC 41 (at para. 61), the penalties "are meant to capture serious conduct, not ordinary negligence or simple mistakes on the part of a tax preparer or planner."

[194] The concept of "gross negligence" was defined as follows in *Venne v. The Queen*, [1984] F.C.J. No. 314 (QL), 84 D.T.C. 6247 (F.C.T.D.):

> "Gross negligence" must be taken to involve greater neglect than simply a failure to use reasonable care. It must involve a high degree of negligence tantamount to intentional acting, an indifference as to whether the law is complied with or not.

[195] The test for "gross negligence" is an objective one (*Wynter*, *supra*, at para. 21). Gross negligence is assessed based on the expected conduct of a reasonable person in the same circumstances.

(3) ***Discussion***

[196] It has been established that Mr. De Pellegrin filed his income tax return for the 2006 taxation year and that it was incorrect. Thus, the material element exists in this case (*D'Andrea v. The Queen*, 2011 TCC 298 at para. 35).

[197] But what about the mental element? Did Mr. De Pellegrin make—or participate in, assent to or acquiesce in the making of—a false statement or omission knowingly, or did he do so under circumstances amounting to gross negligence?

[198] For the following reasons, the Court finds that the Minister did not discharge his burden of justifying the penalties assessed under subsection 163(2) for the 2006 taxation year in respect of the amounts added to Mr. De Pellegrin's income under subsection 15(1) and the unexplained deposits added to his income under subsection 9(1).

[199] As noted above, in 2007, Mr. De Pellegrin decided to get his tax affairs in order and hired professionals to prepare and then file his and Horizon's income tax returns for 2002 to 2009. The tax authorities refused to accept the returns filed as part of the voluntary disclosure process because, among other things, income tax returns filed by two different representatives indicated different incomes.

[200] The justification for the assessment of the penalties that was presented by Mr. Barry at the hearing was very succinct. Moreover, the Respondent did not enter

into evidence any auditor's report setting out the reasons why the Minister decided to assess penalties against Mr. De Pellegrin in respect of the unexplained deposits in his personal bank account that were added to his income, as well as in respect of the amounts added to his income under subsection 15(1) for the 2006 taxation year. The Act is clear and provides that the burden is on the Minister to establish the facts justifying the assessment of penalties.

[201] The Court finds that the Respondent failed to demonstrate, on a balance of probabilities, that Mr. De Pellegrin's actions in filing his 2006 income tax return amounted to gross negligence, in respect of both the income from the unexplained deposits in his personal bank account and the amounts added to his income under subsection 15(1).

[202] As noted in *Wynter*, *supra* (paras. 18 and 19), gross negligence:

> [18] ... arises where the taxpayer's conduct is found to fall markedly below what would be expected of a reasonable taxpayer. …
>
> [19] Gross negligence requires a higher degree of neglect than a mere failure to take reasonable care. It is a marked or significant departure from what would be expected. It is more than carelessness or misstatements. The point is captured in the decision of this Court in *Zsoldos v. Canada (Attorney General)*, 2004 FCA 338 at para. 21, 2004 D.T.C. 6672:
>
> > In assessing the penalties for gross negligence, the Minister must prove a high degree of negligence, one that is tantamount to intentional acting or an indifference as to whether the law is complied with or not. (See *Venne v. R.* (1984), 84 D.T.C. 6247 (Fed. T.D.), at 6256.)
>
> [Emphasis added.]

[203] To assess whether gross negligence has occurred, as noted above, the conduct expected of Mr. De Pellegrin, who operated Horizon from 1999 to 2005, should be measured against that of a reasonable taxpayer with the same business experience, that is, someone who has operated a business for five to six years. Mr. De Pellegrin hired Tax Defenders to assist him with the voluntary disclosure process and to prepare both his income tax returns and those of Horizon. These same professionals helped Mr. De Pellegrin at every step of the audit and in discussions with Mr. Barry. The evidence demonstrates that Mr. De Pellegrin provided dozens of boxes of documents during the audit, after Mr. Barry requested additional information.

[204] The Court cannot conclude, on a balance of probabilities, that Mr. De Pellegrin's actions in filing his income tax return as part of the voluntary disclosure process for the 2006 taxation year amounted to gross negligence. Mr. De Pellegrin hired professionals to put his tax affairs in order after the difficult years following the death of his father and provided them with all of the necessary documents to prepare and file the income tax returns as part of the voluntary disclosure process.

[205] The Respondent provided no evidence demonstrating that Mr. De Pellegrin acted intentionally, or that he showed indifference regarding compliance with the Act, by failing to include these amounts in his income. Although the Court found that an amount of $5,183 should be added to Mr. De Pellegrin's income, it is satisfied that it is Mr. De Pellegrin's inattention to the work done by his representatives that led to this false statement and that it is not an intentional action or indifference as to compliance with the Act amounting to gross negligence. On the contrary, the evidence shows that Mr. De Pellegrin took all the necessary steps to rectify his tax situation and comply with his tax obligations.

[206] In addition, the evidence illustrates that Mr. De Pellegrin always used Horizon's bank accounts as if they were his own, withdrawing sums for himself and depositing sums, for example when he sold the residence, and depositing funds from his mother. As noted by the Appellant, the Minister could have decided to tax Mr. De Pellegrin in this regard under subsection 15(2), but he decided to tax him under subsection 15(1).

[207] Furthermore, the Court cannot find that Mr. De Pellegrin knowingly made false statements in his income tax return by not reporting the amount of $54,840 as a benefit conferred on a shareholder under subsection 15(1) or by failing to include in his income the unexplained deposits in his personal bank account in the amount of $5,183. The Court concludes that the Minister failed to discharge his burden of justifying the assessment of the penalties in this regard.

Signed at Ottawa, Ontario, this 15th day of January 2025.

"Dominique Lafleur"

Lafleur J.

Translation certified true
on this 15th day of January 2025.

Melissa Paquette, Senior Jurilinguist

CITATION:	2025 TCC 7
COURT FILE NO.:	2018-686(IT)G
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