Docket: 2014-935(IT)G

BETWEEN:

GLENN F. PLOUGHMAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 10 and 11, 2016, at St. John's, Newfoundland

By: The Honourable Justice Don R. Sommerfeldt

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	André LeBlanc

AMENDED JUDGMENT

The Appeal from the **assessment dated July 10, 2007 and** made under **section 163.2 of** the *Income Tax Act* is dismissed, with costs in favour of the Respondent, to be calculated according to Tariff B of Schedule II to the *Tax Court of Canada Rules (General Procedure)*.

This Amended Judgment is issued in substitution of the Judgment dated April 25, 2017.

Signed at **Edmonton**, **Alberta**, this **10th** day of **May**, 2017.

"Don R. Sommerfeldt"

Sommerfeldt J.

Citation: 2017 TCC 64
Date: 20170425
Docket: 2014-935(IT)G

BETWEEN:

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REASONS FOR JUDGMENT

Sommerfeldt J.

I. INTRODUCTION

[1] These Reasons pertain to an Appeal brought by Glenn F. Ploughman against an assessment under section 163.2 of the *Income Tax Act*[1] (the "*ITA*"). That section is colloquially referred to as the third-party penalty provision. In 2001 and 2002, Mr. Ploughman had a connection to a charitable donation program (the "Donation Program"). The nature and extent of his connection to the Donation Program were significant issues in this Appeal.

[2] The Donation Program was the same charitable donation program in respect of which Julie Guindon, a lawyer in Ottawa, issued a legal opinion on September 19, 2001. The Canada Revenue Agency (the "CRA") assessed Ms. Guindon under section 163.2 of the *ITA* and her appeal from that assessment was ultimately decided in favour of the Crown by the Supreme Court of Canada.[2] Mr. Ploughman maintained that his connection to the Donation Program was significantly different from, and substantially less than, that of Ms. Guindon and certain other individuals who could be described as the promoters or developers of the Donation Program. The CRA considered Mr. Ploughman to be one of the promoters or creators of the Donation Program, and assessed him accordingly.

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1 R.S.C. 1985, c.1 (5th supplement), as amended.

2 *Guindon v The Queen*, 2015 SCC 41; *aff'g* 2013 FCA 153; *rev'g* 2012 TCC 287.

[3] In his reasons, the trial judge who heard Ms. Guindon's appeal set out an agreed statement of facts, in which reference is made to Mr. Ploughman**.** It should be noted that Mr. Ploughman was not a party to that appeal, nor was he a party to the agreement that resulted in that agreed statement of facts. Accordingly, I have not made reference to, or relied on, that agreed statement of facts insofar as it refers to Mr. Ploughman.

II. ISSUE

[4] The issue in this Appeal is whether Mr. Ploughman participated in, assented to or acquiesced in the making of, statements by 135 of the participants in the Donation Program that Mr. Ploughman knew, or would reasonably be expected to have known but for circumstances amounting to culpable conduct, were false statements that could be used by or on behalf of those participants for a purpose of the *ITA*. In part, this requires a determination of whether Mr. Ploughman was merely a canvasser or a marketer for the Donation Program (as he alleges), whether he participated in the creation, or was a promoter, of the Donation Program (as the Crown has assumed), or whether he may have had some other connection to the Donation Program or to the false statements.

III. FACTUAL BACKGROUND

[5] In 2001, Lee Goudie, a land developer, was endeavouring to develop a hotel and casino resort to be known as "Hawkes Nest Plantation Golf Resort and Casino" ("Hawkes Nest") in the Turks and Caicos Islands ("TCI"). Mr. Goudie and Mr. Ploughman first met in the mid-1990s.[3] They reconnected in 2001, at which time Mr. Ploughman indicated that he was interested in Hawkes Nest, which led to a business connection with Mr. Goudie for the purpose of furthering the Hawkes Nest development project (the "Development Project"). As Mr. Ploughman was a financial advisor in 2001, his role (according to Mr. Goudie) was to assist in raising the financing to fund the Development Project. While there was relatively little evidence concerning the early financing arrangements for the Development Project, it appears that, in the spring and summer of 2001, a number

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[3] Mr. Goudie testified that he met Mr. Ploughman in 1995 or 1996; see *Transcript*, Wednesday, February 10, 2016, page 14, line 1. Mr. Ploughman testified that he has known Mr. Goudie since about 1996 or 1997; see *Transcript*, Thursday, February 11, 2016, page 32, lines 27-28.

of initial investors (the "Founding Members") had loaned money to TDL to provide partial funding for the project.[4]

[6] The development of Hawkes Nest was to be carried out through a corporation. For this purpose, arrangements were made for the incorporation of Tropical Development Ltd. ("TDL").[5] TDL was incorporated in the TCI, apparently under the auspices of a TCI law firm known as Misick & Stanbrook. Although none of TDL's constating or organizational documents were produced in evidence, it appears that initially Mr. Goudie was the sole shareholder of TDL. Mr. Goudie testified that, during the course of developing Hawkes Nest, TDL issued sufficient shares to Mr. Ploughman to result in him becoming a 50% shareholder, but that, when Mr. Ploughman subsequently became embroiled in a lawsuit with Datile Securities Inc. ("DSI"), Mr. Ploughman requested that Mr. Goudie arrange for all but one of his shares to be transferred to Mr. Goudie.[6] Mr. Ploughman testified that he did not, at any time, become a shareholder of TDL.

[7] Due to a slowdown in the tourism business in the wake of the 911 catastrophe, and the resultant reticence on the part of investors to invest in tourist-based properties at that time, in the fall of 2001 TDL realized that it faced a funding shortfall. Mr. Goudie testified that, in the face of this realization, Mr. Ploughman suggested that TDL could raise additional funds by promoting a charitable donation program (defined above as the "Donation Program") based on the creation or acquisition of a timeshare property and the donation of vacation ownership weeks to registered charities. Mr. Goudie indicated that Mr. Ploughman had knowledge and experience pertaining to the implementation of charitable donation programs.

[8] To implement the Donation Program, certain steps were identified and assignments were made. Mr. Goudie testified that he or TDL were responsible for the preparation or provision of the following documents:

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4 Exhibit R-1, Tab 55.

5 There seems to have been some confusion about the name of this corporation, as various documents that were created in 2001 and 2002 referred to it as "Tropical Development Limited", "Tropical Development Ltd.", "Tropical Development International Inc.", or "Tropical Development International". This corporation was originally named "Tropical Amusement Inc." or "Tropical Amusements (TCI) Inc." In August 2001 it changed its name. As this corporation was incorporated in TCI, and as its solicitor, Gordon Kerr of Misick & Stanbrook, referred to it as "Tropical Development Limited," I have assumed that (after the name change) that was the correct name of the corporation.

6 *Transcript*, Wednesday, February 10, 2016, page 31, line 2 to page 32, line 28.

a) the promotional material for the Global Trust of Canada (the "Global Trust");[7]

b) the Sale Agreement, pursuant to which TDL was to sell certain timeshare vacation ownership weeks to the settlor (the "Settlor") of the Global Trust;

c) the Deed of Gift of Vacation Ownership Weeks, pursuant to which the Settlor was to settle the above-mentioned vacation ownership weeks on the trustee (the "Trustee") of the Global Trust;

d) the rules and regulations of Hawkes Nest;

e) an independent evaluation of the vacation ownership weeks, to be prepared on behalf of the registered charities to which the vacation ownership weeks would eventually be given;

f) the Marketing and Sales Agreement with TDL;[8] and

g) the conveyance of the various vacation ownership weeks from the Trustee to the charitable donors (the "Donors") (i.e., the participants in the Donation Program), who were the Class A Beneficiaries of the Global Trust.[9]

[9] Mr. Goudie testified that Mr. Ploughman was to provide the remaining documents that were required to implement the Donation Program. According to Mr. Goudie, those documents were:

a) the Deed of Trust;

b) the document creating a charge against the vacation ownership weeks;

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7 Although the Global Trust was to be a significant and essential party in some of the transactions on which the Donation Program was based, as events unfolded, the Global Trust was not actually settled or otherwise created. Nevertheless, I will use the term "Global Trust" to refer to the trust that was intended to have been created.

8 This might be a reference to the Marketing Agreement between TDL and Global Marketing Ltd. dated September 17, 2001; see Exhibit R-1, Tab 8. Alternatively, it might refer to the Vacation Ownership Marketing Agreement between TDL and Les Guides franco-canadiennes (District d'Ottawa) dated November 22, 2001; see Exhibit R-1, Tab 14.

9 *Transcript*, February 10, 2016, page 20, line 17 to page 22, line 6. The individuals who participated in the Donation Program became beneficiaries of the Global Trust. Some of those documents refer to them as Class "A" beneficiaries, while others refer to them as "Class A" beneficiaries. In these Reasons, I will refer to them as Class A Beneficiaries.

c) the applications pursuant to which the prospective participants in the Donation Program would apply to become Class A Beneficiaries of the Global Trust;

d) an opinion of legal counsel in TCI concerning the legal title to the vacation ownership weeks;

e) a resolution of the trustee of the Global Trust distributing the vacation ownership weeks to the Class A Beneficiaries of that trust; and

f) the Deeds of Gift of vacation ownership weeks by the Class A Beneficiaries (i.e., the Donors) to a registered charity.[10]

Mr. Ploughman testified vehemently that he was not expected to, and did not, prepare or provide any of the documents listed above.[11]

[10] Mr. Goudie understood that a legal opinion would be required in respect of the Donation Program. Accordingly, in mid-2001 Mr. Goudie made arrangements to retain Ms. Guindon. On July 10, 2001, Ms. Guindon sent a letter to TDL to the attention of Mr. Goudie, confirming the nature of her engagement. That letter also contained the following statement:

> I also wish to confirm that I indicated to you that the opinion does not fall within my field of expertise. Therefore, I recommended that you have it reviewed by other professionals such as a tax lawyer and an accountant to ensure the accuracy of the opinion. I am aware that this may result in additional fees, however, I believe that this is not unreasonable in light of the block fee that I am charging you. You also confirmed your request that the opinion letter should be addressed to KGR Tax Services Ltd since they are the trustees of Global Trust of Canada, the trust designated for the Charitable Donation Program.[12]

There was no evidence that Mr. Ploughman saw the above-mentioned letter in 2001.

[11] As noted by Ms. Guindon in her letter, KGR Tax Services Ltd. ("KGR") had agreed to be the trustee of the Global Trust. KGR was owned equally by Mr. Ploughman, Richard St.-Denis and Keith Benson (both of whom were business

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10 *Ibid.*, page 22, lines 9-10.

11 *Ibid.*, page 140, lines 11-13; and *Transcript*, February 11, 2016, page 13, line 24 to page 14, line 4.

12 Exhibit R-1, Tab 1. The amount of the fee charged by Ms. Guindon to TDL was $1,000.

associates of Mr. Ploughman). It carried on a tax preparation business. Mr. Ploughman indicated that it was in the summer of 2001 when KGR agreed to be the trustee of the Global Trust, and that he and his fellow shareholders (whom he described as partners) agreed to having KGR act as the trustee, as the trustee fees would generate some cash flow for KGR.[13] Mr. Ploughman was the president of KGR.

[12] In her testimony, Ms. Guindon stated that she met Mr. Ploughman through Mr. St.-Denis, who was her cousin and who had been her financial advisor for many years. Ms. Guindon was introduced to the Donation Program on May 15, 2001, when she met with Mr. St.-Denis and Mr. Goudie.[14] Ms. Guindon stated that she subsequently had several meetings in respect of the Donation Program over the summer and fall of 2011, as follows:

a) On May 30, 2001, Ms. Guindon met with Mr. St.-Denis, Mr. Goudie and Mr. Ploughman at 331 Somerset Street West, Ottawa.[15] Ms. Guindon indicated that the meeting was either at the office of DSI (which was the entity with which Mr. Ploughman was then affiliated) or the office of TDL. The purpose of the meeting was to explain to Ms. Guindon the Donation Program, which was to be based on a charitable donation program which involved the Athletic Trust of Canada (the "Athletic Trust") in respect of which Mr. Ploughman and Mr. St.-Denis had been canvassers in 2000. According to Ms. Guindon, Mr. Ploughman took the lead in explaining the Athletic Trust program.

b) On July 3, 2001, there was a follow-up meeting. Mr. Goudie attended that meeting with Ms. Guindon, but she cannot remember whether Mr. Ploughman or Mr. St.-Denis also attended.[16]

c) On August 23, 2001, Ms. Guindon attended a meeting with Mr. Goudie at 331 Somerset Street West. Mr. Ploughman participated in the meeting by telephone.[17]

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13 Exhibit R-1, Tab 51. See *Transcript*, February 11, 2016, page 50, lines 24-27. See also *Transcript*, February 10, 2016, page 16, line 26 to page 17, line 9.

14 *Transcript*, February 10, 2016, page 71, lines 17-22.

15 *Ibid.*, page 71, lines 22-28. The office of Mr. Ploughman and his corporations was located on the second floor of the premises at 331 Somerset Street West. The office of Mr. Goudie and TDL was located on the third floor of the premises at 331 Somerset Street West and was subleased from Mr. Ploughman or one of his corporations.

16 *Ibid.*, page 75, lines 18-22.

[13] In his testimony, Mr. Ploughman acknowledged that he met with Ms. Guindon, apparently on more than one date, although he has forgotten the precise dates. He stated that the purpose of meeting with Ms. Guindon was to explain to her how the Athletic Trust program worked. He also stated that, when he was meeting with Ms. Guindon, he did not know that Mr. Goudie was planning a charitable donation program of his own, although he suspected that such might be the case.[18]

[14] As mentioned, the Donation Program was modelled on the Athletic Trust charitable donation program, with which Mr. Ploughman and Mr. St.-Denis had been involved as canvassers in 2000. In essence, it was anticipated that, in 2001, under the Donation Program, a trust would be established to acquire timeshare units (i.e., vacation ownership weeks) in respect of a property in TCI. Subsequently, the trust would distribute those timeshare units to its beneficiaries, who would be individuals (in these Reasons, sometimes called the "Donors" or the "Class A Beneficiaries") found by Mr. Ploughman, Mr. St.-Denis and other canvassers, and the Donors would subsequently donate their timeshare units to a registered charity, whereupon they would each receive from the charity an official receipt[19] showing the amount of the donation as being an amount equal to the fair market value of the donated units. As the timeshare units would be encumbered by a lien relating to the initial acquisition and financing of the timeshare units, and as the charity apparently (or purportedly) could not accept properties subject to an encumbrance, the Donors were expected to make a payment to the lienholder to remove the lien before the donation of the timeshare units to the charity was completed. A timeshare marketing agent was to be engaged by the charity to sell the donated timeshare units to the public. For each timeshare unit sold, an amount representing profit and stipulated to be at least $500 per unit was to be paid to the charity.

[15] Thus, the Donation Program was dependent on having available timeshare units. In this regard, TDL made arrangements to purchase a sixteen-room hotel, which was known as the Arawak Inn and which was located in TCI on land adjacent to the site of the proposed Hawkes Nest development.

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17 *Ibid*., page 74, lines 21-27.

18 *Transcript*, February 11, 2016, page 17, line 9 to page 18, line 22.

19 In these Reasons, the term "official receipt" has the meaning ascribed by section 3500 of the *Income Tax Regulations*, CRC 1977, c.945, as amended.

[16] After TDL acquired the Arawak Inn, TDL undertook renovations to upgrade the property in conjunction with its conversion from a hotel to a timeshare facility. To facilitate the renovations, TDL engaged the services of Iva Dianne Customs Design, which was a partnership formed by Mr. Ploughman and his wife, Iva Dianne Ploughman, and which carried on the business of providing design and furnishing services.

[17] Over the summer of 2001, Ms. Guindon prepared multiple drafts of her proposed opinion letter. She kept those letters in her file, but discussed the details of the Donation Program from time to time with Mr. Goudie, Mr. St.-Denis and (according to her) Mr. Ploughman, and made revisions to the proposed opinion letter as she obtained additional information.

[18] On the second page of her opinion letter, she listed the various documents that she ostensibly had reviewed in formulating her opinion. While some of those documents were finalized before Ms. Guindon issued her opinion on September 19, 2001, other documents existed only in draft form in 2001, and some documents were never completed. Some of the draft documents that were reviewed by Ms. Guindon were actually only photocopies of the Athletic Trust documents that had been marked up or annotated by hand to show the proposed revisions that would be needed to convert such documents into those that could be used in the Donation Program. When Ms. Guindon prepared her opinion, those annotated photocopies had not yet been retyped or reformatted to insert the handwritten revisions.

[19] Ms. Guindon stated that she was relying on Mr. Goudie and Mr. Ploughman to provide her with the documents listed on page 2 of her opinion letter. She also stated that she assumed, as time passed and she had heard nothing further, that the documents must have been obtained and that everything was in order. Mr. Ploughman testified that, since Ms. Guindon stated in her opinion letter that she had reviewed the documents, he assumed that such documents had been finalized and provided to her. It seems that each was relying on the other and hoping for the best. It also seems that neither was inclined to ask the hard questions about the status of the documents. As it ultimately turned out, the documents never were finalized, and the Global Trust and the timeshare units never were created.

[20] Ms. Guindon coincidentally happened to be the president of a registered charity, Les Guides franco-canadiennes (District d'Ottawa) ("Les Guides"). Mr. St.-Denis and (according to Ms. Guindon) Mr. Ploughman asked her in October 2001 if Les Guides would be interested in becoming involved in the Donation Program.[20] Ms. Guindon subsequently presented the proposal to the board of directors of Les Guides, which approved the participation of Les Guides in the Donation Program.

[21] Mr. Ploughman testified that, in 2001, his sister-in-law was working in his office in Ottawa. She had previously worked for the 4-H Provincial Council of Newfoundland ("4-H") and, upon seeing the promotional package for the Donation Program, she suggested to Mr. Ploughman that it would make sense for 4-H to be one of the charities in that program. Subsequently, she approached 4-H, which apparently agreed to participate. However, in early January 2002 there was a wholesale change in the board of directors and executive committee of 4-H, and the new directors felt that there was insufficient time to analyse the Donation Program and to prepare the official receipts. Accordingly, they caused 4-H to withdraw from participation.[21]

[22] The structure for the Donation Program contemplated the creation of an entity that would be an intermediary between the Donors and the registered charities and that would also provide certain services to the charities. In this regard, Mr. St.-Denis arranged for the incorporation, under the *Canada Business*

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20 *Transcript*, February 10, 2016, page 78, line 24 to page 79, line 3.

21 *Transcript*, February 11, 2016, page 89, line 9 to page 92, line 11; and Exhibit R-1, Tab 26.

Corporations Act,[22] of Suntopic International Advisors Ltd. ("SIA") on September 18, 2001.[23]

[23] Ms. Guindon had further communication with Mr. St.-Denis and Mr. Ploughman in early 2002, when it became necessary to prepare the official receipts to be issued by Les Guides to the 140 individuals who had purportedly donated timeshare units to Les Guides. Ms. Guindon stated that Les Guides did not have sufficient staff to prepare 140 receipts; therefore, according to her, Mr. St.-Denis and Mr. Ploughman offered to have to the receipts prepared in their office.[24] On Saturday, February 9, 2002, Ms. Guindon and another individual, who was the treasurer of Les Guides, attended at the offices of Mr. St.-Denis and Mr. Ploughman, where Ms. Guindon and the treasurer reviewed and signed the official receipts, which were subsequently sent to the 140 Donors, 135 of whom included those receipts with their respective income tax returns and claimed a charitable donation tax credit.[25] Each of those receipts stated that the particular Donor had made an in-kind donation of a specified number of "Biennial Weeks Vacation Ownership at Arawak Inn & Beach Resort." As those vacation ownership weeks (or timeshare units) were never created, and thus were never donated by the Donors to Les Guides, each receipt contained a false statement.

[24] The statements that triggered the CRA's application of section 163.2 of the *ITA* were the official receipts issued by Les Guides to the 135 Donors who included those receipts with their respective tax returns. As the receipts were signed by Ms. Guindon or the treasurer of Les Guides, the Crown has not alleged that Mr. Ploughman made the statements. Rather, it is the position of the Crown that Mr. Ploughman participated in, assented to or acquiesced in the making of the false statements which are embodied in the official receipts.

IV. WITNESS RELIABILITY

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22 R.S.C. 1985, c. 44.

23 Exhibit R-1, Tab 9 and Tab 12.

24 *Transcript*, February 10, 2016, page 97, line 19 to page 98, line 11.

25 Subparagraphs 15(o) through (t) of the Crown's Reply indicate that 139 of the 140 Donors included their official receipts with their respective income tax returns and that, when the CRA assessed the penalty under section 163.2 of the *ITA*, it did not have sufficient information concerning seven of the Donors, with the result that the amount of the penalty was calculated in respect of 132 Donors. At the hearing, the Crown indicated that the amount of the penalty was calculated by reference to 135 Donors and their respective official receipts; see *Transcript*, February 10, 2016, page 127, lines 21-22.

[25] As the Crown bears the burden of proof in respect of an assessment under section 163.2 of the *ITA*,[26] the Crown presented its case first.[27] Counsel for the Crown called three witnesses: Mr. Goudie, Ms. Guindon and Todd Collins, who is an official of the CRA. Mr. Ploughman testified on his own behalf. He did not call any other witnesses.

[26] Mr. Collins gave evidence concerning the calculation of the amount of the assessed penalty. I found his testimony to be credible and reliable. As well, Mr. Ploughman stated that he has no quarrel as to the amount of the penalty, although he vigorously maintained that he is not liable for the penalty.

[27] I found the evidence presented by Mr. Ploughman, on the one hand, and by Mr. Goudie and Ms. Guindon, on the other hand, to be a classic "he said, they said" situation. As indicated above, Mr. Goudie and Ms. Guindon stated that Mr. Ploughman was an active participant in the planning and creation of the Donation Program. In fact, they described him as the one who knew how the Donation Program was supposed to be implemented and the one who took the lead in directing that implementation. On the other hand, Mr. Ploughman adamantly insisted that he was not involved whatsoever in the planning or implementation of the Donation Program or the preparation of the official receipts issued by Les Guides.[28]

[28] Each of those three witnesses appeared to fall victim to the typical human response of endeavouring to show his or her actions in the best possible light. As I listened to the testimony of Mr. Ploughman, Ms. Guindon and Mr. Goudie, my sense was that each of them seemed to believe that he or she was being forthright and truthful. However, as the events which were the subject of the hearing occurred 14 to 15 years ago, it was evident that memories had faded and the respective recollections of some of the details of the Donation Program and the involvement of various individuals in respect of the Donation Program had waned to some extent. As well, I had the impression that there was, whether consciously or unconsciously, an element of finger pointing on the part of those three witnesses. It seemed that their memories may have been coloured by an inclination to shift blame to someone else, to portray his or her involvement in respect of the

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26 See subsection 163(3) of the *ITA*.

27 See *The Queen v Taylor* [1984] CTC 436, 84 DTC 6459 (FCTD); *Johnson v The Queen*, [1994] 1 CTC 2025, 94 DTC 1009 (TCC); and *Pompa v The Queen*, [1995] 1 CTC 466, 94 DTC 6630 (FCA).

28 *Transcript*, February 10, 2016, page 140, lines 11-13; February 11, 2016, page 13, line 24 to page 14, line 4.

Donation Program in the best possible light, or to suppress the memory of one's own questionable conduct.

[29] There are circumstances that raise questions concerning the credibility and reliability of each of those three witnesses. As readers of the *Guindon* case are aware, Ms. Guindon signed a tax opinion letter in which she stated that she had reviewed various documents, when, in fact, many of those documents had not even been prepared or finalized when she signed the letter. This raises concerns about her credibility. As well, based on the decision in her own appeal, it appears that, on June 12, 2003, at a time when Ms. Guindon knew that the CRA would not accept the charitable donations associated with the Donation Program, she made representations to the CRA regarding her own claim in respect of her donation in 2001 of vacation ownership weeks to Les Guides. In commenting on that conduct, Bédard J stated that Ms. Guindon lied to the authorities and that such conduct reflected negatively on her character.[29]

[30] During the hearing of this Appeal, it became apparent that on February 27, 2012, Mr. Goudie sent a letter to Lewis Martin of DSI, which had sued Mr. Ploughman, and in the letter Mr. Goudie told Mr. Martin that Mr. Ploughman did not own any shares in TDL. According to Mr. Goudie (but not Mr. Ploughman), this was an incorrect statement. Although Mr. Goudie testified that Mr. Ploughman had pressured him into sending the letter, the fact remains that Mr. Goudie sent what he acknowledges was a misleading and incorrect letter, which raises concerns about his credibility.

[31] I found Mr. Ploughman's testimony during cross-examination to be evasive, defiant and self-serving. An example of Mr. Ploughman's evasiveness pertains to his answers during cross-examination in respect of the ownership of the Arawak Inn. When asked whether that property had been purchased through TDL, Mr. Ploughman replied:

> I wasn't sure and I'm still not sure which company actually bought the - again, he had three separate names to companies. He had Tropical Development. He had Tropical Development International. He had Tropical Amusements. So even today, I'm not sure which entity bought the Arawak Inn.[30]

As explained in footnote 5 above, all three of the terms used by Mr. Ploughman in this answer actually referred to the corporation that I have designated as TDL in

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29 *Guindon* (TCC), *supra* note 2, ¶111. See also *Guindon* (SCC), *supra* note 2, ¶85.

30 *Transcript*, February 11, 2016, page 34, lines 8-13.

these Reasons. I am not concerned that Mr. Ploughman, in giving this answer, used three different names to refer to TDL, because all three of those names, and others, were used by Mr. Goudie, Mr. St.-Denis and Mr. Ploughman in 2001 and 2002 to refer to TDL. What concerns me is his assertion that he was not sure which entity bought the Arawak Inn, as that assertion appeared to be an evasive statement.

[32] The evasiveness becomes apparent when one reads a letter that Mr. Ploughman sent to the Class A Beneficiaries on April 5, 2002, in which he referred to "Gordon Kerr, legal counsel to *Tropical Development Ltd* (owner of the Arawak Inn and Beach Resort)."[31] Similarly, a report prepared by Mr. Ploughman on February 20, 2004 suggests that he was aware then that TDL was the purchaser of the Arawak Inn.[32] The evasiveness is also evident when one reviews certain Minutes of Settlement that Mr. Ploughman entered into with the Crown in 2011, to settle a tax dispute in respect of the business carried on by Iva Dianne Customs Design,[33] which, as indicated above, was a partnership formed by Mr. Ploughman and his wife. In those Minutes, which Mr. Ploughman, as the appellant in that appeal, signed on November 14, 2011, the following statement was made:

> The Appellant's [i.e., Mr. Ploughman's] business, Iva Dianne Customs Design ("Iva Dianne"), of which the Appellant is a 50% partner, invoiced Tropical Development Ltd. ("Tropical) in 2001 and 2002 in the amounts of $168,906 and $145,937 respectively….[34]

On or about November 17, 2011, Mr. Ploughman sent to the CRA a Request for Taxpayer Relief, with an accompanying letter, containing the following statement:

> During taxation year 2001 Iva Dianne Design undertook a contract of work to renovate a small Hotel and Bar complex, located on Grand Turk Island – one of the Turks and Caicos Islands – owned by a TCI-registered company Tropical Development Ltd (Tropical).[35]

Thus, contrary to what Mr. Ploughman said during his cross-examination (to the effect that, in 2001, as well as in 2016, he did not know which entity had purchased

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31 Exhibit R-1, Tab 41. The italicized name of TDL appeared in the original.

32 Exhibit R-1, Tab 55. In a couple of instances in that letter Mr. Ploughman referred to the president of TDL, when the context suggests that, insofar as the various legal transactions were concerned, Mr. Ploughman likely intended to refer to TDL itself.

33 See paragraph 16 above. The tax dispute involving Iva Dianne Customs Design was not directly related to the issues that are the subject of this Appeal.

34 Exhibit A-1, Tab 9.

35 Exhibit A-1, Tab 10.

the Arawak Inn), the above documents indicate that in 2002, 2004 and 2011 he seemed quite certain that it was TDL that had purchased the Arawak Inn.

[33] Apart from the evasiveness described in the preceding paragraph, I have other serious concerns about Mr. Ploughman's credibility, for several reasons, including the following inconsistencies or contradictions in his evidence:

a) During his cross-examination, Mr. Ploughman testified that, when the renovations to the Arawak Inn began, he was not aware that the objective was to convert that building into a timeshare facility. He also testified that it was his recollection that his wife's job was to increase the value of the Arawak Inn as a one-star (or lower) hotel to a three-star hotel.[36] However, on February 20, 2004, Mr. Ploughman wrote a report on the Development Project and the Donation Program, in which he stated:

> The sole purpose of purchasing the Arawak Inn property was to convert the property from a hotel to a "time-share" in order to establish a "real property" that could be utilized by *The Global Trust of Canada* as a Charitable Donation vehicle. Knowing that the Arawak Inn had gone into bankruptcy being operated as a hotel property, there was never any intention to operate the Arawak Inn as a hotel and repeat that scenario.[37] [Italics in original.]

b) During his testimony, Mr. Ploughman stated that he was not involved in the creation or incorporation of SIA, and that he only became involved with SIA in 2004 when it was necessary to sign an annual return,[38] which he did as the secretary of SIA. In that same capacity, he signed the 2002 and 2003 corporate income tax returns of SIA, which he had prepared, which showed that he was the secretary of SIA and which stated that he owned 50% of the issued common shares of SIA in 2002 and 2003.[39] In addition, the 2002 tax return implied that Mr. Ploughman was a 50% shareholder of SIA in 2001, which was the year in which SIA was incorporated.[40] Hence, it seems that Mr. Ploughman was involved with SIA well before 2004.

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36 *Transcript*, February 11, 2016, page 163, lines 9-15.

37 Exhibit R-1, Tab 55.

38 *Transcript*, February 10, 2016, page 141, lines 1-6.

39 Exhibit R-1, Tabs 56 and 57.

40 In SIA's 2002 tax return, the question about whether there had been an acquisition of control since the previous taxation year (i.e., 2001) was answered in the negative. In his testimony, Mr. Ploughman explained that he understood the negative answer to the question about an acquisition of control as meaning that "nothing had changed"; see *Transcript*, February 11, 2016, page 165, lines 13-26. Thus, I read SIA's 2002 income tax

c) During his cross-examination, Mr. Ploughman went so far as to state that before March 2004 he did not even know about the existence of SIA. I find this statement difficult to accept, given that the full name of SIA appears at least nine times in Ms. Guindon's opinion letter of September 19, 2001. More specifically, it appears four times in paragraph 2(l), twice in paragraph 2(n) and three times in section 3 of that letter. Furthermore, the Deeds of Gift by the various Donors were addressed to SIA. Mr. Ploughman signed at least four of those Deeds of Gift as the witness of the signature of the particular Donor.[41]

d) In his Answer, which was filed with the Court on October 24, 2014, Mr. Ploughman stated that, to the best of his knowledge, KGR never purported to act as the trustee of the Global Trust.[42] That statement is contradicted by several documents, including:

i. the Beneficiary Applications, which were addressed to KGR, as the trustee of the Global Trust, and at least two of which showed Mr. Ploughman as the canvasser for the particular applicant;[43]

ii. the Certificates issued by KGR, as the trustee of the Global Trust, to the various participants in the Donation Program (although Mr. Ploughman has stated that those Certificates were issued without his knowledge);[44]

iii. a document entitled Official Certification of Fair Market Value of Charitable Donation, which was dated December 31, 2001, was issued on the letterhead of the Global Trust, and showed KGR as the trustee of that trust;[45]

iv. the letter to the Donors that was dated March 18, 2002, the first paragraph of which began with the phrase "As Trustee of the *Global*

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return as implying that Mr. Ploughman was a 50% shareholder of SIA in 2001, presumably from the time of SIA's incorporation, which occurred on September 18, 2001.

41 Exhibit R-1, Tabs 10 and 17.

42 Exhibit R-1, Tabs 37 and 41.

43 Exhibit R-1, Tab 15.

44 Exhibit R-1, Tab 21.

45 Exhibit R-1, Tab 22.

Trust of Canada and as the President of the charity involved," which was written on KGR letterhead, and which was signed by Ms. Guindon, in her capacity as the president of Les Guides, and by Mr. Ploughman, who, below his signature, was described as "President KGR Tax Services Ltd Trustee of *Global Trust of Canada*;"[46] and

v. the letter dated April 5, 2002, which was written on KGR letterhead, which was addressed to the beneficiaries of the Global Trust, which was signed by Mr. Ploughman and which, below his signature and name, stated "for the Trustees [*sic*] of *Global Trust of Canada*."[47]

While Mr. Ploughman has stated that the Certificates described in clause ii above were prepared by someone other than himself, and while the authorship of the documents described in clauses i and iii above is unclear, the two letters described in clauses iv and v above were signed by Mr. Ploughman, in his capacity as the president of KGR, which was purporting to act as the trustee of the Global Trust.

e) During his evidence in chief, Mr. Ploughman stated that Mr. Goudie "very generously took advantage of information that I had available in my office, which was the Athletic Trust Program."[48] This assertion had, in essence, also been made on September 20, 2006, when Mr. Ploughman's then solicitor sent a letter to the CRA, in response to the CRA's proposal letter of June 12, 2006, which indicated that the CRA proposed to assess Mr. Ploughman under section 163.2 of the *ITA*. Mr. Ploughman confirmed that he gave to his solicitor the information on which the solicitor's letter was based.[49] During his cross-examination, Mr. Ploughman acknowledged that he saw and approved the letter before it was sent to the CRA. On page 7 of that letter, Mr. Ploughman's solicitor stated:

> Mr. Ploughman and his company, as indicated, had acted as canvassers in the Ottawa area for the 2000 product [i.e., the Athletic Trust donation program]. When those activities were completed, some explanatory and promotional materials from that campaign were left over, and were available for review in

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46 Exhibit R-1, Tab 37. See subparagraph 37.k) below.

47 Exhibit R-1, Tab 41. See subparagraph 37.m) below.

48 *Transcript*, February 10, 2016, page 145, lines 20-22.

49 *Transcript*, February 11, 2016, page 31, lines 22-23.

> Ploughman's Ottawa office. They were seen there by Goudie, who obtained a complete set of them some time during the summer of 2001.[50]

During his cross-examination, Mr. Ploughman initially stated that "the only place that he [Mr. Goudie] could have gotten them [the Athletic Trust materials] was from my office."[51] As the cross-examination continued, Mr. Ploughman acknowledged that he had distributed at least 50 to 100 copies of the Athletic Trust materials to individuals whom he had canvassed in 2000, such that Mr. Goudie could have obtained those materials from some place other than Mr. Ploughman's office. He further acknowledged that he was not sure that Mr. Goudie saw those materials in his (Mr. Ploughman's) office. He also conceded that he had told his solicitor something that he was not able to affirm as being the truth.[52] Thus, Mr. Ploughman acknowledged that he was not convinced of the veracity of all of the information that he gave to his solicitor for inclusion in the letter of September 20, 2006.

f) In the letter of September 20, 2006, from Mr. Ploughman's solicitor to the CRA, the following statement appears:

> It is important to understand, as well, that the compensation arrangements between Goudie and Ploughman did not involve any direct monetary compensation to the latter for his marketing efforts, whether to investors generally or to charitable trust investors in particular.[53]

However, on February 17, 2002, Mr. Ploughman had sent a fax to Mr. Goudie, which began with the statement, "We have a very serious financial situation that only you can fix."[54] Mr. Ploughman went on to explain that he and his colleagues had raised US$394,500 in cash from the Donation Program, as well as arranging for some of the Founding Members to convert their promissory notes into charitable donations. Mr. Ploughman then stated, "The problem is … we have not been paid the **$75,990 USD commissions** owed and it must be done immediately!" [Boldface emphasis and ellipses in original.] Thus, contrary to what Mr. Ploughman instructed his solicitor to say in the letter of September 20, 2006, it seems that there was an arrangement, at least in Mr. Ploughman's mind, for the payment of

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50 Exhibit R-1, Tab 60, page 7.
51 *Transcript*, February 11, 2016, page 30, lines 12-13.
52 *Ibid.*, page 30, line 15 to page 31, line 26.
53 Exhibit R-1, Tab 60, pages 10-11.
54 Exhibit R-1, Tab 28.

> direct monetary compensation for his marketing efforts in respect of the Donation Program.

For the reasons set out above, particularly the inconsistencies or contradictions between Mr. Ploughman's testimony and various documents,[55] I have found that Mr. Ploughman was not a credible witness. I am not certain whether the above inconsistencies or contradictions arose from a desire to mislead or from a faulty memory, but, either way, Mr. Ploughman's testimony is unreliable.

[34] Given my concerns about the credibility and reliability of the three main witnesses, I have endeavoured to base my decision on the available documentary evidence, much of which was created contemporaneously with, or shortly after, the events in question.

V. ANALYSIS

A. Statutory Provisions

[35] Section 163.2 of the *ITA* was announced in conjunction with the federal budget of 1999 and subsequently added to the *ITA*, with effect for statements made after June 29, 2000. The Supreme Court of Canada has held that the section imposes an administrative penalty, and not a criminal fine.[56] In this Appeal, Mr. Ploughman did not argue that section 163.2 of the *ITA* was penal in nature or that he was entitled to the procedural safeguards in section 11 of the *Canadian Charter of Rights and Freedoms*. Rather, he argued that he did not participate in the creation, planning or preparation of the Donation Program and that he had no involvement in the creation, signing or distribution of the official receipts issued by Les Guides.

[36] The Crown assessed Mr. Ploughman on the basis that subsections 163.2(2) and (4) were both applicable. Those subsections read as follows:

> (2) Every person who makes or furnishes, participates in the making of or causes another person to make or furnish a statement that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by another person (in

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55 In assessing credibility, a court may consider inconsistencies in the evidence of a witness; *Nichols v The Queen*, 2009 TCC 334, ¶23. See also *Dao v The Queen*, 2010 TCC 84, ¶9.

56 *Guindon*, *supra* note 2.

> subsections (6) and (15) referred to as the "other person") for a purpose of this Act is liable to a penalty in respect of the false statement.
>
> (4) Every person who makes, or participates in, assents to or acquiesces in the making of, a statement to, or by or on behalf of, another person (in this subsection, subsections (5) and (6), paragraph (12)(c) and subsection (15) referred to as the "other person") that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by or on behalf of the other person for a purpose of this Act is liable to a penalty in respect of the false statement.

B. Review of Documents

[37] As indicated above, I have endeavoured to base my decision on the documentation that was prepared, primarily in 2001 and 2002, in respect of the Donation Program. The documents that indicate that Mr. Ploughman may have had a connection to the Donation Program, and my comments (which are italicized) in respect of those documents, are summarized below.

a) In a memo dated August 15, 2001, on TDL letterhead, sent by Mr. St.-Denis to the Founding Members, Mr. St.-Denis indicated that:

   (i) at 7:30 p.m. on August 8, 2001, Mr. Goudie and Mr. Ploughman attended a dinner meeting on Grand Turk Island, during which Gordon Kerr, TDL's lawyer in TCI, introduced Mr. Goudie and Mr. Ploughman to a local contractor who could resolve the problem of shifting sand in the waters off the Arawak Inn, and

   ii) at 9:00 a.m. on August 9, 2001, on Grand Turk Island, Mr. Goudie and Mr. Ploughman "met with the lawyers to sign the final documents for the purchase of the Arawak Inn" and to change "the name from Tropical Amusement Inc to Tropical Development International."[57]

   Comment: During his cross-examination, Mr. Ploughman stated that he attended the dinner meeting on August 8, 2001, as well as a question and answer session at 2:30 p.m. on the same day. However, he was adamant that he did not attend the meeting with the lawyers on August 9, 2001.[58]

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57 Exhibit R-1, Tab 6.

58 *Transcript*, February 11, 2016, page 55, line 23 to page 56, line 5.

As Mr. St.-Denis' memo is hearsay and as its author was not called as a witness, I have not given any weight to it.

b) The Annual Return (Form 22) filed by SIA with Industry Canada for 2002 and 2003 shows that Mr. Ploughman was the secretary of that corporation.[59]

Comment: As indicated above, when discussing Mr. Ploughman's credibility, it is my view that Mr. Ploughman became involved with SIA in 2001 or 2002, and that his involvement with SIA was greater than he acknowledged during his testimony.

c) Two Beneficiary Applications, dated December 8 and 14, 2001, respectively, show that Mr. Ploughman was the canvasser for two individuals who applied to be considered as Class A Beneficiaries of the Global Trust. The Applications were addressed to KGR, which was described as the trustee.[60]

Comment: While the two Applications make it clear that KGR was intended to be the trustee of the Global Trust, it is not certain that Mr. Ploughman actually saw those documents in December 2001. Although his name appears on the documents, it was hand-printed, rather than signed. Furthermore, the handwriting used to print his name on each of the two documents appears to be different. Hence, it is possible that other persons printed Mr. Ploughman's name on those documents.

d) Two Promissory Notes, each showing a due date of December 14, 2001, but dated by the particular makers as of December 13 and 14, 2001 respectively, made by the two individuals referred to in the preceding subparagraph, and delivered to TDL in respect of the encumbrance attaching to certain vacation ownership weeks, were signed at the bottom, on December 13 and 14, 2001

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59 Exhibit R-1, Tab 9. A single Annual Return covered both years.

60 Exhibit R-1, Tab 15. It is my understanding that Mr. Ploughman was the canvasser for a number of other individuals who also applied to be considered as Class A Beneficiaries of Global Trust; however, only two of the Beneficiary Applications of Mr. Ploughman's clients were entered into evidence.

respectively, by Mr. Ploughman, who was described as an Authorized Canvasser.[61]

Comment: Those two documents are consistent with Mr. Ploughman's assertion that his only connection in 2001 to the Donation Program was as a canvasser.

e) Four Deeds of Gift, made by four individuals (including one of the individuals referred to in subparagraphs c) and d) above), and made on various days in December 2001, were witnessed by Mr. Ploughman. Each Deed was addressed to SIA and showed the name and address of the Global Trust.[62]

Comment: Although 140 individuals participated as donors in the Donation Program, only 11 of the Deeds of Gift were entered into evidence. Those 11 Deeds designated Les Guides as the charity to receive the gift of vacation ownership weeks. It is my understanding that some of the other Deeds showed 4-H as the designated charity. As Mr. Ploughman signed at least four of the Deeds as a witness of the particular Donor's signature, it appears that Mr. Ploughman likely knew that SIA (of which he was a 50% shareholder and the secretary) was involved in the Donation Program.

f) A letter dated December 4, 2001, sent by Lewis Martin, president of DSI, to various unnamed clients, refers to Mr. Ploughman, Mr. Benson and Mr. St.-Denis, who had been representatives of DSI and who had previously sent their own letter to the same clients. The DSI letter contained the following statement:

> Much to our surprise, we recently discovered that over the past several months, the three individuals [i.e., Mr. Ploughman, Mr. Benson and Mr. St.-Denis] had been working on another timeshare programme, located in the Turks and Caicos Islands, without informing head office.[63]

Comment: As this letter is hearsay and as its author, Mr. Martin, was not called as a witness, I have not given any weight to it.

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61 Exhibit R-1, Tab 16. It is my understanding that a number of additional clients of Mr. Ploughman participated in the Donation Program and signed similar Promissory Notes. However, only two of those Promissory Notes were entered into evidence.

62 Exhibit R-1, Tab 17. Mr. Ploughman may have witnessed the signatures of other Donors; however, only four of the Deeds of Gift witnessed by him were entered into evidence.

63 Exhibit R-1, Tab 19.

g) The Certificates issued by KGR, as the trustee of the Global Trust, to various individuals on December 29, 2001, show that those individuals were Class A Beneficiaries of the Global Trust and were entitled to receive a capital distribution of biennial vacation ownership weeks at the Arawak Inn, which was described as a division of Hawkes Nest.[64]

> *Comment: Those Certificates indicate that KGR was the trustee of the Global Trust. However, they were not signed by anyone, including Mr. Ploughman, and there is nothing to suggest that, in December 2001, Mr. Ploughman was aware that the Certificates had been issued.*

h) On February 17, 2002, Mr. Ploughman faxed a memo to Mr. Goudie, in which Mr. Ploughman stated that, since the middle of November 2001, Mr. St.-Denis, Mr. Benson, Suresh Kendalwal and he (i.e., Mr. Ploughman) had raised US$394,500 in cash from the Donation Program, which had entitled those four individuals collectively to US$75,990 in commissions, which TDL had not yet paid and which Mr. Ploughman was requesting. Mr. Ploughman then went on to discuss the money that TDL owed to the charities, as follows:

> As well, the Charities involved (Girl Guides and 4-H) have entered into this program so that they would receive $500 Cdn (CASH) UP FRONT since they used their Charitable Donation status to allow <u>us</u> to pursue this program. We completed 361 Charitable Donation transactions which means that the Charities are owed a total of **$180,500 Cdn**. That must be done as soon as possible.
>
> In good faith, <u>*I got all of these people involved in this program*</u>….
>
> Unless you get this matter settled immediately, <u>*my personal credibility with all of these people will be lost forever*</u>**.**[65] [The boldface emphasis was in the original. The underlined italicized emphasis has been added by me.]

> *Comment: While it is not clear, it seems that the phrase "all of these people", which was used twice in the above memo, may have been intended to refer not only to the other three canvassers but also to the two charities. If so, this suggests that Mr. Ploughman may have been instrumental in persuading Les Guides and 4-H to participate in the Donation Program. As well, Mr. Ploughman's statement in the above*

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64 Exhibit R-1, Tab 21. Although there were presumably 140 such Certificates issued, only 5 of them were entered into evidence.

65 Exhibit R-1, Tab 28. See also subparagraph 33.f) above.

memo to the effect that the charities used their status "to allow us to pursue this program" implies that Mr. Ploughman was involved in the pursuit of the Donation Program.

i) In early March 2002, Mr. Ploughman wrote an undated letter to Mr. Kerr (who subsequently acknowledged that the letter had been faxed to him on March 4, 2002). In that letter, Mr. Ploughman stated:

> You will recall, when you and I last spoke in your office in late fall of 2001, that *I briefed you* on the Charitable Donation program that was being offered to Canadian taxpayers based on the Arawak Inn being legally offered as a "Vacation Ownership" (ie Time Share) property. There were several crucial issues involved in this program, all of which Lee Goudie assured me were being dealt with through your offices. [Underlined italicized emphasis added.]

Mr. Ploughman went on to discuss those crucial issues, the third of which was the settlement of the Global Trust, which, as understood by Mr. Ploughman, was created by Mr. Goudie and settled by Mr. Kerr. Mr. Ploughman then stated:

> The total amount of the Charitable Donation receipts issued, which will be claimed by Canadian taxpayers in filing their 2001 tax returns, is $2,541,000 USD. If these taxpayer claims prove to be fraudulent in any manner, Canada Customs and Revenue Agency (CCRA) will pursue all legal means at their disposal to recover the assets and penalize those involved. Obviously, Lee Goudie, as the creator of the Global Trust of Canada will be first in line but the named "settlor" may not be far behind.[66]

Comment: The fact that Mr. Ploughman, in his letter to Mr. Kerr, stated "I briefed you" suggests that he (Mr. Ploughman) was involved in the Donation Program. Mr. Ploughman's statement to Mr. Kerr, about the Canada Customs and Revenue Agency (the "CCRA") (as it was then known) pursuing taxpayers if their claims to charitable donation tax credits were to prove to be fraudulent, indicates that Mr. Ploughman was aware that, in structuring the Donation Program, the stakes were high.

j) On March 14, 2002, Mr. Kerr replied to the letter that had been faxed to him by Mr. Ploughman on March 4. Mr. Kerr stated that he had discussed Mr. Ploughman's letter with Mr. Goudie and that his reply was based on those discussions. Mr. Kerr's reply included the following statements:

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66 Exhibit R-1, Tab 29.

> 3. As we understand the position[,] your nominee was issued a share in Tropical Development Limited in consideration of your ability to prepare, organise and promote a charitable donation programme. We understand that you have become party to litigation in Canada as a result of your alleged unauthorised use of a structure that was originally prepared by your former employer. It therefore appears that you are unable to deliver the programme which, as indicated, was the consideration for the share issued to your nominee by the company. In that regard you have failed to provide the consideration and accordingly the share should be surrendered to the company forthwith.…
>
> 5. You will also be aware that there is no document in existence which has been signed by the writer or any other party as settlor of any trust connected to Tropical Development. The lack of substantive documentation was brought to your attention (as you admit) by the writer in late 2001. At that meeting you explained for the first time the proposed trust structure and how it work[s]. The writer cautioned you that there was nothing in existence to be sold to the prospective participants in the scheme because strata title to the property had not been issued and accordingly no time share units existed.[67]
>
> *Comment: As Mr. Kerr's letter of March 14, 2002 is hearsay and as Mr. Kerr was not called as a witness, I have not put any weight on paragraph 3 of that letter. However, I have considered the statements in paragraph 5 of Mr. Kerr's letter, as they are corroborated by Mr. Ploughman in the document discussed in subparagraph k) immediately below.*

k) On March 18, 2002, using KGR letterhead, Mr. Ploughman (in his capacity as the president of KGR, which was described as the trustee of the Global Trust) and Ms. Guindon (in her capacity as the president of Les Guides) sent a letter, which they both signed and which was marked "*****URGENT*****", to all Donors in the Donation Program. Among other things, the letter stated:

> As Trustee of the *Global Trust of Canada* and as the President of the charity involved, it is our responsibility to ensure that all assets acquired by the Trust are properly structured prior to distribution to beneficiaries of the Trust.
>
> This past weekend, it has been brought to our attention by legal counsel in the Turks and Caicos Islands that the legal "deeded" title has not yet been finalized for the vacation-ownership units at the Arawak Inn and Beach Resort on Grand Turk. This is the property that was utilized by the Trust as the basis of the Charitable Donation program.

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67 Exhibit R-1, Tab 33.

We, therefore, recommend that you do not submit, at this time, the charitable donation receipt issued by "Les Guides Franco-Canadiennes (District d'Ottawa)". It is very likely, at this point in time, that CCRA (formerly Revenue Canada) would disallow such a claim.

We are working vigorously with all of the parties involved to resolve the outstanding "title" issue. We anticipate having the issue resolved prior to April 30th, the final day for filing 2001 Tax Returns.

If you have already filed your 2001 Tax Return, we recommend that you submit a T1-Adjustment form (copy attached) to eliminate the charitable donation receipt issued by "Les Guides Franco-Canadiennes (District d'Ottawa)"….

On the other hand, if you have not yet submitted your 2001 Tax Return, we recommend that you delay filing until the "title" issue is resolved.[68] [Boldface emphasis and italics in original.]

Comment: This letter clearly indicates that in March 2002 Mr. Ploughman was aware that KGR was purportedly the trustee of the Global Trust and that he was aware that the Trustee had certain responsibilities. The letter also confirms that he was aware that not all of the transactions on which the Donation Program was based had yet been implemented. In addition, he was aware that potential adverse tax consequences could arise if the official receipts issued by Les Guides were to be used at that time.

The fourth and sixth paragraphs of the above letter suggest that the title difficulties could be resolved between March 18, 2002 and April 30, 2002, in such a manner as to enable the Donors to submit their official receipts with their 2001 income tax returns. The letter did not provide any explanation as to how a "fix" implemented in March or April 2002 could retroactively cure a purported gift that was to have been made in 2001.

l) On March 20, 2002, Mr. Benson received an email from a client, expressing a concern about his gift under the Donation Program and his investment in the Development Project. The client requested a refund of his money. Mr. Benson faxed a copy of that email to Mr. Goudie,[69] who replied to Mr. Benson in a letter dated March 20, 2002, on TDL letterhead. Mr. Goudie's reply included the following statement:

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68 Exhibit R-1, Tab 37.

69 Exhibit R-1, Tab 38.

> I apologize if any misunderstanding has occurred but in my defence Mr. Ploughman when [*sic*] ahead and did this offer without Tropical Developments [*sic*] authorization. I was aware of the issues discuss [*sic*] in you [*sic*] fax and Mr. Ploughman assured me that it would not be a problem if the issues where [*sic*] dealt with In [*sic*] the year 2002. Mr. Ploughman is the Tax expert not me.[70]

Comment: The statement quoted above is consistent with the testimony given by Mr. Goudie, to the effect that the tax aspects of the Donation Program were dealt with by Mr. Ploughman.[71] *When Mr. Ploughman cross-examined Mr. Goudie, Mr. Goudie adhered to his prior testimony. As stated above, during Mr. Ploughman's testimony, he denied having any involvement whatsoever in developing the Donation Program.*

m) In a letter dated April 5, 2002, on KGR letterhead, to the beneficiaries of the Global Trust (i.e., the Donors), Mr. Ploughman advised that he had met with Mr. Kerr on March 26, 2002, and had received a status update. The letter described the steps that had been completed and the steps that were in progress but not yet completed (several of those steps required approvals by TCI government officials). Mr. Ploughman then stated:

> Mr. Kerr categorically assured the undersigned that he fully understood the urgency of the situation and that he would, personally, ensure that all of the steps above will be completed prior to 30 April 2002.
>
> *We can now state that the issues are in the process of being resolved and we are comfortable enough with the progress made that we can recommend that you go ahead and submit the Charitable Donation receipt to CCRA.*[72] [Italicized emphasis in original.]

Comment: In my view, the recommendation set out in this letter is a significant factor in deciding this Appeal. As Mr. Ploughman was aware that the completion of some of the outstanding steps required approvals from government officials over which Mr. Kerr had no control, I question whether Mr. Ploughman was on solid ground in recommending to the Donors that they submit their official receipts to the CCRA (as it then was). In fact, as each of those receipts contained a false statement, by making this recommendation, it seems to me that

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70 Exhibit R-1, Tab 39.

71 *Transcript*, February 10, 2016, page 64, lines 4-12.

72 Exhibit R-1, Tab 41.

Mr. Ploughman was participating in the making of, or causing the Donors to make, or assenting to or acquiescing in the making of, the false statement. The question then becomes one of determining whether Mr. Ploughman knew, or would reasonably have been expected to know but for circumstances amounting to culpable conduct, that each of the official receipts contained the false statement.

n) On July 30, 2002, Mr. Ploughman sent a letter, on the stationery of Glenn F. Ploughman Consulting Ltd. ("GFP Consulting"), to Dennis Drummond of Global Marketing Ltd. in Kingston, Massachusetts, to request an appraisal of the timeshare units. The following statements (among others) were contained in that letter:

> You may recall that, during the fall of last year, a "Charitable Donation" program was launched here in Canada whereby Canadian taxpayers were able to take advantage of a tax credit by receiving a "gift" of a timeshare unit from a Canadian Trust and, subsequently, donating the "gift" to a charity.
>
> This program was completed by December 31st, 2001 and about 400 Canadian taxpayers took advantage of the tax breaks. Now, the Canadian Revenue Department has requested the submission of an "Appraisal" by an independent agency in order to substantiate the value of the timeshare weeks. The submission has to be in the hands of the Revenue Dept by next Monday. *I know that we had spoken about this some time ago* and, at that time, you had no problem in providing such an "Appraisal".
>
> Dennis, I have taken the liberty of preparing a letter of "Appraisal" for your signature. Would you be kind enough to sign it and fax it directly back to me….
>
> In the meantime, please call so that I can update you on progress (or lack thereof?) of the development. Lee is meeting today with the Chief Minister and other members of cabinet to try to get full approval of the project, including registration of the Arawak Inn as a timeshare.[73] [Underlined italicized emphasis added.]

Comment: It is curious that Mr. Ploughman took steps to obtain an appraisal from Mr. Drummond. Mr. Ploughman's involvement in obtaining the appraisal is not consistent with his assertion that he had nothing to do in the planning or preparation of the Program.

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[73] Exhibit R-1, Tab 42.

o) On August 12, 2002,[74] Mr. Ploughman, using the letterhead of GFP Consulting, sent a letter to Mr. Goudie, who was in TCI, where he had spoken by telephone with the Attorney General of TCI. The following are excerpts from that letter:

> It certainly appears that you are having your problems with government officials trying to get this resolved. As you know, it is no less frustrating on our end trying to explain, as best we can, that governments, in general, are slow. Then you throw in the fact that we are dealing with a Caribbean country and the speed gets slower still….
>
> Now, let me describe what I see as the steps *we* must take to move ahead (and commence raising additional cash):
>
> 1. The Arawak Inn must be approved, and registered, by the TCI government as a "timeshare";
>
> 2. The TCI government must approve, and register, the Arawak Inn as a "deeded" property…. [O]nce the 2001 CCRA requirements are satisfied, and we have additional units "deeded", *we can immediately commence a new Charitable Donation program for 2002* to raise new cash. There is definitely lots of interest for 2002 if we can ever get 2001 cleaned up;
>
> 3. All of the questions raised by CCRA must be fully answered and submitted within the deadlines imposed;
>
> 4. Once approved and registered as a "timeshare", the Arawak Inn must be affiliated with a timeshare exchange company…. This will allow Dennis Drummond at Global Marketing Ltd. to commence immediate sales of timeshare units and start raising cash….
>
> 5. The corporate structure of Tropical Development Ltd. must be revised to reflect the proper allocation of interests….
>
> 6. Additional Banking signatories, as per our verbal agreement, have to [be] finalized;
>
> 7. As additional cash is raised, a specific amount of each raise has to be allocated to expenses that have already been incurred but have not yet been paid….

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[74] The typed date on this letter was shown as August 15, 2002. Someone drew a diagonal stroke through the "15" and wrote "12" by hand above it.

These are very basic steps that have to be taken before *we* can proceed further.[75] [Underlined italicized emphasis added.]

> *Comment: The language and tone of the above letter suggest that Mr. Ploughman was more than simply a canvasser in respect of the Donation Program, and imply that he had some involvement in its planning and preparation. It is particularly noteworthy that, even though many of the issues in respect of the 2001 Donation Program were unresolved, Mr. Ploughman was already looking forward to a new charitable donation program for 2002. This too implies that Mr. Ploughman's involvement in 2001 was greater than he has acknowledged.*
>
> *During his cross-examination, when Mr. Ploughman was asked about the proposal in the letter of August 12, 2002, to resolve the issues surrounding the 2001 Donation Program and then commence a new charitable donation program for 2002, he stated, "It was a concerted effort between myself and Lee Goudie. If 2001 would work, there's no reason the same structure couldn't be used in future years."* [76]

p) On August 20, 2002, Mr. Ploughman sent a letter to Mr. Kerr, in which Mr. Ploughman referenced the meeting that the two of them had had in Mr. Kerr's office on March 26, 2002, at which time they had discussed the things that needed to be done to finalize the implementation of the Donation Program. Mr. Ploughman then stated:

> During our conversation we were categorically assured that all of these issues would be completed prior to April 30th, 2002 – the deadline for Canadian Taxpayers to file their annual tax returns. Based on these assurances, Canadian taxpayers who participated in the 2001 *Global Trust of Canada* Charitable Donation program submitted the applicable Charitable Donation receipt together with their 2001 tax returns….
>
> Is the TCI government fully aware of the intricacies of the Charitable Donation program and the fact that this is one of the ways that Tropical Development Ltd planned to raise capital to fund the Hawkes Nest Plantation project? If the Charitable Donation program fails, and it will if CCRA cannot be satisfied in the given timeframe, financing for the entire Hawke's [*sic*] Nest project will, quite likely, be jeopardized.

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75 Exhibit R-1, Tab 46.

76 *Transcript*, February 11, 2016, page 148, lines 19-21.

> I have undertaken to write this letter on behalf of the 135 Canadian taxpayers who participated in the 2001 *Global Trust of Canada* Charitable Donation program and who face a serious reassessment of their tax returns, with inherent financial penalties and fines, if they cannot respond appropriately to CCRA.[77]

Comment: The last paragraph quoted above is consistent with Mr. Ploughman's assertion during his testimony that his only involvement with the Donation Program, other than as a canvasser, occurred in 2002, when he learned that not all of the transactions relating to the Donation Program had been implemented and when he began to take steps to salvage the situation. However, it is also possible to read that paragraph as suggesting that Mr. Ploughman's involvement with the Donation Program was greater than that of a canvasser. Furthermore, the second paragraph quoted above shows the connection between the Donation Program and the Development Project, with which Mr. Ploughman has admitted to being involved. It is difficult to understand how Mr. Ploughman could have been involved with the Development Project, without being aware in 2001 of the Donation Program other than as a canvasser.

q) On August 21, 2002, the day after Mr. Ploughman had sent the above letter, Mr. Kerr faxed a letter to Mr. Ploughman. In his letter, Mr. Kerr explained the unanticipated difficulties and delays that he had encountered in dealing with various governmental officials in TCI. He then stated:

> Whilst I recall that I told you that I would make every effort to have these matters attended to by April 30, 2002, I certainly did not give a categorical assurance or grantee [*sic*] of same. I have dealt for too long with government departments to risk my reputation on their ability. I carried out my obligation to you which was to make every effort to have these items secured by April 30, 2002. In the event I was frustrated by matters which were entirely outside my control. I trust you understand and accept this position.
>
> I now wish to turn to a point in which I [have a] vested personal interest in [*sic*]. The extract of the opinion which you provided from Brennan & Guindon indicates that the trust had been settled in Ontario by myself. I wish to make it absolutely clear that I have not settled any trust nor [have] I agreed at any time to act as settlor with respect to this matter. I confirm that I was asked by Lee Goudie whether I would act as settlor but at no time did I ever consent to this because I was unaware of the structure which would be put in place at the time he requested that I do so. Now that I am aware of the structure and of the manner in

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77 Exhibit R-1, Tab 47.

> which this has been handled to date you will appreciate that I have grave reservations as to whether I would consent to act as settlor of the trust….
>
> I must make it clear that neither myself nor this firm accepts any responsibility for the charitable donation programme nor for any losses or difficulties with which any participant or advisor with respect to that programme may now face. At our meeting in March of this year (when the programme was first explained to me) I was at pains to point out to you that the whole implementation of this programme appeared to be premature. Had any of the details of the programme been discussed with me on a previous occasion I would have rendered the same advice.[78]

Comment: If Mr. Kerr's letter can be taken at face value, it would appear that in March 2002 (before Mr. Ploughman recommended that the Donors submit their official receipts to the CCRA), Mr. Ploughman should have been aware that there were difficulties with the Donation Program. However, as the letter is hearsay, as it is clear from the language of the letter that Mr. Kerr was trying to protect his own interests, and as he was not called as a witness, I have not placed any weight on this letter.

As I am not putting any weight on Mr. Kerr's letter, and as I have concerns about Mr. Ploughman's credibility, I make no finding as to whether Mr. Kerr did, or did not, give a categorical assurance to Mr. Ploughman that he (Mr. Kerr) would personally ensure that all of the title-perfection steps would be completed before April 30, 2002.[79]

r) On August 22, 2002, Mr. St.-Denis and Mr. Ploughman sent a memorandum to the Founding Members, concerning the Development Project. An excerpt from this memorandum reads as follows:

> During late summer of 2001, the principals of Tropical Development Ltd. devised a strategy whereby select Canadian taxpayers could become beneficiaries of a trust and receive a "gift" of a Time-Share unit which they, in turn could donate to a Canadian charity. … This "Charitable Donation" program required a "real property", such as an existing Time-Share property or a hotel that could be converted to a Time-Share property. The Arawak Inn, immediately adjacent to the project site on Grand Turk, had been in receivership and was purchased by Tropical Development Ltd. for the purpose of providing an asset that could be utilized for the Charitable Donation program. Major renovations were completed during the fall of 2001 and the property was brought up to a level acceptable to

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78 Exhibit R-1, Tab 48.

79 Exhibit R-1, Tabs 41 and 47.

the Time-Share industry. Subsequently, a Charitable Donation program was established for tax year 2001.

… Once all of the government approvals are in place, another Charitable Donation program for tax year 2002 can be implemented and the professional Time-Share marketing company that has been under contract since August 2001 can commence selling "Time-Share" units which would produce cash flow for repayment of the original Promissory Notes and for moving the overall project forward.

It appears that the only way to secure full TCI government approval for the various components of the project is for a representative of the original Promissory Note holders ("Founding Members") and the taxpayers who participated in the 2001 Charitable Donation program to arrange a meeting with TCI government officials….

In order to officially represent the group of founding members, it is suggested that one individual be authorized to intercede with TCI government. Glenn F. Ploughman has volunteered to act on behalf of the group. Attached is a Letter Of Authorization appointing Glenn F. Ploughman to act on your behalf in an attempt to resolve the outstanding issues. If you are in agreement with this process, please sign and return the attached Letter of Authorization immediately.[80] [Underlining in original.]

Comment: The use of the phrase "principals of Tropical Development Ltd." (to describe those who devised the strategy on which the Donation Program was based) is curious, as it is not clear whether the word "principals" referred to shareholders, directors, officers, employees or someone else. Although Mr. Ploughman was adamant that he was not at any time a shareholder of TDL, there are suggestions in the evidence that at one time he may have held 50% of the issued shares of TDL and that he subsequently transferred all but one of those shares to Mr. Goudie. As it is unclear whether Mr. Ploughman was a shareholder of TDL, or whether Mr. Goudie was the only person who was ever a shareholder of TDL, and as the word "principals" might possibly refer to persons other than shareholders, I have not drawn any conclusions from the use of that word in the above memorandum.

As indicated in the above excerpt, Mr. St.-Denis and Mr. Ploughman stated that, "Once all of the government approvals are in place, another Charitable Donation program for tax year 2002 can be

80 Exhibit R-1, Tab 49.

implemented…." This statement, to me, suggests that both authors of the memorandum, i.e., Mr. St.-Denis and Mr. Ploughman, may have been involved in the Donation Program in 2001 and were looking forward to another similar program in 2002. In addition, the fact that Mr. Ploughman volunteered to represent the investors and the Donors in a meeting with TCI government officials suggests that Mr. Ploughman's connection to the Donation Program was greater than he has acknowledged.

s) On September 1, 2002, Mr. Goudie sent a memo to "All Founding Members, Promissory Note Holders, and Participants," in which he provided an update on the status of the Development Project, including the various fundraising activities, such as the Donation Program. In that memorandum, Mr. Goudie stated:

> I know that many of you have serious concerns about the charitable donations program, particularly those of you who have received notices from CCRA.
>
> You should be aware that, since Tropical Development Ltd is not directly responsible for the implementation of this program, but is simply the vehicle used to generate the charitable donations, any and all questions you may have regarding your participation in this program should be directed to Glenn Ploughman and/or Richard St. Denis.[81]

Comment: As indicated above, during their respective testimonies, Mr. Goudie maintained his position that Mr. Ploughman had been involved in planning the Donation Program, while Mr. Ploughman vehemently denied such an assertion.

t) On September 2, 2002, an individual, who appears to have been one of the Founding Members, sent an email to Mr. Ploughman, raising various concerns and complaints, one of which appears to have been Mr. Ploughman's request for a Letter of Authorization to represent the Founding Members. On September 9, 2002, Mr. Ploughman sent a memo to that individual. In Mr. Ploughman's memo, he stated (among other things) the following:

> Let me explain to you some of the details of the Charitable Donation program and who did what. During the fall of 2000 a similar Charitable Donation program was launched by an organization from Toronto using the Athletic Trust of Canada as a vehicle to raise money for Charities. The program was quite successful and raised

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[81] Exhibit R-1, Tab 50.

a substantial amount of cash. Lee [Goudie] was made aware of the concept of the Athletic Trust of Canada and discussions were held as to whether or not this concept could benefit the Hawkes Nest Plantation development. The answer appeared to be "Yes", providing certain critical items were put in place. The very first requirement was to have a "real property" that could be transferred into a Trust and, subsequently, donated by taxpayers to a Charity. In July 2001, a decision was made to purchase the Arawak Inn to be used as the "real property" for the program. **That was the sole purpose to purchasing the Arawak Inn!** However, before the program could be implemented, several other items had to be put in place. A Trust had to be established … [*sic*] so Lee created the Global Trust of Canada. I have played NO PART in the creation of the Trust! Using the documentation from the Athletic Trust of Canada program, Lee created all of the applicable documentation for the Global Trust of Canada Charitable Donation program. In order to establish a Trust, you need a Trustee. Since I am part of a small tax preparation company, called KGR Tax Services Ltd., after consulting with my partners, we agreed to act as the Trustee for Global Trust of Canada. It could be a reasonable way for us to generate some cash flow in the form of "Trustee Fees". To make sure that all of the legalities that had to be completed were, indeed, in place, a legal opinion was provided to KGR Tax Services Ltd and received on September 23, 2001….

Let me turn to the issue of Gordon Kerr's involvement. I did not make the initial approach to Gordon Kerr. That was done by Lee at the same timeframe that the Trust was being created! Once Gordon tentatively agreed to become the "settlor" of Global Trust of Canada, *I explained the details of the concept to him* and, at that time (Fall 2001), he had no disagreement with acting as "settlor". Why else would his name have been in the legal opinion letter? By March 2002, I was made aware that not all of the legalities were completed (ie strata plan not registered, Arawak Inn not converted to Time-Share) so, since I could not get satisfactory responses from Lee, I took a personal trip to TCI to meet with Gordon in an attempt to determine what steps were still outstanding and when would they be completed. Gordon provided me with assurances that the outstanding issues should be completed by April 30th and that, all things being equal, he was still prepared to act as "settlor" of the Trust. To date, I have not been informed otherwise but, with all of the crap going on right now, I would certainly understand his reluctance to go anywhere near this.

Let me be very clear on this matter. The Global Trust of Canada Charitable Donation program was created by Tropical Development Ltd. and was implemented by Tropical Development Ltd. and the money raised was forwarded to Tropical Development Ltd….

My request for a "Letter of Authorization" from Founding Members was based solely on the fact that, if progress is not made soon, someone has to make things happen!... If you, or any other member of the Group, knows the intimate history of this project and can speak to the details of [*sic*] Charitable Donation program, I

am quite prepared to recommend to the "Founding Members" that you act as their representative. I have no ax to grind in this … [*sic*] I just want the damn thing to work, and that includes the 2001 Charitable Donation Program – which can still be rescued if all the parties will cooperate….[82] [Underlined boldface emphasis in original; underlined italicized emphasis added by me.]

Comment: Given that Mr. Ploughman has acknowledged that the sole purpose for purchasing the Arawak Inn was to facilitate the Donation Program, and given that he and his wife (operating as Iva Dianne Customs Design) were hired by TDL to design the renovations to, and to refurbish, the Arawak Inn, it is difficult to believe Mr. Ploughman's assertion that in mid-2001 he was not aware of the Donation Program.

When Mr. Ploughman stated that Mr. Kerr had provided assurances that the outstanding issues would be completed by April 30, 2002, and that Mr. Kerr was still prepared to act as the settlor of the Global Trust, it would appear that Mr. Ploughman had disregarded the statements made by Mr. Kerr in his letter of August 21, 2002, in which he indicated that he had grave reservations about being the settlor of the Global Trust and in which he reminded Mr. Ploughman that in March 2002 he (Mr. Kerr) had pointed out that the implementation of the Donation Program appeared to be premature.

Mr. Ploughman's indication that he was willing to recommend that the individual to whom he was writing be the authorized representative of the Founding Members, if that individual knew the intimate history of the Development Project and could speak to the details of the Donation Program, suggests that Mr. Ploughman may have been implying that he himself had such knowledge of the intimate history of the Development Project and could speak to the details of the Donation Program.

u) On February 20, 2004, Mr. Ploughman, on behalf of KGR, wrote a report in respect of the Development Project and the disallowance by the CCRA of the Donation Program. The language and tone of this report suggest that its author was involved in planning both the Development Project and the Donation Program. The following statements were included in that report:

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82 Exhibit R-1, Tab 51.

… The sole purpose of purchasing the Arawak Inn property was to convert the property from a hotel to a "time-share" in order to establish a "real property" that could be utilized by *The Global Trust of Canada* as a Charitable Donation vehicle. Knowing that the Arawak Inn had gone into bankruptcy being operated as a hotel property, there was never any intention to operate the Arawak Inn as a hotel and repeat that scenario.…

Notwithstanding the fact that the Canadian legal opinion assured all participants in the program that all matters were finalized and that *The Global Trust of Canada* Charitable Donation program met all legal requirements, in February 2002 it was discovered that the "hotel to time-share" conversion of the Arawak Inn had not yet been completed. Without this conversion having been completed, there was no "real property" to donate to a Canadian Charity and, therefore, no possibility of being able to go ahead with the *Global Trust of Canada* Charitable Donation program. A representative of KGR Tax Services Ltd., acting on behalf of *The Global Trust of Canada* "beneficiaries" group, made a personal trip to meet with Gordon Kerr at his office in the Turks and Caicos Islands. During that visit the representative was verbally assured that the conversion process was "in hand" and would be completed prior to April 30th, 2002, the date for filing Canadian Tax returns, and that there would not be any problem with the *Global Trust of Canada* Charitable Donation program going ahead. With these encouraging words, all of the participating Canadian taxpayers were advised to go ahead and file the applicable Charitable Donation tax receipt with their 2001 Canadian tax returns.[83] [Italicized name of the Global Trust in the original.]

Comment: By speaking of the sole purpose of purchasing the Arawak Inn and by disclaiming any intention to operate the Arawak Inn as a hotel, Mr. Ploughman has given the impression that he had some involvement in the making of the decisions pertaining to the Arawak Inn.

Turning to Mr. Ploughman's summary of his meeting with Mr. Kerr, it seems that Mr. Ploughman left that meeting with a more optimistic outlook than that of Mr. Kerr, about the speed at which the conversion of the Arawak Inn to a timeshare property would be completed. It is noteworthy that merely on the strength of Mr. Kerr's "encouraging words," without any follow-up by Mr. Ploughman in late April 2002, he advised the Donors to file the official receipt from Les Guides with their 2001 income tax returns.

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83 Exhibit R-1, Tab 55.

[38] Having reviewed the documents referenced above, particularly those described in subparagraph 39.c) below, I am of the view that Mr. Ploughman's involvement in respect of the Donation Program was greater than he has acknowledged.

C. Creator or Promoter

[39] It is the position of the Crown that Mr. Ploughman was a creator or promoter of the Donation Program. Mr. Ploughman vigorously denied having any such role. Although, the evidence concerning the question of whether Mr. Ploughman was a creator or promoter of the Donation Program is conflicting and not necessarily conclusive, I am inclined to concur with the Crown's position for the following reasons:

a) As explained above, I did not find Mr. Ploughman's testimony to be credible or reliable.

b) Mr. Ploughman was a significant shareholder and an officer of KGR and SIA, both of which played important roles in the Donation Program.

c) Several documents written by Mr. Ploughman suggest that he was involved in creating or promoting the Donation Program. Those documents include:

   i. the memo dated February 17, 2002, from Mr. Ploughman to Mr. Goudie, in which Mr. Ploughman stated that Les Guides and 4-H "used their Charitable Donation status to allow us to pursue this program", also stated that "I got all of these people [presumably referring to the other canvassers and the charities] involved in this program" and further stated that, unless the canvassers and the charities were paid the amounts owed to them immediately, his "personal credibility with all of these people will be lost forever";[84]

   ii. the undated letter written by Mr. Ploughman in early March 2002 to Mr. Kerr, in which Mr. Ploughman stated that he briefed Mr. Kerr in respect of the Donation Program in the late fall of 2001;[85]

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84 Exhibit R-1, Tab 28. See subparagraph 37.h) above.

85 Exhibit R-1, Tab 29. See subparagraph 37.i) above.

iii. the letter dated March 20, 2002, from Mr. Goudie to Mr. Benson, in which Mr. Goudie stated, "Mr. Ploughman is the Tax expert not me";[86]

iv. the letter dated July 30, 2002, which Mr. Ploughman wrote to Dennis Drummond of Global Marketing Ltd.,[87] in which Mr. Ploughman requested the appraisal about which he had spoken to Mr. Drummond "some time ago," which seems peculiar given that Mr. Ploughman testified that Mr. Goudie was responsible for obtaining the appraisal; it is also peculiar that Mr. Ploughman drafted the appraisal, such that Mr. Drummond needed to do nothing more than to sign it and return it;

v. the letter dated August 12 (or perhaps 15), 2002, from Mr. Ploughman to Mr. Goudie, in which Mr. Ploughman said, "let me describe what I see as the steps we must take to move ahead (and commence raising additional cash)", and observed that "once the 2001 CCRA requirements are satisfied, and we have additional units 'deeded', we can immediately commence a new Charitable Donation program for 2002 to raise new cash";[88] and

vi. the memorandum dated August 22, 2002, from Mr. St.-Denis and Mr. Ploughman to the Founding Members, in which the authors indicated that Mr. Ploughman had volunteered to act on behalf of the Founding Members and the Donors to intercede with the TCI government.[89]

d) In discussing the letter of August 12 (or perhaps 15), 2002, from Mr. Ploughman to Mr. Goudie (i.e., item v above), Mr. Ploughman, during his cross-examination, stated that the resolution of the issues pertaining to the 2001 Donation Program and the structuring of a 2002 charitable donation program "was a concerted effort between myself and Lee Goudie."[90] If Mr. Ploughman was working in concert with Mr. Goudie to remedy the 2001 Donation Program and to plan a 2002 program, it is likely that he was similarly involved in structuring the 2001 Donation Program.

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86 Exhibit R-1, Tab 39. See subparagraph 37.l) above.
87 Exhibit R-1, Tab 42. See subparagraph 37.n) above.
88 Exhibit R-1, Tab 46. See subparagraph 37.o) above.
89 Exhibit R-1, Tab 49. See subparagraph 37.r) above.
90 *Transcript*, February 11, 2016, page 148, lines 19-20.

[40] However, if I am wrong in finding that Mr. Ploughman was a creator or promoter of the Donation Program, my decision also rests on Mr. Ploughman's correspondence in March and April 2002, particularly the letters of March 18, 2002 and April 5, 2002 that he (together with Ms. Guindon, in the case of the letter of March 18, 2002) sent to the Donors.[91]

D. False Statements

[41] Each of the official receipts filed by the 135 Donors contained a statement to the effect that the particular Donor had made an in-kind donation, with a stated value, to Les Guides. As the timeshare units that were purportedly the subject of those donations were never created, and thus were not given by the Donors to Les Guides, those statement were, for the purposes of subsections 163.2(2) and (4) of the ITA, false statements. Mr. Ploughman did not make the false statements contained in the official receipts filed by the 135 Donors with their 2001 income tax returns. However, the Crown has alleged that Mr. Ploughman participated in, assented to or acquiesced in the making of those false statements, or he caused the Donors to make those false statements. In my view, when Mr. Ploughman sent his letter of April 5, 2002 to the Donors and, in that letter, recommended that they submit their official receipts to the CCRA, for the purposes of subsection 163.2(2), he participated in the making of, or caused the Donors to make or furnish, a false statement, and, for the purposes of subsection 163.2(4), he participated in, assented to or acquiesced in the making of, a false statement by the Donors.

E. Culpable Conduct

[42] The question for determination is whether Mr. Ploughman knew, or would reasonably be expected to have known but for circumstances amounting to culpable conduct, that the official receipts contained a false statement. In other words, did Mr. Ploughman know, or would he reasonably be expected to have known but for circumstances amounting to culpable conduct, that the purported gifts which were the subject of the official receipts had not actually been made?

[43] Subsection 163.2(1) of the *ITA* defines "culpable conduct" as follows:

> "culpable conduct" means conduct, whether an act or a failure to act, that
>
> (*a*) is tantamount to intentional conduct;

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91 Exhibit R-1, Tabs 37 and 41.

> (*b*) shows an indifference as to whether this Act is complied with; or
>
> (*c*) shows a wilful, reckless or wanton disregard for the law.

[44] In *Guindon*, the Supreme Court of Canada stated that the statutory definition of "culpable conduct" clearly sets a high standard and evinces a clear intention that "culpable conduct" be a more exacting standard than simple negligence. The Supreme Court also stated that the phrase "shows an indifference as to whether this Act is complied with" originated in the jurisprudence pertaining to the gross negligence element of subsection 163(2) of the *ITA*. Referencing *Venne*[92] and *Sidhu*,[93] the Supreme Court noted that:

> … "an indifference as to whether the law is complied with" is more than simple carelessness or negligence; it involves "a high degree of negligence tantamount to intentional acting" …. It is akin to burying one's head in the sand….
>
> > … The burden is to prove on a balance of probability such an indifference to appropriate and reasonable diligence in a self-assessing system as belies or offends common sense.

The Supreme Court concluded its discussion of culpable conduct by stating:

> … while there has been debate as to the scope of "culpable conduct" …, the standard must be at least as high as gross negligence under s. 163(2) of the *ITA*. The third party penalties are meant to capture serious conduct, not ordinary negligence or simple mistakes on the part of a tax preparer or planner.[94]

[45] For reasons that will be explained below, I am of the view that Mr. Ploughman's conduct was sufficiently serious so as to come within paragraph (*b*) of the definition of "culpable conduct" in subsection 163.2(1) of the *ITA*, i.e., his conduct showed an indifference as to whether the *ITA* was complied with.

(1) Indifference Concerning the Global Trust

[46] The Global Trust was to have been an essential component of the structure on which the Donation Program was based. Without that trust, there was no vehicle through which the Donors could receive the timeshare units that they purportedly donated to Les Guides. In addition, KGR, as the trustee of the Global Trust, was to have played a significant role in facilitating the transfers of the timeshare units. As

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92 *Venne v The Queen*, [1984] CTC 223 (FCTD).

93 *Sidhu v The Queen*, 2004 TCC 174.

94 *Guindon* (SCC), *supra* note 2, ¶58-61.

the president of KGR, Mr. Ploughman too would have had a key role to play in the structure.

[47] According to paragraph 2(c) of Ms. Guindon's opinion letter, which was addressed to KGR, to the attention of Mr. Ploughman, and which was reproduced in the promotional materials used by Mr. Ploughman in canvassing for the Donation Program, the Global Trust was to be established, pursuant to a Deed of Trust, upon the Settlor transferring $100 to the Trustee (i.e., KGR). As Mr. Ploughman was a principal shareholder and the president of KGR, he should have known that KGR had neither executed the Deed of Trust nor received $100 from the Settlor. If he did not have that knowledge, it was indicative of indifference as to whether the *ITA* was complied with, particularly when Mr. Kerr had made it clear to Mr. Ploughman on March 26, 2002 that Mr. Kerr had not settled the Global Trust. If, by the end of March 2002, Mr. Ploughman did not know that the Global Trust had not been created, such lack of knowledge was, in my view, due to having "buried his head in the sand." Thus, before Mr. Ploughman sent his letter of April 5, 2002 to the Donors, if he did not know that the Global Trust did not exist, it showed an indifference as to whether the *ITA* was complied with.

[48] Notwithstanding the significance of the Global Trust and KGR in facilitating the Donation Program, Mr. Ploughman seems to have been relatively unconcerned about the role and duties of KGR as the trustee of the Global Trust. For instance, during his cross-examination, Mr. Ploughman made the following statements:

> Q. But may I remind you, Mr. Ploughman, that not only were you – did you agree to be a canvasser of the program, but you also agreed to be a trustee of the program. So as trustee of the program, why you did not ask to receive the deed of gift that is claimed to be in existence in the legal opinion?
>
> A. As I said before, I had never act[ed] as a trustee for anything before or after. So, I don't have a response for that. I don't know what the responsibilities of a trustee were. We were supposed to be a bare trustee, whatever that means.
>
> Q. When did you find out what responsibilities or what duties as a trustee you had?
>
> A. I still don't know.
>
> Q. You still don't know?
>
> A. No. No.

> Q. You still don't know?
>
> A. No….[95]
>
> A. … at that point in time, I didn't know what a trustee was supposed to do. I still don't….[96]
>
> Q. You're saying that you don't know what a trust does. You don't know what a trustee do[es]. You said you know nothing about [a] trust; you've never been a trustee before. Yet you've been involved in three donation programs, either at the development stage or as a canvasser, trying to convince people to embark into a donation program involving a trust but you would not know what the role of the trustee or the trust would be in the program? Is that –
>
> A. That's what I'm saying.[97]

Given that the Global Trust and KGR, as its trustee, played such a significant role in the Donation Program, one would have expected that Mr. Ploughman would have shown greater concern in ensuring that KGR knew and fulfilled its duties as trustee.

[49] Mr. Ploughman's assertion that he did not, and does not, know the responsibilities of a trustee is perhaps at odds with the opening paragraph of the letter dated March 18, 2002, by Mr. Ploughman and Ms. Guindon to the Donors, in which they stated, "As Trustee of the *Global Trust of Canada* and as the President of the charity involved, it is our responsibility to ensure that all assets acquired by the Trust are properly structured prior to distribution to beneficiaries of the Trust."[98] Thus, Mr. Ploughman seems to have been aware of at least one responsibility of the Trustee, i.e., to ensure that, before making a distribution, the Global Trust actually held property that could be distributed. Not only did he fail to cause KGR to fulfill that responsibility, but he also failed to cause KGR to ensure that the Global Trust actually existed before it purported to make a distribution.

(2) Indifference Concerning Timeshare Units

[50] In the letter dated March 18, 2002, by Mr. Ploughman and Ms. Guindon to the Donors, Mr. Ploughman and Ms. Guindon stated that they were working vigorously with the involved parties to resolve the outstanding issue concerning the

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95 *Transcript*, February 11, 2016, page 76, lines 7-24.

96 *Ibid.*, page 83, lines 7-8.

97 *Ibid.*, page 85, lines 5-14. See also page 84, lines 13-16; and page 109, lines 10 & 20-22.

98 Exhibit R-1, Tab 37.

timeshare titles and that they anticipated having the issue resolved before April 30, 2002. They also recommended that the Donors not file their 2001 income tax returns until the title issue had been resolved. That statement and recommendation implied that the title issue could be resolved and that the official receipts for the gifts purportedly made in 2001 could then be submitted by the Donors, with their 2001 income tax returns, to the CCRA.[99]

[51] It appears that in March and April 2002, Mr. Ploughman was proceeding on the premise that the timeshare units could be created with retroactive effect to December 2001. In paragraph c)7 of his Notice of Appeal he stated:

> In March 2002 I made a personal trip to the Turks and Caicos Islands to meet with the owner of Tropical Development, Lee Goudie, and the company's legal counsel, Gordon Kerr, in an effort to determine what issues were still unresolved and what, if anything, could be done to salvage this program. During that meeting I was assured by Tropical Development's TCI legal counsel that, although the timeshare weeks were not yet properly registered at the applicable TCI government offices, it was simply a matter of administrative time and that, in the TCI lawyer's opinion, all outstanding issues would be resolved prior to April 30, 2002 and that, under TCI laws, registration of the timeshare weeks could be made effective as of December 2001 which would allow all Canadian participating taxpayers the ability to use their Charitable Donation receipts for their 2001 Income Tax returns. Consequently, upon my return to Ottawa, I issued a second letter advising all participating taxpayers that they could go ahead and utilize the Charitable Donation receipts for 2001 as originally planned.

[52] During Mr. Ploughman's cross-examination, in describing the meeting that Mr. Ploughman had with Mr. Kerr on March 26, 2002, the following exchange took place:

> Q. [Counsel for the Crown referred Mr. Ploughman to the letter dated March 18, 2002, which was sent by Mr. Ploughman and Ms. Guindon to the Donors, and then asked the following questions.] …You're basically telling your clients or the donors of the program that once the issue is resolved there will be a distribution in 2002 and you'll be able to use your 2001 tax receipt, and how in the world, I'm asking you, can this be? Can you make a gift in … 2002, but yet apply for a claim, a donation claim, as if the transaction took place in 2001?

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[99] In Ms. Guindon's appeal to the Tax Court of Canada, she argued that it was a mistake, which she characterized as an error of law rather than an error of fact, to indicate in the letter of March 18, 2002 that the defect in title could be remedied retroactively to perfect the donation. See *Guindon* (TCC), *supra* note 2, ¶27 & 74.

> A. According to the information that Gordon Kerr gave me during my meeting with him, he assured me that all of the issues could be dealt with. This was an assurance that all of the issues could be dealt with and that under Turks and Caicos law – this was his terminology – because all of the title deeding and everything had been applied for in 2001, that it could be shown as a 2001 deed.
>
> Q. And what does Mr. Kerr know about Canadian law?
>
> A. I have no idea.
>
> Q. You have no idea?
>
> A. No.[100]

[53] It is noteworthy that, although Mr. Ploughman flew more than 2,500 kilometres from Ottawa to Providenciales to meet with a TCI lawyer, who advised him that, under TCI law, the creation of the timeshare units could be retroactive to December 2001, Mr. Ploughman did not drive or walk a few blocks in downtown Ottawa to meet with a Canadian tax lawyer or tax accountant to determine whether any such retroactivity under TCI law would be recognized under Canadian law, for the purposes of the *ITA*. The failure to determine whether any retroactive creation in TCI of the timeshare units would have been recognized in Canada for the purposes of the *ITA* showed an indifference as to whether the *ITA* was complied with.

(3) Indifference Concerning Other Steps

[54] Apart from the issues concerning the existence of the Global Trust and the creation of the timeshare units, there were problems with other steps, including the sale of the timeshare units by TDL to the Settlor, the transfer of the timeshare units by the Settlor to the Global Trust, the distribution of the timeshare units by the Global Trust to the Donors, and the gift of the timeshare units by the Donors to Les Guides. During Mr. Ploughman's cross-examination, in discussing the letter of March 18, 2002, which he and Ms. Guindon sent to the Donors, he stated that, by that date, he knew that there was a major problem and that the Donors should not use their official receipts.[101] In particular, he knew at that time that the timeshare units were not structured properly.[102] He also knew that there was nothing in the Global Trust and that there had not been a distribution from that trust because there

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100 *Transcript*, February 11, 2016, page 118, line 27 to page 119, line 17.

101 *Ibid.*, page 112, lines 19-21.

102 *Ibid.*, page 113, lines 14-15.

were no assets to distribute.[103] In addition, the following exchanges during cross-examination are significant:

> Q. So as trustee, all you did during the period of November 17 to December 31 [2001] was to give an entitlement to the beneficiaries and at no time did you distribute any assets to them?
>
> A. Of course not. There were no assets to distribute.
>
> Q. … So tell me, if there's no distribution of assets being done during that period, how can the beneficiary of the trust be able to give in return during that period, assets they don't have?
>
> A. You got me. They couldn't.
>
> Q. So you knew that the charity had received no assets yet as of December 31st, 2001[?]
>
> A. No, I didn't. No, I did not know. I said in February of that year, I knew that there were major structural problems. That's when I knew….[104]
>
> Q. … Now in your March 18, 2002 [letter], you clearly state that there was no distribution that took place, correct? Are we to read this first paragraph as an admission by you that the trust had yet to distribute any assets to the beneficiaries as of March 18, 2002?
>
> A. That's correct.
>
> Q. … And how in the world could a distribution take place after March 18, 2002 and become a gift that took place in 2001?
>
> A. It couldn't.
>
> Q. It couldn't?
>
> A. No.[105]
>
> Q. … As a tax preparer involved in the preparation of tax returns, how you got the principle that one can make a gift transaction in 2002 and yet be able to claim it in 2001 in filing their tax return?
>
> A. I can't answer that. I don't know….

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103 *Ibid.*, page 114, lines 1 & 17-26.
104 *Ibid.*, page 116, lines 8-22.
105 *Ibid.*, page 118, lines 5-16.

Q. Is it fair to say that this is a wrong proposition to inform donors that although the distribution of the asset did not take place in 2001, they would still be able to use their tax receipts in 2001?

A. Yes, that's fair.

Q. … And you have no explanation why you would mislead your clients that way or the donors of this charitable campaign that way?

A. I certainly didn't realize at that point in time that I was misleading anybody.

Q. How did you come up with the understanding that this is wrong now today?

A. Because you've told me….

A. I understand the concept now that you can't file something from a year when it didn't take place. I understand that….

Q. And as a tax preparer, you did not know back then that basic principle?

A. I never encountered it before.

Q. So –

A. I wasn't a tax expert. I was simply a preparer. If somebody brought in a charitable donation receipt, I put it in their tax return.

Q. Did you make an inquiry with a tax specialist?

A. No, I didn't.

Q. Another tax specialist than yourself?

A. No, I didn't.

Q. Before advising your charitable donors of this possibility?

A. No.

Q. You did not. Why? You didn't feel that it was important enough?

> A. I don't recollect why I wouldn't, but I certainly had no reason to, I didn't think.[106]

[55] Thus, even if the timeshare units could have been created retroactively, Mr. Ploughman appears not to have given any serious thought as to whether the other steps of the structure underlying the Donation Program could have been implemented with retroactive effect to 2001. In other words, in order for the Donation Program to have worked, not only was it necessary for the timeshare units to have been created in 2001 (or at least with retroactive effect under Canadian law to 2001, assuming that this was possible), but it was also necessary, with effect in 2001, to transfer the retroactively created timeshare units from TDL to the Settlor (although by March 26, 2002 Mr. Ploughman knew that Mr. Kerr had not yet agreed to be the Settlor), then from the Settlor to the Global Trust (although by March 26, 2002 Mr. Ploughman knew, or should have known, that the Global Trust was not yet created), then from the Global Trust to the Donors, and then from the Donors to Les Guides. I accept that, when Mr. Ploughman sent the letter of March 18, 2002 to the Donors, he did not realize that he was misleading them. However, given that Mr. Ploughman knew by February 2002 that there were serious problems with the transactions underlying the Donation Program, his failure, before sending the letters of March 18, 2002 and April 5, 2002, to consider whether all of those transactions could have been implemented in 2002, with retroactive effect to 2001, showed an indifference as to whether the *ITA* was complied with.

(4) Indifference Considering Recommendation

[56] Upon returning to Canada, after his meeting with Mr. Kerr on March 26, 2002, Mr. Ploughman drafted the letter that he sent to the Class A Beneficiaries (i.e., the Donors) on April 5, 2002.[107] He opened the letter by reminding the Donors that, in his letter of March 18, 2002, he had advised them to delay submitting the official receipts to the CCRA until the title issue had been satisfactorily resolved. He then summarized the steps that still needed to be completed to resolve the title issue, and gave a status report as to the progress in respect of those steps. He also stated that Mr. Kerr had categorically assured him that he (Mr. Kerr) understood the urgency of the situation and that he would personally ensure that all of the steps would be completed before April 30, 2002.[108]

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106 *Ibid.*, page 123, line 6 to page 124, line 26.

107 Exhibit R-1, Tab 41.

108 As stated in paragraph 37.q) above, I have not found that Mr. Kerr gave this categorical assurance to Mr. Ploughman.

Nowhere in the letter did Mr. Ploughman comment on any of the other transactions (such as the creation of the Global Trust, the sale of the timeshare units by TDL to the Settlor, the transfer of the timeshare units by the Settlor to the Global Trust, the distribution of the timeshare units by the Global Trust to the Donors, and the gift of the timeshare units by the Donors to Les Guides) that were necessary to implement the Donation Program. Mr. Ploughman concluded the letter by stating that the issues were in the process of being resolved and that he was "comfortable enough with the progress made" that he could recommend that the Donors submit their official receipts to the CCRA.

[57] After sending the letter of April 5, 2002 to the Donors, there is no indication that Mr. Ploughman took any further steps that month to ascertain whether Mr. Kerr had completed the items to which he had said that he would attend by the end of April, nor is there any indication that Mr. Ploughman addressed the other transactions that had not yet been implemented (i.e., the creation of the Global Trust, the sale of the timeshare units by TDL to the Settlor, the transfer of the timeshare units by the Settlor to the Global Trust, the distribution of the timeshare units by the Global Trust to the Donors, and the gift of the timeshare units by the Donors to Les Guides). Mr. Ploughman did not send any further communication to the Donors in April 2002. Thus, he left them with the impression set out in his letter of April 5, 2002, that it would be acceptable for them to file the official receipts with the CCRA.

[58] By recommending to the Donors that they file their official receipts with their 2001 income tax returns, without first confirming that all the problems with the Donation Program had been satisfactorily resolved, Mr. Ploughman displayed an indifference as to whether the *ITA* was complied with.

(5) Culpable Conduct Conclusion

[59] During the cross-examination of Mr. Ploughman, the letter of April 5, 2002 and the related circumstances were discussed as follows:

> Q. … on April 5th, 2002, there were still outstanding issues regarding the title of the assets, correct?
>
> A. Yes.
>
> Q. The assets were still undistributed to the beneficiary, correct?
>
> A. That's correct.

> Q. Yet, you tell Canadian taxpayers to go ahead and submit their receipts although there are still issues regarding the structure of the donation scheme, correct?
>
> A. Yes.
>
> Q. Why? Why would you do that?
>
> A. Because I was assured by Gordon Kerr that it could be done by the 30th of April.
>
> Q. Why not tell people "look, we're trying to do our best to have everything resolved by April 30th. Get your tax returns ready for filing. We'll tell you as soon as it is resolved to go ahead. It may be on the last day. But if on the last day it has not been resolved, we'll let you know and therefore you should not use your tax receipts"? Why was that not done in this –
>
> A. In hindsight, that would have been the proper thing to do. I didn't do that. I had assurances from a lawyer that it was going to happen properly and as a consequence, I sent out this letter. The reason that Julie Guindon did not co-sign it at that time, she was out of town, because I recall calling her office and saying "let's send out another letter" but she wasn't there, so I sent it myself. Again, in hindsight, total mistake.
>
> Q. … So on April 30th, 2002, you must have known that the whole structure was not in place.
>
> A. I must have.
>
> Q. Did you feel like sending a letter to the donors?
>
> A. In hindsight, of course I would have. I should have sent a letter….[109]

[60] In the above exchange, Mr. Ploughman indicated several times that, in hindsight, he would have done things differently. I do not think that hindsight should be taken into consideration when determining whether an individual's actions or behaviour constituted culpable conduct for the purposes of section 163.2 of the *ITA*. I think that those actions or behaviour should be examined in the light of the circumstances existing at the particular time in question.

[61] However, given the serious problems that plagued the Donation Program in late 2001 and early 2002 and that were known to Mr. Ploughman in February 2002, even without the benefit of hindsight, common sense cried out for the

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[109] *Transcript*, February 11, 2016, page 131, line 25 to page 133, line 13.

exercise of reasonable diligence to determine whether those problems could be remedied, and, if so, whether the remedy would be retroactive to 2001 for the purposes of the *ITA*. Hindsight is not required to determine that more was required of Mr. Ploughman, before sending his letter of April 5, 2002, than simply relying on the verbal assurances of Mr. Kerr[110] that he would personally ensure the completion of steps to be taken by TCI government officials over whom he had no control. Common sense also dictated that, after sending his letter of April 5, 2002, Mr. Ploughman should have communicated with Mr. Kerr in mid- or late April to ascertain whether the timeshare title issue had been resolved. Furthermore, it was contrary to common sense for Mr. Ploughman to think that only the timeshare title issue needed to be resolved, without addressing the other problems of which he was also aware, namely, the non-existence of the Global Trust and the failure to transfer the timeshare units from TDL to the Settlor, from the Settlor to the Global Trust, from the Global Trust to the Donors, and from the Donors to Les Guides.

[62] In summary, by February 2002, Mr. Ploughman was aware that there were serious problems with the transactions underlying the Donation Program. He focused his attention on the timeshare title issue, but only to the extent of seeking verbal assurances from Mr. Kerr that the issue would be resolved by April 30, 2002, without realistically considering whether Mr. Kerr could control the speed at which the TCI government officials might give their approvals, and without engaging in any follow-up with Mr. Kerr to confirm that the timeshare title issue had actually been resolved by the end of April. Mr. Ploughman seemed to ignore the other essential transactions, particularly the creation of the Global Trust and the successive transfers of the timeshare units from TDL to the Settlor, to the Global Trust, to the Donors, and to Les Guides. In a sense, Mr. Ploughman buried his head in the sand insofar as those other transactions were concerned. In my view, Mr. Ploughman displayed an indifference as to whether the *ITA* was complied with, such that, for the purposes of section 163.2 of the *ITA*, his conduct may be described as culpable conduct.

F. Reliance on Lawyers

[63] Mr. Ploughman stated repeatedly that he relied in good faith on the opinion letter signed by Ms. Guindon, to the effect, according to Mr. Ploughman, that the legal steps pertaining to the Donation Program had been completed satisfactorily,

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110 Assuming that those assurances were given in the manner described by Mr. Ploughman, and not in the manner described by Mr. Kerr in his letter of August 21, 2002; see Exhibit R-1, Tab 48.

that no outstanding issues remained to be finalized, and that the Donation Program was legally constituted. Mr. Ploughman also stated repeatedly that he relied on the verbal assurances of Mr. Kerr to the effect that the TCI government approvals would be issued and the timeshare conversion would be completed before April 30, 2002. Mr. Ploughman submitted that, by reason of subsection 163.2(6) of the *ITA*, as explained in Information Circular 01-1, *Third Party Civil Penalties*, he cannot be considered to have acted in circumstances amounting to culpable conduct.

(1) Statutory Criteria

[64] Subsection 163.2(6) of the *ITA* reads as follows:

> For the purposes of subsections (2) and (4), a person (in this subsection and in subsection (7) referred to as the "advisor") who acts on behalf of the other person is not considered to have acted in circumstances amounting to culpable conduct in respect of the false statement referred to in subsection (2) or (4) solely because the advisor relied, in good faith, on information provided to the advisor by or on behalf of the other person or, because of such reliance, failed to verify, investigate or correct the information.

It is important to note that, to come within subsection 163.2(6), an advisor may not rely on information provided by any person in general. Rather, the information on which the advisor relies must be provided by the person who ultimately makes the false statement or by someone acting on behalf of that person. As the false statements were made when the 135 Donors filed their official receipts with the CCRA, for Mr. Ploughman to come within subsection 163.2(6), he would have had to rely on information provided to him by or on behalf of those Donors. Ms. Guindon and Mr. Kerr were acting on behalf of TDL and Mr. Goudie (and perhaps others who were involved in planning the Donation Program). I did not see any evidence to suggest that either Ms. Guindon or Mr. Kerr was acting on behalf of any of the Donors, either collectively or individually. Thus, subsection 163.2(6) does not apply to Mr. Ploughman's reliance on information provided to him by Ms. Guindon or by Mr. Kerr.[111]

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[111] A further point to note is that subsection 163.2(6) of the *ITA* applies only where the advisor is acting on behalf of the person who makes the false statement. Therefore, to come within subsection 163.2(6), in addition to satisfying the other criteria of the subsection, Mr. Ploughman would have needed to have acted on behalf of the 135 Donors who submitted their official receipts to the CCRA. It is my understanding that some of those Donors were clients of Mr. Ploughman. Although I do not know the nature of his relationship with those clients, it is possible that he was acting on behalf of them.

[65] Subsection 163.2(7) of the *ITA* states that subsection (6) does not apply in respect of a statement that an advisor makes (or participates in, assents to or acquiesces in the making of) in the course of an excluded activity, which is defined in subsection 163.2(1) of the *ITA* to include the activity of promoting or selling an arrangement, an entity, a plan, a property or a scheme (referred to as the "arrangement") where it can reasonably be considered that one of the main purposes for a person's participation in the arrangement was to obtain a tax benefit, or the activity of accepting consideration in respect of the promotion or sale of an arrangement. It may be arguable that the statements made by Mr. Ploughman in his letters of March 18, 2002 and April 5, 2002 were made in the course of an excluded activity. However, as there was insufficient evidence concerning the manner in which the Donation Program was marketed by Mr. Ploughman and his colleagues, and as this issue was not addressed by Mr. Ploughman or counsel for the Crown in their pleadings or submissions, I am unable to determine whether subsection (7) precluded Mr. Ploughman from coming within subsection (6).

(2) Good Faith

[66] As my interpretation of subsections 163.2(6) and (7) of the *ITA*, as set above, may be incorrect, I will also consider whether Mr. Ploughman was acting in good faith when he relied on the opinion or advice given to him by Ms. Guindon and Mr. Kerr. Subsection 163.2(6) requires that an advisor's reliance must be in good faith. The phrase "good faith" has historically received two different meanings, as explained in *Siano v Helvering*, as follows:

> [The words "good faith"] are capable of and have received at least two divergent meanings. What one might call the broad or subjective view defines them as describing an actual state of mind irrespective of its producing causes. An extreme example of this point of view is found in the case of *State v. West Branch Lumber Co.*, 64 W.Va. 673, 63 S.E.372, 380, where the court said: "Good faith, … is used in its popular sense as the actual, existing state of the mind, whether so from ignorance, skepticism, sophistry, delusion, fanaticism, or imbecility, and without regard to what it should be from given legal standards of law or reason." …On the other hand, many courts have construed the words narrowly and objectively and have introduced criteria. We quote from three pertinent cases: … [The quotations from the first two cases are omitted.]

However, many of the Donors were the clients of other canvassers, such that Mr. Ploughman may not have been acting on behalf of those Donors.

> "Good faith is defined to be honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry" *Cochran v. Fox Chase Bank*, 209 Pa. 34, 58 A. 117, 118, 103 Am.St.Rep. 976.[112]

[67] In *Siano*, which was a case involving an alcohol tax permit, the court applied the narrow objective test (which the court called the "diligence or reasonable inquiry interpretation"), rather than the broad subjective test (which the court call the "state of mind theory"). I am of the view that, in construing section 163.2 of the *ITA*, which is designed to encourage greater care on the part of third parties,[113] such as "tax preparers, advisors, shelter promoters and valuators,"[114] it is appropriate to apply the narrow objective meaning of "good faith" so as to encourage diligence and reasonable inquiry on the part of those third parties.

[68] The extract from the *Cochran* case quoted in *Siano* appears to have been included in the revised 4th edition of *Black's Law Dictionary*. In any event, in *MacAlpine v T.H.*, the British Columbia Court of Appeal gave the following as one of the meanings of "good faith":

> Good faith: Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder on inquiry.[115]

The Court of Appeal attributed the above definition to page 822 of the revised 4th edition of *Black's Law Dictionary*.[116] The CRA has also adopted the definition of "good faith" set out in *MacAlpine*.[117]

[69] As explained below, I am of the view that in 2001 and 2002 there were circumstances that should have put Mr. Ploughman on inquiry about the existence (or non-existence) of the Global Trust and the implementation (or not) in 2001 of the transactions on which the Donation Program was based.

(3) Existence of Trust

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112 *Siano v Helvering*, 13 F Supp 776, at 780 (DCNJ 1936).

113 *Guindon* (TCC), *supra* note 2, ¶33; *Guindon* (FCA), *supra* note 2, ¶42; and *Guindon* (SCC), *supra* note 2, ¶62, 74 and 83.

114 David M. Sherman, *Notes* (in respect of section 163.2), as set out in *Practitioner's Income Tax Act*, 50th ed. (Toronto: Thomson Reuters Canada Limited, 2016), p.1203.

115 *MacAlpine v T.H.*, 82 DLR (4th) 609, [1991] 5 WWR 699 (BCCA), ¶41.

116 *Ibid.*, ¶42.

117 Information Circular 01-1, *Third Party Civil Penalties*, ¶35.

[70] One of the key elements of the Donation Program was the existence of the Global Trust. As explained above, the original plan was that TDL would sell the timeshare units to Mr. Kerr, who, as the Settlor, would settle the timeshare units on the Global Trust, which in turn would distribute them to the Donors, who would then give them to Les Guides. Thus, without the existence of the Global Trust there would have been no mechanism for the Donors to acquire the property which they purportedly donated to Les Guides.

[71] Mr. Ploughman testified that on March 20, 2002, he telephoned Ms. Guindon to enquire about the creation of the Global Trust and she told him that it had been created on August 22, 2001.[118] After describing the telephone conversation that he had with Ms. Guindon on March 20, 2002, Mr. Ploughman stated, "Since the lawyer who wrote the legal opinion gave me that information as late as March 20th, 2002, I had no reason to question the validity whether a trust was created or not."[119]

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[118] If Ms. Guindon actually told Mr. Ploughman on March 20, 2002 that the Global Trust had been created on August 22, 2001, I am curious as to the basis on which she made that statement. It would have been peculiar for Ms. Guindon to have said this to Mr. Ploughman, given that the creation of a trust requires several elements, including:

> (a) certainty of intention, certainty of subject matter and certainty of objects, which are typically set out in a trust agreement, and
>
> (b) the settlement or vesting of the trust property in the trustee.

See Donovan W.M. Waters *et al.*, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Thomson Reuters Canada Limited, 2012), p. 178-179; Dennis Pavlich, *Trusts in Common-Law Canada* (Markham: LexisNexis Canada Inc., 2014), p. 44 & 53; and Mark R. Gillen *et al.*, *The Law of Trusts: A Contextual Approach* (Toronto: Emond Montgomery Publications Limited, 2015), p. 104-106.

Concerning the requirement that there be a trust agreement, an incomplete draft of a Trust Agreement was faxed to and/or from the offices of Mr. Ploughman and Ms. Guindon on April 4, 2002. The incomplete draft was undated (apart from showing the year 2001). It did not show the name of the settlor. It contained the name of the Global Trust, but this name was inserted in the spot intended for the name of the trustee. In a blank space next to the defined term "Trustees", the name "KGR Tax Services Ltd." appeared in handwriting, which Ms. Guindon testified was her own. See Exhibit R-1, Tab 40; *Transcript*, February 10, 2016, page 106, line 5 to page 110, line 4; and *Transcript*, February 11, 2016, page 124, line 27 to page 131, line 6. While there was considerable uncertainty, at the hearing of this Appeal, surrounding the preparation and faxing of the draft Trust Agreement, it is clear that, on April 4, 2002, there was not an executed Trust Agreement.

[119] *Transcript*, February 10, 2016, page 143, lines 7-21; and February 11, 2016, page 44, lines 18-26. See also Exhibit A-1, Tab 14.

[72] I am not convinced that Mr. Ploughman was acting in good faith when he took the position that he had no reason to question whether the Global Trust had been created or not. According to Ms. Guindon's opinion letter, the Global Trust was to be created pursuant to a Deed of Trust, with Mr. Kerr as the settlor and KGR as the trustee.[120] Paragraph 2(c) of the opinion letter stated that the Global Trust was to be settled by the payment of $100 by the Settlor to the Trustee. As a result of Mr. Ploughman's receipt of Mr. Kerr's letter dated March 14, 2002 and Mr. Ploughman's meeting with Mr. Kerr on March 26, 2002, in late March 2002 Mr. Ploughman knew that Mr. Kerr had not become the settlor of the Global Trust.[121] As well, as the president and one of three equal shareholders of KGR, Mr. Ploughman knew, or should have known, that KGR had not executed the Deed of Trust or received the $100.[122] If he did not actually know in 2001 that KGR had not yet executed the Deed of Trust, received the $100 or become the trustee of the Global Trust, such lack of knowledge must have been because he made no inquiries or he turned a blind eye.

[73] Thus, I question whether Mr. Ploughman was acting in good faith, as he says, when he relied on Ms. Guindon's opinion and assurance that the Global Trust had been created. My doubt is reinforced by a telling admission that Mr. Ploughman made during his testimony in chief. In discussing the Class A Beneficiary certificates that were purportedly issued by the Global Trust on December 29, 2001,[123] he stated:

> Tab 21 of the Respondent's Documents, your honour, where it shows a certificate of a Class A beneficiary, it does not state that this was a distribution. It states that the beneficiary is entitled to receive a capital distribution. That's significantly different than a distribution from a trust. *There was no trust, I readily admit that, and I knew it at that time.*[124] [Underlined italicized emphasis added.]

Taking Mr. Ploughman's statement at face value, it would seem that in late 2001 he was aware that the Global Trust did not exist. However, when Mr. Ploughman was cross-examined, in the following exchange, he sought to clarify the above statement:

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120 The draft document pertaining to the creation of the Global Trust was entitled "Trust Agreement", did not show the name of the settlor and had the handwritten name of KGR as the trustee.

121 Exhibit R-1, Tab 33. See also Tabs 48 & 51.

122 *Transcript*, February 11, 2016, page 44, line 27 to page 45, line 7.

123 See Exhibit R-1, Tab 21.

124 Testimony of Glenn Ploughman, *Transcript*, Wednesday, February 10, 2016, page 148, line 23 to page 149, line 2.

Q. But yesterday when you – and I want to be precise in what I'm going to say because I heard you in your testimony in chief yesterday saying that – you said there was no trust after you pointed out the wording. You said "there was no trust and I readily admit that." Those are your words. "I knew at that time there were [*sic*] no trust". So on December 29, 2001, you knew that there was no trust?

A. No. No, incorrect.

Q. So you –

A. That's not what I said.

Q. Okay. So what did you say?

A. I said that by February of 2002, I knew there was no trust. That was when I inquired about all of the issues that were in the legal opinion. Where was the trust? Where was everything?

Q. You found out in February of 2002 that there were no trust?

A. I found out that I thought there was no trust and then in March -- you may recall my Tab 14, in March, I inquired from Julie Guindon "when did you create the trust?" and she gave me the date. So at that point –

Q. Yes, may I ask you – may I ask you, if you find out – if you find – I'm having a difficult time because I want to use the same terminology that you're using, but it seems that you're saying that in February you thought that – or it – you thought that the trust did not exist?

A. No, I didn't know if it existed or not at that point, and I verified in March with a phone call to Julie Guindon to confirm when it was created.[125]

[74] As noted above, the telephone conversation with Ms. Guindon, to which Mr. Ploughman referred, occurred on March 20, 2002. If she told him during that conversation that the Global Trust was created on August 22, 2001, such a comment would have been peculiar because the Deed of Trust had not yet been drafted, let alone signed by either the Settlor or the Trustee. Nor had the $100 been paid by the Settlor to the Trustee to settle the Global Trust. In any event, when Mr. Ploughman met six days later, on March 26, 2002, with Mr. Kerr, Mr. Kerr confirmed that the Global Trust had not yet been settled. If Mr. Ploughman continued to believe after March 26, 2002, that the Global Trust

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125 *Transcript*, February 11, 2016, page 81, line 1 to page 82, line 1. See also *Transcript*, February 10, 2016, page 143, lines 7-21.

was in existence, in my view he was turning a blind eye to the many factors that indicated that there was no trust. If, when Mr. Ploughman sent his letter of April 5, 2002 to the Donors, he was relying on Ms. Guindon's statement on March 20, 2002, to the effect that the Global Trust had been created on August 22, 2001, there were several circumstances that ought to have put him on inquiry, such that I do not think that he was acting in good faith.

(4) Opinion Letter

[75] Mr. Ploughman stated that he relied on the opinion letter signed by Ms. Guindon on September 19, 2001, and that, by reason of her opinion, he understood that everything was in order and that the Donation Program had been properly structured and implemented before the opinion letter was signed and delivered. For instance, Mr. Ploughman made the following statement in the Notice of Objection that he sent to the Chief of Appeals on July 9, 2007:

> Since I was provided with a legal opinion stating that all facets of the program were in order, I had absolutely no reason to suspect otherwise.[126]

[76] Similarly, Mr. Ploughman stated the following in his Notice of Appeal, which he filed on July 30, 2014:

> In the fall of 2001 I was provided with a complete marketing package which included a Legal Opinion prepared by a local Ottawa lawyer indicating that this program was legally constituted and that all relevant legal issues had been reviewed by the lawyer involved and that no outstanding issues remained to be finalized. I relied in good faith on information provided to me by this professional Ottawa-based lawyer. In short, it was my understanding that this was a valid and legal package that could be marketed in good faith.…
>
> … I relied IN GOOD FAITH on the Legal Opinion provided by a professional lawyer. I had absolutely no reason to question the validity of the Legal Opinion.[127] [Underlined emphasis in the original.]

[77] As part of the pleadings, on October 24, 2014 Mr. Ploughman filed an Answer, which contained the following statements:

> 5. In accordance with the Legal Opinion, dated September 19, 2001, signed by Julie Guindon, a fully-licensed professional lawyer practicing in Ottawa, there were no outstanding issues to be completed prior to

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126 Exhibit A-1, Tab 7.

127 Notice of Appeal, page 2, paragraph c)4, and page 4, paragraph f)4.

> marketing the donation program. There was absolutely no reason for the Appellant [i.e., Mr. Ploughman] to suspect that the donation program was not legally constituted during the marketing campaign which commenced on November 17th, 2001 and concluded on December 31, 2001….
>
> 7. … the Appellant has never stated that a trust was ever settled. In fact, it was only discovered after a personal visit to the Turks and Caicos Islands in the spring of 2002 that there were legal issues surrounding the complete package, including a delay in the conversion of the Arawak Inn to a time-share. Without the time-share units being available for distribution to the public, there was no possibility of a trust being settled. In fact, it never was and, as a consequence, KGR Tax Services Inc. could never have served as Trustee. Nor, to the best of my knowledge, was it ever purported to have done so….
>
> 17.j. Contrary to the statements issued in the legal opinion, it is agreed that the Trust never existed and that the time-share units never existed. However, there was no reason for the Appellant to suspect that the legal opinion was not valid….[128]

Paragraphs 7 and 17.j of Mr. Ploughman's Answer, as set out above, are perplexing, since, if the Global Trust and the timeshare units never existed, as Mr. Ploughman acknowledges, it is difficult to see how the legal opinion could be valid, as it was premised on the existence of the Global Trust and the timeshare units.

[78] Turning to an analysis of the opinion letter itself, its very first line indicated that its writer was opining in respect of the Canadian federal income tax consequences pertaining to the Donation Program. In other words, Ms. Guindon's letter was a tax opinion; it was not an opinion as to whether the Donation Program had been completely and properly implemented. In fact, her opinion was based on her understanding that such was the case.

[79] Mr. Ploughman acknowledged that Ms. Guindon's opinion letter was addressed to KGR, to his attention, although he expressed surprise that it had been so addressed since he had understood that the letter would be addressed to some other entity. Nevertheless, Mr. Ploughman stated that he read the opinion letter and that he understood the letter's writer to opine that the documents listed on page 2

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[128] Answer, paragraphs 5, 7 and 17.j.

of the letter had all been put in place.[129] However, the last sentence at the bottom of page 1 of the opinion letter sets out an assumption, as follows:

> It is assumed that all the transactions described in our letter will be implemented using the same documents you provided to us and that they are the same as those listed below.

Ms. Guindon stated at the top of page 2 of her letter that, in providing her opinion, she had reviewed various documents, which she then listed. The first document in the list was the Deed of Trust.[130] As explained above, Mr. Ploughman knew, or should have known, that KGR had not entered into such a deed. Therefore, he knew, or should have known, that Ms. Guindon could not have reviewed all of the documents in the list and that the assumption at the bottom of page 1 of her letter could not be sound, which should have prompted him to realize that he could not reasonably rely on her letter.

[80] At some point before March 14, 2002, Mr. Kerr was provided with a copy of Ms. Guindon's opinion letter of September 19, 2001. When Mr. Kerr wrote to Mr. Ploughman on March 14, 2002, Mr. Kerr made the following comments about some of the documents listed on page 2 of the opinion letter:

> 4. It is interesting to note that an opinion letter of of Brennan and [*sic*] Guindon dated September 19th, 2001 regarding the proposed charitable donation program refers to various items [documents] none of which were in existence at the date of execution of the letter. In particular there was no executed sale agreement as referred to in Clause 1(d), nor are we aware of any rules and regulations of the Hawkes Nest Plantation Resort being promulgated. There was no legal opinion provided by this firm or so far as we are aware any other local Counsel with respect to title to vacation ownership weeks. Many of the other items are things which we have never seen and can therefore pass no comment on. However, it would appear that the opinion which, you will note was issued to KGR Tax Services Limited and not to Tropical Development Limited is substantially flawed. Your comments on this would be welcome.[131]

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129 *Transcript*, February 11, 2016, page 37, lines 15-23.

130 Curiously, the Deed of Trust is identified as item (b) in the list of documents on page 2 of Ms. Guindon's opinion letter, notwithstanding that the Deed of Trust is the first document shown in that list. In other words, there is no item (a) in the list. This irregularity did not seem to cause Mr. Ploughman any concern.

131 Exhibit R-1, Tab 33. The sale agreement, rules and regulations, and legal opinion referred to by Mr. Kerr are described in subparagraphs 8.b), 8.d) and 9.d) above.

In commenting on Mr. Kerr's letter of March 14, 2002 above,[132] I noted that the letter is hearsay and that Mr. Kerr was not called as a witness, such that I did not put any weight on paragraph 3 of that letter. Notwithstanding that some of the statements made by Mr. Kerr in paragraph 4 of his letter of March 14, 2002 are also hearsay, and even if those statements are false, the very fact that Mr. Kerr advised Mr. Ploughman that three of the documents listed in Ms. Guindon's opinion letter did not exist and that the opinion letter was substantially flawed (even if Mr. Kerr's advice was mistaken) should have put Mr. Ploughman on inquiry and should have prompted him to question whether he could, in good faith, rely on that letter, without first investigating the matter further.

[81] Paragraph 2(c) of Ms. Guindon's opinion letter indicated that the Global Trust would be settled by the transfer of $100, as an irrevocable gift, by the Settlor to the Trustee. The first sentence of paragraph 2(h) of the opinion letter stated, "During the year 2001, the Settlor will gift the vacation ownership weeks [i.e., the timeshare units] to the Trustee." Thus, Mr. Ploughman knew, or should have known, that Ms. Guindon's opinion was based on the premises that $100 would be settled by the Settlor on the Trustee and that the gift of timeshare units by Mr. Kerr to KGR would occur in 2001. By the end of Mr. Ploughman's meeting with Mr. Kerr on March 26, 2002 (if not sooner), Mr. Ploughman knew that the timeshare units had not yet been created and that Mr. Kerr had not yet become the settlor of the Global Trust. Therefore, Mr. Ploughman knew, or should have known, that Mr. Kerr had not paid $100 to KGR and had not gifted the timeshare units to KGR in 2001. Consequently, Mr. Ploughman knew, or should have known, that two of the factual premises on which Ms. Guindon's opinion letter was based were not true, with the result that, when he wrote his letter of April 5, 2002, it was unreasonable for him to rely on the opinion letter.

[82] Paragraphs 2(i) and (j) of Ms. Guindon's opinion letter contemplated that the Trustee would distribute the timeshare units from the Global Trust to the Class A Beneficiaries (i.e., the Donors), who would likely gift those units to a charitable organization. As explained above, Mr. Ploughman knew, or should have known, that Mr. Kerr (as the intended settlor) and KGR (as the intended trustee) had not done anything in 2001 to create the Global Trust or to implement the various sequential transfers of the timeshare units. Hence, Mr. Ploughman knew, or should have known, that no timeshare units had been distributed by the Global Trust to the Donors before the end of 2001, with the result that the Donors did not have any timeshare units which they could have donated to Les Guides in 2001. In fact, the

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[132] See subparagraph 37.j) above.

second paragraph of the letter dated March 18, 2002, sent by Mr. Ploughman and Ms. Guindon to the Donors,[133] makes it clear that such was the case. As Ms. Guindon's opinion was premised on the implementation of the above transactions and as Mr. Ploughman knew that those transactions had not been implemented, when he sent his letter of April 5, 2002 to the Donors, his claimed reliance on the opinion letter was not done in good faith.

(5) Verbal Assurances

[83] Mr. Ploughman stated that he relied on the verbal assurances that Mr. Kerr gave to him during their meeting on March 26, 2002, to the effect that Mr. Kerr would personally ensure that all of the steps necessary to resolve the timeshare title issue were completed before April 30, 2002.

[84] Subsection 163.2(6) of the *ITA* provides a safe harbour for an advisor who relies, in good faith, on information provided by or on behalf of a person who makes a false statement. I question, without deciding, whether the word "information," as used in that subsection, extends to a statement of one's intended future conduct. The *Canadian Oxford Dictionary* defines "information" as "something told; knowledge…. items of knowledge; news…."[134] *The Shorter Oxford English Dictionary* defines "information" as "training, instruction; communication of instructive knowledge…. That of which one is apprised or told; intelligence, news."[135] *Quaere* whether those definitions are sufficiently broad as to suggest that the word "information," as used in subsection 163.2(6), is intended to include, not only knowledge of something that exists or has occurred, but also a forecast or assurance of what will occur? As the meaning of the word "information" was not argued before me at the hearing, I will, for the purposes of the ensuing discussion, give Mr. Ploughman the benefit of the doubt and assume that Mr. Kerr's verbal assurances constituted information.

[85] Mr. Ploughman began his letter of April 5, 2002 by reminding the recipients that in his letter of March 18, 2002 he had advised them to delay submitting their official receipts to the CCRA until such time as the timeshare title issue had been

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133 Exhibit R-1, Tab 37. See also *Transcript*, February 11, 2016, page 116, lines 8-12, where Mr. Ploughman acknowledged that during the period from November 17, 2001 to December 31, 2001 the Global Trust had no assets to distribute.

134 Katherine Barber (ed.), *Canadian Oxford Dictionary*, 2nd ed. (Don Mills: Oxford University Press, 2004), p. 775.

135 C.T. Onions *et al.* (ed.), *The Shorter Oxford English Dictionary on Historical Principles*, 3rd ed. (Oxford: Oxford University Press, 1986), vol. I, p. 1069.

resolved satisfactorily. He then went on to summarize the steps that had to be taken, which included obtaining a strata plan survey of the Arawak Inn, creating 52 deeds (i.e., one deed for each week of the year) for each of the rooms in the Arawak Inn, subdividing each of the 52 deeds for each room into two separate entities (which is the term used by Mr. Ploughman) known as biennial weeks, and then registering all of those entities with the TCI government as "titled biennial vacation-ownership weeks." In the letter, Mr. Ploughman then went on to state:

> Gordon Kerr, legal counsel to *Tropical Development Ltd.* (owner of the Arawak Inn and Beach Resort) advised that:
>
> a. the "strata plan" survey has been completed;
>
> b. the "strata plan" has been submitted from his office to the Planning Department of the TCI government;
>
> c. once the Planning Department completes their administrative work, it is passed (internally) to the Land Registry Department for 'rubber-stamping'. This finalizes the process.
>
> Mr. Kerr categorically assured the undersigned that he fully understood the urgency of the situation and that he would, personally, ensure that all of the steps above will be completed prior to 30 April 2002.[136] [Italics in original.]

[86] Item c above indicated that two actions remained to be performed:

a) the TCI Planning Department needed to complete its administrative work; and

b) the TCI Land Registry Department needed to rubber-stamp something, presumably the strata plan survey, the overall process or possibly something else.[137]

The outstanding actions were to be performed by government officials, and not by employees who worked in Mr. Kerr's office. Thus, Mr. Ploughman should have been well aware that Mr. Kerr had no control over the individuals who would be completing the administrative work and doing the rubber-stamping.

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136 Exhibit R-1, Tab 41.

137 In a letter sent on August 21, 2002 by Mr. Kerr to Mr. Ploughman, Mr. Kerr explained that the timeshare conversion process had two stages, the first being the registration of the property as a strata plan, and the second being the registration of the property for sale by timeshare. See Exhibit R-1, Tab 48.

[87] According to a report prepared on February 20, 2004 by Mr. Ploughman on behalf of KGR, the acquisition by TDL of the Arawak Inn was finalized on September 4, 2001 and the process of converting it from a hotel to a timeshare property was to begin immediately thereafter. In February 2002, Mr. Ploughman learned that the conversion had not yet been completed.[138] When Mr. Ploughman met with Mr. Kerr on March 26, 2002, the conversion was still incomplete. As the conversion had been in process for more than six months when Mr. Ploughman met with Mr. Kerr, it should have been apparent to Mr. Ploughman that the process was slow and drawn out.

[88] As noted above, on August 12 (or 15), 2002 Mr. Ploughman sent to Mr. Goudie a letter that began with the following comment:

> I just received your most recent Email regarding your telephone call with the [TCI] Attorney General. It certainly appears that you are having your problems with government officials trying to get this resolved. As you know, it is no less frustrating on our end trying to explain, as best we can, that governments, in general, are slow. Then you throw in the fact that we are dealing with a Caribbean country and the speed gets slower still.[139]

Thus, by mid-August 2002, Mr. Ploughman was well aware that the TCI government was moving slowly. This may not have been a new revelation for Mr. Ploughman. As well, the above comment indicates that Mr. Ploughman was aware "that governments, in general, are slow." Accordingly, it may be reasonable to assume that in early April 2002 he was similarly aware that the TCI government would not necessarily work rapidly.

[89] As indicated above, one of the characteristics of good faith is a freedom from knowledge of circumstances which ought to put the holder on inquiry. It was, or should have been, apparent to Mr. Ploughman that the resolution of the timeshare title issue required steps to be taken by TCI government officials who were not under the control of Mr. Kerr. As Mr. Ploughman knew that the timeshare conversion process depended on government approval, and not merely on steps to be taken personally by Mr. Kerr, after sending his letter of April 5, 2002, Mr. Ploughman should have been aware of the need to inquire of Mr. Kerr before the end of April 2002 to ascertain whether the government approval had actually been given. Mr. Ploughman made no such inquiry. Thus, I do not think that he acted in good faith when relying on the verbal assurances of Mr. Kerr.

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138 Exhibit R-1, Tab 55.

139 Exhibit R-1, Tab 46.

CONCLUSION

[90] In summary, I have made the following findings:

a) Mr. Ploughman was a creator or promoter of the Donation Program.[140]

b) Each of the 135 official receipts filed by the Donors with their 2001 income tax returns contained a false statement.

c) When Mr. Ploughman sent his letter of April 5, 2002 to the Donors, recommending that they submit their official receipts to the CCRA, he participated in the making of, or caused the Donors to make or furnish, or assented to or acquiesced in the making of, the false statements.

d) When Mr. Ploughman sent his letter of April 5, 2002 to the Donors, he knew, or would reasonably be expected to have known but for circumstances amounting to culpable conduct, that each of the official receipts contained a false statement.

e) When Mr. Ploughman sent his letter of April 5, 2002 to the Donors, his indifference concerning the non-existence of the Global Trust, the non-existence of the timeshare units, the failure to implement in 2001 (or even in 2002) the other transactional steps on which the Donation Program was based, and his indifference as to whether his recommendation in that letter was well founded, showed an indifference as to whether the ITA was complied with and thus constituted culpable conduct.

f) Mr. Ploughman's reliance on the opinion letter of Ms. Guindon and the verbal assurances of Mr. Kerr did not satisfy the statutory criteria of subsection 163.2(6) of the *ITA*, and in any event, was not done in good faith.

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[140] As indicated in paragraph 40 above, my decision is not dependent on this finding. In my view, the findings set out in subparagraphs 90.b) through f) are sufficient to support my decision.

[91] For the reasons set out above, this Appeal is dismissed, with costs in favour of the Respondent, to be calculated in accordance with Tariff B of Schedule II to the *Tax Court of Canada Rules (General Procedure)*.

Signed at Ottawa, Canada, this 25th day of April, 2017.

"Don R. Sommerfeldt"

Sommerfeldt J.

CITATION:	2017 TCC 64
COURT FILE NO.:	2014-935(IT)G
STYLE OF CAUSE:	GLENN F. PLOUGHMAN AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	St. John's, Newfoundland
DATE OF HEARING:	February 10 and 11, 2016
REASONS FOR JUDGMENT BY:	The Honourable Justice Don R. Sommerfeldt
DATE OF **AMENDED** JUDGMENT:	**May 10**, 2017

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