[OFFICIAL ENGLISH TRANSLATION]

2000-761(IT)G

BETWEEN:

RAYNALD GRENIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on September 15, 2002, and judgment delivered orally from the bench on September 26, 2002, at Québec, Quebec, by

the Honourable Judge Pierre Archambault

Appearances

Counsel for the Appellant:	Daniel Bourgeois
Counsel for the Respondent:	Michel Lamarre Valérie Tardif

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1993, 1994, 1995 and 1996 taxation years are dismissed, with costs.

Signed at Ottawa, Canada, this 1st day of October 2002.

"Pierre Archambault"

J.T.C.C.

Translation certified true
on this 10th day of February 2004.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

Date: 20021214
Docket: 2000-761(IT)G

BETWEEN:

RAYNALD GRENIER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT
(delivered orally from the bench
on September 26, 2002, at Québec, Quebec,
and amended for greater clarity)

Archambault, J.T.C.C.

[1] Dr. Raynald Grenier is appealing from income tax reassessments made by the Minister of National Revenue (**Minister**) for the 1993 to 1996 taxation years inclusive. First, in computing Dr. Grenier's income, the Minister disallowed a portion of his losses from a farming business for 1994 to 1996. It is the Minister's view that the chief source of Dr. Grenier's income was neither farming nor a combination of farming and some other source of income and that the amount of deductible farm losses was accordingly subject to the restrictions provided for in subsection 31(1) of the *Income Tax Act* (***Act***).

[2] Second, the Minister added unreported income of $26,184 and $29,368 to Dr. Grenier's income for the 1993 and 1994 taxation years respectively. Dr. Grenier

does not dispute the inclusion of the last amount for the 1994 taxation year. He contends, however, that the Minister was not entitled to reassess him for the 1993 taxation year because he did so after the normal reassessment period. The Minister contends that Dr. Grenier made a misrepresentation attributable to neglect, carelessness or wilful default in respect of that year and that the reassessment was made in accordance with subsection 152(4) of the *Act*.

Facts

[3] Dr. Grenier was born on a farm in the Thetford Mines region. At the age of 12 or 13, he went to boarding school. He completed his education at the Congregation of Jesus and Mary in Québec and studied medicine at Laval University. He worked on his father's farm during his school vacations. He began his general medical practice in the Lac Mégantic region in 1966 and says that he invested less than $1,000 in order to furnish his doctor's office. In 1971, he began specializing in dermatology, which he began practising in Québec in 1975.

[4] Dr. Grenier purchased his first piece of forest land for $15,000 in 1967. It was a 272-acre lot. Over the next 30 years, he acquired some 60 other lots in various regions of Quebec: Thetford Mines, Québec and the township of Leeds. He says he became one of the largest forestry producers in the Québec region. However, Dr. Grenier did not keep accounting records and was unable to provide very detailed and accurate answers concerning either his gross farming income or a portion of his expenses.

[5] He says he invested virtually all his savings in that farming activity and also devoted a large part of his spare time to it. He says that he does not like television or golf. He has not taken any courses in sylviculture but is self-taught, having acquired part of his knowledge by consulting forest engineers. Generally, he has a forest engineer draw up forest management plans, which constitute a kind of general management guide for a given lot. Those management plans enable him, in particular, to obtain property tax refunds of up to 85 percent and also to obtain subsidies to develop forest lands, subsidies which consist in particular in the payment of up to 80 percent of the cost of planted trees. A forest management plan costs approximately $250, of which $100 is paid by Dr. Grenier and the rest by the Ministère des Ressources naturelles.

[6] Over his career as a sylviculturalist, he says that, with his family's help, he has planted approximately 500,000 trees, invested some $750,000 in the purchase of forest lands and at least $300,000 in farming operations. Dr. Grenier is registered

with the Ministère des Ressources naturelles as a forestry producer and has been a member of the Union des producteurs agricoles since 1966. In 1989, the Minister of Natural Resources awarded him a prize as a "forest builder" in the Québec region. He even sat on a parliamentary committee that examined sylvicultural production problems. He subscribes to various sylvicultural magazines and journals.

[7] The farm losses he reported from 1980 to 2000 amounted to more than $385,000, whereas his net income from his medical practice for the same period was $2,908,504 out of gross income of $3,663,807.

[8] During the relevant period, from 1994 to 1996, he spent at least four days a week on his medical practice. At the start of his medical practice, he said, he worked three half-days at the hospital and devoted the rest of his time to planting on his forest lands. He admitted that he had always accepted new patients and that the number of medical acts he performed in 1993 was lower than at present. His gross income from his medical practice from 1993 to 1996 was as follows: $254,932 in 1993; $261,146 in 1994; $257,864 in 1995; and $255,661 in 1996.

[9] He says that he himself completed his tax returns in 1993 and 1994 and that he did not notice the omission of medical income of $26,184 in 1993 and of $29,368 in 1994. As is the case for his farming business, he keeps no accounting records for his professional practice. He receives statements from the Régie de l'assurance maladie every two, three or four weeks and adds them up at the end of the year. He refused to use the computer services of an accounting business out of a concern to respect the confidentiality of his patients' personal information. At the end of 1993, he did not obtain a comprehensive annual statement from the Régie de l'assurance maladie. Nor did he check the total of the cheques he had deposited in his bank account. Dr. Grenier does not know the source of his error. However, he believes that the unreported amounts might correspond to the equivalent of two statements that may have been lost or even stolen from his residence. He corrected the situation in part by asking the Régie to make direct deposits to his bank account starting in May 1993.

[10] The evidence only shows very few forest harvests from 1980 to 2000, virtually none in fact, except in the period from 1997 to 2000. Income from forestry activity seems to have been $26,193 in 1997, $37,537 in 1998, $44,087 in 1999 and $17,735 in 2000, although it is unclear whether that income came solely from logging. However, the unusually high sales could be explained by tax problems resulting from the Minister's assessments disallowing the deduction of Dr. Grenier's farming losses. He apparently needed money to pay his tax liability. The wood sales

also could have enabled him to show profits in his tax returns. For 1997, 1998 and 1999, he reported profits from his farming business of $7,827 in 1997, $3,409 in 1998 and $9,621 in 1999. Dr. Grenier said that he had grown and sold Christmas trees in the 1970s, but he stopped in 1989 because of the introduction of the GST. I note, however, that Part IX of the *Excise Tax Act* did not come into effect until 1991.

[11] It was not clearly explained to the Court why there have been few harvests. The impression given was that Dr. Grenier appears to want to defer those activities until his retirement. It should also be added that sylvicultural production is carried out over a long period of time: softwood trees take between 40 and 70 years to mature. However, as counsel for the respondent noted, part of the harvest could have been expected to be available during the relevant period and in previous years. I further note that the gross income that Dr. Grenier derived from sylviculture often consisted of subsidies and property tax refunds. For 1994 and 1995, for example, those amounts represented 60 percent and 79 percent of the gross income reported by Dr. Grenier.

[12] Dr. Grenier is now 64 years old, and he says he is considering transferring part of his forest lands to his children.

Analysis

Restricted Farm Losses

[13] First, I will address the question of restricted farm losses raised by the application of section 31 of the *Act*. Considerable difficulties are involved in the application of that section, and it is therefore not surprising to note that there is a large number of often seemingly contradictory cases. Counsel for the parties moreover cited a number of them.

[14] In my view, the three most important decisions for determining the relevant legal principles regarding the application of section 31 are the following. First, there is *Moldowan v. The Queen*, [1978] 1 S.C.R. 480; 77 DTC 5213, which is the most frequently cited decision by the highest court in Canada—the Supreme Court of Canada. Then there are two decisions by the Federal Court of Appeal, which to my knowledge are the most recent decisions providing a detailed analysis of the application of section 31 of the *Act*. They are *Watt v. Canada*, [2001] F.C.J. No. 517; and *Canada v. Donnelly*, [1998] 1 F.C. 513; [1997] F.C.J. No. 1351.

[15] I would first like to quote the following passage from *Moldowan*, *supra*, in which Dickson J. states the scope of section 31 (then section 13), at pages 487 and 488:

> In my opinion, the *Income Tax Act* as a whole envisages three classes of farmers:
>
> (1) a taxpayer, for whom farming may reasonably be expected to provide the bulk of income or the centre of work routine. Such a taxpayer, who looks to farming for his livelihood, is free of the limitation of s. 13(1) in those years in which he sustains a farming loss.
>
> (2) the taxpayer who does not look to farming, or to farming and some subordinate source of income, for his livelihood but carries on farming as a sideline business. Such a taxpayer is entitled to the deductions spelled out in s. 13(1) in respect of farming losses.
>
> (3) the taxpayer who does not look to farming, or to farming and some subordinate source of income, for his livelihood and who carries on some farming activities as a hobby. The losses sustained by such a taxpayer on his non-business farming are not deductible in any amount.
>
> The reference in s. 13(1) to a taxpayer whose source of income is a combination of farming and some other source of income is a reference to class (1). It contemplates a man whose major preoccupation is farming. But it recognize [*sic*] that such a man may have other pecuniary interests as well, such as income from investments, or income from a sideline employment or business. The second provides that these subsidiary interests will not place the taxpayer in class (2) and thereby limit the deductibility of any loss which may be suffered to $5,000. While a quantum measurement of farming income is relevant, it is not alone decisive. The test is again both relative and objective, and one may employ the criteria indicative of "chief source" to distinguish whether or not the interest is auxiliary. A man who has farmed all of his life does not become disentitled to class (1) classification simply because he comes into an inheritance. On the other hand, a man who changes occupational direction and commits his energies and capital to farming as a main expectation of income is not disentitled to deduct the full impact of start-up costs.
>
> [My emphasis.]

[16] In *Donnelly*, the Federal Court of Appeal, *per* Robertson J., stated the following at paragraphs 8 and 9:

> A determination as to whether farming is a taxpayer's chief source of income requires a favourable comparison of that occupational endeavour with the taxpayer's other income source in terms of capital committed, time spent and profitability, actual or potential. The test is both a relative and objective one. It is not a pure *quantum* measurement. All three factors must be weighed with no one factor being decisive. Yet there can be no doubt that the profitability factor poses the greatest obstacle to taxpayers seeking to persuade the courts that farming is their chief source of income. This is so because the evidential burden is on taxpayers to establish that the net income that could reasonably be expected to be earned from farming is substantial in relation to their other income source: invariably, employment or professional income. Were the law otherwise there would be no basis on which the Tax Court could make a comparison between the relative amounts expected to be earned from farming and the other income source, as required by section 31 of the Act. The extent to which the evidential burden regarding the profitability factor or test differs from the one governing the reasonable expectation of profit requirement is a matter which I will address more fully below.
>
> In summary, the cumulative factors of capital committed, time spent and profitability will determine whether farming will be regarded as a "sideline business" to which the restricted farm loss provisions apply. These guiding principles flow from the following decisions: *Moldowan* (*supra*); *Timpson (R.) v. M.N.R.*, [1993] 2 C.T.C. 55 (F.C.A.); *Poirier (B.) Estate v. Canada*, [1992] 2 C.T.C. 9 (F.C.A.); *Connell (J.P.) v. M.N.R.*, [1992] 1 C.T.C. 182 (F.C.A.); *Roney (C.H.) v. M.N.R.*, [1991] 1 C.T.C. 280 (F.C.A.); *Morrissey v. Canada*, [1989] 2 F.C. 418 (C.A.); *Gordon (R.T.) v. The Queen*, [1986] 2 C.T.C. 280 (F.C.T.D.); *Mott (P.S.) v. M.N.R.*, [1988] 2 C.T.C. 127 (F.C.T.D.); and *Mohl (G.) v. Canada*, [1989] 1 C.T.C. 425 (F.C.T.D.).
>
> [My emphasis.]

[17] In paragraph 13 of the decision in *Watt*, Sexton J. quotes the following passage from the Federal Court of Appeal's decision in *The Queen v. Morrissey:*

> We are of the view that the Tax Court Judge properly applied the law on this point as outlined by this Court in The Queen v. Morrissey:

> On a proper application of the test propounded in Moldowan, when, as here, it is found that profitability is improbable notwithstanding all the time and capital the taxpayer is able and willing to devote to farming, the conclusion based on the civil burden of proof must be that farming is not a chief source of that taxpayer's income. To be income in the context of the Income Tax Act that which is received must be money or money's worth. Absent actual or potential profitability, farming cannot be a chief source of his income even though the admission that he was farming with a reasonable expectation of profit is tantamount to an admission which itself may not be borne out by the evidence, namely, that it is at least a source of income.

[My emphasis.]

[18] These legal principles shall be applied to the facts of these appeals. Dr. Grenier, regrettably for him, was unable to show that during the relevant years he was a farmer of class (1) as described by the Supreme Court of Canada in *Moldowan*. In other words, he did not manage to show that the chief source of his income was farming or a combination of farming and another source of income.

[19] The main tests for determining whether farming is a chief source of income are the time devoted to farming activities, capital invested and present and future profitability. In general, I must note that the evidence adduced by Dr. Grenier was insufficient to meet those tests. The tests for which he brought the best evidence—which however does not mean that that evidence was entirely satisfactory—was the capital invested. The only evidence on that point is an estimate by Dr. Grenier that he invested a minimum of between $500,000 and $800,000 in his capital assets, mainly forest lands, and between $300,000 and $350,000 in operations. I have no doubt that Dr. Grenier invested more money in his farming business than in his medical practice. Even on that aspect, however, the evidence is far from clear. Dr. Grenier did not file balance sheets that would have made it possible to determine the amount of capital invested in his farming business and in his professional practice. In addition, the only evidence concerning the acquisition cost of the furniture necessary to operate his medical practice refers to the start of his career in Lac Mégantic. At that time, he spent less than $1,000 to furnish his office. Nothing was said about the capital assets used when he practiced in dermatology in Québec during the relevant taxation years.

[20] There are no accurate data to quantify the time devoted to farming activities. Dr. Grenier was vague in his answers. In argument, his counsel contended that Dr. Grenier was constantly preoccupied with sylviculture. However, there is no specific evidence showing that Dr. Grenier devoted more time to his farming activities than to his professional activities. He said that, with his family's help, he had planted at least 500,000 trees on his many lots (68 in 2001) acquired over some 30 years. There is no question that Dr. Grenier must have spent many hours planting those trees. However, as counsel for Dr. Grenier acknowledged, that was not an activity that required spending a large number of hours throughout the year to carry it out, as is the case, for example, in dairy farming.

[21] As to the time spent on his professional activities, it appears from the evidence as a whole that Dr. Grenier must have spent four to four-and-a-half days a week on his medical practice. The gross income he earned from his profession started at about $79,226 in 1980, the first year for which the evidence provides information, and remained around $100,000 for most of the 1980s. In 1989, his income increased considerably to more than $210,000 and remained between $220,000 and $261,000 during the 1990s. In the relevant years, income amounted to $254,932 in 1993; $261,146 in 1994; $257,864 in 1995; and $255,661 in 1996. For 2000, the last year for which figures were available, his gross professional income was $247,756. These figures therefore show that Dr. Grenier's professional activity remained at a very high level compared to what it had been at the start of his career, and this does not indicate a change in professional orientation at all.

[22] Dr. Grenier's farming business constantly produced losses during the period from 1980 to 2000. It is true that, for 1997, 1998 and 1999—that is to say after the services of an accountant were retained—small net incomes of $7,827 for 1997, $3,409 for 1998 and $9,621 for 1999 may be noted. However, in all likelihood, those figures do not reflect the actual financial situation of the farming business. Property taxes were in fact not deducted for those three taxation years. The amounts of property tax paid from 1993 to 1996 varied between $17,954 and $45,644 whereas, for 1997, 1998 and 1999, the amounts reported were only $2,607 for 1997, $907 for 1998 and $938 for 1999. Property tax amounted to $40,261 for the 2000 taxation year.

[23] Even if it were accepted that the annual amount of property tax was only $35,000, the taxpayer would also have incurred large losses for the years from 1997 to 1999, that is, cumulative losses of $79,691 instead of a cumulative profit of $20,857. The taxpayer would therefore have incurred farm losses for each of the last

21 years of farming operation for which the evidence provides figures. The cumulative losses from 1980 to 2000 would then be $485,674 rather than $385,126.

[24] This finding leads me to address the third test: the present and future profitability of the business. The figures stated above provide an adequate response to the question of present profitability. As to the future profitability of the business, the evidence brought by Dr. Grenier consists of his statements that his many forest lands are worth several millions of dollars and that the annual growth of his trees represents an annual economic value of $200,000.

[25] Those statements are utterly insufficient to establish the profitability of the farming business, an element I distinguish from the reasonable expectation of profit that Dr. Grenier may have. The Court has no objective element on the basis of which to conclude that, even at the time of his retirement, Dr. Grenier could make large profits. It is not impossible that Dr. Grenier's activity may generate large profits. However, the evidence did not establish that on a balance of probabilities. No evidence was adduced either on the value of the lands owned by Dr. Grenier or on the issue as to whether the operation of those woodlands could generate substantial profits. Even for the years from 1997 to 1999, during which certain wood sales likely took place, the taxpayer continued to incur losses. The forestry engineer even acknowledged in his testimony that selective wood-cutting on forest lands could prove to be not very profitable.

[26] It is also disturbing to see that Dr. Grenier did little wood-cutting and harvesting during those 21 years. The only wood-cutting activities, and modest ones at that, during the 1997 to 2000 taxation years appear to have been the result of financial difficulties arising from assessments whereby the Minister disallowed a portion of farm losses.

[27] Dr. Grenier does not appear to have concerned himself with cutting wood. His only strategy appears to have been to plant the largest possible number of trees in the most efficient way possible on the basis of the forest management plans suggested by the engineers. On that point, he filed management plans that provide a general indication of the approach that had to be followed. However, no documentary evidence was adduced to confirm the existence of sylvicultural directives, which outlined a more specific approach to operating the sylvicultural business.

[28] There are no specific figures on the value of the wood grown by Dr. Grenier[1] that enabled me to conclude that his activities were profitable. Even if there is an agent who can sell the wood grown by Dr. Grenier, there is no indication that that can constitute a profitable operation. I note that, in 2000, a wood sale was clearly reported for an amount of $17,735 and the direct costs related to cutting that wood appear to have been $8,326, which therefore represents 47 percent of the proceeds of the sale. Fixed costs in particular must be added to those costs.

[29] In view of the flagrant lack of evidence on the profitability of Dr. Grenier's farming activity, his counsel suggested that the Court rely on its judicial knowledge. First of all, the Court does not have such knowledge and cannot conjecture as to whether the estimates made by Dr. Grenier in his testimony were reasonable. Furthermore, I have read articles published in two magazines filed in evidence by Dr. Grenier to show that he had subscribed to magazines on sylviculture and that he was operating as a serious agricultural producer. In an article in the January 1992 edition of *Le Progrès forestier*, Jacques Hébert defines the small-scale forestry producer as follows, at page 43:

> [TRANSLATION]
>
> . . . he who owns his lots, who is knowledgeable in his sylvicultural techniques and who has a concern for the progressive practice of his art; he does his own work himself with his family and makes a living out of it.

[30] In an article published in *Forêt Conservation* in February 1993, Louise Desautels writes as follows, at page 8:

> [TRANSLATION]
>
> Forest farms have long been talked about in Quebec. But the concept that people could make a decent living from the many resources of their forests has not yet really been applied in actual fact.
>
> [My emphasis.]

[1] Counsel for Dr. Grenier claims that the wood should have been sold through the Office des producteurs de bois, the exclusive sales agent of producers.

[31] After stating that two serious projects had been developed in the Gaspé Peninsula and the Lower St. Lawrence to transform theory into practice, she went on to say at page 9:

> [TRANSLATION]
>
> . . . In both cases, the objective is to establish forest farms, that is to say, units on which multiple-use forestry and sustainable use of resources by individuals would become permanent activities capable of generating decent annual revenues.
>
> [My emphasis.]

[32] In referring to a project being carried out in the area of Témiscouata, she notes the following on the same page:

> [TRANSLATION]
>
> . . . A small private forest in that area currently covers an average of 80 ha, whereas the minimum area for anyone considering living off his forest would be 250 ha.

[33] She later refers to a certain Richard Savard at page 10:

> [TRANSLATION]
>
> In any case, the project coordinator believes, the arrangement will make it possible to conduct an initial test of the concept of forest farms. "The argument constantly made against those who propose such farms is that they are not profitable over the long term," he explains. "So before developing the project, we brought together a team of forestry engineers and economists to make some calculations and computer simulations."
>
> The group's finding is clear. Three factors stand in the way of the profitability of forest farms: the low price paid by wood buyers, mortgage expenses where the farmer has had to buy his land, and over-equipping, which consists in acquiring too much machinery operating only a few days a year. . . .
>
> This prospect of non-profitability is also a concern for Gérald Tremblay, spokesman for the Matane Region Forestry Committee.
>
> [My emphasis.]

[34] Lastly, Ms. Desautels writes at page 12:

> [TRANSLATION]
>
> . . . Gérald Tremblay notes, "a farmer's annual salary would quite quickly be about $25,000." That income would come from subsidized developments, wood sales and, depending on the potential in the area, one or two related activities: hospitality services to fishermen and hikers, deer breeding and so on.
>
> [My emphasis.]

[35] These passages do not prove that sylviculture cannot be profitable since that is evidence that one or more expert witnesses would have had to show. However, they at least indicate that it is far from obvious that sylviculture can be profitable and that Dr. Grenier should have established profitability in his case by means of convincing evidence, more convincing than simply expressing his conviction that he would make millions from the sale of his wood and his land once retired. To make a profit, one must incur expenses, and the profitability of an economic activity can be determined by subtracting all expenses from revenues. In view of the lack of probative evidence that Dr. Grenier's farming operation was profitable, I conclude that evidence on the question of profitability would not have supported his position.

[36] Consequently, it is not open for me to conclude that Dr. Grenier's sylvicultural operation was profitable or that the farming business or combination of farming and another source was his chief source of income. It is far from clear that Dr. Grenier was a farmer of class 01 as described by Dickson J.

[37] Before concluding, I would like to cite certain passages from *Donnelly* and *Watt*, which present facts quite similar to those of the instant appeals. It is therefore not surprising that some of the comments and statements made by the judges in those decisions are entirely applicable in this case. In paragraph 1 of his reasons in *Donnelly*, Robertson J. refers to taxpayers "*who earn their income in the city and lose it in the country*". In this case, there was no evidence at all that Dr. Grenier lived on one of his forest lands. On the contrary, at the time he came to testify, Dr. Grenier was living in the city of Québec. The address stated on his tax returns for the years 1993 to 2000 and on the forest management plans is his address in Québec or Sillery. I have no reason to believe that he was living elsewhere since he carried on his medical profession in Québec.

[38] In *Donnelly*, even though the taxpayer devoted 40 hours a week to his farming operation and only 24 hours to his medical practice, that did not prevent the Federal Court of Appeal from finding that his medical practice constituted the chief source of his income. In paragraph 3, Robertson J. concluded that the taxpayer "*lived, ate and breathed horses*". I have no doubt here that Dr. Grenier was passionate about planting his trees and that, through that activity, he made a great and valuable contribution to the reforestation of Quebec. The prize awarded to him moreover attests eloquently to Dr. Grenier's contribution. However, such acknowledgement does not establish that Dr. Grenier was a class 01 farmer for the purposes of section 31 of the *Act*.

[39] Furthermore, it is interesting to note the following comments by Robertson J. in *Donnelly* on the question of the lack of evidence, at paragraph 13:

> In the present case, it was incumbent on the taxpayer to establish what he might have reasonably earned but for the two setbacks which gave rise to the loss: namely the death of Mr. Rankin and the decline in horse prices. I say this because the Tax Court Judge concluded that but for these setbacks the taxpayer would have earned the bulk of his income from farming in the three taxation years in question. While there is no doubt that the loss of Mr. Rankin, and the changes in American tax law had a negative and unexpected impact on the business, no evidence was presented to show what profit the taxpayer might have earned had these events not occurred and whether the amount would have been considered substantial when compared to his professional income. It was not enough for the taxpayer to claim that he might have earned a profit. He should have provided sufficient evidence to enable the Tax Court Judge to estimate quantitatively what that profit might have been.
>
> [My emphasis.]

[40] Later, he adds the following at paragraph 14:

> . . . The Tax Court Judge did not engage in an analysis of what profit might have been earned by the taxpayer in each of the three taxation years in question. No doubt this gap was occasioned in part by the taxpayer's failure to adduce the necessary evidence as reflected in the testimony of Dr. McCarthy. His evidence was directed at whether the horse-farming operation gave rise to a reasonable expectation of profit. He admitted that he had never reviewed the taxpayer's books nor compared the business' revenue and expenses . . . . He could offer

> no opinion on the potential profitability of the horse-farming business.
>
> [My emphasis.]

[41] As was done in *Donnelly*, at paragraph 16, it could be stated here (with the necessary changes, of course):

> . . . that . . . additional income transferred from the medical practice, was used to purchase new horses. Arguably, his actions do not indicate any desire to earn income from the horse-farming business during the taxation years in question. Rather, it would seem that his consistent reinvestment in new stock pointed to a desire to improve his stables, perhaps with the hope that he could retire in the future and live off the horse-farming income at that time.
>
> [My emphasis.]

In this instance, it seems that Dr. Grenier, as mentioned earlier, is interested solely in planting trees and does not expect to live off his lands until he has retired. Rather, it is indeed surprising to note that Dr. Grenier is considering transferring his lands to his children[2] once he reaches retirement age.

[42] Lastly, the following comments by Robertson J. at paragraph 21 should be recalled:

> It may well be that in tax law a distinction is to be drawn between the country person who goes to the city and the city person who goes to the country. In future, those insisting on obtaining tax relief in circumstances approaching those under consideration should do so through legislative channels and not through the Tax Court of Canada. The judicial system can no longer afford to encourage taxpayers or their counsel to pursue such litigation in the expectation that hope will triumph over experience.
>
> [My emphasis.]

Need I recall that Dr. Grenier lived and earned his income in the city and lost it in the country?

---

[2] Would that mean that it would be the next generation that may then be able to make enough profit to live off those lands?

[43] Finally, there are the following comments by Sexton J. in *Watt*, paragraph 15, with which I unreservedly concur:

> In dismissing this appeal we do not want to be taken as having no sympathy for the lot of farmers such as the Appellant. Clearly the Appellant was genuinely involved in farming. However, section 31 of the Income Tax Act and the cases which have considered that section, apply a test which may, in some cases, seem to be unfair. While we feel bound by the authorities in this Court to dismiss this appeal, we cannot help but note the many section 31 cases being brought before the Tax Court and this Court producing sometimes conflicting results. Despite the appearance of unfairness in some of those cases, where a taxpayer with a well-paying job is also seriously involved in unprofitable farming but not a "hobby farm", Parliament has not re-examined this provision which Justice Dickson in 1977 described as an "awkwardly worded and intractable section". Nor has the Supreme Court of Canada revisited this problem since 1977. Perhaps it is time to amend or at least clarify this provision to make it more suited to our time.
>
> [My emphasis.]

Statute-barred Year

[44] Now I will address the question of the statute-barred year, 1993. In my view, the Minister discharged the burden of showing that the taxpayer made a misrepresentation attributable to neglect or carelessness. I am not convinced that Dr. Grenier did so by wilful default, and the Minister rightly cancelled the penalty. However, as Strayer J. acknowledged in *Venne v. Canada*, [1984] F.C.J. 314; 84 DTC 6247, the Minister's burden is not as great when it comes to reopening a statute-barred year. Strayer J. wrote as follows:

> I am satisfied that it is sufficient for the Minister, in order to invoke the power under sub-paragraph 152(4)(a)(i) of the Act to show that, with respect to any one or more aspects of his income tax return for a given year, a taxpayer has been negligent. Such negligence is established if it is shown that the taxpayer has not exercised reasonable care. This is surely what the words "misrepresentation that is attributable to neglects [sic]" must mean, particularly when combined with other grounds such as "carelessness" or "wilful

> default" which refer to a higher degree of negligence or to intentional misconduct.
>
> [My emphasis.]

[45] In this instance, Dr. Grenier's negligence consisted of relying solely on the statements the Régie de l'assurance maladie sent him in response to each of his requests for payment of fees and which he kept in his files and of failing to check the totals of the figures appearing on those statements by comparing them with the totals of his deposits of the cheques issued by the Régie or of failing to request the total of his fees from the Régie at the end of the year. Since he did not keep any books and had decided, for ethical reasons, not to retain the services of an accountant, who could have reconciled the amounts he had claimed from the Régie and the statements it provided, Dr. Grenier should have exercised reasonable care by at least calculating the total amount of his deposits or, better yet, by requesting the annual statement from the Régie.

[46] For all these reasons, Dr. Grenier's appeals are dismissed, with costs.

Signed at Ottawa, Canada, this 14th day of December 2002.

"Pierre Archambault"

J.T.C.C.

Translation certified true
on this 10th day of February 2004.

Sophie Debbané, Revisor