Dockets: 2003-2513(IT)G

BETWEEN:

BRIAN LEBLANC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

- AND –

2003-2514(IT)G

BETWEEN:

TERRY LEBLANC,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 20, 21 and 22, 2006 at Ottawa, Ontario.

Before: The Honourable D.G.H. Bowman, Chief Justice

Appearances:

Counsel for the Appellants:	William Van Veen François Baril
Counsel for the Respondent:	Roger Leclaire Nicolas Simard

JUDGMENT

The appeals from the assessments made under the *Income Tax Act* for the 1996, 1997, 1998 and 1999 taxation years are allowed with costs and the

assessments are referred back to the Minister of National Revenue for reassessment and reconsideration in accordance with these reasons.

There should be one set of counsel fee for both appellants.

Signed at Ottawa, Canada this 21st day of December 2006.

"D.G.H. Bowman"

Bowman, C.J.

Citation: 2006TCC680
Date: 20061221
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REASONS FOR JUDGMENT

Bowman, C.J.

[1] These appeals are from assessments under the *Income Tax Act* issued to two brothers, Brian and Terry Leblanc. The appeals were heard together on common evidence and relate to the 1996, 1997, 1998 and 1999 taxation years.

[2] The assessments arise from the Minister of National Revenue's including the appellants' sports lottery ticket winnings in their income. In so doing, the Minister has taken the position that wagering on government-run sports lotteries was a business of the appellants.

[3] The assessments were originally calculated on a net worth basis. It is now agreed that the increase was attributable to lottery winnings and it is further agreed that each of the appellants won the following amounts in the years in question. These amounts are net of their losses.

1996	**1997**	**1998**	**1999**
$875,874	$755,271	$418,178	$715,221

[4] Before I set out the facts of these somewhat unusual cases I shall summarize the respective positions of the parties.

[5] The appellants' first argument is that lottery winnings, by their very nature, are always tax exempt and can never be considered income from business, regardless of the volume of tickets or the circumstances surrounding their purchase. They submit that lottery winnings can only be characterized as capital gains, and as such are not taxable by virtue of paragraph 40(2)(*f*) of the *Act.*

[6] The appellants' alternative argument is that even if it is possible for lottery winnings to be considered income from business, on the facts, the appellants were not operating a business, and therefore, their lottery winnings were not taxable as business income.

[7] The respondent's position is that the appellants' sport lottery winnings are taxable as income from business under subsection 9(1) of the *Act*. Counsel submits that their wagering activity can be considered a business because it was managed and organized with the object of realizing a profit.

The Facts

[8] The appellants are two unmarried young men in their thirties or thereabouts. They graduated from high school but have no formal training in anything except for some computer courses in high school. Before their substantial lottery winnings they worked in their father's window washing business.

[9] Brian – and perhaps Terry, the evidence is not clear – started playing sports lottery games prior to 1992 and it appears won a substantial amount of money either prior to 1996 or early in 1996 with which they embarked upon the involvement in betting that is the subject of these appeals.

[10] In the years 1996 through 1999 they plunged massively and with a rash abandon into sports lotteries such as Point Spread or Over/Under. The three lottery games most commonly played by the appellants were Pro-Line, Point Spread and Over/Under. These games are described by the expert, Dr. Garry Smith, who was called as a witness by the appellants. He has had a great deal of experience in gambling related matters.

> *Pro-Line* — players pick anywhere from 3 to 6 games from a game list (available through lottery ticket outlets, daily newspapers or lottery corporation websites), wagering a minimum of $2 to a maximum of $100 (the maximum bet allowed by some lottery corporations is only $25). For each game played, bettors must choose between three possible outcomes; (a) a home team win, (b) a visitor team win or (c) a tie (the definition of a tie varies depending on the sport). The odds for each outcome are posted on the game list and the expected prize amount for a winning bet is shown on the purchased ticket. For example, a successful $10 bet on three games with odds of 2.50, 1.70 and 3.55 would produce a win of $150.90 (2.50 x 1.70 x 3.55 x 10). To win, all selections must be correct.
>
> *Point Spread* — is a two outcome game (either a visiting or home team win against a posted point spread) whereby players can select between two and 12 games. Prizes are awarded for all correct picks or for picking winners in 9 of 10, 10 of 11, 10 of 12 or 11 of 12 games. The prize amount is determined by three factors; the amount bet, the number of games selected and the sport wagered on (the outcomes of hockey and baseball games are seen as easier to predict than either basketball or football games, hence the payout is slightly higher for the latter two sports.
>
> *Over/Under*— is also a two outcome format (players choose whether the total score of both teams in an individual game will be over or under a posted number) and players choose from two up to 10 games. Again, all selections must be correct to win.

[11] The appellants rented a house in Aylmer so that they could play both the Ontario and Quebec lotteries. They led unusual lives. They spent their time playing lottery games or watching sports on television. They also played ping pong and golf and sat around the house drinking beer and eating pizza. Despite their winnings, they lived cheaply and spent very little on material goods. Their winnings were all ploughed back into the lottery games.

[12] Most of the evidence was given by Brian, the younger brother. He estimated as well that 95% of the bets they made were lost. In the years in question their involvement was, as I said, massive. Brian testified that it was not unusual for them to bet $200,000 or $300,000 in a week. Although they did not play every week, they estimate that they might have spent $10 to $13 million per year. However, the

accuracy of these figures is hard to confirm because they kept no records and so the likelihood of the estimates being correct falls within a range of indeterminate magnitude. It is however all I have to go on. Even the amount of the agreed net winnings is in my view somewhat problematic but I must accept its accuracy because it is an agreed fact.

[13] The losing tickets were kept in the basement of their house in Aylmer. Brian said this was to establish where the money came from, if anyone questioned it. It strikes me as equally consistent with their somewhat bizarre and obsessive behaviour. The winning tickets were kept upstairs in jars or boxes until there was a theft which prompted them to buy a safe. At one point they had to sue the Ontario Lottery and Gaming Corporation ("OLG") to force it to check green garbage bags full of tickets. The case was settled.

[14] Although Brian was always the one who picked which bets to make, the appellants split their winnings 50/50. To make his selections, Brian would refer to the OLG odds, as well as the Las Vegas odds for the same games. In the early years, he obtained all of this information from the newspaper, or the OLG's published lists. In later years, the information was available on the OLG's websites. He looked at that information and decided whether to place a wager.

[15] In the beginning Brian would pick a few sporting events, and then manually calculate the wager combination for those events. In later years, Terry created a computer program that would do that manual process for them. More specifically, Brian would input his sporting event choices into the program and it would list all of the possible combinations of those choices. Brian would identify his preferred combination choice or choices and then they would buy multiple tickets, sometimes thousands of tickets, on those choices.

[16] During the taxation years in question, they were playing four to five times a week, purchasing thousands of tickets, for dozens of combinations of predominantly long shot outcomes. These bets could total $200,000 — $300,000 per week. Betting on these long shot outcomes increased the potential payout, but also significantly increased the risk. It was highly unlikely that these tickets would be winners, but if they were, then the potential payouts were substantial. For the appellants, this resulted in a great many losses and a few high-return wins. In terms of the number of bets, they lost a "high majority", which Brian estimated to be 95% of the time.

[17] To place their bets, the appellants would call in their order to a retail outlet. Because the Lottery Corporations imposed limits on how many tickets each retail outlet could sell, as well as how many tickets each retail outlet could sell to any one individual, the Appellants had to purchase their tickets from various retailers in order to purchase the quantity they wanted.

[18] With such high-volume purchases the appellants were able to negotiate a 2-3% discount with many retailers. This discount came from the fact that retailers got a commission for their lottery tickets sold, as well as a discount for their lottery tickets redeemed. The appellants offered to buy and redeem their tickets at the retail outlets in exchange for a portion of those commissions. They chose to buy tickets only from those retailers that agreed to the discount.

[19] In the beginning, the appellants went out to the outlets to pick up their pre-ordered tickets themselves, but by mid-1996, they decided they did not want to do this legwork, so they started paying three of their friends to be their "helpers". These helpers were assigned a "territory" or "route" of stores from which they would pick up tickets. The appellants used helpers because they said the fun in playing the sports lottery is in placing the wagers and watching the games, not in running around town to pick up the tickets. They were "lazy" and only wanted to do the fun activities.

[20] In approximately 1998, the OLG lowered the retail selling limits. In order to maintain their level of betting, the appellants had to get more helpers – up to 15 in total – to go to more retailers to pick up the ordered tickets. As a result of the lowered limits, the appellants could no longer get volume discounts.

[21] Two things stand out: (a) the magnitude of their betting defies all logic. It is simply not susceptible of rational analysis; (b) nonetheless they won. It looks as if they won big. If the estimate of $10,000,000 to $13,000,000 per year is accurate — and that is all I have to go on — they spent upwards of $52,000,000 over four years. The evidence also shows that Brian played the lottery once in Alberta and at least once in Nova Scotia. It appears that once Brian also went to Australia to gamble. The agreed figure of the net winnings in those years was $2,761,544 for each brother or $5,523,088 in the aggregate. Obviously the appellants were very successful in their wagering on government-run sports lotteries, in particular, two big wins in early 1996 and another in 1999. The appellants say this is because they have been "lucky". The respondent says this is because they have developed a "system".

[22] I mentioned above that I had some difficulty accepting the accuracy of the numbers that were being thrown around with a certain devil-may-care insouciance. Nonetheless, the net winnings are agreed upon and I have the appellants' unchallenged testimony about the amount they spent on the sports lotteries. If we accept these figures it would mean that if they spent $50,000,000 to produce net winnings of $5,500,000 they must have had gross winnings of a mind-boggling $55,500,000.

[23] It became apparent to me that the word "odds" was being used in several different senses in the evidence and I confirmed this impression by the answers I received from questions I put to the expert, Dr. Smith. The "odds" of winning a game of chance such as Lotto 6/49 are a mathematically determined and unchanging ratio. The chances of one ticket winning the Lotto 6/49 jackpot are said to be one in 13.5 million. Another sense in which "odds" is used, at least in a betting context, takes another factor into account — how many bets are placed on a particular result. Thus, in horse racing, for example, the odds on a particular horse may constantly change right up to the point at which betting is closed depending on how much people are betting on that horse's chances of winning. The Canadian Oxford Dictionary hints, not too clearly, at this distinction. The other dictionaries, including the 20 volume Oxford English Dictionary are not much clearer.

[24] The Canadian Oxford Dictionary defines "odds" as follows:

> **odds** ***plural noun*** **1** the ratio between the amounts staked by the parties to a bet, based on the expected probability either way. **2 a** the chances or balance of probability in favour of or against some result (*the odds are against it*; *the odds are that it will rain*). **b** this probability expressed as a ratio (*the odds against winning the raffle are 500 to 1*). **3** the balance of advantage (*the odds are in your favour, won against all the odds)*. **4** an equalizing allowance to a weaker competitor; a handicap. **5** a difference giving an advantage (*it makes no odds*). □ **at odds** (often foll. by ***with***) in conflict or at variance. **by all odds** certainly. **over the odds** *Brit.* above a generally agreed price etc. **take odds** accept a bet. [apparently pl. of ODD *noun* "unequal things": compare NEWS]

[25] The expert, Dr. Smith, identified a third meaning of "odds", the "one-sided" odds given by the lottery corporations as compared to the "true" odds. From table 4 of his report it is apparent that the lottery corporations provide odds that are significantly different from the true odds in order to limit the amounts they have to pay out. The discrepancy becomes even more startling the more games that are played. If one plays 10 games the payout is 200 to one. The true odds are 1024 to

one. What this illustrates is that people like the appellants are playing with an opponent, the OLG, who holds cards in a deck that is already stacked against the player.

[26] Dr. Smith's report demonstrates rather dramatically several points:

(a) The odds against winning in lotteries such as the sports lotteries of the type the appellants played are astronomical;
(b) There is no way one can beat the odds;
(c) The payouts are in no way reflective of the true odds;
(d) Skill plays no part in winning in the sports lotteries.

[27] The appellants argue that lottery winnings, by their very nature, are always tax exempt and can never be considered income from business, regardless of the volume of tickets or the circumstances surrounding their purchase. They submit that this non-taxable status is confirmed in the case law and in paragraph 40(2)(*f*) of the *Act*.

> Subsection 9(1)
>
> Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.
>
> Paragraph 40(2)(*f*)
>
> Notwithstanding subsection (1) ...
>
> ... (f) a taxpayer's gain or loss from the disposition of
>
> (i) a chance to win a prize or bet, or
> (ii) a right to receive an amount as a prize or as winnings on a bet, in connection with a lottery scheme or a pool system of betting referred to in section 205 of the *Criminal Code* is nil;
>
> Section 248
>
> "**business**" includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(*c*), section 54.2, subsection 95(1) and paragraph 110.6(14)(*f*), an adventure or concern in the nature of trade but does not include an office or employment.

[28] It would serve no purpose for me to quote the numerous judicial definitions of "business" or "carrying on a business". You can cite myriads of judicial

definitions of business (Stroud's Judicial Dictionary, 5th Ed. has over six pages) and you will not get any closer to a solution in a case such as this one. One might start, for example, with the definition of Jessel M.R. in *Smith v. Anderson*, (1880) 15 Ch.D. 247 at 258[1]:

> That is to say, anything which occupies the time and attention and labour of a man for the purpose of profit is business. It is a word of extensive use and indefinite signification.

Such a definition would usually be unexceptionable when one is talking about a commercial activity. If applied literally and mechanically it would include the activities of a person who consistently and regularly placed bets on horses, or played the lotteries or the gaming tables. It would mean that the gambling activities in every case that I have cited above would be a business, yet we know that this is not so. Gambling—even regular, frequent and systematic gambling—is something that by its nature is not generally regarded as a commercial activity except under very exceptional circumstances. This is recognized in the cases referred to below.

[29] Compulsive gamblers, whether they play lotteries or gaming tables may spend a lot of time and money gambling and they certainly do so with a view to winning. People who go every day to the racetrack devote time and money to this pastime and after a while they may develop a degree of expertise, or at least persuade themselves that they do. Traditionally, however, their gains are not taxed and, more importantly, their losses are not deductible. I start with the judgment of Rowlatt J., one of England's most respected tax judges. In *Graham v. Green*, [1925] 2 K.B. 37, Rowlatt J. said at page 38:

> In this case the appellant was in the habit of betting on horses at starting prices. He did it on a large and sustained scale, and he did it with such shrewdness that he made an income out of it, and it is found that substantially it was his means of living. Under those circumstances he has been assessed to income tax in respect of those emoluments, and hence this appeal.

At pages 41-42, he said:

> Now we come to betting, pure and simple. It has been settled that a bookmaker carries on a taxable vocation. What is the bookmaker's system? He knows that there are a great many people who are willing to back horses, and that they will back horses with anybody who holds himself out to give reasonable

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1 Reversed on a different point 15 Ch.D. 268

> odds as a bookmaker. By calculating the odds in the case of various horses over a long period of time and quoting them so that on the whole the aggregate odds, if I may use the expression, are in his favour, he makes a profit. That seems to me to be organizing an effort in the same way that a person organizes an effort if he sets out to buy himself things with a view to securing a profit by the difference in their capital value in individual cases.
>
> Now we come to the other side, the man who bets with the bookmaker, and that is this case. These are mere bets. Each time he puts on his money at whatever may be the starting price. I do not think he could be said to organize his effort in the same way as a bookmaker organizes his, for I do not think the subject matter from his point of view is susceptible of it. In effect all he is doing is just what a man does who is a skilful player at cards, who plays every day. He plays to-day, and he plays to-morrow, and he plays the next day, and he is skilful on each of the three days, more skilful on the whole than the people with whom he plays, and he wins. But it does not seem that one can find, in that case, any conception arising in which his individual operations can be said to be merged in the way that particular operations are merged in the conception of a trade. I think all you can say of that man, in the fair use of the English language, is that he is addicted to betting. It is extremely difficult to express, but it seems to me that people would say he is addicted to betting, and could not say that his vocation is betting. The subject is involved in great difficulty of language, which I think represents great difficulty of thought. There is no tax on a habit. I do not think "habitual" or even "systematic" fully describes what is essential in the phrase "trade, adventure, employment, or vocation." All I can say is that in my judgment the income which this gentleman succeeded in making is not profits or gains, and that the appeal must be allowed, with costs.

[30] A somewhat similar view was expressed by Hugessen J.A. in *The Queen v. Rumack*, 92 DTC 6143 at 6143:

> This appeal raises the issue of the proper income tax treatment to be given certain types of lottery winnings. Traditionally such winnings have always been exempted from income tax, being treated as "windfalls", i.e., of a capital nature.

and at page 6144:

> With the introduction of capital gains tax in Canada in 1972, it became necessary to deal with the possibility that lottery winnings which were not income might nonetheless attract tax as capital gains. Clearly, a policy decision was reached that they should not be so taxed and the result was the enactment of paragraph 40(2)(*f*) and subsection 52(4) above, both of which appear in Subdivision c of Division B of Part I: "Taxable capital gains and allowable capital losses".

[31] In that case the income portion of a stream of income from an annuity purchased from a lottery win was held to be income since it did not fall within paragraph 40(2)(*f*). The statements of Hugessen J.A. illustrate broadly the attitude in Canada to lottery winnings but they do not deal with the question whether gambling winnings that are not exempted from taxation under paragraph 40(2)(*f*) as capital gains are taxable because they are income from a business.

[32] There is another line of authorities in which Rowlatt J.'s case of *Graham v. Green, supra*, was distinguished. In *Burdge v. Pyne*, [1969] 1 All ER 467 (Ch. Div.). In that case Mr. Burdge was unsuccessful in his appeal before Pennycuick J. of the Chancery Division. Mr. Burdge owned the gambling club in which he did the betting. The court held that the gambling winnings were just part of the ordinary income of the club he owned. Pennycuick J. in discussing Rowlatt J.'s judgment in *Graham v. Green*, said at pp. 470-471:

> The learned judge, in his judgment, considers closely the nature of betting transactions, and he reaches the conclusion that, in the absence of an organisation comparable to that of a bookmaker, betting transactions do not of themselves amount to a trade or such an enterprise as would give rise to a charge under Case VI of Sch. D. That case is a long way from the present, because here there is a trade, whereas there the person charged was not carrying on any trade at all.
>
> The other case is that of *Down (Inspector of Taxes)* v. *Compston* (4). The headnote there reads (5):
>
> > "The respondent, a professional golfer, had, in addition to his other activities, for a number of years habitually engaged in private games of golf for bets of varying amounts. The respondent was assessed under Sched. D, to include, *inter alia*, the balance of gains over losses arising out of the bets made on such games, on the ground that the winnings made could not accurately be called mere betting receipts, but were profits arising out of his vocation as a professional golfer:—HELD: the respondent's winnings did not arise from his employment or vocation, and they were not analogous to gratuities for services rendered, nor was there any organisation to support the view that the respondent was carrying on a business of betting. The assessment ought, therefore, to be discharged."
>
> In that case, it will be seen, Mr. Compston was carrying on a business or profession—viz., that of a professional golfer—but it was held that his private bets with those with whom he was engaged to play rounds of golf could not be said to arise out of his profession as a professional golfer. LAWRENCE, J., said (6):

> "The argument for the Crown is, as I understand it, that there is in this case the vocation of a golf professional, and that the winnings on bets on golf matches played by a golf professional are in the course of his vocation as a golf professional, and arise out of that vocation, and that therefore it is not necessary to find that there are so many transactions, or such an organisation of these betting transactions as to constitute a separate employment or vocation in itself; but it is said that, as the respondent has the vocation of a golf professional, the winnings which he makes in these matches occur in the course of, and arise out of, that vocation, and are therefore taxable, just as much as the Easter offerings of a clergyman or the gratuities of a waiter. On the other hand, on behalf of the respondent it is contended that the winnings of the respondent do not in any true sense arise out of his vocation; they arise from the bets, and not from his vocation as a professional golfer; his vocation as a professional golfer merely affords the opportunity for making the bets, and does not give rise in any proper sense to the winnings from the bets."

Then, after considering certain examples given by counsel for the respondent, he said (7):

> "I am in agreement with the argument which has been presented for the respondent, and with the decision of the commissioners in this case, and I hold that the winnings of the respondent did not arise from his employment or vocation . . ."

Then, finally, he says there was no organisation.

> So in that case the vocation afforded in some sense the opportunity for making the bets, in that Mr. Compston would not have had companions on his rounds against whom to bet if he had not been a professional golfer, but the bets did not arise out of his vocation. Again it seems to me that that case is wholly distinguishable, for this short, simple reason; that in the present case the club was not merely the occasion which enabled the taxpayer to play private games of cards. The playing of cards was part of the activities of the club, and his winnings from those games of cards, it seems to me, arose in the full sense out of the carrying on of the club.

I might say the *Down v. Compston* case cited by Pennycuick J. ([1937] 2 All E.R. 475), seems rather close to the line.

[33] The *Down* case might be compared to *Luprypa v. The Queen,* 97 DTC 1417. The facts are somewhat interesting. At page 1417, Justice McArthur said:

> The Appellant testified that prior to 1989 he had been gainfully employed in various endeavors. After his separation and divorce in 1986, he entered a "mid-life crisis" and spent the three relevant years playing pool for money. He stated that every weekday Monday through Friday he would play snooker in the

afternoon using this time as a practice session improving his skills. Each weekday evening, commencing after 11:00 p.m., he would attend a bar where he would play opponents who were inebriated. The Appellant would not drink alcoholic beverages during the week giving him an advantage. He indicated that from playing pool in this manner he made $16,000 in 1989, $20,000 in 1990 and $40,000 in 1991. He was a skillful player and won between $200 and $300 almost daily. Using the Appellant's approximation of daily earnings of $200, extended over a 48-week period, he would have earned $48,000 per year.

Justice McArthur's analysis at pages 1418 to 1419 is useful:

Analysis (*Gambling as income*)

The dominant issue is whether the proceeds from the Appellant's pool playing are taxable. In his able argument, Counsel for the Appellant presented that nowhere in his search for relevant jurisprudence could he find a case where gambling gains were held to be taxable. He referred the Court to several cases.

In *Balanco v. M.N.R.* 81 D.T.C. 887 the taxpayer freely and frequently waged on horse races, sporting activities and card games with a view to profit. The Tax Review Board held that it was not an established business so as to characterize the taxpayer as a professional gambler. M.J. Bonner, Member of the Board (as he then was), stated at page 888:

> . . . There is a total absence of any evidence here which indicates the presence of any organized system for the minimization or management of risk. This lack of system distinguishes the Appellant, an intemperate gambler, from the professional gambler.

In *Dubrovsky v. M.N.R.* 88 DTC 1712, the Tax Court Judge held that the taxpayer's gambling activities were not a source of income as there was no reasonable expectation of profit and it was just a question of luck.

In *M.N.R. v. Morden* 61 DTC 1266 at page 1267 Cameron, J. of the Exchequer Court decided that:

> The respondent's gambling gains were not income subject to tax. He was addicted to gambling -- it was his hobby and it provided him with the excitement he craved. Although his bets were high at times and his gains substantial, it could not be found that, during the years in question, he had conducted an enterprise of a commercial character in relation to his betting activities or had so organized these activities as to make them a business, calling or vocation.

Respondent's counsel referred the Court to the following quotations from the same cases. In *Balanko v. M.N.R.* 81 D.T.C. 887, the Court stated at page 888:

> While risk-taking is necessary . . . it is management or minimization of risk which is the characteristic of business activity. . . . There is a total absence of any evidence here which indicates the presence of any organized system for the minimization or management of risk. This lack of system distinguishes the Appellant, an intemperate gambler, from the professional gambler.

In *Dubrovsky (supra)* the Court stated that this type of case depends primarily on its own particular facts.

In *Morden (supra)* the Exchequer Court stated the following at page 1269:

> To be taxable, a gambling gain must be derived from carrying on a "business" as that term has been defined in s. 127(1)(*e*) (*supra*). Casual winnings from bets made in a friendly game of bridge or poker or from bets occasionally placed at the race track are, in my view, clearly not subject to tax. As stated by Hyndman, D.J. in the *Walker* case, each case must depend on its own particular facts. A reasonable test in such matters seems to be that stated in *Lala Indra Sen*, [1940] 8 I.T.R. (Ind.) 187, where Braund, J. said at p. 218:
>
> If there is one test which is, as I think, more valuable than another, it is to try to see what is the man's own dominant object -- whether it was to conduct an enterprise of a commercial character or whether it was primarily to entertain himself.
>
> . . . I find no evidence that the respondent during the years in question in relation to his betting activities conducted an enterprise of a commercial character or had so organized these activities as to make them a business calling or vocation.

With this background, I have no difficulty in concluding that the Appellant carried on a business of playing pool for profit. He had a system and a reasonable expectation of profit. It was his principal source of income during the years in question. He approached his business in a professional manner:

a) He carefully managed the risks.
b) He was a skilled player.
c) He played Monday through to Friday each week.
d) He spent his afternoons playing snooker to perfect his skills.
e) He played inebriated opponents after 11:00 p.m. to minimize his risk.
f) He won most of the time earning, approximately $200 daily.

g) He drank alcoholic beverages only on weekends when not playing pool to give him a sober advantage over his inebriated opponents.
h) He was calculating and disciplined.
i) It was his primary source of income and he relied on this steady income.

[34] I do not think that one could, on the evidence, reasonably conclude that the factors found by Justice McArthur apply in this case.

[35] A case not mentioned in Justice McArthur's thorough analysis is a decision of Dumoulin J. of the Exchequer Court in *M.N.R. v. Beaudin*, 64 DTC 5077. In that case the issue was the taxability of race track earnings of a country doctor. Apparently the doctor used his horse to pull his buggy to visit patients in the winter and in the summer he raced this versatile steed and won substantially. Dumoulin J. said at page 5078.

> . . . It is certain that this country doctor really appears to have devoted all his spare time, and perhaps even a little more than his spare time, to the equine prowess of his animals.
>
> It still remains that the degree of interest or zeal which a person devotes to a hobby does not change its nature.

[36] One further authority to which I would refer is *The Queen v. Balanko*, 88 DTC 6228, a decision of Collier J. of the Federal Court – Trial Division, in which he held that an inveterate gambler was not taxable on his earnings. At pp. 6229-6230, Collier J. said:

> I adopt, as my own, the conclusions of Mr. Bonner. I quote from his Reasons reported in Balanko versus Minister of National Revenue, 1981 Dominion Tax Cases 887 at 888:
>
> > On the evidence, I would characterize the Appellant's card-playing activities both at the Seroza Club and at the Ventress office as having been undertaken in the character of a customer as opposed to that of a proprietor of a gambling establishment. The Appellant played, he said, because he enjoyed it.
> >
> > The Appellant's trips to the horse races do not appear to have been either regular or particularly frequent during the years in question.
> >
> > The Appellant's evidence as to wagers on sporting events was that he did not enjoy watching sports unless he had made a wager on the outcome. The bets made by the Appellant appear to have varied in amount, but they appear to have

> been very substantial, at least in some cases, and certainly on a cumulative basis.
>
> The Appellant from time to time borrowed money to finance his gambling activities. Save for gambling, he had no substantial source of income, and no significant occupation apart from the previously mentioned employment at the Seroza Club, which was during the latter part of the three-year period.
>
> There can be no doubt that the Appellant freely indulged his inordinate passion for gambling, but I cannot conclude that in doing so he carried on a business. Counsel for the Minister stressed that the Appellant gambled with a view to profit. However, it must be observed that such intention is one shared by all who gamble, and the presence of the intention to win or make money in gambling, which is there in all who gamble, does not lead to a conclusion that all who gamble, or even all those who gamble frequently, are carrying on a business.
>
> Counsel for the Minister stressed that the Appellant took risks, and that he borrowed money in order to carry on his gambling activities. While risk-taking is necessary in a business, it is management or minimization of risk which is the characteristic of business activity. For example, in the case of an insurer, he would have regard to the statistical incidents of losses in deciding whether to insure or how much to charge for coverage. There is a total absence of any evidence here which indicates the presence of any organized system for the minimization or management of risk. This lack of system distinguishes the Appellant, an intemperate gambler, from the professional gambler. In this regard, reference should be made to the decision of Mr. Justice Rowlatt in *Graham v. Green*, (1925) 2 K.B. 37.
>
> I have read all the legal authorities given to me by counsel. As has frequently been said, this type of case must depend primarily on its own particular facts. I refer specifically, however, to *Minister of National Revenue v. Morden*, 61 DTC 1266. I find here, as Mr. Justice Cameron did there, this taxpayer's gambling activities in 1974, 1975 and 1976, did not amount to a calling, or the carrying on of a business.

The result of these cases is that certain types of gambling can in some circumstances be a business but it is a rare circumstance.

[37] The gambling cases fall into three broad categories:

(a) There are cases involving the gamblers for whom gambling is a pleasurable pursuit. They are not taxable even though they do it regularly, even compulsively and with some sort of organization or system. *Graham v. Green*, *Balanko*, *Markowitz v. M.N.R.*, 64 DTC 397, *Walker v. M.N.R.*, 52

DTC 1001, and *Beaudin* and *Epel v. The Queen*, 2003 DTC 1361, are examples.

(b) Gambling gains have been held to be taxable where the gambling was an adjunct or incident of a business carried on, for example by a casino owner who gambles in his own casino or an owner of horses who trains and races horses and who bets on the races; (*Down* or *Badame v. M.N.R.*, 51 DTC 29).

(c) Gambling gains have also been held to be taxable where a person uses his own expertise and skill to earn a livelihood in a gambling game in which skill is a significant component (for example the pool player who, in cold sobriety, challenges inebriated pool players to a game of pool). Another more flamboyant example is the professional riverboat gambler.

[38] Which side does this case fall on? The determination is not an easy one, largely because of the size of the numbers. We have on the one hand the fact that lottery winnings have never been taxed in Canada and the general perception that lottery winnings are not taxable is deeply embedded in the Canadian fiscal psyche. On the other hand, we have the argument that playing the lotteries, which certainly has a profit motive, is just like any other activity: if you do it often enough it becomes a business. For reasons set out below I do not think it is just like anything else. Betting on games of pure chance, like lotteries, simply lacks the badges of trade.

[39] A logical corollary of the view that gambling wins are taxable is that if frequent lottery players are going to be taxed on their winnings they should be allowed to deduct their losses. These are, however, policy considerations that are in Parliament's realm, not the court's. The court is being asked to apply the traditional tests of business activity to a game of pure chance with which the usual indicia of commerciality simply do not fit. The appellants' activities in playing sports lotteries fall in my view within neither categories (b) nor (c) of the three categories set out above.

[40] Counsel for the respondent lists a number of facts that he submits prove the appellants were engaged in a business. Some of them are:

- The appellants did not have jobs, but rather lived on the proceeds of their sports lottery play;

- The appellants played in a number of jurisdictions and moved near the Quebec — Ontario border to facilitate this multi-jurisdictional gambling;
- The appellants considered and compared the lottery corporations' odds with the Las Vegas odds;
- The appellants only chose long shots with high payout potential;
- The appellants used a computer program to come up with combinations of long shots;
- The appellants structured their bets to maximize retail outlet payouts;
- The appellants bought a significant number of tickets, spending a significant amount of money on a regular basis;
- The appellants bought tickets at various retail outlets;
- The appellants requested volume discounts from retailers and only dealt with those who agreed;
- The appellants used up to 15 paid helpers to handle the purchasing and checking of the tickets; and
- The more the appellants won, the more they bet.

[41] It is suggested that the appellants must have had a system because they were so successful and that that system involved buying a significant number of tickets on long shot outcomes, which, it is argued, minimized their risk, because it ensured that if they did win, they won big. For the reasons that I set out below this strikes me as a *non sequitur*.

[42] I shall deal with the last point first. If I understand it correctly it is this: since you won it proves you must have had a system and therefore a business. If you had lost it would have proved you had no system and therefore no business and you could not have deducted your losses. This contention is about as classic an exposition as I have ever seen of the logical fallacy *post hoc ergo propter hoc*. It is true, they won, but to say they won because they had a system has no basis in the evidence at all. They won in spite of having no system. If one is looking for a pattern it is that they bet massively and recklessly and in those games where they could, they bet on long shots. Certainly it meant that if they won they won big, but the converse is that if they lost they lost big and given the astronomical odds against winning, their chances of losing were far greater than their chances of winning.

[43] It is said in some cases that one of the features of a business is the steps taken to minimize risk. If that is so the appellants' huge investment in long shots is the antithesis of the minimization of risks.

[44] All of the other points listed are consistent with and indeed point to compulsive gambling rather than a business.

[45] Counsel for the respondent says that the huge number of purchases, for a significant dollar value, covering multiple outcomes, demonstrates that the appellants had a system and that it must therefore follow that they were engaged in a business. With respect, I am unable to agree with this contention. It is true that the appellants bet significant amounts on dozens of different parlay combinations at a time. For each combination, they purchased a large number of tickets at various outlets throughout the city. They then paid their friends to drive around and pick up all of their tickets. However, in my view, the administrative complexity of their purchasing pattern was the result of the OLG's imposition of limits on the number of wagers per ticket and sales per outlet. If there were no such limits, the appellants could have purchased a few, high-wager tickets at a single location. This is no different from a Las Vegas gambler placing large stacks of chips all over the roulette table, for one spin of the wheel. The mere complexity of the appellants' purchasing pattern does not make it a system that would transform their winnings into business income.

[46] The problem with pointing to the sheer volume of bets placed as an indication of a business is that in the case of gambling a large number of bets in itself is not indicative of anything other than a tendency to bet heavily. If you flip six houses in a year the chances are you have lost your fiscal innocence and become a trader. Six stock trades justify no similar conclusion. How many betting transactions does it take to turn a bettor into a professional gambler? I do not think that sheer volume of bets is a reliable guide. Suppose a person places 20 Lotto 6/49 bets on each draw. That works out to 2,080 in a year. That is a high number. In the case of any other commodity, even shares, it could indicate a trading activity. I do not think it does so in the case of lottery betting. The volume of bets is not, however, in the case of gambling, an indication of a business or a professional gambler. Indeed, it is more likely an indication of the precise opposite.

[47] Professor Garry Smith's evidence on the odds in gambling and the characteristics of professional gambling was very helpful. I accept his conclusion that given the rigid game structure, the artificial winning caps and the minimal impact (if any) of sports-related knowledge, sports lottery parlay games offer overwhelming odds against a player's succeeding on a regular basis. Without some kind of system to "beat the house", you could not reasonably expect to earn a profit. However, Professor Smith said that he knew of no system that could "beat

the house" in sports lottery parlay games. Because there is no such system, and the odds are so overwhelming, professional gamblers do not play parlay bets, which they call "sucker bets". When asked whether he thought that the appellants' purchasing pattern could be considered such a system, he stated that it was "preposterously risky" and in fact should be characterized as a "risk maximizing" system. I agree.

[48] This conclusion is consistent with the case law on gambling. The appellants are not professional gamblers who assess their risks, minimize them and rely on inside information and knowledge and skill. They are not like the racehorse-owner, who has access to the trainers, the horses, the track conditions and other such insider information on which to base his wagers. Nor are they like seasoned card players or pool players who prey on unsuspecting, inexperienced opponents. Rather, they are more accurately described as compulsive gamblers, who are continually trying their luck at a game of chance.

[49] On these facts, I have concluded that their gambling activities were of a personal nature. Accordingly, their winnings are not business income pursuant to subsection 9(1) of the *Act*. They are capital gains, and as such, are not taxable by virtue of paragraph 40(2)(*f*) of the *Act*.

[50] The appeals are allowed with costs and the assessments are referred back to the Minister of National Revenue for reassessment and reconsideration in accordance with these reasons. There should be one set of counsel fee for both appellants.

Signed at Ottawa, Canada this 21st day of December 2006.

"D.G.H. Bowman"

Bowman, C.J.

CITATION:	2006TCC680
COURT FILES NOS.:	2003-2513(IT)G 2003-2514(IT)G
STYLE OF CAUSE:	Brian Leblanc and Terry Leblanc v. Her Majesty The Queen
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 20, 21 and 22, 2006
REASONS FOR JUDGMENT BY:	The Honourable D.G.H. Bowman, Chief Justice
DATE OF JUDGMENT AND REASONS FOR JUDGMENT:	December 21, 2006

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