

Dockets: 2014-1786(IT)G,  
2014-1787(IT)G

BETWEEN:

MARTIN FOURNIER GIGUÈRE,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeals heard concurrently and consecutive with the appeals of *Antoine Bérubé* (dockets 2014-123(IT)G and 2014-461(IT)G) and of *Philippe D'Auteuil* (dockets 2014-90(IT)G and 2014-1171(IT)G), on September 13, 14, 15, 16, 20, 21, 22 and 23, 2021, at Quebec City, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant: Danny Galarneau  
Bénédicte Dupuis

Counsel for the Respondent: Grégoire Cadieux  
Sonia Bédard

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**JUDGMENT**

The appeals from the reassessments made on April 3, 2013, in respect of the appellant's 2009 and 2010 taxation years are dismissed without costs, in accordance with the attached reasons for judgment.

The appeal from the reassessment made on April 3, 2013, in respect of the 2011 taxation year is allowed in part without costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in order to

reduce the appellant's taxable income for the 2011 taxation year by \$279,830, in accordance with the attached reasons for judgment.

Signed at Montréal, Quebec, this 25th day of November 2022.

“Réal Favreau”

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Favreau J.

Translation certified true  
on this 15th day of October 2024.

Melissa Paquette

Citation: 2022 TCC 132  
Date: 20221221  
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BETWEEN:

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**AMENDED REASONS FOR JUDGMENT**

Favreau J.

[1] These are appeals from reassessments made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended (the “Act”) by the Minister of National Revenue (the “Minister”) on April 3, 2013, in respect of the appellant’s 2008, 2009, 2010 and 2011 taxation years.

**I. Assessment and appeal history**

[2] On April 3, 2013, the Minister reassessed the appellant in respect of the 2008, 2009, 2010 and 2011 taxation years. Under these reassessments, the Minister added the following amounts from the appellant’s poker activities to his income and assessed penalties under subsection 163(2) of the Act:

2008	\$250,679
2009	\$573,882
2010	\$156,855
2011	\$747,444

[3] The reassessment of April 3, 2013, in respect of the 2008 taxation year was made outside of the normal reassessment period for that taxation year.

[4] Following a consent reached before this Court regarding the part of the appellant's appeals that concerns the assessment of penalties set out in subsection 163(2) of the Act in accordance with the reassessments dated April 3, 2013, in respect of the 2008, 2009, 2010 and 2011 taxation years, the appellant's appeals were allowed without costs by way of a judgment dated June 23, 2015, and the reassessments were amended by the penalties under subsection 163(2) of the Act being vacated. Moreover, also by way of this judgment, the appeal from the reassessment in respect of the 2008 taxation year was allowed without costs, and that assessment was vacated.

[5] As a result of a partial consent that was reached by the parties on September 13, 2021, under subsection 172 of the Act, the parties consented that, should this Court decide to tax the appellant's poker earnings as business income, the judgment would be rendered so as to partially allow the appeal with respect to the 2011 taxation year and to amend the reassessment of April 3, 2013, to reduce the appellant's taxable income for the 2011 taxation year by \$279,830 on the basis that this amount—\$279,830—represents the balance due for the appellant's share of the \$8,944,310 amount that Jonathan Duhamel won in November 2010 at the World Series of Poker in Las Vegas.

## **II. Issue**

[6] The only issue before this Court is whether Martin Fournier Giguère's net poker earnings should be included in computing his income as income from a business under sections 3 and 9 of the Act for the 2009, 2010 and 2011 taxation years.

[7] As indicated above, the issue of Martin Fournier Giguère's net poker earnings is not in dispute before this Court.

## **III. Positions of the parties**

### **A. Position of the appellant**

[8] According to the appellant, this Court must determine whether poker is a game of chance (betting) or whether it is a game of skill.

[9] If this Court finds that poker is a game of chance, it must allow the appeals and vacate the reassessments on the basis of paragraph 40(2)(f) of the Act.

[10] Under section 3 of the Act, a taxpayer's source of income must be identified in order to determine how this income will be treated for tax purposes.

[11] A taxpayer's gambling-related activities may be taxable income if they constitute a source of income. As a general rule, earnings from games of chance are not taxable as they do not come from a source of income.

[12] In order to determine whether or not a taxpayer's activities constitute a source of income from a business, the Supreme Court of Canada developed a two-stage approach in *Stewart v. Canada*, 2002 SCC 46 ("*Stewart*").

[13] The first stage consists of determining whether the poker activity is undertaken in pursuit of profit or whether it is a personal endeavour. The first stage is relevant only when there is some personal element to the activity, because when the nature of the taxpayer's activity is not in any way personal, a source of income within the meaning of the Act is inevitably present.

[14] If the taxpayer's activity can be both a hobby and a business, it must be determined whether the taxpayer undertook this activity in a sufficiently commercial manner, namely, with the subjective intention of making a profit, supported by objective evidence of businesslike behaviour (para. 54 of *Stewart*).

[15] When analyzing this subjective intention to profit, it is important to consider all the facts surrounding the taxpayer's activity in light of a variety of factors. In *Moldowan v. The Queen*, [1978] 1 S.C.R. 480 ("*Moldowan*"), the Supreme Court of Canada proposed the following four criteria in order to objectively determine if a taxpayer has a reasonable expectation of profit:

- (a) the profit and loss experience in past years;
- (b) the taxpayer's training;
- (c) the taxpayer's intended course of action; and
- (d) the capability to show a profit.

[16] These criteria do not constitute an exhaustive list of the criteria to be considered, however. The overall assessment to be made is whether the taxpayer is carrying on the activity in a commercial manner. For instance, the case law has

introduced into the analysis of a taxpayer's operation of a business the criterion of risk minimization. Indeed, the courts consider that taking risks is an inherent characteristic of any income-generating activity and that it is the minimization or management of risk that is likely to make such an activity a source of income.

[17] The mere pursuit of profit is not enough to lead to a finding that a taxpayer is operating a business. All the criteria must be analyzed within the specific context of the game in the given case, because it is obvious that all players intend to make a profit when they engage in activities or games.

[18] According to *Cohen v. The Queen*, 2011 TCC 262 ("*Cohen*"), there must be more than the mere hope or desire of winning. There must be a planned and reasonable expectation of profit. The gambling earnings of a taxpayer who intends to win but who is not carrying out his or her activities in a businesslike manner will not generally be taxable.

[19] The second stage of the approach developed by the Supreme Court of Canada in *Stewart*—that it must be determined whether the source of the income is a business or property—does not apply in the present case if the taxpayer's activity does not represent a personal endeavour and if it is determined that the taxpayer had a subjective intention to profit. The appellant acknowledges that this would be business income.

[20] According to counsel for the appellant, applying the criteria established in the case law to the facts specific to the appellant shows that:

- (a) Poker is an activity of a personal nature;
- (b) The appellant's poker activities were used only to generate funds for recreational activities and were not intended to maximize his income;
- (c) Before 2008, the appellant engaged in poker in a recreational and non-competitive manner;
- (d) The appellant testified that he would watch poker tournaments on television and look at forums and blogs on various websites. He himself wrote for a poker blog, describing some of his poker games, among other things. The appellant also developed a coaching business, as part of which he would provide live commentary on certain poker games. The appellant never attended or received any specific, relevant or significant poker training;

- (e) The appellant did not reinvest his poker earnings into the game, nor did he invest his earnings, with the exception of a condominium in Florida and a residence in Quebec City that was purchased with Philippe D'Auteuil. Above all, the appellant was seeking competition, adrenaline, the thrill. The appellant did not have any bookkeeping or accounting, and he did not have any plans for developing a viable business. The appellant's situation was more akin to a pathological gambling problem than reasonable businesslike behaviour with an expectation of profit;
- (f) Even though the appellant won more than he lost during the years at issue, his ability to make a profit was unpredictable and unstable. The appellant could not control the outcomes of the poker games because ultimately, it is chance that determines who wins and who loses;
- (g) The appellant's behaviour did not make it possible for him to minimize risk. He did not choose his opponents, and he limited himself to accessing those tables that were available. He would give himself over to playing at multiple tables simultaneously (up to 12 tables at a time), to the point that he would lose control. The appellant would play while under the influence of alcohol and drugs, and he testified that he was unable to control his "tilt" (behaviour). During the years at issue, the appellant lost 100% of the live (in-person) tournaments that he participated in; and
- (h) The fact that the appellant was playing online frequently and over an extended period of time shows nothing. The number of games and their frequency point to compulsive behaviour and addiction issues more than they attest to the commercialization of an activity.

[21] Counsel for the appellant argue that games of chance do not have the inherent characteristics that are essential to a determination that the appellant was undertaking a commercial activity capable of generating taxable income.

[22] It was demonstrated at the hearing that the excerpts from the various Internet forums and blogs cannot be given much reliability or credibility. This is why the respondent withdrew nearly three quarters of the exhibits from the appellant's record, exhibits which had been consulted for the purposes of writing the appellant's audit report and the expert report of Randal D. Heeb, Ph.D. in Economics, filed in the appellant's record. It is submitted that if the passages from the audit report and Dr. Heeb's expert report that refer to the withdrawn exhibits and that were not proven at the hearing, the audit report and the expert report would be tenuous, even factually unfounded.

[23] Counsel for the appellant are challenging the report by Dr. Heeb, who was retained by the respondent, on several fronts:

- (a) As he has a Ph.D. in Economics, Dr. Heeb does not possess the extensive knowledge or the deep and very technical understanding that an expert in mathematics and statistics requires in order to determine with some degree of scientific certainty whether poker is a game of chance or of skill;
- (b) Dr. Heeb mentioned having testified as an expert in five trials in the United States and one trial in Canada (*Cohen v. Canada (Citizenship and Immigration)*, 2015 FC 1192). Contrary to what the expert would have the Court believe, his findings about poker have never been analyzed, much less endorsed or affirmed, by any court in Canada. On the other hand, in the United States, a trial judge held that poker is a game in which skill predominates over chance, but the appeal court in the same case reversed the trial judgment (see *United States v. DiCristina*, 12-3720 (726 F.3d 3292)) and the Supreme Court of the United States refused to hear the appeal made by the defendant *DiCristina*, thereby ending the debate; and
- (c) The expert's testimony is more similar to the testimony of a fact witness proclaiming himself to be a professional poker player than to the testimony of an impartial and independent expert in economics. During his testimony, the expert referred to his own playing habits, inferred conclusions about the behaviour of players even though he does not possess the required qualifications to do so, and made general statements without any sources to support them. In terms of the expert's overall testimony, he has not submitted an objective opinion to the Court and does not possess the degree of independence and credibility required for his opinion and expertise to be retained.

[24] Counsel for the appellant filed two rebuttal expert reports. The first report is by Mathieu Dufour, who holds a Ph.D. in Mathematics and who wrote his doctoral thesis on game theory. The purpose of Dr. Dufour's report was to analyze and determine the role of chance in the outcome of Texas Hold'em-style poker games. According to this expert, two conclusions must be drawn:

- (a) The outcome of a game of poker clearly depends both on chance—because of the distribution of the cards—and on the skill of the players; and
- (b) In terms of game theory, chance always predominates over skill. According to his statistical analysis of the appellant's results, the appellant's results are not above the average.



[25] Dr. Dufour expressed several criticisms regarding Dr. Heeb's reports, including the following:

- (a) The tests that were carried out were not independent;
- (b) An error in science and logic was committed in that he showed that skill plays a role in poker, but he did not show that skill is preponderant; and
- (c) The [TRANSLATION] "skill contribution measure" that was developed does not meet any of the necessary criteria of a robust and reliable statistical measure.

[26] The second rebuttal expert report is that of Jeffrey Rosenthal, who holds a Ph.D. in Statistics. The purpose of this report was to determine the relative contributions of chance and skill in online poker games and to determine whether the statistical tests carried out by Dr. Heeb adhere to the required statistical conventions.

[27] This expert concluded with certainty that it is not possible to determine, on the basis of the tests and analyses carried out by Dr. Heeb, that skill predominates over chance in poker. According to him, it is not possible to determine how big a part either chance or skill actually plays in poker, and it is undeniable that skill does not predominate over chance, regardless of the hundreds of hands that might be played. He rejected outright the conclusion drawn by Dr. Heeb that after only 3,000 hands, skill eclipses chance.

#### B. Position of the respondent

[28] The respondent pointed out the very broad meaning given to the definition of the term "business" in subsection 248(1) of the Act: "includes a profession, calling, trade, manufacture or undertaking of any kind whatever and ... an adventure or concern in the nature of trade".

[29] According to the analysis in *Cohen*, when a taxpayer's activities involve a personal element (as in this case), the Court must determine if this activity is undertaken in a sufficiently commercial manner so as to be classified as a venture and considered a source of income for the purposes of the Act.

[30] According to *Stewart*, 2002 SCC 46, in order for a taxpayer's activity to be classified as commercial in nature, the taxpayer must have the subjective intention to profit. This determination should be made based on objective factors, and the

relevant activity must have been carried out in accordance with objective standards of businesslike behaviour.

[31] The commercial nature of an activity is characterized by the existence of an organized system with the purpose of managing or minimizing risk. The absence of such a system distinguishes an inveterate player from a professional one (see *Balanko v. M.N.R.*, 81 D.T.C. 887).

[32] Applying the criterion of subjective intention to profit to cases involving gambling or betting earnings “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” (see *M.N.R. v. Morden*, 61 D.T.C. 1266 at 1269).

[33] In *Moldowan*, the following objective factors were used to determine the subjective intention to profit:

- (a) the profit and loss experience in past years;
- (b) the taxpayer’s training;
- (c) the taxpayer’s intended course of action; and
- (d) the capability of the venture to show a profit.

[34] The list of factors set forth in *Moldowan* is not exhaustive, and other factors can be considered.

[35] Applying these criteria to the facts in the present case shows that:

The profit and loss experience in past years:

- The appellant’s audit shows a net worth of \$101,877 in 2007 and \$321,555 in 2008. The appellant himself estimated his poker earnings to be \$290,000 in 2008, which is higher than his earnings of \$250,679 in 2008 as assessed by the Canada Revenue Agency (“CRA”).

Training:

- The appellant read a few books about poker and learned by playing many hands on poker websites;

- The appellant participated in discussion forums regarding strategy; and
- The appellant posted and commented on hands that were played on discussion forums.

The taxpayer's intended course of action:

- Beyond the adrenaline that playing poker gave him, the appellant's testimony and the interviews he gave were to the effect that he was making a [TRANSLATION] "career" out of it and that he liked the attention it gave him;
- In 2012, the appellant gradually became less absorbed in poker, and in 2013 he had definitely turned the page in that his life no longer revolved around poker;
- The number of hours that the appellant devoted to playing poker (30 hours per week) was significantly higher than the number of hours he devoted to his coaching activities (5 hours per week);
- The appellant's income from coaching—\$46,315 in 2008, \$47,775 in 2009 and \$51,222 in 2010—was considerably lower than his earnings from his poker activities, which amounted to \$250,679 in 2008, \$573,882 in 2009 and \$156,855 in 2010; and
- The appellant used two software programs to keep track of his earnings ("Bankroll") on his game records, and he would analyze his monthly statistics.

Capability to show a profit:

- The appellant's earnings from his poker activities amounted to \$250,679 in 2008, \$573,882 in 2009, \$156,855 in 2010, and \$468,614 in 2011;
- According to Dr. Heeb's report, the appellant has a very high skill level, which translates to an expectation of profit of \$0.43 per hand; and
- According to Dr. Rosenthal's rebuttal expert report, the appellant's probability of earning is 79.9% after 58,946 hands played.

Management or minimization of risk in accordance with objective standards of businesslike behaviour:

- When he participated in live tournaments, he often engaged in sharing ("swapping") a percentage of his winnings with and selling ("staking") a

percentage of his winnings to other participants based on the cost of the tournaments:

- under \$3,000: he would assume the costs himself;
  - up to \$10,000: he would stake 50% of his winnings;
  - above \$10,000: he would stake more than 50% of his winnings;
- The appellant provided a list of live tournaments at which he bought percentages from other players. This list does not include the online tournaments in which the appellant participated;
- The appellant used two software programs that allowed him to obtain certain information and some statistics about his opponents' playing habits, including the HUD display and the basic functions of these software programs;
- The appellant adapted his strategies based on the levels of each table and on his opponents' skill level. He would play many hands on low-limit tables with weaker players;
- The appellant would play a great number of hands, namely, between 50,000 and 75,000 hands per month. He would sometimes play long sessions followed by breaks that would last several days; and
- When his account ("Bankroll") on the Full Tilt Poker website was frozen, the appellant considered the possibility of selling, at a discount, the balance, which amounted to over \$100,000 at the time.

Analysis of the categories of players set out by Justice Bowman in *Leblanc v. The Queen*, 2006 TCC 680 ("*Leblanc*")

- The gambling cases fall into three broad categories:
  - (a) ... [T]he gamblers for whom gambling is a pleasurable pursuit ... are not taxable even though they do it regularly, even compulsively and with some sort of organization or system. ...
  - (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 ... .
  - (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 ... .

- Given the facts in relation to the appellant's poker playing, it must be concluded that the appellant's poker activities are not merely a pleasurable pursuit and that he was using his expertise and skills to earn his living at poker, a game in which skill plays an important role.

[36] Dr. Heeb's expert reports contain the following findings:

- Skill predominates over chance in poker, and the appellant demonstrated his superior level of skill;
- The appellant's level of skill is consistent with his earnings;
- This advantage explains the profit that the appellant made insofar as he played often and did so over a long period of time;
- Good players can improve their probability of potentially earning money through the decisions they make. The optimal strategy results in maximizing the probability of winning (this statement is consistent with the findings of Dr. Dufour); and
- Poker players can use their skill to increase their probability of winning, and if they play often, they will increase their expectation of earning money over the long term. A player has an expectation of long-term profit to the extent that the probability that they will earn money exceeds 50%, which is true in the appellant's case (this statement is consistent with the conclusions of Dr. Rosenthal).

Testimony of Martin Fournier Giguère (nicknamed "Dr. Giggy")

[37] Martin Fournier Giguère testified at the hearing to explain where his interest in poker came from and to describe his activities over the course of the years at issue, namely from 2009 to 2011.

[38] He was born in 1987 in Bic, close to Rimouski, and he completed a DCS in social studies at Cégep de Rimouski. After his CEGEP, he enrolled in business administration at Université Laval in Quebec City and he moved to Quebec City, where he rented an apartment with two of his friends. He spent his first summer in Quebec City [TRANSLATION] "partying".

[39] He did only one half-session of the 2006/2007 academic year, and he was playing poker three to four evenings a week with Philippe D'Auteuil, whom he had met at CEGEP.

[40] At the start of 2007, he travelled to Europe with Philippe D'Auteuil and other friends. The group rented a house in the Alps for three to four months. Afterward, he visited cities in France and other cities in Europe, like Barcelona and Amsterdam. Poker matches paid for the trip.

[41] In 2008, he travelled to Australia for three to four months with five other people, including Antoine Bérubé and Philippe D'Auteuil. The group had a temporary place for playing poker. At the end of the trip, the group went to the Fiji islands. The appellant won more money than in 2007, and his earnings were enough to pay for the cost of his trip.

[42] When he returned from the trip, he and Philippe D'Auteuil became co-owners, buying a single-family house in Quebec City. He had a 40% share in the house and occupied the basement. Two roommates, who did not pay rent, also lived in the house. He was 21 years old at the time and had many friends. The house had an open-door policy, and big parties involving between 50 and 100 people often took place there.

[43] Regarding his playing style, the appellant stated that he would play sequences of three or four 12-hour days in a row, after which he would sometimes not play again for one or two weeks. According to the appellant, the estimate of how many hours were played is based on the number of hands played. However, he did not submit any records to confirm the number of hours played based on the number of hands played. He often switched computers and did not retain his game data. With respect to the game itself, the appellant stated that he played almost exclusively no-limit Texas Hold'em cash games. On average, he played between 8 and 14 tables at the same time in 2008 and 2009. He participated in tournaments, especially while travelling abroad, which sometimes represented between 10% and 15% of his playing hours. He had little success at tournaments.

[44] In 2009, he went to Las Vegas to participate in the World Series and in five or six other tournaments. He rented a house there for a month in order to provide accommodations for around 10 players from Quebec. He registered for the main tournament ("Main Event") and sold percentages to other players, including to Philippe D'Auteuil. He never won a tournament in Las Vegas. The players from Quebec who were in Las Vegas partied often, and these parties involved drugs and alcohol. When he returned from Las Vegas, he bought a Volcano vaporizer for smoking cannabis and hashish. He stated that he smoked once or twice a day for about 10 years.

[45] In addition, in 2009, he bought a condominium in Hallendale, Florida, for which he made a cash payment of US\$360,000. His plan was to spend his winters there. The reality was that he went there only three times and often lent the apartment to his friends before he sold it.

[46] In 2010, the appellant was living in Quebec City and was becoming increasingly isolated. He was smoking more and more cannabis and was playing at night a good deal, from 8 p.m. or 9 p.m. until around 8 or 9 the next morning. He was a compulsive gambler. He did not like losing and would sometimes play non-stop until he won.

[47] Later that year, he rented a house in Las Vegas as he had done in 2009. He registered for the main tournament and bought 5% of the winnings of Jonathan Duhamel, whom he knew through the PokerCollectif discussion forum on the Internet. As a result of Mr. Duhamel's win in November 2010, the appellant gained US\$450,000 from his investment, US\$300,000 of which was paid to him on the spot. An American tax of 30% on his earnings was deducted at source, but he was able to recover this entire amount in 2011 by claiming gambling losses of an equivalent amount in the United States.

[48] From 2008 to 2012, the appellant acted as a poker coach and made videos for the BlueFire Poker Training website at a rate of \$500 per video. He also shared his poker knowledge with other players on a one-on-one basis, charging between \$100 and \$400 per hour. He stated that he earned between \$40,000 and \$50,000 a year from these activities and that this income was reported in his income tax returns.

[49] From 2008 to 2012, the appellant used the software programs Hold'em Manager and Poker Tracker to retain his personal statistics, including his game history, the number of hands played and his earnings. These programs namely collected and retained his statistics based on cards received and the habits of the other players against whom he was playing.

[50] In 2012, he gradually became less absorbed in poker and began focusing on golf. In 2013, he began to have health problems as a result of his unhealthy lifestyle (lack of sleep, psychosis, stress, etc.).

[51] Being a compulsive player, the appellant experienced "tilt," namely, a state of mind in which players get angry and lose their mental clarity. The appellant had a bad temper and would often break his computer and mouse. On one occasion, he fractured his hand by hitting the garage wall at his Quebec City residence. He stated

that he is now more “zen” and has better control of his emotions. He meditates and practises Buddhism and martial arts.

[52] During cross-examination, the appellant stated that he did not provide his game records because he did not have them. He played 95% of the time on the Full Tilt Poker website and only 5% of the time on the PokerStars website. This was because he could not play cash games on the PokerStars website.

[53] In the request for information regarding his tax returns that had been filed with the CRA, the appellant indicated that between January 1, 2008, and December 31, 2010, he played on the Full Tilt Poker, PokerStars, PartyPoker and Ultimate Bet poker websites, and that he used the Hold'em Manager and Poker Tracker statistics software programs.

[54] In terms of his playing time, he indicated that at the beginning, he was playing approximately 30 hours per week and that later, his playing time was 10 hours per week, which translates to approximately 8,000 to 10,000 hands per week. According to the appellant, this information varies a great deal.

[55] In the request for information mentioned above, the appellant confirmed that he had acted as a private coach for certain poker players. He made videos, which he sold on the BlueFire Poker Training website. Players had to subscribe to gain access to this website.

[56] Once again in connection with the above-mentioned request for information, the appellant submitted, as an appendix to his response, a list of the live tournaments that he participated in during the period. This list includes 14 tournaments, all of which he lost. However, he had sold percentages to other players for the most expensive half of the tournaments.

[57] In addition to the list of live tournaments, the appellant provided lists of the tournaments that he had bought percentages in and from which he had made money (six events). During his testimony, the appellant reported that he had bought percentages in about 10 other events, from which he had not earned any money.

[58] During the cross-examination of the appellant, the respondent submitted into evidence several excerpts from personal blogs containing information about, among other things, the number of hands played by the appellant. In one of these blogs, the appellant reported that, on February 26, 2009, he had played, easily, between 50,000 and 60,000 hands a month and that he was hoping to play 80,000 hands that coming



March. In July 2009, the appellant posted to the same blog a screen capture of his Full Tilt Poker game information for the period spanning January 1 to July 26, 2009. The screen capture shows that during this period and on this website alone, he had played 179,277 hands in 234.25 hours, which is an average of 765.32 hands per hour.

[59] On September 8, 2007, the appellant posted information on his blog that showed he had won \$32,250 in eight days. On February 21, 2010, he reported having played 60,000 hands in February and having lost \$20 0000.

[60] Once again on his blog, the appellant reported that on October 21, 2010, he had played 75,360 hands and that he had played until he had recovered his losses. The chart shown on the blog is an excellent example of performance analysis. On this same page, the appellant reported that he had access to all the hands that he had played over the course of the year on the PokerStars and Full Tilt Poker websites. In his blog entry for October 31, 2010, the appellant reported that he had played 88,000 hands in one week alone.

[61] In his blog entry for November 12, 2010, the appellant made reference to Jonathan Duhamel's win at the world poker championship, reporting namely that he had bought 5% of Jonathan Duhamel's winnings in the event and that, on the day before the final, he had had dinner with Duhamel and three other players in order to prepare a game strategy to take full advantage of the fact that Jonathan Duhamel had more chips than his opponent because he had eliminated more players.

[62] During the cross-examination of the appellant, the respondent submitted into evidence excerpts of interviews that the appellant gave and comments that he made on the PokerCollectif discussion forum.

[63] During an interview posted on the Internet on March 20, 2008, while the appellant was in Australia on a trip, the appellant provided information about his game strategy. He stated that he played aggressively, betting heavily and overbidding ("bluffing") often. He also mentioned that he would often add money to the pot when he was not required to do so, in order to force his opponents out of their comfort zone and to make it hard for them to adapt.

[64] In an interview dated October 27, 2009, and posted on the Internet, the appellant reported that he used the HUD poker software, which displays in real time the statistics of the players against whom he was playing, but that he used it only to remind himself of the approximate preflop range of each player.

[65] To illustrate the appellant's reputation as a poker player, the respondent submitted into evidence excerpts from Simon Gravel's book, entitled *Les maîtres du poker* ([TRANSLATION] "Poker Masters"), including the following: [TRANSLATION] "Giguère, who runs the show on \$1,000 tables, has a distinctive style. It is not enough to say he is an aggressive player; rather, he is more reminiscent of an agitator, a provocateur, or frankly of a maniac, to use the commonly used terms. . . . Dr. Giggy is not always bluffing. The ease with which he makes money from his big hands explains why he is so often among the 30 biggest winners in the world in the monthly reviews." The appellant acknowledged that the excerpts about him in the book are a fair representation of the content of the telephone interview that he had with Mr. Gravel.

[66] The appellant also acknowledged that he had been trying to become well-known by participating in discussion forums on the PokerCollectif website. In this regard, the respondent submitted into evidence excerpts wherein the appellant posted hands with unorthodox bluffs to generate discussion around which had worked well and which had not. These excerpts are interesting because they illustrate the psychology of the game.

#### Auditor's evidence

[67] Mathieu Marois testified on behalf of the CRA as the auditor of the appellant's file. He is an expert in business valuation and has a bachelor's degree in business administration and a certificate in accounting, C.G.A., C.B.V., and E.E.E.

[68] The audit report, dated March 11, 2013, was entered into evidence and the facts stated therein were not contested, except the conclusions that were drawn based on the excerpts from the various online forums and blogs, which the respondent did not enter into evidence. The audit period covers the 2008 to 2011 taxation years.

[69] The appellant had responded to a questionnaire about his gambling habits at the start of the audit, but it was not possible for an initial interview with the appellant to be carried out as his counsel at the time had opposed the meeting and all direct communication with the appellant.

[70] According to the information provided by the appellant, he mainly carried out his activities on the following poker websites: PokerStars, Full Tilt Poker, PartyPoker and Ultimatebet. He also participated in live poker tournaments, including the World Series of Poker in Las Vegas and the WRT in Niagara Falls.

[71] According to the appellant, he played around 10 hours of online poker per week, at a rate varying between zero and five times per week, which translates to about 8,000 to 10,000 hands per week.

[72] The appellant acknowledged having used the software programs Hold'em Manager and PokerTracker, which saved his statistics, his game history and other data related to his poker activities. The appellant maintained that he had not saved his game statistics, whereas the auditor was able to note the opposite.

[73] The appellant did not provide any game records from the poker websites he visited, nor did he provide the game statistics that were saved in the software he had been using while playing poker online. Counsel for the appellant stated in writing that the game records from the Full Tilt Poker website were not available and that he and his client would not take steps to obtain the above-mentioned records from the other gambling websites.

[74] The appellant's unreported business income was determined using the net-worth method following an audit of the appellant's personal bank records; his credit card statements; the Equifax report; the land register in relation to the residence that the appellant had acquired, which was located at 3637 Robert-Lepage Street in Quebec City; the appellant's file at the Société d'assurance automobile du Québec; various interviews given by the appellant; and other information about the appellant that was available on the Internet.

[75] The appellant's net worth was compiled following consideration of a document entitled "Sommaire de l'actif et du passif à partir de février 2012" ([TRANSLATION] "summary of assets and liabilities from February 2012"), which the appellant's counsel submitted at the initial interview with the appellant. The overall discrepancies revealed by the net worth are consistent with those revealed by the deposits analysis.

[76] As poker was the appellant's only income-producing activity, the auditor treated the discrepancies established through net worth as originating exclusively from unreported poker earnings. According to the auditor, the appellant's poker earnings came from his online matches, from live poker tournaments, from swaps with other players of percentages of the entry costs to various tournaments (for example, the appellant swapped percentages with champion Jonathan Duhamel at the 2010 World Series of Poker, which earned him a profit of close to \$450,000), and from his activities as a poker coach, for which he was paid between \$100 and

\$400 per hour to share his knowledge with other players who, like him, specialized in online poker.

[77] The appellant's poker activities allowed him to make a profit of over \$1,700,000 over a four-year period.

[78] Again according to the audit report, the appellant managed to acquire, using his poker earnings, three significant assets over the course of the audit period. He acquired a 2008 Buick Enclave at a cost of \$43,855.32, which he paid for by cheque. He acquired 40% of a residence for a total cost of \$527,500—without taking out any type of loan—and he also acquired a condominium in Florida at a cost of US\$267,777.17, which was paid for by way of a bank transfer. These asset acquisitions show that the appellant believed he was in a position to continue making a considerable profit and that he would be able to continue supporting himself in the future using his poker profits.

Expert reports submitted by the respondent

[79] The expert called by the respondent was Randal D. Heeb, Ph.D. (Economics), an economic consultant and partner at the economic consulting firm Bates White L.L.C. The Court recognized Dr. Heeb as an expert in economics and game theory. He is a professional poker player in the United States and has been successfully playing poker for over 25 years, both live and online. He has testified and written reports in five cases, including one in Canada (*Cohen v. The Queen*, 2011 TCC 262).

[80] He was called on to summarize and update the opinions that he had expressed in *United States v. DiCristina*, which was heard in 2012 before the U.S. District Court of the Eastern District of New York, 2012 U.S. Dist. Lexis 118037, in an initial expert report dated July 5, 2012, in a supplemental expert report dated August 13, 2012, and in a statement dated August 20, 2012, all of which concerned whether skill predominates over chance in no-limit Texas Hold'em-style poker games played online.

[81] Dr. Heeb wrote an initial report dated August 21, 2020, to which he attached the reports written for *DiCristina*. Following an analysis of data provided by PokerStars, representing 415 million hands of no-limit Texas Hold'em cash games played on the PokerStars website (the "PokerStars Data") in this U.S. dispute, and following an analysis of data obtained from HandHQ, an independent data source, representing observational data of over 170 million PokerStars hands of poker for the same period, that is to say from April 2010 to March 2011, at the same game

level as the PokerStars Data (it must be understood here that this data essentially underlies the PokerStars Data, as observed from an independent source), Dr. Heeb concluded that poker is a game in which both skill and chance play a role in determining the outcome of the game, but that the skill of the player predominates over chance.

[82] His opinion is based on the following factors in particular:

- Poker is a game that involves a considerable number of complex decisions that can affect the outcome of the game;
- Many people live off poker and win on a regular basis;
- Successful players regularly win more often than less successful players, and this is the case with virtually all opening hands;
- The skill level of the players based on the statistical analysis of the PokerStars Data, taking into account the many variables related to statistics and the tactics used by the players, is a good indicator of outcomes (i.e., how much money a player will win for each game played);
- Monte Carlo simulation techniques have shown that the most-skilled players outdo the least-skilled players at every level of the game. The purpose of this exercise was to determine how many hands it would take for a skilled player to dominate a less-skilled player in at least 90% of cases (i.e., winning more money or losing less money);
- Several other independent tests, each of which tended to show that skill predominated over chance in poker, resulted in a high degree of confidence in this conclusion;
- The analysis of online no-limit Texas Hold'em cash games—played at tables of no more than six players at the \$0.50/\$1 to \$10/\$20 levels—allowed the expert to formulate the opinion that poker is a game wherein skill predominates over chance, as it does for a number of other similar poker games;
- A player's skill is even more important in live games because players must [TRANSLATION] “read” their opponents and deduce which cards their opponents have;
- In response to a question of the court in *DiCristina*, Dr. Heeb stated that in his opinion, the contribution of skill relative to the contribution of chance in poker

is at least 81% for skill and 19% for chance, after 300 hands of play. After 3,000 hands, skill clearly predominates over chance;

- In response to the arguments and observations made by Dr. David DeRosa, the expert retained by the U.S. government in *DiCristina*, Dr. Heeb explained that more players lose rather than win money because of the fee required by the operator of the poker games, commonly referred to as the “rake”, which is calculated based on a small percentage that is deducted from each pot that is won; and
- In his statement dated August 20, 2012, which was in response to a letter from the U.S. government dated August 17, 2012, Dr. Heeb, among other things, refuted the government’s argument to the effect that a poker player’s skill should be measured in terms of each hand that is played rather than over a longer period of time reflecting the actual number of hands played.

[83] In the last part of his report, Dr. Heeb provided an overview of the academic literature on skill and chance in poker. The most interesting study was the one conducted in 2019 by computer science experts from Carnegie Mellon University who demonstrated that Pluribus, an artificial intelligence bot, was able to beat an elite group of five professional players at a six-player table playing no-limit Texas Hold’em over the Internet. The study, which examined a sequence of 10,000 hands, showed that Pluribus clearly outdid the professional players.

[84] Dr. Heeb wrote a second report dated September 8, 2020, after being asked by the respondent to assess whether the appellant showed great skill in poker (if possible, how much skill) and whether the appellant’s poker earnings in 2009, 2010 and 2011 corresponded with his skill level. To carry out this task, the expert consulted his reports in relation to *DiCristina* as well as public documents, including Simon Gravel’s book *Les Maîtres du poker*, interviews, excerpts from discussion forums and several other documents and videos on the Internet and data from HandHQ regarding bets from \$0.50/\$1 to \$10/\$20.

[85] According to the HandHQ data, the appellant played 58,946 hands and won \$25,563, for an average of \$0.43 per hand for the period from April 2010 to March 2011. Dr. Heeb compared these results to those of three comparison groups, namely the [TRANSLATION] “total population”, which consisted of all the players; the [TRANSLATION] “recreational players”, which consisted of all the players who had played fewer than 1,000 hands and half the players who had played more than 1,000 hands; and the [TRANSLATION] “very skilled players”, which consisted of half of the players who had played more than 1,000 hands but who were excluded from

the [TRANSLATION] “recreational players” and who had made a per-hand profit that was above the average in the first two-thirds of their hands. The [TRANSLATION] “recreational players” category represented 90.8% of the players who had played in \$10/\$20 games and 88.8% of the players who had played in \$5/\$10 games. As a result, the [TRANSLATION] “very skilled players” category represented 9.2% of the players who had played \$10/\$20 games and 11.2% of the players who had played \$5/\$10 games.

[86] Dr. Heeb’s comparisons between the appellant’s results and those of the various groups of players enabled him to conclude that:

- After 58,946 hands, the average per-hand results for the players in the [TRANSLATION] “total population” category was negative at \$0.16 per hand;
- It was very likely that, after 58,946 hands, the appellant would obtain more profitable results than a player in the [TRANSLATION] “total population” category;
- On a yearly basis, 37.5% of the players in the [TRANSLATION] “very skilled players” category, who played the same number of hands and with the same combination of games with \$5/\$10 and \$10/\$20 bets as the games played by the appellant, had an expectation of making a profit, and the most skilled players in this category were able to win on a regular basis and earn a living playing poker;
- After 58,946 hands, the players in the [TRANSLATION] “very skilled players” category were 88.3% more likely to get better results than the [TRANSLATION] “recreational players”;
- The appellant was a very skilled player whose profit-per-hand results exceeded not only those of players in the [TRANSLATION] “recreational players” category, but also most of the results obtained by players in the [TRANSLATION] “very skilled players” category;
- The players who made up the [TRANSLATION] “recreational players” category had a negative expectation of profit at \$0.67 per hand whereas the appellant had a real positive result of \$0.43 per hand, which placed the appellant in the 99.96th percentile among the players in this category in terms of anticipated profit outcomes. A player in this category had only a 0.04% chance of winning as much as the appellant after 58,946 hands, which translates to four players out of the 10,000 players in this category; and

- Compared to the players in the [TRANSLATION] “very skilled players” category, the appellant was in the 94.28th percentile of players in terms of earnings.

[87] The expert retained by the respondent also wrote a rebuttal expert report dated November 25, 2020, following the report by Professor Jeffrey Rosenthal, one of the two experts retained by the appellant. After reviewing Professor Rosenthal’s report, Dr. Heeb adhered to the opinions he had provided in his two previous reports. According to Dr. Heeb, poker is a game in which the part played by the skill of the players predominates over the part played by chance in determining the outcomes of the games. Moreover, the expert reasserted that the appellant was a very skilled poker player as he was in the 95.95th percentile, on the basis of his per-hand earnings, among the players in the [TRANSLATION] “total population” category and in the 99.96th percentile among the players in the [TRANSLATION] “recreational players” category.

[88] Dr. Heeb also estimated that the appellant had a 79.9% probability of earning the average annual salary of a U.S. entrepreneur, namely US\$50,000, and that he had a 98.6% probability of earning an annual net profit, assuming he committed to playing poker on a full-time basis.

[89] On July 14, 2021, Dr. Heeb wrote a separate rebuttal expert report in response to the report by Dr. Mathieu Dufour, who was one of the two experts retained by the appellant. After carrying out an exhaustive review of Dr. Dufour’s report, Dr. Heeb still maintained that poker is a game of skill in the sense that skill is a more important factor than chance in determining the outcome in poker. Contrary to the opinion expressed by Dr. Dufour, Dr. Heeb was of the opinion that the appellant was a very skilled player and that his substantial and repeated financial successes in the game of poker were consistent with his high level of skill.

[90] Dr. Heeb first addressed and refuted the three main areas of disagreement brought up by Dr. Dufour, namely:

- that the various skill criteria used are not independent;
- that the proposed criteria and analyses are criteria to determine whether the degree of skill in poker is above zero, not to determine whether skill plays a greater role than chance; and



- that the measure of the degree of skill lacks a reliability index (i.e., a margin of error), has no unambiguous definition, does not measure the intended concept—skill—and does not produce consistent results.

[91] Next, the expert clarified points that were sources of confusion, including the skill criterion, how the number of hands played was calculated, and the rate at which a professional poker player who is playing online plays games. With respect to this last point, Dr. Heeb discussed three possible sources of confusion.

[92] The first source of confusion has to do with the number of live games played by professionals. According to Dr. Heeb, the rate at which a professional plays live is about 30 hands per hour, namely 300 hands during a daily 10-hour session and 1,500 hands during a 50-hour week, while professional online players will normally play 50 hands per hour at each table at which they are playing.

[93] The second source of confusion concerns the number of tables at which a player can simultaneously play online. According to Dr. Heeb, experienced players can easily play at 4 tables simultaneously and some players can even play at up to 12 tables or more at the same time. A player who is playing at 4 tables simultaneously for 10 hours per day, 5 days per week will have played 10,000 hands in a week (namely 50 hands an hour x 4 tables x 10 hours a day x 5 days a week).

[94] The third source of confusion relates to the appellant's annual rate of play because the experts focused only on the data obtained from HandHQ, data which refers to only one game platform (PokerStars) and only to bets of between \$0.50/\$1 and \$10/\$20 over a period of 12 months ending in March 2011. In the appellant's case, only 58,946 hands were taken into account despite the fact that he acknowledged having played a great deal on at least two other sites: Full Tilt Poker and PartyPoker. As a result, the number of hands played by the appellant that were taken into account represents only a tiny fraction of the number of hands he actually played over the course of a year.

[95] Dr. Heeb provided details regarding the commission rate required on the PokerStars website (the rake) because Dr. Dufour had assumed that this rate was 5% of the bets. According to Dr. Heeb, this rate is incorrect and has the effect of skewing the impact of the rake substantially. The real rake rate charged by the PokerStars website is about 5%, up to a maximum of \$3 for bets of \$5/\$10 and \$10/\$20. After the pot of a game reaches \$60, there is no added rake. The impact of the rake per hand per player for the period for which the PokerStars data is available is \$0.18 per hand per player for bets of \$10/\$20 and \$0.16 per hand per player for bets of \$5/\$10.

Expert reports submitted by the appellant

[96] The first expert called by counsel for the appellant was Jeffrey S. Rosenthal, who holds a Bachelor of Science in Mathematics and Physics and in Computer Science from the University of Toronto (1988) and a Ph.D. in Mathematics from Harvard University (1992). He has been a professor of statistics at the University of Toronto since 1993.

[97] He was tasked with assessing the relative contributions of skill and chance as factors for online poker players and, specifically, with reviewing and commenting on the various reports produced and conclusions drawn by Dr. Heeb in the dispute between the appellant and the CRA. Professor Rosenthal produced a report dated October 19, 2020, and testified at the hearing. To carry out his task, Professor Rosenthal had access to Dr. Heeb's various reports from *DiCristina* and from the appellant's case and Philippe D'Auteuil's and Antoine Bérubé's cases; he also had access to financial files and emails regarding the appellant's winnings and losses from his online gambling and the detailed data on the 187 million games played online on the PokerStars website over the April 2020 to March 2011 period.

[98] Essentially, Professor Rosenthal's position is that Dr. Heeb's conclusions that the appellant was an extremely skilled player and that this skill greatly predominates over chance after a few thousand hands are not sufficiently borne out and are even contradicted by the appellant's actual results, which show high probabilities of losing and long periods of substantial losses.

[99] Dr. Rosenthal observed a circularity in Dr. Heeb's analysis in that the players were selected from various categories and assessed using the same data for that year. The same thing happened in order to measure the betting model statistics and the poker earnings that were made.

[100] In the specific case of the appellant, Professor Rosenthal observed that his skill percentage, calculated according to Dr. Heeb's formula, was estimated as being between 0% and 2.4% (based on one hand alone), between 20% and 50% (on a monthly basis), and 59.9% (on an annual basis). During the period when the data was available, the appellant went through a long losing streak (two months), which is not consistent with the winnings models designed by Dr. Heeb for the most skilled players. At the recommended level of 3,000 hands, the appellant's estimated skill percentage did not exceed 16.2%.

[101] The second expert called by counsel for the appellant was Dr. Matthieu Dufour, who holds a Ph.D. in Mathematics from Université de Montréal and who is a member of the Society of Actuaries. Since 2001, Dr. Dufour has been a professor of actuarial science in the department of mathematics at Université du Québec à Montréal, and he has published a number of articles on game theory.

[102] His task, as an independent expert in mathematics, game theory, probability theory and actuarial science, was to analyze and determine the role of chance in the outcomes of Texas Hold'em-style poker games and to establish whether it is possible to play this game with the hope of making positive gains over the long term.

[103] Professor Dufour wrote a report dated June 11, 2021, as well as a reply dated August 11, 2021, to Dr. Heeb's response to his report. To carry out his task, Professor Dufour had access to the notices of appeal and the replies to the notices of appeal regarding the appellant, and to all the expert reports produced by Dr. Heeb and by Professor Rosenthal in the appellant's record.

[104] Professor Dufour testified at the hearing. His testimony and his report emphasized three main areas of disagreement with Dr. Heeb's conclusions. These areas of disagreement are the following:

- Dr. Heeb's assessment criteria are not independent and are all variations of one single criterion, i.e., the observation that on average, the best players within his sample perform better than the players who are not as good. A player's skill may explain some of his or her success, but Dr. Heeb's charts-based demonstration is flawed because the same types of charts are obtained with purely random results caused entirely by chance;
- At no point did Dr. Heeb demonstrate that skill outweighs chance in poker; and
- [TRANSLATION] "the measure of the contribution of the skill" of a poker player, as developed by Dr. Heeb, does not meet any of the necessary criteria of a robust and reliable statistical measure, namely an unambiguous definition, the presence of a confidence interval (margin of error), the capacity to measure the intended object, and consistent results (negative values).

[105] Professor Dufour also concluded that an analysis of the appellant's results, over the period from April 2010 to March 2011, of \$0.40 per hand showed that the

appellant had an a priori probability of only 20.9% of ending the year with at least the earnings he had made, which is absolutely unremarkable and in no way stands out from the average.

[106] In his reply to Dr. Heeb's response, Professor Dufour addressed the following issues, among others:

- The confusion surrounding the conclusions to the effect that [TRANSLATION] “[p]oker involves skill” (laconic conclusion) and [TRANSLATION] “[i]n poker, skill predominates” (flawed conclusion);
- The [TRANSLATION] “measure of skill” assessment criterion; and
- A seasoned player's capacity to take advantage of his or her opponents' weaknesses in an online game.

[107] Regarding the [TRANSLATION] “predominance of skill”, Professor Dufour pointed out that Dr. Heeb did not specifically define the meaning of this concept.

[108] Regarding the [TRANSLATION] “measure of skill” assessment criterion, Professor Dufour argued that this test does not meet the minimum standards of credibility for a statistical test, namely on account of the absence of any kind of confidence interval to validate it.

[109] Regarding a seasoned player's capacity to take advantage of his or her opponents' weaknesses in an online game, Professor Dufour stated, on the basis of the mathematical theorems from game theory, that chance far outweighs skill in terms of a player's success and that, for this reason, many hands are required for a player who is much better than another player to win a convincing victory. According to him, it has not been shown that the appellant had a particular talent for detecting whether or not his online opponents were bluffing.

#### Relevant statutory provisions

[110] The provisions of the Act that apply in this case are paragraph 3(a), subsection 9(1), paragraph 40(2)(f) and subsection 248(1).

[111] Paragraph 3(a) provides that, in computing his or her income, a taxpayer must include income from a source inside or outside Canada, including income from a business. Subsection 9(1) sets out that a taxpayer's income for a taxation year from a business is the taxpayer's profit from that business for the year. Paragraph 40(2)(f)

provides that a taxpayer's gain or loss from the disposition of a chance to win a prize or bet, or a right to receive an amount as a prize or as winnings on a bet, is nil. Subsection 248(1) specifies that the definition of the term "business" includes a profession as well as an undertaking of any kind whatever and an adventure or concern in the nature of trade.

[112] These provisions of the Act read as follows:

**Income for taxation year**

**3** The income of a taxpayer for a taxation year for the purposes of this Part is the taxpayer's income for the year determined by the following rules:

(a) determine the total of all amounts each of which is the taxpayer's income for the year (other than a taxable capital gain from the disposition of a property) from a source inside or outside Canada, including, without restricting the generality of the foregoing, the taxpayer's income for the year from each office, employment, business and property,

...

**Income**

**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.

**Loss**

**(2)** Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of the taxpayer's loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source with such modifications as the circumstances require.

...

**40(2)(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;

...

**248(1) *business*** includes a profession, calling, trade, manufacture or undertaking of any kind whatever and, except for the purposes of paragraph 18(2)(c), section 54.2, subsection 95(1) and paragraph 110.6(14)(f), an adventure or concern in the nature of trade but does not include an office or employment; (*commerce*)

## **I. Analysis and conclusion**

[113] There is no doubt that no-limit Texas Hold'em-style poker is a game of chance and of skill. The experts who were retained by the parties agree on this matter. The disagreement between the experts pertains to, in essence, the conclusions that were drawn by Dr. Heeb to the effect that skill predominates over chance.

[114] This question, while very interesting, is not really relevant for determining whether the appellant was operating a business during the years at issue because, contrary to the appellant's contentions, poker is not a "bet[ting]" game under paragraph 40(2)(f) of the Act. The right to receive an amount as winnings on a bet is not earned in connection with a lottery scheme or a pool system of betting referred to in section 205 of the *Criminal Code*. It should also be pointed out that section 205 of the *Criminal Code* was abolished by the statute of 1985, R.S., c. 52 (1st Supp.), s. 1, assented to on December 20, 1985.

[115] In general, the parties agree on the criteria to be used to determine whether the appellant was operating a business or not (see paras. 12–19 and paras. 29–34). Where they diverge is in how these criteria should be applied to the particular facts in the appellant's case.

[116] In 2009, 2010 and 2011, the appellant's poker activities were much more than a pleasurable pursuit. He played poker to earn a living; in this sense, he was a professional poker player. He played poker in a non-recreational manner for the purpose of making a profit. He organized his life around poker. He even played while on vacation and would pay for his trips with his poker earnings.

[117] The appellant's poker activities, namely playing, teaching, and participating in discussion forums, represented his only source of income. He devoted almost all his time, apart from when he was sleeping, eating, or partying, to poker.

[118] Playing was by far the main poker activity in which the appellant engaged. The appellant stated that he devoted only five hours per week to teaching poker and only five hours per week to online poker discussion forums.

[119] In his response to the CRA's questionnaire and in his testimony, the appellant grossly underestimated the number of hours he dedicated to playing poker and the number of hands he played. The appellant did not provide his game records and he estimated that he played approximately 10 hours per week, which translates to between 8,000 and 10,000 hands per week. During the hearing, the respondent showed that the appellant was playing more than 50,000 to 60,000 hands per month at a rate of 765 hands per hour and that he even played 86,000 hands in October 2010. At the hearing, the appellant also acknowledged that in 2008 and 2009, he was playing around 30 hours of poker per week and that, subsequently, his playing time went down.

[120] As a matter of fact, the appellant was devoting almost all his time to his poker activities. During his testimony, he answered that he had been spending little to no time maintaining the residence that he had acquired in 2008 with Philippe D'Auteuil. The house had an open-door policy, and big parties involving between 50 and 100 people were often held there. According to him, the water in the pool was not kept clean, garbage was left in the garage, and the housekeepers kept losing heart and leaving, one after another.

[121] Clearly, the appellant had developed an addiction to poker. For him, poker was an obsession, and he sometimes played more than 24 hours in a row.

[122] Before 2008, the appellant had played poker in a recreational and non-competitive manner. He never attended or received any specific poker training. He testified that he would watch poker tournaments on television, that he would look at forums and blogs on various Internet sites, and that he had read a few books about poker. He had learned mostly by playing with his friends three or four times per week and, later on, by playing a considerable number of hands on poker websites.

[123] The audit that was carried out by the CRA showed that the appellant had a net worth of \$101,877 in 2007 and \$321,555 in 2008. The appellant himself estimated his poker earnings to be \$290,000 in 2008, which is higher than the earnings assessed by the CRA, namely \$250,679.

[124] The appellant's earnings from his poker playing amounted to at least \$250,679 in 2008, \$573,882 in 2009, \$156,855 in 2010 and \$468,614 in 2011, namely, a total of more than \$1,450,000 over a period of four years. These results show that the appellant was able to make a profit on a yearly basis both consistently and regularly, even though the appellant could not predictably control the outcomes of the poker games he was playing.

[125] With this level of earnings over such a long period of time, the appellant could reasonably expect to be able to earn his living by playing poker and even to launch a career as a professional player. The purchase of the condominium in Florida and the residence in Quebec City shows that the appellant was confident about reaching his objectives.

[126] The appellant's gambling earnings were also incidental to his coaching activities, from which he earned an income of \$46,315 in 2008, \$47,775 in 2009 and \$51,222 in 2010, amounting to more than \$145,000 over a period of three years.

[127] Despite his unconventional lifestyle, the appellant behaved in a businesslike manner. He played poker to win. He had strategies that he adapted depending on the level of the tables and his opponents' prowess. He would play many hands on low-limit tables with weaker players. He used software programs that allowed him to get information and statistics on his opponents' playing habits. He tracked his earnings on gambling websites using two software programs that also allowed him to analyze his own monthly statistics.

[128] The appellant adopted objective standards of risk management and minimization. When he participated in live tournaments, he often shared percentages with and sold percentages to other players based on the cost of entering the tournaments, and he himself bought percentages from other players, the most well-known being the 5% from Jonathan Duhamel in the World Series of Poker in Las Vegas. When the appellant's Full Tilt Poker account was frozen, he considered the possibility of selling, at a discount, the balance of the account, which amounted to over \$100,000 at the time. These facts show that the appellant's poker activities were aimed both at lowering his risk of suffering losses and at maximizing his income. The appellant consistently reinvested a portion of his poker earnings back into playing.

[129] On the basis of the foregoing, I conclude that on a balance of probabilities, the appellant had the subjective intention to profit by engaging in poker activities and that he was using his expertise and his abilities to earn his living through poker, a game of chance in which skill plays an important role.

[130] When writing these reasons, I had the opportunity to read the judgment that my colleague, Justice Dominique Lafleur, rendered on June 22, 2022, in the file of Jonathan Duhamel (2022 TCC 66). Justice Lafleur allowed the appeal of Mr. Duhamel, another poker player. In my opinion, there is no incompatibility between the present judgment and that of Justice Lafleur because each case turns on



its own facts. The criteria used to determine whether the earnings that the appellant and Mr. Duhamel obtained from their poker activities should be included in the computation of their respective incomes as income from a source that is a business are the same, but the application of these criteria to the facts pertaining to each appellant has led to different results. The same exercise should be carried out with respect to the appeals of Antoine Bérubé and Philippe D'Auteuil, which were heard concurrently and consecutive with the appellant's appeals.

[131] For all of these reasons, (a) the appeals from the reassessments made on April 3, 2013, in respect of the appellant's 2009 and 2010 taxation years are dismissed without costs; and (b) the appeal from the reassessment made on April 3, 2013, in respect of the 2011 taxation year is allowed in part without costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment in order to reduce the appellant's taxable income for the 2011 taxation year by \$279,830.

These amended reasons for judgment are issued to replace the reasons for judgment dated November 25, 2022.

Signed at Montréal, Quebec, this 21st day of December 2022.

“Réal Favreau”

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Favreau J.

Translation certified true  
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Melissa Paquette

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DATE OF AMENDED  
JUDGMENT: December 21, 2022

APPEARANCES:

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