

Dockets: 2014-123(IT)G
2014-461(IT)G

BETWEEN:

ANTOINE BÉRUBÉ,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard together in part on common evidence and consecutively with the appeals of *Philippe D'Auteuil* (dockets 2014-90(IT)G and 2014-1171(IT)G) and of *Martin Fournier Giguère* (dockets 2014-1786(IT)G and 2014-1787(IT)G), on September 13, 14, 15, 16, 20, 21, 22 and 23, 2021, at Québec, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant: Danny Galarneau
Bénédicte Dupuis

Counsel for the Respondent: Grégoire Cadieux
Sonia Bédard

JUDGMENT

The appeal from the reassessment made on May 25, 2012, for the 2008 taxation year is dismissed without costs in accordance with the attached reasons for judgment.

The appeals from the reassessments made on October 16, 2012, regarding the 2009, 2010 and 2011 taxation years are allowed in part without costs and the said

assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in order to reduce the appellant's taxable income for the 2009, 2010 and 2011 taxation years by \$206,920, \$48,939 and \$3,367 respectively.

Signed at Montreal Quebec, this 25th day of January 2023.

"Réal Favreau"

Favreau J.

Translation certified true
on this 30th day of January 2024.
François Brunet, Revisor

Citation: 2023 TCC 12
Date: 20230125
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REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal 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 May 25, 2012, for the 2008 taxation year and on October 16, 2012, for the appellant's 2009, 2010 and 2011 taxation years.

I. Assessment and appeal history

[2] On May 28, 2009, the Minister made an initial assessment against the appellant following the filing of his 2008 income tax return in which the appellant did not report his poker earnings.

[3] After the appellant refused to sign a waiver of the "normal reassessment period" for the 2008 taxation year, the Minister made a reassessment for the 2008 taxation year on May 25, 2012, adding \$377,478 of poker winnings to the appellant's income. This assessment was made within the "normal reassessment period" and was based on an analysis of the appellant's bank accounts.

[4] Following receipt of additional information, the Minister made a reassessment on October 16, 2012, adding a further \$1,271,198 in poker income to the appellant's

income for the 2008 taxation year and assessed a penalty under subsection 163(2) of the Act. This reassessment was made outside the normal reassessment period.

[5] On October 16, 2012, the Minister also reassessed the appellant for the 2009, 2010 and 2011 taxation years, adding the following amounts to the appellant's income:

2009	\$884,323
2010	\$454,867
2011	\$231,208

[6] The Minister assessed penalties under subsection 163(2) of the Act in respect of the additional tax on amounts added to the appellant's income for the 2009, 2010 and 2011 taxation years.

[7] Following an agreement reached before this Court on the part of the appellant's appeals concerning the assessment of penalties under subsection 163(2) of the Act pursuant to reassessments dated October 16, 2012 for the 2008, 2009, 2010 and 2011 taxation years and the reassessment made outside the "normal reassessment period", i.e. the October 16, 2012 reassessment for the 2008 taxation year, the Court rendered the following judgment:

- (a) the appeal from the October 16, 2012, reassessment for the 2008 taxation year was allowed without costs and the assessment was vacated. However, the May 25, 2012, reassessment for the 2008 taxation year is still in dispute;
- (b) the appeals from the October 16, 2012, reassessments for the 2009, 2010 and 2011 taxation years were allowed, without costs, and the reassessments were amended to vacate the penalties assessed under subsection 163(2) of the Act.

[8] The parties entered into a partial consent on September 13, 2021. The parties subsequently agreed that, in the event that the Court were to decide to tax the appellant's poker winnings as business income, judgment be rendered to partially allow cost-free appeals and vary the October 16, 2012, reassessments to reduce the appellant's taxable income by \$206,920 for the 2009 taxation year, \$48,939 for the 2010 taxation year, and \$3,367 for the 2011 taxation year.

II. Issue

[9] The only issue before this Court is whether the net earnings from Antoine Bérubé's poker gambling activities should be included as business income in computing his income under sections 3 and 9 of the Act for the 2008, 2009, 2010 and 2011 taxation years.

[10] The computation of the amounts of net earnings from Antoine Bérubé's poker gambling activities is not in dispute before this Court.

III. Positions of the parties

A. Appellant's position

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

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

[13] According to 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 fiscal purposes.

[14] 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.

[15] To determine whether a taxpayer's activities constitute a source of business income, the Supreme Court of Canada propounded a two-stage approach in *Stewart v. Canada*, 2002 SCC 46 (*Stewart*).

[16] The first stage consists of determining whether the poker activity is undertaken in pursuit of profit or whether it is a personal endeavour. This first inquiry is only relevant when the activity contains personal elements, as when the taxpayer's activity is not in any way personal in nature, a source of income within the meaning of the Act is inevitably present.

[17] If the taxpayer's activity can be both a pastime and a business, it must be determined whether the taxpayer undertook this activity in a sufficiently commercial

manner—with the subjective intention of making a profit—supported by objective evidence of businesslike behaviour (paragraph 54 of *Stewart*).

[18] When analyzing this subjective intention to make a profit, it is important to consider all the facts surrounding the taxpayer's activity in the light of a variety of factors. In *Moldowan v. The Queen*, [1978] 1 S.C.R. 480 (*Moldowan*), the Supreme Court of Canada set out the following four criteria to objectively determine whether 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.

[19] These criteria do not constitute an exhaustive list of the criteria to be considered, however. The overall assessment to be made is whether or not 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 undertaking of a business the criterion of risk minimization. In effect, the courts consider that taking risks is an inherent trait of any income-generating activity and that it is the minimization or management of risk that is liable to transform such an activity into a source of income.

[20] The presence of profit-seeking activities is not enough to lead to a finding that the taxpayer is undertaking a business. All the criteria must be analyzed within the context of the specific game in the given case because, obviously, all players intend to make a profit when they engage in activities or games of this type.

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

[22] The second stage of the approach propounded 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 constitute a personal endeavour and if it is determined that the taxpayer had

a subjective intention to profit. The appellant admits that this would be business income.

[23] According to counsel for the appellant, applying the criteria established by case law to the specific facts relative to the appellant shows that:

- (a) poker is an activity of a personal nature;
- (b) the appellant's poker activities were only used to generate funds for recreational activities and were not intended to maximize his income;
- (c) before 2008, the appellant played poker recreationally and socially; The respondent did not provide proof of the appellant's previous income. The audit of the appellant's activities began on January 1, 2008, without considering the appellant's activities. This demonstrated the lack of seriousness of the auditor's work. He simply assumed that the appellant was operating a business as of January 1, 2008;
- (d) the appellant testified that one of his friends taught him to play poker. The appellant started out as a chess master who had little interest in card games. He learned the rules of poker and read a book about it. The appellant had never attended or received any specific, relevant or significant poker training;
- (e) the respondent has not demonstrated that the appellant's long-term intention was to carry on a business. The appellant testified that following a depressive episode that began after he was diagnosed with type 1 diabetes, he was introduced to poker by a friend. He spent a lot of time playing poker on a very variable schedule. He spent large amounts of money on parties, alcohol and drugs. He became increasingly anxious. As a result, he lost interest in poker gambling and enrolled in a bachelor's degree in mathematics at Laval University, which he was still completing when the case was heard.
- (f) The appellant's testimony demonstrated that, above all, he was seeking competition, adrenaline and the thrill. The appellant challenged individuals considered to be very good heads-up poker players. Heads-up poker is a high-risk game with buy-ins that can amount to several thousand dollars, which can be lost very quickly. According to the appellant, this behaviour was risky, reckless and irrational. When he lost large amounts, the appellant tried to recover them by playing poker for long periods of time or by playing blackjack, a game of chance where the house always wins in the long run;

- (g) The appellant did not do any bookkeeping or accounting and did not establish a strategy to develop a viable business. The appellant was young and naive and had no long term vision for his future. He had no business plan;
- (h) The appellant's situation was more akin to a pathological gambling problem than a business plan. The appellant was anxious and played poker to calm his anxiety, among other things. He clearly had a gambling addiction;
- (i) the evidence adduced during the hearing does not support the view that the appellant has the ability to make a profit. The fact that the appellant generated more gains than losses during the years at issue does not support the conclusion that poker activities necessarily constitute a commercial activity. In this case, the ability to make a profit is unpredictable and unstable;
- (j) according to the evidence in the record and the appellant's testimony, the respondent cannot validly argue that the appellant adopted a behaviour that minimized risk. He often played under the influence of alcohol and often challenged other players. At the hearing, the appellant testified that he challenged a player to make an additional bet at 10 to 1 odds (\$50,000 / \$5,000) simply to ridicule that opponent. The appellant's gambling compulsion annihilated any claim that he was trying to minimize his risk and confirmed his irrational decisions;
- (k) the appellant did not choose his opponents and limited himself to playing at open tables. He played at several tables at once (up to 12 tables at a time) to the point where he lost control;
- (l) the fact that the appellant played online frequently and over an extended period of time does not prove anything. The number and frequency of his bets point to compulsive behaviour and a dependency disorder more than they attest to the commerciality of an activity.

[24] Counsel for the appellant argued that gambling games do not have the inherent characteristics that are essential for a determination that the appellant was undertaking a commercial activity capable of generating a taxable income.

[25] It was demonstrated at the hearing that excerpts found on Internet forums or blogs cannot be attributed much reliability or credibility. This is why the respondent withdrew nearly three quarters of the exhibits from the appellant's file, exhibits which had been consulted for the purposes of writing the appellant's audit report and the expert report of Randal D. Heeb, PhD in Economics, which were submitted to

the appellant's file. It is suggested that if the passages from the audit report and Dr. Heeb's expert report refer to the exhibits which were withdrawn and not proven at the hearing, the audit report and the expert report would be tenuous, even factually unfounded.

[26] Counsel for the appellant attacked the report by the expert Dr. Heeb, who was retained by the respondent, on several fronts:

- (a) as he has PhD in economics, Dr. Heeb does not possess the in-depth knowledge or sophisticated and technical understanding that an expertise 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 did find that poker is a game where skill prevails over luck, but the Court of Appeals overturned the trial judgment in the same case (see *United States v. DiCristina*, 12-3720 (726 F.3d 3292) and the United States Supreme Court declined to hear the defendant *DiCristina's* appeal, which put an end to the controversy;
- (c) the expert's evidence resembled more the testimony of a fact witness proclaiming himself to be a professional poker player than that 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 although he does not possess the required qualifications to do so, and made general statements without any supporting sources. In terms of the expert's overall testimony, he did not adduce an objective opinion to the Court and he does not possess the degree of independence and credibility required for his opinion and expertise to be accepted.

[27] Counsel for the appellant tabled two counter-expertise reports. The first report is from Mathieu Dufour, who holds a doctorate in mathematics and wrote his doctoral thesis on game theory. The purpose of Dr. Dufour's report is to analyze and determine the role of chance in the results of Texas Hold'em-style poker games. According to this expert, there are two conclusions to 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;
- (b) describing game theory, chance always predominates over skill. According to his statistical analysis of the appellant's results, Mr. D'Auteuil's results are not better than the average.

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

- (a) the tests that were carried out were not independent;
- (b) a scientific and logical error was made in that he showed that skill plays a role in poker, but he did not show the preponderance of skill; 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.

[29] The second counter-expertise report is that of Dr. Jeffrey Rosenthal, who holds a PhD in statistics. The purpose of this report is to determine the relative contributions of chance and skill in online poker games and to determine whether the statistical tests carried out by the expert, Dr. Heeb, adhere to the required statistical conventions.

[30] This expert, Dr. Rosenthal, concluded with certainty that it is not possible to determine, based on 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 the degree of importance of either chance or skill in poker, and it is irrefutable 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

[31] The respondent pointed out the very broad meaning given to the definition of the word [TRANSLATION] "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.

[32] 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 to be a source of income for the purposes of the Act.

[33] 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.

[34] 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. MNR*, 81 DTC 887).

[35] Applying the test of subjective intention to profit from 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 *MNR v. Morden*, 61 DTC 126 at page 1267).

[36] In *Moldovan*, 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.

[37] The list of factors set forth in *Moldovan* is not exhaustive and other factors can be considered.

[38] Applying these criteria to the facts in this case shows that:

The profit and loss experience in past years:

- according to the appellant's betting account on the PartyPoker site, as of December 31, 2007, the appellant had a \$243,966 bankroll.

Training

- after losing everything at first, the appellant decided to study the basics of poker more seriously. He read a few books, participated in discussion forums and viewed high-limit games in real time;
- from 2008 to 2010 inclusively, the appellant subscribed to several (5) online poker learning sites;
- he perfected his game by discussing strategies with other players. He posted and commented on poker hands on discussion forums. He watches high-limit games played online and analyzed the hands he played himself.

The taxpayer's intended course of action:

- the appellant dropped out of his actuarial studies to concentrate on poker;
- poker was the focal point of his social life and he continued to gamble online even while travelling, which always included a destination where tournaments were held;
- the appellant spent about 30 hours a week playing online at several tables at once: 1-on-1 tables, 4 to 12 6-player tables and occasionally at 9-player tables;
- between 2008 and 2012, the appellant did not have any other gainful employment.

Capability to show a profit:

- the appellant's poker earnings were \$1,648,676 in 2008, \$884,323 in 2009, \$454,867 in 2010 and \$231,208 in 2011;
- according to the expert, Dr. Heeb, his earnings showed a very high level of skill and an expectation of \$0.13 per-hand profit;
- according to the counter-expertise report from the expert, Dr. Rosenthal, the appellant's probability of gain was 58.4% after 104,185 hands.

Management or minimization of risk according to the objective standards of businesslike behaviour:

- the appellant adapted his game based on his experience and the amount of money available in his accounts (his bankroll). He gradually increased the amount he bet at the tables (\$5/\$10 and \$20/\$40);
- the appellant behaved seriously when he withdrew \$30,000 from his account (bankroll) to secure this money and limit his risk to \$12,000 in order to acquire experience at NL400;
- the appellant used Hold'em Manager software for two or three months. This software is used to identify specific opponents and obtain statistics on how they play. He said he preferred to perform his own analysis of his opponents' strength and learn about his opponents on Internet sites;
- the appellant mainly played online and on several gaming tables at once (1-on-1 tables, 6-player tables and occasionally on 9-player tables);
- the appellant exchanged his money on the PartyPoker website with other players, including Philippe D'Auteuil, for money from other websites because these transactions were more efficient and quicker and avoided delays involved in transferring money through his own bank account;

IV. Antoine Bérubé's testimony

[39] Antoine Bérubé testified at the hearing to explain why he was interested in poker and describe his activities over the course of the years in question, from 2008 to 2011.

[40] The appellant is now 34 years old and lives in Québec. He is the father of a three-month-old baby girl. He has been studying economics at Laval University since 2016.

[41] The appellant completed high school with good grades and wanted to be a mathematician. He is athletic (badminton, soccer) and enjoys playing chess.

[42] When he completed secondary IV, he was diagnosed with type 1 diabetes, which greatly affected him (loss of motivation and withdrawal). After barely completing secondary V, he enrolled in the natural sciences program at CEGEP de

Rimouski. He was not very motivated and did not attend all his classes. He enrolled in courses that he had to repeat during the summer.

[43] In the summer of 2005, when he was 18, he participated in a chess tournament in Montreal which he won. In September 2005, he participated in another chess tournament in Québec. In the fall of 2005, he spent a lot of time playing video games and chess. He then stopped playing sports and started drinking alcohol. He was introduced to poker when he played with a friend who had a suitcase of chips.

[44] In the winter of 2006, he familiarized himself with the rules of poker and made his first deposit on a gambling site. He read a book on the basics of poker.

[45] In the fall of 2006, he played low-stakes games because he did not have any money to gamble with. He tried to steal his friends' email passwords and money from cars. He lost everything and his parents, with whom he was living, refused to lend him money. He dropped out of school and played in a poker tournament in Montreal, which he lost.

[46] In 2007, the appellant withdrew his entire savings of \$1,000 and deposited it on the PartyPoker site. At that time, he played a lot of poker and a little chess. He joined discussion forums and watched the players play. He played in a poker tournament in Cap Rouge and met other players there. The caller indicated that he was playing about 35 hours a week at the time and that he played poker 95% of the time on the PartyPoker website. At the end of 2007, he had a \$150,000 bankroll.

[47] The appellant explained that in 2008 he led a disorderly and wanton lifestyle. He stopped all his physical and sports activities, but kept on playing chess. During the week, he played poker at night and went to bed very late. When he played, he drank liquor and smoked marijuana. On weekends, he went to bars with his friends and went to bed very late. Gambling was omnipresent in his life. He wagered on everything including restaurant bills. When he lost, he became angry and sometimes lost his temper. He was a poor loser and always wanted to get revenge. To make up for his losses, he played blackjack. In 2008, the appellant met Philippe D'Auteuil and Martin Fournier Giguère on discussion forums and when playing games with friends.

[48] The appellant provided explanations regarding the in-person tournaments he played in from 2008 to 2010. He said he participated in about 20 tournaments in which he lost a small amount of money. In addition to the annual tournaments in Las Vegas and the Bahamas, he participated in tournaments in London and Prague with

Jonathan Duhamel and in Amsterdam. During the tournaments in Las Vegas in 2009 and 2010, he rented a residence with friends whose doors were open to Quebec poker players and partygoers.

[49] On February 12, 2010, the appellant signed a contract to purchase a condominium in Sainte-Foy for \$530,000. In this contract, the appellant is referred to as a professional poker player.

[50] The appellant said he only played between 15 and 20 hours per week in 2012, whereas in 2007 and 2008 he could play 30 hours per week. His gambling addiction abated in 2010. He said he started using cocaine at parties in 2010 and that his use increased sharply in the following years.

[51] In 2015, he had a panic attack caused by stress, alcohol and drugs. He took medication for a year.

[52] In 2016, the appellant enrolled in a bachelor's degree in economics and mathematics at Laval University on a part-time basis.

[53] During his testimony and cross-examination, the appellant also provided information on his gambling habits.

[54] He played online poker 95% of the time and in in-person tournaments only 5% of the time. When playing online, he played no-limit cash games. One third of the time, he played 1-on-1 up to four tables simultaneously. Two thirds of the time, he played between 4 to 12 players at once. On average, he played tables of six players at six tables simultaneously.

[55] The gambling limits depended on availability. His gambling limits were mostly \$5/\$10, \$10/\$20, and \$25/\$50. The appellant said he once played \$100/\$200 limit games and lost \$100,000 in one night.

[56] The appellant said that, in his early days, he played exclusively on the PartyPoker site. Subsequently, he also played on the FullTiltPoker site 60% of the time and on the PokerStars site about 20% of the time.

[57] The appellant also admitted that he acquired Hold'em Manager and PokerTracker software in 2008 or 2009. The applications compile statistics including his winnings. He also said he visited sites such as Pokertableratings.com which compile the statistics of player's games and also displayed the earnings of

each player. The appellant said he seldom used this statistical data while he was playing because it made him lose his focus.

[58] The appellant participated in discussion forums on the Pokercollectif site to promote himself and put down other players. He posted high-stake hands. According to him, about 80% of his posts were not poker related. He also admitted that he had granted interviews, including one to Simon Gravel, author of the book "*Les maîtres du Poker*".

[59] From 2008 to 2012, the appellant developed a playing strategy by studying the basics of poker, watching high-limit games and discussing hands with other players.

[60] On cross-examination, the appellant admitted that he had used several pseudonyms when playing on poker sites, including the following:

Roland Thetrault (FullTiltPoker);
Tiltman and Tabarnaanaak (PartyPoker);
Negro Vente 1 (PokerStars).

[61] During the period at issue, the appellant subscribed to the CardRunners site, which shows videos of players in action and explains the reasons for the way they play. The appellant also visited the ducescracked.com, Bluefire Poker, PokerSavvy Plus and Leggo Poker for advice videos.

[62] In 2008, the appellant knew he was a good poker player and thought he was invincible. He was an above-average player because of his experience and his ability to assess his opponents.

[63] The appellant confirmed that from 2008 to 2011 he had no income other than his poker earnings.

V. Auditor's evidence

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

[65] He was assigned the appellant's file in the summer of 2011, and he initially contacted the appellant on August 1, 2011.

[66] The audit report, dated September 26, 2012, was entered into evidence and the facts stated therein were not contested, except with regard to the conclusions that were drawn based on excerpts from various online forums and blogs available on the Internet, which the respondent had not entered into evidence.

[67] The unreported income shown on the May 25, 2012, and October 16, 2012, reassessments for the 2008, 2009, 2010 and 2011 taxation years were based on the records provided by the PartyPoker site. The amounts assessed represent only the profits that the appellant made on this site. They do not take into account the profits that the appellant made on other sites because the information from the other sites was not available. The PartyPoker site is only one of three major online poker sites on which the appellant played.

[68] According to information provided by the PartyPoker site, the appellant participated in poker games on the site on 330 days in 2008, 307 days in 2009, 265 days in 2010 and 266 days in 2011. The appellant played an average of 6.35 days out of 7 every week in 2008. According to a sample taken for 2008, the appellant played approximately 130 hours in April (i.e. 28 days out of 30) and 237 hours in November (i.e. 30 days out of 30). This statistic represents an average playing time of 4 hours and 20 minutes per day in April and 7 hours and 54 minutes in November (an average of 30 to 56 hours per week).

[69] The auditor explained that he chose to gather samples only for 2008 because, starting in 2009, the appellant began to move his poker activities to the FullTiltPoker and PokerStars sites.

[70] An analysis of the appellant's Visa credit card showed that he was in Australia during the months of February and March 2008, which did not prevent him from playing online poker almost every day during his trip.

[71] An analysis of the total winnings made solely on the PartyPoker site showed that his winnings were about \$2,949,171 for 2008 to 2011, an average of \$750,000 per year. The appellant's actual winnings were likely higher because he was playing poker on other poker sites.

[72] An analysis of the appellant's bank statements showed that the appellant deposited tens of thousands of dollars from his poker activities into his bank accounts on a monthly basis. The appellant deposited \$377,478 in 2008, \$842,328 in 2009 and \$468,428 in 2010, even though he had no other income-generating activities.

[73] According to the analysis of the records provided by the PartyPoker site, the appellant has always kept more than \$1,000,000 in his bankroll (money available in his online account) since August 18, 2008. On May 20, 2009, the balance reached \$2,339,904. On August 11, 2011, the day of the initial interview with the appellant, his account balance was \$1,370,986.

VI. Expert reports submitted by the respondent

[74] The expert called by the respondent was Randal D. Heeb, PhD (Economics), a consulting economist and partner at Bates White LLC, an economic consulting firm. The Court recognized Dr. Heeb as an expert in economics and game theory. He is a professional poker player in the United States and he 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.

[75] He was called to summarize and update the opinions he had expressed in *United States v. DiCristina*, United States District Court of the Eastern District of New York, 2012 U.S. Dist. Lexis 118037, in an initial expert report dated July 5, 2012, an additional expert report dated August 13, 2012, and a statement dated August 20, 2012, which addressed the issue of whether skill prevailed over luck in online No-Limit Texas Hold'em poker.

[76] Dr. Heeb, wrote an initial report dated August 21, 2020, to which he attached the reports submitted in *DiCristina*. Dr. Heeb analyzed the data provided by PokerStars on 415 million hands of No-Limit Texas Hold'em poker cash games played on the PokerStars website (the PokerStars Data) in this U.S. case and the data obtained from HandHQ. HandHQ is an independent data source representing observational data from over 170 million poker hands from PokerStars for the same period, i.e. from April 2010 to March 2011, at the same level as the PokerStars Data games (it must be understood here that these data are essentially data that underly the PokerStars Data, as observed from an independent source). After completing these analyses, Dr. Heeb concluded that poker is a game in which both skill and chance play a role, but that the skill of the poker player predominates over chance in this game.

[77] His opinion is based, among other things, on the following factors:

- poker is a game that involves a considerable number of complex decisions which can have an impact on the results;

- many people live off poker and win on a regular basis;
- successful players regularly win more 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);
- the techniques of the Monte Carlo Simulation have shown that the most skilled players dominated the least skilled players at every level of the game. The purpose of this inquiry was to determine how many hands it would take for a skilled player to dominate a less-skilled player in at least 90% of the cases (i.e., winning more money or losing less money);
- several other independent tests, each of which purported to show that skill predominated over chance in poker, resulted in a great deal of confidence in this conclusion;
- the analysis of the online No-Limit Texas Hold'em cash games—played at tables of no more than six players at the levels of \$0.50/\$1 to \$10/\$20—led the expert to formulate his 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 as players must [TRANSLATION] "read" their opponents and deduce which cards their opponents have in their possession;
- in response to a question from the Court in *DiCristina*, Dr. Heeb stated that in his opinion, the ratio of skill relative to chance in poker is at least 81% for skill and 19% for chance, after 300 hands of play. After 3,000 hands, skill clearly dominates over chance;
- in response to the arguments and observations made by the expert who was retained by the American government, Dr. David DeRosa, in *DiCristina*, Dr. Heeb explained that more players lose rather than win money because of the fees required by the operator of the poker game, commonly referred to as the rake, which is calculated based on a small percentage that is deducted from each pot that is won;

- in his statement dated August 20, 2012, which was in response to a letter from the American 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 that would reflect the actual number of hands played.

[78] In the last part of his report, Dr. Heeb provided an overview of the academic literature that addresses the question of skill and chance in poker. The most interesting study was conducted in 2019 by computer science experts from the Carnegie Mellon University. They demonstrated that Pluribus, an artificial intelligence bot, was capable of beating an elite group of five professional players at a six-player table playing No-Limit Texas Hold'em on the Internet. The study, which examined a sequence of 10,000 hands, showed that Pluribus clearly dominated the professional players.

[79] Dr. Heeb wrote a second report dated September 8, 2020, in response to a mandate from the respondent to assess whether the appellant showed great skill in poker (if possible, what level of skill) and whether the appellant's poker earnings obtained over the course of 2009, 2010 and 2011 corresponded with his skill level. To carry out his mandate, the expert consulted his reports in relation to the *DiCristina* case as well as public documents, including Simon Gravel's book entitled *Les Maîtres du poker*, interviews, excerpts from discussion forums and several other documents and videos on the Internet and data from HandHQ regarding the bets from \$0.50/\$1 to \$10/\$20.

[80] According to the HandHQ data, the appellant played 104,184 hands only taking into account his games with bets in the amount of \$10/\$20, and won \$13,451, for an average of \$0.13 per hand over the course of the period from April 2010 to March 2011. Dr. Heeb compared these results to those of three comparison groups, those being the [TRANSLATION] "total population" which consisted of all players, [TRANSLATION] "recreational players" which consisted of all players who had played fewer than 1,000 hands and half the players who had played more than 1,000 hands, and [TRANSLATION] "very skilled players" which consisted of half of the players who played more than 1,000 hands but who were excluded from the "recreational players" and who made a per-hand profit that was above the average in the first two-thirds of their hands. The "recreational players" category represented 90.8% of players who had played in \$10/\$20 games and 88.8% of players who had played \$5/\$10 games. As a result, the "very skilled players" category represented 9.2% of players who had played \$10/\$20 games and 11.2% of players who had played \$5/\$10 games.

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

- after 104,184 hands, the average per-hand results for the players in the "total population" category was negative at \$0.17 per hand;
- it was very likely that, after 104,184 hands, the appellant would obtain more profitable results than a player in the "total population" category;
- on a yearly basis, 50.8% of the players in the "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 104,184 hands, players in the "very skilled players" category were 93.4% more likely to get better results than "recreational players";
- the appellant is a very skilled player whose profit-per-hand results exceed not only those of players in the "recreational players" category, but also most of the results obtained by players in the "very skilled players" category;
- players in the "recreational players" category have a negative expectation of profit at \$0.91 per hand whereas the appellant had a real positive result of \$0.13 per hand, which places the appellant in the 99.1 percentile of players in this category for anticipated profit outcomes. A player in this category has only a 0.9% chance of winning as much as the appellant after 104,184 hands, which translates to four out of 10,000 players in this category;
- compared to players in the "very skilled players" category, the appellant is in the 59th percentile of players in terms of earnings.

[82] The expert retained by the respondent also wrote a counter-expertise report dated November 25, 2020, following the report by Jeffrey Rosenthal, one of the two experts retained by the appellant. After reviewing Dr. Rosenthal's report, Dr. Heeb adhered to the opinions he had voiced in his two previous reports. According to Dr. Heeb, poker is a game in which the skill of the players predominates over chance as a factor in determining the outcomes of the games. Moreover, the expert reconfirmed that the appellant was a very skilled poker player as, based on his per-hand earnings, he was in the 75.29 percentile of players in the "total population" category and in the 99.1 percentile of players in the "recreational players" category.

[83] Dr. Heeb also estimated that the appellant had a 58.4% probability of earning an average annual salary for an American entrepreneur, US\$50,000, and that he had a 66.2% probability of earning an annual net profit, assuming he played poker on a full-time basis.

[84] On July 14, 2021, Dr. Heeb produced another expert rebuttal report to refute the report produced by Dr. Mathieu Dufour, one of the two experts retained by the appellant. After having performed 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 poker outcomes. Contrary to the opinion expressed by Dr. Dufour, Dr. Heeb was of the view that the appellant is a very skilled player and that his substantial and repeated financial successes in poker are consistent with his high level of skill.

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

- that the various criteria of skill used are not independent;
- that the proposed criteria and analyses are actually criteria that make it possible to determine whether the degree of skill in poker is above zero, not whether skill plays a greater role than chance;
- the measure of the degree of skill lacks a reliability index (i.e., a margin of error), has no clear definition, does not measure the intended concept—skill—and does not produce consistent results.

[86] Next, the expert clarified several items that could be sources of confusion, including the criterion of skill, how the number of hands played was calculated and the rate at which a professional poker player plays online. With regard to this last point, Dr. Heeb discussed three possible sources of confusion.

[87] 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, which is to say 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.

[88] The second source of confusion has to do with the number of online tables at which a player can simultaneously play. According to Dr. Heeb, experienced players

can easily play at four 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 (that is to say 50 hands an hour x 4 tables x 10 hours a day x 5 days a week).

[89] The third source of confusion relates to the appellant's annual rate of play because the experts only focused on the data obtained from HandHQ, which refers to only one game platform (PokerStars) and only for bets of between \$.50/\$1 and \$10/\$20 over a period of 12 months, ending in March 2011. In the appellant's case, only 92,653 hands were taken into account despite the fact that he acknowledged having played intensely 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 minuscule portion of the number of hands he actually played over the course of a year.

[90] 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 effect of the rake per hand per player for the period for which the PokerStars data are 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.

VII. Expert reports submitted by the appellant

[91] The first expert mandated by counsel for the appellant was Jeffrey S. Rosenthal, who holds a BSc in mathematics and physics and in computer science from the University of Toronto (1988) and a doctoral degree in mathematics from Harvard University (1992). Since 1993, he has been a professor of statistics at Toronto University.

[92] His mandate consisted of assessing the relative contributions of skill and chance as factors for online poker players and, specifically, to review and comment on the various reports produced and conclusions drawn by the expert Dr. Heeb in the litigation between the appellant and the CRA. Dr. Rosenthal produced a report dated October 19, 2020, and he testified at the hearing. To carry out his mandate, Dr. Rosenthal had access to Dr. Heeb's various reports from the *Di Cristina* case and

from the appellant's case, and the reports from the cases of Martin Fournier Giguère and Antoine Bérubé, as well as financial files and emails regarding the appellant's gains and losses from his online gambling and the detailed data on the 187 million games played online on the PokerStars website over the course of the period from April 2020 to March 2011.

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

[94] Dr. Rosenthal opined that Dr. Heeb's is reasoning in circles in his analysis in that the players were selected for various categories and assessed using the same data from that year. The same procedure was carried out in order to measure the betting model statistics and the poker earnings that were made.

[95] In the specific case of the appellant, Dr. Rosenthal observed that his skill percentage, calculated according to Dr. Heeb's formula, was estimated to be 0%, 45.5% (on a monthly basis), 33.3% (on an annual earnings basis) and 82.9% of total annual earnings for the year the data were from. Over the course of the period for which there was available data, the appellant went through a long losing streak which is not consistent with the models of earnings 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 19.4%.

[96] The second expert called by counsel for the appellant is Dr. Matthieu Dufour, who holds a doctoral degree in mathematics from the Université de Montréal and 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 the Université du Québec à Montréal and has published a number of articles on game theory.

[97] His mandate, 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 poker games and to establish whether it is possible to play this game with the hope of making positive gains over the long term.

[98] Dr. Dufour wrote a report, dated June 11, 2021, as well as an answer, dated August 11, 2021, to Dr. Heeb's response to his report. To carry out his mandate, Dr. Dufour had access to the notices of appeal and the responses to the notices of

appeal relative to the appellant, and to all the expert reports produced by Dr. Heeb and by Dr. Rosenthal in the appellant's file.

[99] Dr. Dufour testified at the hearing. His evidence and his report emphasized three main areas of disagreement with Dr. Heeb's conclusions. These areas of disagreement were the following:

- Dr. Heeb's assessment criteria are not independent and they are all variations of the same single criterion, i.e. the observation that on average, the better players within his sample did better than the less good players. A player's skill may explain a certain portion of their success, but Dr. Heeb's graphics-based demonstration is flawed because the same types of graphs are obtained with purely random results caused entirely by chance;
- at no point did Dr. Heeb demonstrate that skill outweighs chance in poker;
- [TRANSLATION] "the measure of the contribution of the [poker player's] skill," as described by Dr. Heeb, does not meet any of the necessary criteria of a robust and reliable statistical measure, namely that of an unambiguous definition, the presence of a confidence interval (margin of error), the capacity to measure the intended object and consistent results (negative values);
- Professor Dufour also concluded that an analysis of the appellant's results, during the period from April 2010 to March 2011, of \$0.17 per hand yielded an a priori probability of 41.6% of ending the year with at least the winnings that he did obtain, which is absolutely unremarkable and in no way stands out from the average.
- in his reply to Dr. Heeb's response, Dr. Dufour addressed the following issues, among others:
 - the confusion surrounding the conclusions that [TRANSLATION] "[p]oker involves skill" (short conclusion) and [TRANSLATION] "[i]n poker, skill predominates" (flawed conclusion);
 - the assessment criteria of the [TRANSLATION] "measure of skill"; and
 - a seasoned player's capacity to take advantage of their opponents' weaknesses in an online game.

[100] Regarding the [TRANSLATION] "predominance of skill," Dr. Dufour pointed out that Dr. Heeb did not clearly define the meaning of this concept.

[101] Regarding the assessment criteria of the [TRANSLATION] "measure of skill", Dr. Dufour argued that this test does not meet the minimum standards of credibility for a statistical test, namely due to the absence of any kind of confidence interval to validate it.

[102] Regarding a seasoned player's capacity to take advantage of their opponents' weaknesses in an online game, Dr. Dufour stated that, based on mathematical theorems from game theory, chance far outweighed 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 had not been shown that the appellant had a particular talent for detecting whether or not his online opponents were bluffing.

VIII. The relevant statutory provisions

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

[104] Paragraph 3(a) provides that, in computing their income, taxpayers must include income from a source inside or outside Canada, including income from a business. Subsection 9(1) provides that 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) 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) clarifies that the definition of the word "business" includes a profession as well as an undertaking of any kind whatever and an adventure or concern in the nature of trade.

[105] 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*)

IX. Analysis and conclusion

[106] There is no doubt that No-Limit Texas Hold'em 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.

[107] 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 submissions, poker is not a game of the [TRANSLATION] "bet[ting]" type as defined in 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. Moreover, we would like to state here that section 205 of the Criminal Code was abolished by the Act of 1985, R.S.C., c. 52 (1st Supp.) a.1 assented to on December 20, 1985.

[108] In general, the parties agree on the criteria to be used to determine whether the appellant was operating a business or not (see paragraphs 13 to 22 and paragraphs 31 to 37). Where they diverge is in how these criteria should be applied to the particular facts in the appellant's case.

[109] Over the course of 2008, 2009, 2010, 2011 and 2012, 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 winnings.

[110] The appellant's poker playing activities represented his sole source of income during the years at issue.

[111] According to the audit report, the appellant's unreported income for the 2008 to 2011 taxation years, which was based only on information from the PartyPoker site, was at least \$3,219,074. It should be noted here that the PartyPoker site is only one of three major online poker sites on which the appellant played.

[112] Concretely, the appellant spent almost all his time playing poker. According to the information provided by the PartyPoker site, the appellant participated in poker games on the site on 330 days in 2008, 307 days in 2009, 265 days in 2010 and 266 days in 2011. According to a sample taken for 2008, the appellant played between 30 and 56 hours per week on average on the PartyPoker site alone. These hours of play do not take into account the hours that the appellant spent on training, analyzing other players and participating in discussion forums.

[113] The appellant used his poker winnings to acquire a significant capital asset, a residence purchase on February 15, 2010, at a total cost of \$530,000, paid in cash.

[114] The appellant used Hold'em Manager software while playing online poker. He used this software to save his playing statistics, playing history and a great deal of other data on his poker activities. It also provided information regarding his opponents. The appellant used this software to identify players against whom it was best not to play and others against whom it was more profitable to play.

[115] Despite his unconventional lifestyle and tendency to always put down his opponents, the appellant behaved in a businesslike manner. He did not need accounting records or business plans. He was playing to win and knew how to achieve his goal. He avoided playing or played more cautiously against certain players. He adapted his game based on his bankroll to avoid exceedingly high risk situations. The appellant adopted objective risk management and minimization standards. He played several tables at once to maximize his winning opportunities in the shortest amount of time.

[116] With the level of earnings made by the appellant over such a long period of time, I am persuaded that the appellant could reasonably expect to be able to earn his living by playing poker and even launch a career as a professional player. In the deed of purchase for the residence acquired by the appellant in 2010, the appellant was referred to as a professional poker player. The appellant also ended his actuarial studies to focus exclusively on playing poker.

[117] In view of the foregoing, I find that, according to the balance of probabilities, the appellant had the subjective intention of making a 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 ability plays a key role.

[118] For all these reasons, (a) the appeal from the reassessment dated May 25, 2012, in respect of the 2008 taxation year is dismissed without costs and, (b) the appeals from the reassessments dated October 16, 2012, in respect of the 2009, 2010 and 2011 taxation years are partially allowed, without costs, and the said assessments are referred back to the Minister of National Revenue for reconsideration and reassessment in order to reduce the appellant's taxable income for the 2009, 2010 and 2011 taxation years by \$206,920, \$48,939 and \$3,367 respectively.

Signed at Montreal, Quebec, this 25th day of January 2023.

"Réal Favreau"

Favreau J.

CITATION: 2023 TCC 12

COURT FILE NOS.: 2014-123(IT)G
2014-461(IT)G

STYLE OF CAUSE: Antoine Bérubé

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: September 13, 14, 15, 16, 20, 21, 22 and
23, 2021

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: January 25, 2023

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