

CANADA / JUDGMENT

Fadali v. The King

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Docket: 2022-3020(GST)G

BETWEEN: HANI FADALI,
Appellant,
and
HIS MAJESTY THE KING,
Respondent .
Appeal heard on April 13, 14, 15 and 16, 2026 at Toronto, Ontario
Before: The Honourable Justice Perry Derksen

Appearances :

Counsel for the Appellant: Leigh Somerville Taylor

Counsel for the
Respondent: Jacqueline Blackett

JUDGMENT

In accordance with the attached Reasons for Judgment;

The appeal from the assessment dated June 9, 2021, made under the Excise Tax Act in respect of the Appellant's reporting period ending January 31, 2020, is allowed and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment, on the following basis:

The penalty assessed under s. 280.1 shall be recomputed having regard to s. 296(2.1) and the amount of the rebate the Minister allowed; and

The parties shall have until June 19, 2026, to reach an agreement on costs, failing which the Crown shall have until July 17, 2026, to serve and file written submissions on costs and the appellant shall have until August 14, 2026, to serve and file written response submissions on costs. Any submissions shall not exceed five pages. If the parties do not advise the Court that they have reached an agreement on costs and no submissions are received, costs shall be awarded to the Crown as set out in the Tariff.

Signed this 19th day of May 2026.

"Perry Derksen"

Derksen J.

Citation: 2026 TCC 86

Date: 20260519

Docket: 2022-3020(GST)G

BETWEEN:

HANI FADALI,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

Derksen J.

I. Introduction

[1] In 2015, the appellant purchased an interest in the property at 5 Carluke Crescent in Toronto (5 Carluke). Later, an application was made to divide the property into two lots to build a two-storey detached home on each lot. Provisional consent was granted in December 2016, together with a land variance contingent on a by-law coming into force. A revised development plan was approved in July 2017. By July 2018, 5 Carluke had been divided into 5A Carluke and 5B Carluke. The existing house was demolished, and construction of two new homes began.

[2] In the spring of 2019—after the new home was constructed—the property at 5A Carluke was listed for sale, and soon after the appellant moved into that home. Construction of the new home at 5B Carluke was completed a bit later, and that property was also listed for sale in August 2019. By October 2019, 5B Carluke was under contract for a sale at \$4.425 million, and the sale closed in January 2020. The sale of 5A Carluke followed in August 2020.

[3] This appeal concerns the new home constructed at 5B Carluke. But since the facts and circumstances relating to 5B Carluke are so interwoven with 5A Carluke, it is necessary to refer to both. The appellant says the new home at 5A Carluke was built for his mother, but she was unable to move in. He also says that the new home on 5B Carluke was designed for his liking, and it was intended to be his personal residence. There is no dispute that the new home at 5B Carluke was never occupied before the sale in January 2020.

[4] So how did this appeal come about?

[5] After seeking advice, the appellant filed a GST/HST return for an annual reporting period ending December 31, 2020. The return was filed on or about May 5, 2021. The appellant reported GST/HST collectible of \$509,071 calculated on a GST/HST inclusive sale price of \$4,425,000 and claimed input tax credits (ITCs) of \$305,812. He remitted a cheque for \$203,259.

[6] The appellant's solicitor at the time, who is not counsel in this appeal, also wrote to the CRA stating that the appellant had been advised that the sale of 5B Carluke was subject to HST and needed to be declared on a return. The solicitor sought a business number for the appellant and wanted it backdated. This did not happen; instead, the appellant became a registrant as of June 2, 2021.

[7] By notice sent on June 9, 2021, the Minister of National Revenue assessed the appellant under the Excise Tax Act , R.S.C., 1985 c. E-15 (ETA) for a monthly reporting period ending January 31, 2020, on the basis that the appellant was liable for net tax of \$509,071 based on GST/HST collectible of \$509,071. The Minister allowed no ITCs and assessed interest and a late-filing penalty.

[8] The CRA asked the appellant to submit a rebate application under s. 257 for a sale of real property by a non-registrant. The appellant did so, and in the application, received by the CRA on July 30, 2021, the appellant claimed a rebate of \$304,901 regarding the sale of 5B Carluke.

[9] The appellant eventually objected to the notice of assessment dated June 9, 2021. The notice of objection focused on the costs associated with the construction of the new home at 5B Carluke and whether the appellant was entitled to ITCs. In the background, the appellant also dealt with a CRA examiner who was reviewing the rebate application. Eventually, by notice of assessment sent on August 11, 2022, the Minister allowed a rebate under s. 257 of \$181,613, considerably less than the amount claimed.

[10] Soon after, the CRA appeals officer finalized the review of the appellant's objection to the June 9, 2021, assessment of net tax. That review focused on the appellant's contention that he was entitled to ITCs of \$305,812. The assessment was confirmed on the basis that no ITCs could be allowed under s. 169(1) because the appellant was not a registrant during the reporting periods in which GST/HST was incurred with respect to 5B Carluke.

[11] The appellant next appealed the June 9, 2021, assessment. Although the appeal raises a myriad of issues, the main issue concerns the appellant's new position that he was not liable to collect GST/HST on the sale of 5B Carluke because he was not a "builder" under the ETA. In short, the appellant argues that the purchase of 5 Carluke, followed by the land variance, construction of the new home, and sale in January 2020 was not in the course of a business or an adventure or concern in the nature of trade. And in the alternative, the appellant argues that if he was a builder and is liable to collect and remit GST/HST on the sale of 5B Carluke, then he is entitled to the ITCs claimed.

[12] Since only the ITCs were raised in the objection, the Minister made few assumptions of fact. Nonetheless, the Crown argues that the appellant was a builder in respect of 5B Carluke and was liable to collect GST/HST on the sale of the property. The Crown also says the appellant is not entitled to any ITCs.

[13] As explained below, I have concluded that the appellant was a “builder” of the new home constructed at 5B Carluke; he is liable to collect and remit GST/HST on the sale. And he is not entitled to the ITCs claimed. I address the remaining issues later in these reasons.

II. The Applicable Statutory Scheme for a Builder

[14] I begin with the main issue, whether the appellant was a builder of the new home constructed at 5B Carluke.

[15] Under s. 165(1), tax is payable by the recipient of a taxable supply made in Canada at 5% of the consideration for the supply. This tax is known as the GST or the federal portion of the HST. In Ontario, which is a participating province in the HST regime, the provincial portion of the HST is payable by the recipient of a taxable supply made in Ontario at 8% of the consideration for the supply. I will refer to the combined effect of ss. 165(1) and (2) as the GST/HST.

[16] Although GST/HST is imposed on the recipient (i.e., the purchaser), the person who makes the taxable supply is required to collect the tax under s. 221(1), although there are some exceptions that are not relevant here.

[17] A “taxable supply” is defined as a supply that is made in the course of a commercial activity and “commercial activity” is in turn defined as a business, an adventure or concern in the nature of trade, or the supply of real property, except to the extent that it is an exempt supply: see s. 123(1). This means that a supply of real property in Ontario is subject to GST/HST unless it is exempt.

[18] An “exempt supply” is defined in s. 123(1) to mean a supply included in Schedule V. Part I of Schedule V sets out various rules for exempt supplies in respect of real property.

[19] Most sales of used—i.e., previously occupied—residential housing are exempt under s. 2 of Part I of Schedule V provided the supply is made by a person who is not a builder of the residential complex. And so, it is through s. 2 of Part I of Schedule V that the question of whether the appellant was a builder arises.

[20] The relevant text of this provision reads:

2. [of Part I of Schedule V] — A particular supply by way of sale of a residential complex or an interest in a residential complex made by a particular person who is not a builder of the complex or, if the complex is a multiple unit residential complex, an addition to the complex, unless

(a) the particular person claimed an input tax credit in respect of the last acquisition by the person of the complex or in respect of an improvement to the complex acquired, imported or brought into a participating province by the person after the complex was last acquired by the person; or

(b) the recipient is registered ...

[remainder omitted / underlining added]

[21] Where a supply by way of sale of a residential complex is made by an individual who is a builder then s. 3 of Part I of Schedule V may come into play to determine whether the supply is exempt. One condition is that, after construction is completed, the property must be used “primarily as a place of residence of the individual [i.e., the builder], an individual related to the individual or a former spouse or common-law partner of the individual.” Since the parties agree that the new home at 5B Carluke was never occupied, this provision is not relevant here.

[22] A few other provisions concerning registration and remittance of any GST/HST collectible are relevant.

[23] A “registrant” is defined to mean a person who is registered, or who is required to be registered, under Subdivision D of Division V: s. 123. Subsection 240(1) requires every person who makes a taxable supply in Canada in the course of a commercial activity engaged in by the person in Canada to be registered. But there are exceptions and an important exception is in s. 240(1)(b), which applies where the only commercial activity of the person is the making of supplies of real property by way of sale “otherwise in the course of a business.” I will return to this exception later.

[24] If GST/HST must be collected and remitted by a non-registrant vendor of real property, the vendor’s net tax for a particular reporting period is calculated under s. 225(1), just like it is calculated for registrants. Moreover, if the non-registrant vendor’s net tax is a positive amount (i.e., an amount is owing) that amount must be remitted to the Receiver General on or before the day on or before which the return for that period is required to be filed (see s. 228(2)(b)).

[25] So, when must a return be filed?

[26] A non-registrant’s return must be filed in accordance with s. 238(2) where, in a reporting period, net tax is remittable. Put simply, the return must be filed within one month after the end of the reporting period. Subsection 238(2) reads:

238(2) Idem — Every person who is not a registrant shall file a return with the Minister for each reporting period of the person for which net tax is remittable by the person within one month after the end of the reporting period.

[27] Here, if GST/HST was collectible on the sale of 5B Carluke, the appellant’s return was due, and any net tax needed to be remitted, by February 29, 2020.

[28] I turn now to the expression builder which is integral to the treatment of residential real property under the ETA.

[29] The ETA has an extended definition of a “builder” in s. 123(1). Under that definition, a builder of a residential complex, such as a home, can include a person who undertakes the construction of a home on their own land or engages another person to do the construction. More specifically, a builder of a residential complex includes a person who, at a time when the person has an interest in the real property on which the complex is situated, carries on or engages another person to carry on for the person the construction or substantial renovation of the complex (see para. (a) of the definition).

[30] However, the definition of builder has an important carve-out or exclusion for individuals that come within paragraph (a) of the definition. Specifically, if the individual does not carry on the construction or substantial renovation—or engage another person to carry on the construction or substantial renovation for the individual—in the course of a business or an adventure or concern in the nature of trade, the individual is not a builder (see para. (f) of the definition).

[31] Here, the relevant parts of the definition are in paragraphs (a) and (f):

123(1) ...

“builder” of a residential complex or of an addition to a multiple unit residential complex means a person who

(a) at a time when the person has an interest in the real property on which the complex is situated, carries on or engages another person to carry on for the person

(i) ...

(ii) in any other case, construction or substantial renovation of the complex,

...

but does not include

(f) an individual described by paragraph (a), (b) or (d) who

(i) carries on the construction or substantial renovation,

(ii) engages another person to carry on the construction or substantial renovation for the individual, or

(iii) acquires the complex or interest in it,

otherwise than in the course of a business or an adventure or concern in the nature of trade,

...

[32] The parties focused on the exclusion in paragraph (f), accepting the appellant satisfies the conditions in paragraph (a). They also agree that the appellant retained a contractor—Andrew Custom Homes Limited—for the management and completion of the construction of the new home at 5B Carluke, such that the appellant comes within subparagraphs (i) and (ii) of paragraph (f).

[33] Key is that the parties agree that if the appellant did not carry on the construction or engage the contractor to do the construction for the appellant, “in the course of a business or an adventure or concern in the nature of trade” , he is excluded from the definition of a builder. If he did, he comes within it.

[34] Paragraph (f) of the definition ensures that individuals who build or substantially renovate their own homes are not subject to the self-supply rules that apply on occupancy under s. 191. In this way, an individual who builds a new home solely for their own personal residence would not come within the definition. But this depends on whether the individual was carrying on the construction (or engaging another person to carry on the construction) in the course of a business or an adventure or concern in the nature of trade.

[35] The appellant pleaded that he was not carrying on a business. And the Crown accepts that, in constructing the new home at 5B Carluke, the appellant was not carrying on a business. The appellant instead focused on whether he was carrying on the construction in the course of an adventure or concern in the nature of trade.

[36] This brings me back to the appellant’s filing of the GST/HST return. It is not clear whether the return was filed on the basis that the appellant was carrying on a business or, alternatively, on the basis that he was carrying on an adventure or concern in the nature of trade. Considering the parties’ positions now, the appellant was not required to be registered. This is because the only commercial activity of the appellant in making the supply of real property by way of sale must have been “otherwise than in the course of a business” : see s. 240(1)(b). Stated another way, if the appellant was engaged in an adventure or concern in the nature of trade—in effect an isolated transaction—he was not required to be registered.

III. Adventure or Concern in the Nature of Trade—Applicable Tests

[37] The parties agree that the tests or factors to be considered in determining whether the appellant was engaged in an adventure or concern in the nature of trade are those set out in *Happy Valley Farms Limited v. Minister of National Revenue* , [1986] 2 CTC 259 (FCTD) (*Happy Valley Farms*): see *Wall v. Canada* , 2021 FCA 132, (*Wall*) at para. 15.

[38] The *Happy Valley Farms* tests consider:

the nature of the property sold;

the length of period of ownership;

the frequency or number of other similar transactions;

work expended on or in connection with the property;
the circumstances that were responsible for the sale of the property; and
motive.

[39] These tests or factors are all based on the facts of the particular case and directly or indirectly lead back to the intention of the taxpayer: Wall at para. 25.

[40] In argument, the appellant also cited CRA publications for additional guidance or context-specific examples that may be useful in determining a person's purpose or intention (Canada Revenue Agency, GST/HST Memorandum 19.2, Residential Real Property, February 1998; Canada Revenue Agency, GST/HST Info Sheet, GI-120; and Canada Revenue Agency, Topical Research Papers, TRP-01, Goods and Services Tax Issues—Commercial Activity).

[41] I turn now to the application of the Happy Valley Farms factors.

IV. Analysis

A. The nature of the property sold

[42] The appellant acquired an interest in 5 Carluke and successfully applied for a land variance to divide the property into two lots. At the time of purchase, 5 Carluke was a large pie-shaped lot on which was situated an older home of between 4,000 and 5,000 square feet. After the existing home was demolished, a new two-storey five-bedroom home of approximately 5,000 square feet, together with a finished basement, was constructed on both 5A Carluke and 5B Carluke.

[43] A house is not in and of itself indicative of either a capital asset or a property acquired and constructed in the course of an adventure or concern in the nature of trade. It depends on the other circumstances (see *Sangha v. The Queen*, 2013 TCC 69 (*Sangha*) at para. 19). I view this factor as neutral.

B. The length of period of ownership

[44] I view the length of ownership as indicative of an adventure or concern in the nature of trade. Some additional context follows.

[45] The appellant acquired a 99% interest in 5 Carluke on September 15, 2015. His mother, Leila Fadali, and Mohamed Habib, described as a family friend, each acquired a 0.5% interest as tenants in common.

[46] The appellant, Mrs. Fadali, and Mr. Habib applied to the Ontario Municipal Board (OMB) to sever the property into two lots and successfully obtained approval for a land variance in December 2016. Later they returned to the OMB with revised development plans. The OMB issued a further order in July 2017 consenting to the variances pending a by-law coming into force.

[47] On September 5, 2017, Mr. Habib transferred his 0.5% interest in 5 Carluke to the appellant, resulting in the appellant and Mrs. Fadali holding interests of 99.5% and 0.5%, respectively, as tenants in common.

[48] On July 5, 2018, 5A Carluke and 5B Carluke were conveyed to the appellant and Mrs. Fadali as tenants in common, with each holding the same interests as before.

[49] As stated, a construction management agreement was entered into with Andrew Custom Homes Limited, a homebuilder. After the old home was demolished, construction started. Construction of the new home at 5A Carluke was completed around March or April 2019. And construction at 5B Carluke was completed one or two months later.

[50] The new home at 5B Carluke was listed for sale on August 16, 2019, for \$4.750 million. About two months later, by an agreement dated October 14, 2019, and finalized on October 17, 2019, the appellant and Mrs. Fadali agreed to sell the property for \$4.425 million. The sale closed on January 7, 2020.

[51] In sum, the appellant owned the property for just over four years, with a new home on 5B Carluke for just over six months. Significant time was taken up by the application to divide 5 Carluke, followed by the appeal before the OMB and the pending coming into force of a zoning by-law. Once the path to division was cleared, the construction and sale of the new home at 5B Carluke moved quickly. The property was listed almost as soon as construction was completed in 2019.

[52] As stated, the length of ownership points toward an adventure or concern in the nature of trade.

C. The frequency or number of other similar transactions

[53] In *Happy Valley Farms*, Rouleau J. recognized that if the same sort of property has been sold in succession over a period of years, or there are several sales at about the same date, a presumption arises that there has been a dealing in respect of the property (see *Happy Valley Farms* at p. 263).

[54] Here, the frequency or number of other similar transactions factor also points toward a finding that the appellant carried on the construction of the new home at 5B Carluke in the course of an adventure or concern in the nature of trade. I consider this factor in more detail but must emphasize that I make no findings about any of the other transactions discussed.

(1) 20 Arrowstook Road, North York

[55] In about 2007, Mrs. Fadali and the appellant's father separated, and they were officially divorced about one year later in 2008. Mrs. Fadali was then living in the family home at 20 Arrowstook Road in North York (20 Arrowstook), which had been purchased in 1997, about three years after the Fadali family had immigrated.

[56] Prior to 2008, the appellant had left the family home to complete an engineering degree followed by a master's degree in applied sciences at the University of Waterloo. He worked in a co-op program with an engineering consulting firm in 2007, completed his master's in 2008 and then took full-time employment with the same firm. Around this time, the appellant returned to live with his mother in the family home. Mrs. Fadali could not qualify for mortgage financing on her own and so the appellant co-signed on the mortgage in lieu of his father. The family home on 20 Arrowstook Road was old and required maintenance.

(2) 17 Wildrose Crescent, Markham – first construction project

[57] In 2012, the appellant bought his first property, which was located at 17 Wildrose Crescent in Markham (17 Wildrose). He lived in the home for about one year and then successfully applied for an additional height variance, demolished the existing home, and constructed a new 4,000-square-foot four-bedroom home. Mrs. Fadali co-signed on the mortgage for 17 Wildrose and was also on title as the appellant had needed her assistance.

[58] The appellant lived in the new home for about four to five months after construction was completed and then it was sold in 2015.

[59] The appellant acquired 17 Wildrose for about \$655,000 and sold the property, after constructing the new home, for proceeds of about \$2.2 million. Although he was prepared to accept that the difference between \$2.2 million and \$655,000 was about \$1.5 or \$1.6 million, he was not forthcoming under cross-examination about whether he realized a gain on the sale. Nor was there evidence of the construction costs for the new home at 17 Wildrose. Instead, the appellant first said he did not know whether there was a gain, and if there was one, he next said it was minimal but emphasized that he could not recall. On this matter, the appellant was hedging his evidence; he seemed unwilling to be candid.

[60] In any event, after 17 Wildrose was sold, the appellant returned to live in the family home with his mother at 20 Arrowstook.

(3) 5 Carluke Crescent, North York – second construction project

[61] At some point in 2015, the appellant says he began discussions with his mother about her leaving the family home. The appellant testified that he and his mother decided to look for a property that could be severed so that two homes could be built, allowing them to live beside each other, preferably in North York. A real estate agent, Mr. Fealizadeh, was then tasked with finding a suitable property. This culminated in the purchase of 5 Carluke.

(4) Arjay Crescent, North York – third construction project

[62] The appellant acquired another property on Arjay Crescent in about April 2021 and moved into the existing home following renovations. After living at the property for about two years, the existing house was demolished, and work began to construct a new five-bedroom home. The appellant continues to live in the home on Arjay Crescent.

[63] A pattern seems to have emerged, at least in respect of the first and second construction projects: the appellant acquired a property, resided in the existing home for a while, and then demolished the existing home and constructed a new home, and in the case of 5 Carluke he constructed two new homes.

D. Work expended on or in connection with the property

[64] I consider this factor to be neutral. I note that in *Sangha* and in *Caddell v. The King*, 2026 TCC 27 (*Caddell*), this Court also considered transactions that involved the purchase of a property and the construction of a new home. In *Sangha*, C. Miller J. said this factor was not determinative (at para. 22.). And in *Caddell*, Russell J. also described the same factor as neutral (at para 34).

E. The circumstances that were responsible for the sale

[65] The appellant testified that the new home constructed at 5A Carluke was intended to be his mother's residence and that the new home constructed at 5B Carluke was intended to be his residence and was designed to his liking.

[66] Mrs. Fadali left the family home at 20 Arrowstook in 2017. She first rented a townhouse in Aurora that was closer to the home of the appellant's brother, Hichem Fadali. After one year, the owners of the rental wanted to sell the townhouse and Mrs. Fadali rented a house nearby for another year.

[67] Mrs. Fadali had also retired in 2017 after working as an office manager for an insurance company. She was then about 71 years old. (For context, Hichem is Mrs. Fadali's second-oldest son, Sherif is the oldest, and the appellant is the youngest.) Around this time, Hichem and his spouse were raising two younger children, and Mrs. Fadali was involved as a grandmother, assisting with the needs of Hichem's children. She drove a car and was able to help with school drop-offs, pickups, and those sorts of matters.

[68] In 2018 or 2019, Mrs. Fadali's health deteriorated. The appellant says she developed lung problems and arthritis, and that there were also concerns about her wellbeing. It soon became apparent that she could not live in a house by herself. The family therefore decided that it would be best for her to live with Hichem in Stouffville, in the basement unit of his residence, particularly since Mrs. Fadali was so integrated into Hichem's family and involved with his children.

[69] The appellant testified that these circumstances led to the new home at 5A Carluke being listed for sale after construction was completed. He said that the real estate agent retained to sell 5A Carluke, who was not Mr. Fealizadeh, was putting insufficient effort into the listing and that there were hardly any showings. For this reason, the appellant testified that he decided to put 5B Carluke up for sale and moved into 5A Carluke. The appellant testified that although the original plan was to live next to his mother, when that was not coming to fruition, he wanted a property with a bigger backyard.

[70] As stated, 5B Carluke was never occupied. It was listed for sale in August 2019, was under a sale contract by October 2019, and was sold in January 2020.

[71] I do not accept the appellant's evidence that his mother's change in circumstances, and in particular her declining health, was responsible for the sale of 5B Carluke. The appellant's explanation lacks plausibility. Considering the whole of the evidence, I am unable to find that the sale of 5B Carluke resulted from frustration or an unforeseen change in circumstances. I will address Mrs. Fadali's evidence and other aspects of the appellant's evidence when I consider motive next.

F. Motive

[72] An adventure or concern in the nature of trade involves a scheme for profit making, usually in an isolated transaction. A taxpayer must have a legitimate intention of gaining a profit from the transaction: *Friesen v. Canada*, [1995] 3 SCR 103, at para. 16. A taxpayer's intention is a factor of utmost importance: *Cardella v. Canada*, 2001 FCA 39 at para. 26; and *Wall* at para. 26.

[73] In considering a person's intention or purpose, the person's conduct is generally more revealing than "ex post facto declarations" (see generally *MacDonald v. Canada*, 2020 SCC 6 at para. 22). Courts are, therefore, not guided only by a person's subjective statements of purpose and instead look for objective manifestations of purpose (*Symes v. Canada*, [1993] 4 SCR 695 at p. 736) and examine the surrounding factual circumstances (see also *Charlebois v. The King*, 2025 TCC 76 at para. 12).

[74] As such, a person's intention at the time of acquiring an asset is often inferred from the surrounding circumstances: *Happy Valley Farms* at para. 14(6). This necessarily requires a highly factually infused determination.

[75] For a transaction to constitute an adventure or concern in the nature of trade, the possibility of resale as an operating motivation for the purchase must have been in the purchaser's mind or the purchaser must have a "secondary intention" at the time of acquisition to sell the property at a profit should a suitable opportunity present itself, and this too must have been an important consideration or an operating motivation in the decision to acquire the property (*Canada Safeway Ltd. v. Canada*, 2008 FCA 24 at para. 61; and see *Procon Mining and Tunnelling Ltd. v. Canada*, 2024 FCA 1 at para. 17).

[76] With these principles in mind, I turn to the appellant's motive in light of the surrounding circumstances. I begin with his situation when 5 Carluke was acquired in September 2015. The evidence is clear that the property was acquired with the intention of dividing it into two lots and constructing two new homes.

[77] The appellant acquired 5 Carluke for approximately \$1.8 million. The solicitor's trust ledger statement for the purchase indicates that a first mortgage was obtained from the Royal Bank of Canada for \$1.370 million and that a further \$436,578 was received from the appellant, Mr. Habib and Mrs. Fadali. There is no clear evidence as to the source of the \$436,578, especially because the appellant was less than forthcoming about whether there was a gain from the sale of 17 Wildrose.

[78] Both the appellant and Mrs. Fadali testified that she contributed some money toward 5 Carluke. But there are no specifics.

[79] In his direct evidence, the appellant referred to his mother's sale of the family home at 20 Arrowstook. He testified that his mother had a large sum available for financing the project. Under cross-examination, the appellant disclosed that 20 Arrowstook remained in the family, and in particular that his brother Sherif had purchased the property from Mrs. Fadali—it seems in 2017—and was using it as a “home office” .

[80] I pause to note that I also found the appellant's evidence about the transfer of 20 Arrowstook to be less than forthcoming. I was left with the impression that the appellant was not being candid; he was holding back. I found that troubling. Later, Hichem said Sherif purchased 20 Arrowstook and was looking to demolish it and build a new home on the property.

[81] The appellant also testified that Mr. Habib did not contribute any funds toward 5 Carluke. He was apparently on title so that the appellant would have a stronger mortgage application and could get a better interest rate.

[82] Key is that there is no clear and credible evidence that Mrs. Fadali contributed meaningful funds toward 5 Carluke in 2015, 2017, or later for the construction costs of the new home on 5A Carluke. When asked how much Mrs. Fadali contributed, the appellant could not recall. The appellant testified that he kept track of the amounts she put in, but no evidence to this effect was introduced at trial.

[83] Mrs. Fadali said she sold 20 Arrowstook in 2017. It was an old home that needed repairs. As for the construction of the new homes, Mrs. Fadali was unsure what funds she had provided to the appellant. She was unable to provide details and said the appellant was taking care of keeping track of these things.

[84] After retiring in 2017, Mrs. Fadali said she had savings from selling 20 Arrowstook. She testified that 20 Arrowstook was sold to Sherif for either \$2.2 million or \$2.4 million and was unsure if there was a debt owed on the property when it was sold. Mrs. Fadali said she gave some money to the appellant, some to her other children, and kept some for herself because she did not want Hichem to be responsible for her financial needs. In the end, Mrs. Fadali was unable to recall how much money she had in savings in 2015 or 2017. Moreover, it is not clear whether Sherif paid the full purchase price for 20 Arrowstook in cash, a fact that could easily have been corroborated with documentary evidence if that were so.

[85] Hichem testified that Mrs. Fadali needed to get rid of 20 Arrowstook because the house was old and difficult to maintain. But since his mother had lived there for so long, it was a big shift in circumstances. He said there was an ongoing conversation to get his mother to move closer to where he and his family lived. And so, when his mother was leaving 20 Arrowstook, he felt that she needed a big upgrade so that she would not feel as though she had lost everything. In this sense, the move out of 20 Arrowstook was about dealing with perceptions. After the move, Hichem said his mother missed North York.

[86] Hichem was not involved in finding 5 Carluke and did not know anything about its financing. He also testified that after the sale of 20 Arrowstook, Mrs. Fadali gave some money to the appellant to help with his endeavours, gave some money to Sherif to help with his endeavours, and kept a little for herself to live on.

[87] I have considered the evidence about the funds available to acquire 5 Carluke and to construct two large luxury homes because it is key to my findings on motive and the inferences to be made from the whole of the evidence. Moreover, the absence of corroborating documents about the appellant's and Mrs. Fadali's financial resources and any contributions toward the acquisition and construction of the new homes—especially where the appellant's intention or motive is in issue—is a factor in my findings.

[88] The property at 5 Carluke was in the St. Andrew neighbourhood, which the appellant agreed was known for multimillion-dollar homes, in effect an affluent area.

[89] So, what did the construction of the two new homes cost?

[90] The appellant testified that the hard construction costs per property were around \$2.2 million, although he had not done a full assessment of the costs associated with 5A Carluke.

[91] In a document submitted to the CRA with respect to the rebate application, the appellant's former solicitor initially sought to support soft costs of \$557,767, monthly costs totalling \$277,889, and construction costs of \$2,251,729. The sum of those amounts is \$3,087,385. An additional \$900,000, representing 50% of the cost of acquiring 5 Carluke, suggests that the appellant may have expended around \$4 million to construct the new home at 5B Carluke.

[92] Later, in June 2022, the appellant sought to support a somewhat lesser amount in correspondence to the CRA auditor examining the rebate application. Included with that document was an April 2018 second mortgage commitment for \$3 million for the construction of 5A and 5B Carluke at 8% interest for a term of two years. Monthly payments were supposed to be \$20,000. I also note that the statements of advance for that mortgage for the period from July 2018 to September 2019, which were included with the appellant's submission to the CRA, total about \$3,000,000.

[93] The appellant was about 33 years old and single when he acquired 5 Carluke in 2015. The parties agree that he had T4 income of \$89,452 in 2015, \$91,077 in 2016, \$103,613 in 2017, \$35,204 in 2018, and \$27,973 in 2019. His total income in those years was entirely T4 income, except in 2019 when his total income was \$55,748.

[94] The appellant acknowledges that he reduced his hours at the engineering firm in 2018 and 2019 because he was focusing on the construction of the homes. But common sense suggests that a person building a personal residence would seek to maintain—and not reduce—employment income to help cover construction costs.

[95] Regarding Mrs. Fadali, the parties also agree that she had income of \$46,730 in 2015, \$36,740 in 2016, \$6,793 in 2017, \$7,468 in 2018, and \$7,589 in 2019. Most of that income was from OAS and CPP benefits. However, in 2015, Mrs. Fadali also had T4 employment income of \$27,600 and net business income of \$12,515. In 2016, she had T4 employment income of \$28,634.

[96] Based on the above evidence, and in the absence of credible and reliable evidence of financial capacity or some other source of wealth, it is implausible and improbable that the appellant had the resources to carry the costs associated with the acquisition of 5 Carluke and the construction of a new luxury home at 5B Carluke as his personal residence.

[97] The evidence regarding financial capacity leads me to infer that the appellant pursued the project at 5 Carluke with a motivation to divide the property and construct the new home at 5B Carluke for resale at a profit. The evidence suggests that the appellant spared no expense. He hired one architect, and then another. He also hired interior designers. Each new home included an elevator and a gym. The photos attached to the MLS listing for 5B Carluke depict a large luxury home.

[98] I accept that Mrs. Fadali seems to have believed that 5A Carluke was being constructed for her. But I conclude that she too lacked the financial capacity to pay for or carry the costs associated with the acquisition of 5 Carluke and the construction costs of a 5,000-square-foot home for use as her personal residence following retirement. This is also too improbable based on the whole of the evidence before me.

[99] I also accept that Mrs. Fadali was confronted with serious and devastating health issues beginning in about 2018, initially with severe pneumonia, followed by COPD, arthritis, and dizziness. She strikes me as someone who was fiercely determined to maintain her independence and who has sought to maintain an active lifestyle.

[100] But based on the whole of the evidence, I am left wondering whether the appellant—and perhaps even Sherif—might have sought to leverage some of the equity that Mrs. Fadali may have had in the family home at 20 Arrowstook. I do not need to make a finding about that here.

[101] What also remains unsatisfactorily explained is why Mrs. Fadali had a nominal 0.5% interest in 5A Carluke and 5B Carluke. That alone suggests that she was not involved in the construction project in the same way as the appellant. Moreover, there was no evidence about how the sale proceeds from 5B Carluke or 5A Carluke were distributed after the sales.

[102] Just before the evidence portion of the hearing concluded, the parties agreed to introduce, on consent, the income tax assessment details for the appellant's 2020 taxation year. The assessment notice indicates that the appellant had a net capital loss in 2020 of \$813,166. The evidence regarding the costs associated with the computation of that loss is not before me. What is clear is that the appellant did not testify that he was in over his head due to unforeseen financial circumstances and had to get out of the project.

[103] During the cross-examination of the appellant and Mrs. Fadali, I wondered at times whether the Crown's theory was being put to them. I mention this intending the utmost respect to counsel, and this is especially important for any lawyer gaining trial experience. I also acknowledge that the CRA did not audit or consider whether the appellant was a builder since the appellant self-reported the sale as a taxable supply. And so, my comment is not meant to be harsh; it is made to give context for an observation about the rule in *Browne v. Dunn* .

[104] Stated simply, the rule in *Browne v. Dunn* provides that "a party who intends to impeach significant testimony provided by an opponent's witness, with unanticipated contradictory evidence or argument on a matter the witness is not apt to know about, must direct the witness's attention to that contradictory information during cross-examination" as a matter of fairness to the witness, opposing counsel and the Court (see *Paciocco*, David M., *Palma Paciocco and Lee Stuesser*, *The Law of Evidence* , 8 th ed. Toronto: Irwin Law, 2020, Ch. 10 at 619, referring to *Browne v. Dunn* (1893), 6 R 67 (HL) at p. 70; and see *R. v. McDonald* , 2025 ONCA 807 at paras. 55–61 for a recent explanation of the rule). It is meant to apply to matters of substance and to give the witness an opportunity to respond. The rule is important and all trial counsel appearing before this Court should be familiar with it, even though there is no fixed consequence when violated.

[105] Here, I am not concerned about a violation of the rule in *Browne v. Dunn* because one topic of cross-examination clearly concerned the appellant's income and financial capacity after the sale of 17 Wildrose. I am, therefore, satisfied that the proposition the appellant lacked the financial capacity to construct the new home at 5B Carluke as a personal residence was put to him, or at a minimum it was insinuated which is a hallmark of cross-examination.

[106] Returning to the specific issue before me, the appellant alleged that he acquired 5 Carluke and constructed the new residence at 5B Carluke to be used as a personal residence, and not as an adventure in the nature of trade. (In actuality, the notice of appeal alleges that the new home on 5B Carluke was intended to be his mother's residence, in effect the reverse of the evidence.)

[107] A trial judge must conscientiously assess the evidence adduced to determine whether the existence of a fact is more probable than not. It is for me, as the trial judge, to decide on the basis of common sense the extent to which it can be concluded from the circumstances and the context that the fact alleged is inherently improbable and the extent to which this conclusion will clarify the question of whether the fact alleged has been proved (see generally *Riddle v. Ivary*, 2026 SCC 9 at para. 88).

[108] In the end, I am unable to accept the appellant's "after the fact" statements of intention that he was constructing a personal residence; it is too improbable. His conduct is inconsistent with that allegation.

[109] My finding is buttressed by the fact that the new home at 5B Carluke was never occupied. Moreover, it is unnecessary for me to rely on the appellant's self-reporting of the sale of 5B Carluke as a taxable supply. Even without considering that fact, I have no hesitation in concluding, on a balance of probabilities, and based on the whole of the evidence and the Happy Valley Farms factors, that the appellant was carrying on the construction of the new home on 5B Carluke in the course of an adventure or concern in the nature of trade. In the circumstances, I find that the appellant was a builder in respect of the new home constructed on 5B Carluke.

G. The Supply was not Exempt under s. 2 of Part I of Schedule V

[110] The exempt supply provision in s. 2 of Part I of Schedule V only applies where the person who has sold a residential complex, such as a home, is not a builder of the complex. Since the appellant was a builder of the new home at 5B Carluke, the sale cannot be an exempt supply under s. 2.

[111] The appellant did not argue that the sale was exempt under any other provision in Part I of Schedule V. In the circumstances, the appellant was required to collect GST/HST of \$509,071 on the sale of 5B Carluke.

[112] I turn next to the appellant's alternative argument, specifically that if he was a builder of the new home at 5B Carluke, then he is entitled to claim ITCs.

V. The appellant is not entitled to ITCs

[113] I have concluded that the appellant is unable to claim ITCs in respect of the GST/HST that became payable in connection with the construction of the new home at 5B Carluke.

[114] The GST/HST is a value-added tax that taxes an increase in the value of property or services. A fundamental principle underlying the GST/HST is that no tax should be included in the cost of property or services acquired by a registrant to make taxable supplies in the course of the commercial activities of the registrant. And so, registrants are generally eligible to claim ITCs for the GST/HST paid or payable on such property or services (see *CIBC World Markets Inc. v. Canada*, 2011 FCA 270 at paras. 6 and 15, citing in part *Canada Revenue Agency, GST/HST Memoranda Series, 8.1: General Eligibility Rules* (May 2005) at para. 1).

[115] The general rule for ITCs is in s. 169(1). A key requirement of s. 169(1) is that the person acquiring property or a service must be a registrant during the reporting period in which GST/HST becomes payable.

[116] Here, the appellant was not a registrant when he incurred GST/HST in respect of property or services acquired for the construction of the new home at 5B Carluke. Moreover, as discussed previously, the appellant was not required to be registered in light of the exception in s. 240(1)(b). As such, a prerequisite for claiming ITCs under s. 169(1) is not satisfied; the appellant's non-registrant status means that he—unlike a person who makes a taxable supply in the course of a business—is not entitled to claim ITCs (for a somewhat comparable scenario, see *Canada v. Villa Ste-Rose Inc.*, 2021 FCA 35 (Villa Ste-Rose FCA) at paras. 28–29).

[117] Parliament recognizes that a non-registrant may have incurred GST/HST in connection with a taxable supply of real property by way of sale and has provided relief in the form of a rebate under s. 257 for the basic tax content of the property. Parliament enacted s. 257(1) to ensure that a non-registrant was not put at a disadvantage compared to a registrant who can deduct ITCs in calculating the amount of net tax payable (see *Villa Ste-Rose FCA* at para. 68). It would make no sense to allow a non-registrant to double up through a claim for ITCs plus a rebate. In the circumstances, the appellant must look to the rebate provision in s. 257 for relief respecting the GST/HST he incurred.

[118] After some prodding, the parties confirmed that the appellant has an objection pending with respect to the Minister's assessment of the rebate under s. 257. In the circumstances, there is no reason for me to comment further or make any findings relating to the GST/HST the appellant incurred. That issue can be left to the objection process, or to any subsequent appeal.

VI. Is the appellant liable for a late-filing penalty under s. 280.1 and, if so, was it properly computed?

[119] A penalty is imposed under s. 280.1 where a person fails to file a return for a reporting period on time as required under Part IX of the ETA and an amount is owing as of the due date for the return. In the notice of appeal, the appellant pleaded that the Minister erred in assessing the penalty. In argument, the appellant said he should not be subject to a penalty under s. 280.1 because he exercised due diligence. In the alternative, the appellant argued that the Minister failed to compute the penalty correctly by not offsetting the amount allowed as a rebate under s. 257.

[120] As for due diligence, which was not really pleaded, I see no merit in the appellant's argument. The return was due on February 29, 2020, but was filed on or about May 5, 2021: s. 238(2). Due diligence is about taking reasonable care to prevent a failure, not taking steps about 14 months later to file a return and remit an amount believed to be due.

[121] Turning to the computation of the penalty under s. 280.1, it is the sum of two amounts. Simplified, the first amount is 1% of the net tax owing. The second amount is one quarter, or 25%, of the first amount for each complete month the return is overdue, up to a maximum of 12 months. Here, the Minister assessed a penalty of \$20,362.84, computed as \$5,090.71, being 1% of \$509,071, plus \$15,272.13, being 25% of \$5,090.71 multiplied by 12.

[122] The appellant argues that s. 228(6) applies so that the Minister, in computing the penalty, should have set off the rebate under s. 257 against the net tax owing. Specifically, the appellant argues that where an amount is reported as due—referred to in s. 228(6) as the “remittance amount”—s. 228(6) deems the person to have remitted on account of the person’s remittance amount, and the Minister is deemed to have paid on account of the rebate, an amount equal to the lesser of the remittance amount and the rebate.

[123] Subsection 228(6) operates where a person files a return under Part IX of the ETA, reports a remittance amount (i.e., an amount due) and claims a rebate in the particular return or in another return, or in an application, filed with the particular return. Here, the appellant did not claim a rebate under s. 257 until July 31, 2021. Since the rebate was not claimed in the return and the rebate application was not filed with the return, s. 228(6) does not apply. But that is not the end of the matter.

[124] The Crown argued that the penalty was properly computed and referred to ss. 296(2.1) and 296(3.1).

[125] Neither party referred to the Federal Court of Appeal’s decision in *Villa Ste-Rose*, which concerned a Crown appeal from a decision of Justice D’Auray of this Court, reported at 2019 TCC 60 (*Villa Ste-Rose TCC*). In that matter, a non-registrant operated a residence for seniors and made exempt supplies. A fire destroyed the residence, and the non-registrant had a new building constructed. The non-registrant was a builder in respect of the construction of the new building and was deemed to have made a taxable supply under the self-supply rules in s. 191. But considering the non-registrant’s status, it could not claim ITCs. The non-registrant late-filed a GST return on September 28, 2015; it was due on December 31, 2014. It attached rebate applications, including an application under s. 257. The rebates claimed exceeded the GST collectible on the self-supply. In assessing, the Minister granted a credit for the rebates claimed but charged interest and imposed a late-filing penalty under s. 280.1 on the entire amount of GST collectible without factoring in the rebates claimed.

[126] In this Court, the Crown argued in *Villa Ste-Rose* that the non-registrant had to pay interest and penalty on the GST collectible regardless of the rebates claimed. Justice D’Auray disagreed and concluded that under s. 228(6), the s. 280.1 penalty was applicable on the net amount due after taking into account the rebates. And since the rebates exceeded the GST collectible, the Minister could not impose interest and a penalty under s. 280.1 (see *Villa Ste-Rose TCC* at paras. 37–38 and *Villa Ste-Rose FCA* at paras. 16 and 37).

[127] In upholding this Court’s decision in *Villa Ste-Rose* , the Federal Court of Appeal undertook a statutory interpretation and referred to s. 296(2.1). Subsection 296(2.1) deals with the treatment of rebates not claimed when the Minister makes an assessment.

[128] Under s. 296(2.1), and subject to certain conditions, if the Minister—in assessing the net tax of a person for a reporting period—determines that an amount would have been payable to the person as a rebate if it had been claimed in an application, the Minister is required to apply all or part of the allowable rebate against the net tax as if the person had (on the particular day), paid or remitted the amount so applied on account of the net tax. For present purposes, it is sufficient to note that the “particular day” is the day on or before which the return was required to be filed (see s. 296(2.1)(a)). Additional conditions are set out in ss. 296(2.1)(b) and (c).

[129] Under s. 296(2.1)(b), the allowable rebate must not have been claimed by the person in an application filed before the day the notice of assessment is sent to the person. This condition is met: the Minister assessed net tax on June 9, 2021, and the rebate application was received on July 31, 2021.

[130] The conditions in s. 296(2.1)(c) ask several hypotheticals, and in particular: would the allowable rebate be payable to the person if it were claimed in an application under Part IX filed on the day the notice of assessment is sent to the person; or would the allowable rebate be disallowed if it were claimed in that application only because the period for claiming the allowable rebate expired before that day? It seems to me that only one of those hypotheticals must be affirmatively answered. And here, there is no question that a rebate would have been payable to the appellant if it were claimed in an application filed on June 9, 2021, i.e., the day that the notice of assessment was sent.

[131] As stated, it is apparent that s. 228(6) does not apply because the rebate was not claimed on the return that was filed and the application was not submitted with the return. Nonetheless, if the Minister had determined that a rebate was allowable before assessing net tax on June 9, 2021, then s. 296(2.1) would have required the Minister to take into account the allowable rebate. And so, the only question is whether it matters that the Minister’s determination that the appellant was entitled to a rebate under s. 257 was reached after net tax was assessed under s. 296(2).

[132] Given the legislative objectives of Parliament in granting a rebate under s. 257 (see *Villa Ste-Rose FCA* at paras. 47–50), I fail to see why the Minister cannot recompute the penalty under s. 280.1 by applying the amount of the rebate—determined on August 11, 2022—against the net tax that was due on the date the return was due in accordance with s. 296(2.1). Indeed, I find it surprising that the Minister did not proactively reassess to reduce the penalty under s. 280.1 after the rebate was granted.

[133] In any event, since the appellant objected to the assessment of net tax made on June 9, 2021, the Minister was required to reconsider the assessment and vacate or confirm the assessment or make a reassessment: s. 301(3). If the appellant had raised the computation of the penalty in the objection, this matter would have been ripe for a reassessment to recompute the penalty by taking into account the rebate allowed by the Minister. The evidence is clear that the

appeals officer was awaiting the decision of the auditor reviewing the rebate application and the Minister's assessment of the rebate under s. 297 was made before the review of the objection was concluded.

[134] It is important to acknowledge that, as matters now stand, the Minister has only determined that the appellant is entitled to a rebate of \$181,613.09. Whether the rebate amount remains as assessed on August 11, 2022, is not before me.

[135] As for s. 296(3.1), referred to by the Crown, it deals with circumstances where there is an excess amount after applying s. 296(2.1) and it is unnecessary for me to further consider it here.

VII. Conclusion

[136] The appeal is allowed but only so that the penalty assessed under s. 280.1 is recomputed having regard to s. 296(2.1) and the amount of the rebate the Minister allowed. The parties shall have until June 19, 2026, to reach an agreement on costs, failing which the Crown shall have until July 17, 2026, to serve and file written submissions on costs and the appellant shall have until August 14, 2026, to serve and file written response submissions on costs. Any submissions shall not exceed five pages. If the parties do not advise the Court that they have reached an agreement on costs and no submissions are received, costs shall be awarded to the Crown as set out in the Tariff.

Signed this 19th day of May 2026.

"Perry Derksen"

Derksen J.

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The Honourable Justice Perry Derksen

DATE OF JUDGMENT:

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