Basis for Assessment, Arguments, and Assumptions: An Examination of the Underlying Policy Considerations

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PRÉCIS
En 1998, la Cour suprême du Canada a énoncé le principe selon lequel le ministre du Revenu national ne saurait être autorisé à avancer un nouveau fondement pour justifier une nouvelle cotisation après l’expiration du délai prévu à cette fin. Peu de temps après, le ministère des Finances annonçait l’introduction d’une nouvelle disposition, à savoir le paragraphe 152(9) de la Loi de l’impôt sur le revenu. Cette disposition a généralement été perçue comme visant à contrecarrer le jugement de la Cour suprême. Le ministère a alors pris un certain recul face à cette réaction apparemment excessive et, lors de l’adoption subséquente du paragraphe 152(9), le libellé utilisé était passablement différent.

Au cours des dernières années, les tribunaux ont eu à se poser deux questions :

1. Qu’est-ce que l’on entend par « nouveau fondement pour justifier une nouvelle cotisation »?
2. Quelle est l’incidence, le cas échéant, du paragraphe 152(9) sur la règle énoncée dans Continental Bank?

Dans cet article, les auteurs tentent de dégager une approche théorique pour répondre à ces questions.

Selon eux, c’est d’une approche équilibrée qui cherche à préserver l’équité procédurale tant pour les contribuables que pour le ministre dont on a besoin. La compréhension du lien qui existe entre les principes de procédure civile dans les procès civils généraux et les règles qui ont été élaborées dans le contexte de contentieux fiscaux représente l’un des outils les plus importants pour analyser l’origine et le fonctionnement de la règle énoncée dans Continental Bank. Les auteurs analysent la règle énoncée dans Continental Bank à la lumière du traitement de situations comparables en vertu des principes normaux de procédure civile.

Les auteurs explorent les origines historiques de la règle Continental Bank ainsi que la jurisprudence élabore dans la foulée de cet arrêt en vue d’établir des critères

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théoriques pour dégager de nouveaux fondements conformément à la règle. Bien que certains jugements postérieurs à Continental Bank laissent entendre que le paragraphe 152(9) a eu pour effet de faire légalement disparaître la règle du fondement, les auteurs estiment qu’au plan de l’interprétation des lois et des politiques, cette disposition n’a aucune incidence sur la règle du fondement. Il s’agit essentiellement d’une codification réglementaire aux fins des contentieux fiscaux des principes généraux applicables à la modification des plaidoyers dans le contexte d’un procès civil.

Les auteurs concluent en établissant un certain nombre de principes permettant de déterminer si le Ministre a violé la règle énoncée dans Continental Bank en avançant un nouveau « fondement » à une cotisation.

ABSTRACT
In 1998, in The Queen v. Continental Bank of Canada, the Supreme Court of Canada enunciated the principle that the minister of natural revenue should not be allowed to advance a new basis for a reassessment after the limitation period has expired. Shortly thereafter, the Department of Finance announced the introduction of a new provision, subsection 152(9) of the Income Tax Act. That provision was widely viewed as being intended to reverse the Supreme Court’s decision. The Department of Finance then retreated somewhat from this apparent overreaction, and when subsection 152(9) was subsequently enacted, the language used was quite different.

For the last several years, the courts have been struggling with two questions:

1. What constitutes a new basis for a reassessment?
2. What impact, if any, does subsection 152(9) have on the Continental Bank rule?

In this article, the authors attempt to identify a principled approach to answering these questions.

In the view of the authors, what is required is a balanced approach that seeks to preserve procedural fairness for both taxpayers and the minister. One of the most important tools necessary for analyzing the origins and operation of the Continental Bank rule is an understanding of the relationship between the principles of civil procedure in general civil litigation and the rules that have grown up in the context of income tax litigation. The authors analyze the Continental Bank rule in light of the treatment of comparable situations under normal principles of civil procedure.

The authors explore the historical origins of the Continental Bank rule and the jurisprudence in the wake of that decision with a view to establishing principled criteria for identifying new bases within the meaning of that rule. While some of the post-Continental Bank jurisprudence suggests that subsection 152(9) has effectively legislated the basis rule out of existence, the authors think that as a matter of statutory interpretation and policy this provision has no bearing on the basis rule. In essence, it is a statutory codification in the area of income tax litigation of the general principles applicable to the amendment of pleadings in the context of civil litigation.

The authors conclude by setting out a number of principles for ascertaining whether the minister has violated the Continental Bank rule by advancing a new “basis” for an assessment.

KEYWORDS: LITIGATION ■ LIMITATIONS ■ ASSESSMENTS ■ TAX BASIS ■ OBJECTIONS
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INTRODUCTION

In 1998, the Supreme Court of Canada caused a considerable stir when it released its decision in The Queen v. Continental Bank of Canada. Oddly enough, it was not the main substance of the decision that aroused so much interest but rather a procedural rule that emerged as a peripheral element of the case and identified limitations on the grounds that the minister of national revenue can rely upon in income tax appeals. The rule in Continental Bank can be stated succinctly:

The Minister should not be allowed to advance a new basis for a reassessment after the limitation period has expired.

Three months after this principle was first enunciated, the Department of Finance announced the introduction of a new provision, subsection 152(9) of the Income Tax Act, which clearly was intended to reverse the Supreme Court’s decision in Continental Bank and permit the minister to rely upon new “bases” for assessments or reassessments. The department then retreated somewhat from this apparent overreaction. When subsection 152(9) was subsequently enacted, the language used was quite different and “basis” did not appear anywhere in the provision (although it is used in the English marginal note). The provision now permits new “arguments” to be raised by the minister after the expiration of the applicable limitation period.

1 98 DTC 6501 (SCC).
2 Ibid., at paragraph 18, per McLachlin J.
3 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as “the Act”). Unless otherwise stated, statutory references in this article are to the Act.
4 At least in part. The original draft was made subject to subsection 152(5), which prevents the minister from including amounts in a taxpayer’s income that were not included before the expiration of the taxpayer’s normal reassessment period. The legislation as finally enacted was not expressly subject to that provision. It is unclear whether, if the legislation had been enacted as originally proposed, it would have actually overridden the Continental Bank decision since it would have been subordinate to subsection 152(5), which, arguably, is the basis upon which that decision rests.
For the last several years, the courts have been struggling with two questions:

1. What constitutes a “new basis for a reassessment”?
2. What impact, if any, does subsection 152(9) have on the Continental Bank rule?

In this article, we will attempt to identify a principled approach to answering these questions.

The debate raging within the tax community over the meaning of the Continental Bank decision tends to gravitate toward one of two extremes. On the one hand, there are those who take the position that an assessment of tax is simply a number and that the minister can use any factual or legal basis to collect tax in that amount once the assessment has been issued. On the other hand, there are those who argue that the minister cannot change or add to any of the facts or reasons he or she originally relied upon to support an assessment once the applicable limitation period has passed. In our view, not surprisingly, the answer lies in a more balanced approach that seeks to preserve procedural fairness for both taxpayers and the minister.

Tax professionals tend to focus on the intricate and difficult aspects of tax, often losing sight of the fact that tax law is dependent upon private law concepts for its application and interpretation—that is, the meaning and operation under private law rules of trusts, contracts, corporations, etc. In the same way that the substantive application of the Act is dependent upon private law concepts, tax appeals under the Act have always relied upon rules of civil procedure and evidence derived from private law.

We think that one of the most important tools necessary for analyzing the origins and operation of the Continental Bank rule is an understanding of the relationship between the principles of civil procedure in general civil litigation and the rules that have grown up in the context of income tax litigation. Here, “principles of civil procedure” does not refer to the detailed procedural rules contained in various provincial and federal codes. While there has been a great effort in recent years to harmonize these rules, obviously technical aspects of procedure vary considerably from jurisdiction to jurisdiction. The principles of civil procedure are broad concepts that have evolved over the years dealing with, for example, amendments of pleadings, onus of proof, standards of review, etc. These principles are substantially the same in all Canadian jurisdictions and originate from both an overriding concern for procedural fairness and a desire on the part of the courts to control their own processes.

Income tax litigation is not radically different from general civil litigation. Some aspects of it, however, do require tailoring of the normal principles of civil procedure to ensure procedural fairness. That said, in our opinion income tax litigation should not depart significantly from the principles of civil procedure unless there are clear and compelling reasons for such a departure. As part of this article, we will endeavour to analyze the Continental Bank rule in light of the treatment of comparable situations under normal principles of civil procedure.

The cases, discussed below, that have been decided in the aftermath of Continental Bank have affirmed the outer limits of the basis rule:
- The minister may not raise grounds that would result in an increase of the tax payable under the original assessment or reassessment.
- The minister may not attempt to use a different transaction to support the assessment or reassessment under appeal.

Where the courts and tax practitioners have struggled is in attempting to deal with the broad middle ground: situations where the same transaction is involved and there is no increase in the tax payable. In such cases, under what circumstances will the minister be said to be advancing a new basis for the assessment or reassessment? It is clear that such cases can occur: in *Continental Bank* itself, the fact situation and the tax payable were the same under the minister’s impugned new basis.

In this article, we will explore the historical origins of the *Continental Bank* rule and the jurisprudence in the wake of that decision with a view to establishing principled criteria for identifying new bases within the meaning of that rule. While some of the post-*Continental Bank* jurisprudence suggests that subsection 152(9) has effectively legislated the basis rule out of existence, we think that as a matter of statutory interpretation and policy this provision has no bearing on the basis rule. In essence, it is a statutory codification in the area of income tax litigation of the general principles applicable to the amendment of pleadings in the context of civil litigation.

The *Continental Bank* rule has to be seen as the historic culmination of a long line of jurisprudence attempting to balance five specific provisions of the Act and one statutory lacuna:

1. Subsection 152(5) prohibits reassessments after the expiration of the “normal reassessment period” applicable to a taxpayer.
2. Subsection 152(4) permits the minister to make “an assessment, reassessment or additional assessment” at any time before the expiration of the taxpayer’s

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5 While Bastarache J wrote that the amount of income was the same (infra note 83), the Crown’s factum indicated at paragraphs 59 and 60 that the amount of the recapture ($84,348,900) was greater than the amount originally assessed on the sale of the partnership interest ($83,052,657).

6 Although the provisions cited are those in the current Act, similar rules have been contained in the Act and its predecessors for many years. The first limitation period (six years) with an exception for misrepresentation or fraud was introduced as section 55 of the Income War Tax Act, RSC 1927, c. 97, by SC 1944-45, c. 43, section 15, assented to on August 15, 1944, applicable on passing; this was the predecessor of current subsections 152(4) and (5). The predecessor of current subsection 152(3) was subsection 42(3) of the Income Tax Act, SC 1948, c. 52, which came into force on January 1, 1949. The predecessor of subsection 152(8) was subsection 69A(4) of the Income War Tax Act, which was enacted by SC 1946, c. 55, section 15. The origins of subsection 152(8) can be found in section 14 of *The Income War Tax Act, 1917*, SC 1917, c. 28. The predecessor of section 166 was section 69D of the Income War Tax Act, which was enacted by SC 1946, c. 55, section 15. The origins of section 166 can be found in subsection 19(1) of *The Income War Tax Act, 1917*.

7 Defined in subsection 152(3.1). The normal reassessment period is three years except in the case of mutual fund trusts and corporations (other than Canadian-controlled private corporations),
normal reassessment period and also permits the minister to reassess after the expiration of the normal reassessment period of a taxpayer where the taxpayer has made “any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing [a] return or in supplying information” under the Act.

3. Subsection 152(3) provides that liability for tax is not “affected by an incorrect or incomplete assessment or by the fact that no assessment has been made.”

4. Subsection 152(8) provides that an assessment, subject to being varied or vacated on objection or appeal, is deemed to be valid and binding notwithstanding any “error, defect or omission in the assessment or in any proceeding under [the] Act relating thereto.”

5. Section 166 provides that an assessment shall not be vacated or varied on appeal “by reason only of any irregularity, informality, omission or error on the part of any person in the observation of any directory provision of [the] Act.”

6. There is no provision of the Act that allows the minister to appeal from an assessment (although the minister is allowed to appeal from a decision of the Tax Court of Canada or the Federal Court of Appeal). The jurisdiction of the Tax Court on an appeal is confined by subsection 171(1) to either dismissing or allowing an appeal. It seems that the court could not “allow” an appeal while increasing the tax payable by an appellant.

In our view, the Continental Bank rule is a procedural rule (for example, “[t]he Minister should not [emphasis added]”). It is closely related to two other procedural rules that have evolved from the early jurisprudence under the Act and its predecessors. The first such rule is that taxpayers are entitled to know the legal and factual details of the assessment or reassessment made against them:

[T]here is a duty to have fully disclosed to the taxpayer the precise findings of fact and rulings of law which have given rise to the controversy. That is one of the few remaining rights accorded to the taxpayer in the legislation the preponderance of which imposes obligations.

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for which the period is four years. Section 152 contains a number of exceptions to and extensions of these limitation periods, none of which are relevant for the purposes of this inquiry.

8 The right of appeal is now found in section 27(1.1) of the Federal Court Act, RSC 1985, c. F-7, as amended, in the case of general procedure appeals and section 28(1)(l) in the case of judicial review of informal procedure decisions to the Federal Court of Appeal. Appeals to the Supreme Court of Canada are governed by section 40(1) (with leave of the Supreme Court of Canada) and section 37.1 (with leave of the Federal Court of Appeal) of the Supreme Court Act, RSC 1985, c. S-26, as amended. These rights of appeal apply equally to the minister and to taxpayers; the minister is not specifically named in any of these provisions. Formerly, section 69C of the Income War Tax Act, 1927, provided for an express right of appeal for the minister from a decision of, for example, the Tax Appeal Board.

9 Kit-Win Holdings (1973) Limited v. The Queen, 81 DTC 5030, at 5038 (FCTD), per Cattanach J.
This rule cannot be found in any provision of the Act or its predecessors; it is simply a judicial recognition that procedural fairness requires that the minister make full and fair disclosure of the basis of any assessment or reassessment. The second such rule is that the minister is entitled to rely upon assumptions of fact made during the course of the assessment or reassessment process and the onus is on the taxpayer to disprove those assumptions. Again, this rule is not rooted in any legislative requirement but rather in the concept that it is unfair to make the minister prove facts in support of an assessment or reassessment that are within the particular knowledge of the taxpayer. As we will explain in the course of this article, this rule has itself evolved in recent years to add procedural protections for the taxpayer and is in many respects closely related to the basis rule adopted in Continental Bank.

In our view, both of these rules involve necessary departures from the normal principles of civil procedure. The minister is not in the position of a normal litigant; he or she has all the power and resources of the state and should not be allowed to ambush a taxpayer in a partisan fashion. Similarly, the minister was not a party to the transactions at issue in tax litigation and cannot reasonably be required to prove or disprove facts that are peculiarly within the knowledge of the taxpayer. The evolution of these concepts, however, affirms the adage that the exception proves the rule. With the exception of these rules, courts and tribunals in Canada have consistently applied the normal principles of civil procedure in income tax disputes since income tax was first introduced in Canada.

All of these principles evolved rather slowly in Canadian tax law. Tax litigation itself evolved slowly over the first 30 years after the introduction of The Income War Tax Act, 1917. In fact, during the period from 1917 to 1923, there was not one court appeal of a tax assessment. The introduction of a new act in 1948 seems to have ushered in a greater degree of attention to procedural fairness in income tax appeals. This was probably also attributable, at least in part, to the fact that 1944 saw for the first time the introduction of a limitation period applicable to the minister’s right to issue assessments and reassessments. The Supreme Court of


11 Although Krishna traces the assumption rule to subsection 152(8), Hogg, Magee, and Li trace the rule to the simple proposition that these are facts best known to the taxpayer: Vern Krishna, Income Tax Law (Concord, ON: Irwin Law, 1997), 18; and Peter W. Hogg, Joanne E. Magee, and Jinyan Li, Principles of Canadian Income Tax Law, 4th ed. (Toronto: Carswell, 2002), 547. See also A. Christina Tari, “The Crown’s Reply,” in Pleading with Revenue Canada: New Opportunities, New Procedures (Toronto: Canadian Bar Association—Ontario, Continuing Legal Education, 1993), tab 5, at 7.

12 Supra note 6.

13 Robert McMechan and Gordon Bourgard, Tax Court Practice (Toronto: Carswell) (looseleaf), 1-4; and Colin Campbell, Income Tax Administration in Canada (Toronto: Carswell) (looseleaf), 13-1.

14 See supra note 6.
Canada enunciated the ministerial assumption rule in 1948. Little more than a decade later, the first cases dealing with limitations on the minister’s right to change the basis of an assessment or reassessment began to emerge.

There are two lines of cases in the early case law. The first such line (which we will refer to as “the Minden cases”) essentially takes the position that the minister can use whatever grounds will avail to defend an assessment and cannot be bound by errors in the making of the assessment. As will be seen, however, the courts subsequently made exceptions for “fundamental” changes to the bases for assessments or reassessments. The second line of early cases (which we will refer to as “the Farris cases”) originally stood for the principle that the minister cannot advance a position that would increase the amount of tax payable by a taxpayer, but gradually expanded to cover a broader principle of procedural fairness.

THE MINDEN CASES

The 1962 decision of MNR v. Minden is the first in this line of cases. The taxpayer had purchased mortgages and agreements for sale at discounts, and the issue was whether the profits she earned on these transactions (they were all paid out in full) were income or (in those days) non-taxable capital gains. The court allowed the minister’s appeal notwithstanding errors in the notices of reassessment. The notices of reassessment contained statements that the taxpayer was “deemed to be in the business of lending money on the security of mortgages and agreements for sale.” While those statements were clearly wrong,

[i]n considering an appeal from an income tax assessment the Court is concerned with the validity of the assessment, not the correctness of the reasons assigned by the Minister for making it. An assessment may be valid although the reason assigned by the Minister for making it may be erroneous. This has been abundantly established.

Thorson P cited no authority for this proposition, and we have been unable to locate any earlier Canadian decisions touching on this point. He did not refer to any of the predecessor provisions to subsection 152(3) or (8) or section 166, although all were applicable at the date these transactions occurred.

The next decision to take this line was the 1963 decision in Belle-Isle v. MNR. The taxpayer had sold a hotel to a related company for consideration consisting of shares and mortgage assumption. The same day he sold the shares to an unrelated third party at a profit. The minister originally assessed the taxpayer for his profit on the sale of the shares (roughly $90,000) but before the Tax Review Board moved

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16 62 DTC 1044 (Ex. Ct.).
17 Ibid., at 1050, per Thorson P.
18 63 DTC 347 (TAB); aff’d. 64 DTC 5041 (Ex. Ct.); aff’d. 66 DTC 5100 (SCC).
to amend the reply, alleging instead recapture on the sale of the hotel (roughly $70,000). The board permitted the amendment and relied in particular on the predecessor to subsection 152(3).\(^9\) Although the legislative basis of the amendment in this case was quite different, it is not unlikely that the court was influenced by the significant reduction in the tax payable by the taxpayer. This decision was affirmed in both the Exchequer Court and the Supreme Court of Canada, but no mention of this issue was made in either court.

In *Wiebe et al. v. MNR,\(^{20}\)* the original reassessments were based on shareholder appropriations. When it turned out that the taxpayers had not been shareholders of the corporation involved, but rather employees, counsel for the minister sought to amend the pleading to allege that the amounts were benefits from employment. The court allowed the amendment:

> The assessments remain the same in this case, but the reasons and premise upon which the assessments are based have changed, hence the request for the amendment. The appellant has not been unduly prejudiced, and has due notice of what faces him at trial.\(^{21}\)

*Wiebe* is the first decision in the *Minden* cases to focus specifically on prejudice to the taxpayer and, by implication, the concept of procedural fairness in general.

In *The Queen v. The Consumers’ Gas Company Ltd.,*\(^{22}\) the Federal Court of Appeal accorded the minister a wide latitude in terms of the grounds that could be advanced to support a reassessment. That case involved reimbursements received by the taxpayer from its customers for costs associated with relocating its pipelines. In an appeal involving prior taxation years, the Federal Court of Appeal had held that these reimbursements did not reduce the undepreciated capital cost of the taxpayer’s pipeline assets. In this appeal, the minister advanced the argument that the reimbursements were income, a position not advanced at the time the original reassessments were made. The court permitted the minister to advance this position:

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9 Ibid., at 349 (TAB), per Boisvert QC:

> [It matters little under what section of the Act an assessment is made. What does matter is whether tax is due. Section 46(3) is conclusive:

> Liability for tax under this Part is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made.

> Hence, if the transaction entered into by the appellant attracts tax, it does not escape the said tax because the respondent availed himself of one section of the Act rather than another section. In this particular case the sale yielded a profit—resulting from an adventure in trade or a capital gain—but in any event the gain must be added to the income, under section 4 of the Act in the first case and section 20 in the second.

20 88 DTC 1234 (TCC).

21 Ibid., at 1236, per Goetz TCJ.

22 87 DTC 5008 (FCA).
What is put in issue on appeal to the courts under the Income Tax Act is the Minister’s assessment. While the word “assessment” can bear two constructions, as being either the process by which tax is assessed or the product of that assessment, it seems to me clear, from a reading of sections 152 to 177 of the Income Tax Act, that the word is there employed in the second sense only. This conclusion flows in particular from subsection 165(1) and from the well established principle that a taxpayer can neither object to nor appeal from a nil assessment.23

The passage is obiter since the taxpayer succeeded in its appeal, and it is interesting to note that the court cited no case law to support this finding.

In Riendeau v. The Queen,24 the taxpayer had been assessed on the basis of subsection 74(5) of the Act, resulting in the reallocation of amounts that had been reported by his wife as her share of income from a partnership with the taxpayer. In confirming the reassessments, the minister acknowledged that subsection 74(5) had been repealed and relied upon sections 3 and 9 of the Act. The Federal Court of Appeal dismissed the taxpayer’s appeal from the bench.25 The court relied upon Belle-Isle and Minden in reaching this result.

The decision of Cullen J in the Trial Division contains an interesting analysis of the effect of subsections 152(3) and (8) and section 166:

> Error will be a matter of degree. Sections 152(3), 152(8) and 166 combined clearly indicate that this error by the Minister of National Revenue is far from fatal. The cases only limit these sections where there is substantial and fundamental error; in such cases, the court will not allow the Minister to hide behind the provisions.

In the case before me, the Minister has not committed an error of sufficient seriousness to put it into the same category as cases like Optical Recording. The defendant has tried to distinguish Belle-Isle, but upon my reading of the case I cannot agree. The Act and the cases (Belle-Isle, Minden) show that an assessment can be valid even if the original reasons assigned were erroneous or because the Minister initially availed himself of one section (subsection 74(5)) instead of another (sections 3 and 9 of the Act) [emphasis added].26

23 Ibid., at 5012, per Hugessen J.

24 91 DTC 5416 (FCA).

25 Ibid., at 5417, per Stone JA:

> In the present case, the amounts assessed remained the same throughout. What is disputed is that the assessments were originally said to have been made on the basis of repealed subsection 74(5) of the Act which, the appellant says, rendered the assessments invalid notwithstanding that the Minister afterward corrected this mistake by confirming the assessments on the basis of sections 3 and 9 of the Act.

> In our view, the Minister’s mental process in making an assessment cannot affect a taxpayer’s liability to pay the tax imposed by the Act itself. He may correct a mistake. The trial Judge was right in rejecting the appellant’s argument and in determining that the Minister was entitled to confirm the reassessments in question.

26 *The Queen v. Riendeau*, 90 DTC 6076, at 6079-80 (FCTD), per Cullen J.
Cullen J referred to the decision in *Guaranty Properties Limited et al. v. The Queen*. In that case, the minister had issued a reassessment in respect of the 1976 taxation year of company A. After 1976, company A was amalgamated with others to form company B, and subsequently company B was amalgamated to form company C. The reassessment was issued after the second amalgamation and addressed to company B. The court held that the liability for company A’s 1976 taxation year was that of company C and that the wrong taxpayer had been reassessed. The evidence established that the minister had knowledge of the second amalgamation at the date the reassessment was issued but that knowledge was not communicated to the auditor working on the file. The minister argued that the curative provisions of the Act (subsections 152(3) and (8) and section 166) saved the assessment, but the court rejected that argument. In the result, the reassessment was held to be invalid. This decision was reversed on appeal by the Federal Court of Appeal on the basis that both company B and company C were jointly and severally liable for the taxes of company A, and thus there was no fundamental error in the assessment.

The trial decision in *Guaranty Properties* should be contrasted with that of the Federal Court of Appeal in *Stephens Estate v. The Queen*. In *Stephens Estate*, the taxpayer sought to have assessments set aside on the basis of typographical errors. The court did not give much credence to the taxpayer’s arguments:

Subsection 152(2) requires the Minister to “send a notice of assessment” to the taxpayer. Nowhere in the Act do we find prescriptions relating to the form of that notice. It follows, in our view, that the form of the notice does not matter and that the subsection merely requires that the notice be expressed in terms that will clearly make the taxpayer aware of the assessment made by the Minister. The notices here in question clearly met that requirement. First, the fact that they bore the printed signature of a person who had ceased to be the Deputy Minister was of no consequence since nothing in the statute requires that notices of assessment be signed by anyone. Second, the fact that the words “Revenue Canada” were not the legal designation of the Department of National Revenue was also immaterial since, as was decided by the judge below, the use of that “publicly well known appellation” could in

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27 87 DTC 5124 (FCTD).

28 By virtue of the operation of section 87 of the Act.

29 Supra note 27, at 5133, per Rouleau J: “The curative provisions of the *Income Tax Act* will not assist the defendant in this case. It is clear from the facts that a number of errors have plagued the defendant throughout this matter. The auditor who should have been made aware of the amalgamation was not advised and, by the time this was discovered and matters rectified, the time limit prescribed by statute for reassessing Dixie’s 1976 taxation year had expired. *Equity alone would prevent the use of curative provisions such as those contained within the *Income Tax Act* to correct a substantive error of this nature. I am of the opinion that the legislation does not contemplate the amendment of a reassessment after the expiry of a limitation period [emphasis added].”

30 90 DTC 6363 (FCA).

31 87 DTC 5024 (FCA).
The rationale in Belle-Isle was followed by the Tax Court in the 1992 decision of Collins v. MNR. In that case, the minister had allowed the taxpayer his rental expenses for two months of the year while the property was rented but denied the balance of the expenses for that year. The minister attempted to support the disallowance before the Tax Court on the basis that the taxpayer had no reasonable expectation of profit or, in the alternative, that the amounts were personal or living expenses. The taxpayer, who represented himself, objected that such an argument was inconsistent with the original assessment. The court harked back to the Belle-Isle decision of the Tax Appeal Board to support the minister’s right to advance this new position.

In Schultz et al. v. The Queen, the Federal Court of Appeal dealt with a case where the taxpayers had originally been assessed on the basis that the wife was an agent of the husband, but in the Tax Court the minister had raised an alternative argument that they were in partnership. The taxpayers did not object to this alternative “basis” in the Tax Court and raised the matter for the first time on appeal (although the court did not regard that point as “fatal”). The court did not accept their contention that this was an alternative basis:

I do not understand that the law as developed in these cases prevented the Minister from pleading the alternative defence before the Tax Court of Canada. It is true that in pleading he is subject to certain constraints. For example, he cannot plead an alternative assumption when to do so would [so] fundamentally alter the basis on which his assessment was based as to render it an entirely new assessment. In my view, in the present cases the Minister has not so changed the basis of the assessments. What he did was merely to assert a different legal result flowing from the self-same set of facts by alleging that those facts show the existence of a joint venture or partnership if they do not show an agency relationship. Even if it could be said that the Minister has alleged new “facts” by adopting the alternative posture, the law as developed allowed him to do so but imposed upon him the onus of proving those facts [emphasis added].

In La Compagnie Price Limitée v. The Queen, the Tax Court allowed the minister to plead that spare parts (originally treated as capital property) were inventory. This decision relied on the Consumers’ Gas decision referred to above.

32 Ibid., at 5025.
33 92 DTC 2227 (TCC).
34 Ibid., at 2231, per Margeson TCCJ.
35 95 DTC 5657 (FCA).
36 Ibid., at 5661, per Stone JA.
37 Ibid., at 5662, per Stone JA.
38 97 DTC 800 (TCC).
What, then, are the common threads that link the *Minden* cases? In our view, there are four:

1. These cases are all characterized by a considerable deference (sometimes explicit, sometimes implicit) to the curative provisions of the Act dealing with assessments and reassessments (subsections 152(3) and (8) and section 166).
2. Beginning with *Wiebe*, there is evidence of an increasing concern for whether the new grounds put forward by the minister would prejudice the position of the taxpayer.
3. Later we see the emergence of a concept of “substantial and fundamental error” (*Riendeau*) or the “fundamental” alteration of the basis of an assessment (*Schultz*), which would not be protected by these curative provisions.
4. None of these cases involved a discussion of, or concern for, the applicable limitation periods for issuing an assessment or reassessment.

In hindsight, the results arrived at in most of these cases seem largely unexceptionable. In *Minden, Wiebe, Consumers’ Gas, Riendeau,* and *Schultz,* it seems difficult to suggest that the taxpayers were prejudiced by the new grounds raised by the minister. While the precise mechanism of taxation changed, the central thrust remained the same. *Stephens Estate* is a clear example of a situation where the curative provisions should work (for example, involving a form with the signature of a former deputy minister); clearly the taxpayer was not prejudiced or denied procedural fairness. *Collins* involved an internally inconsistent assessment (expenses allowed for some months, but an overall allegation of lack of reasonable expectation of profit). As will be discussed below, *Collins* poses difficulties because it seems to validate an assessment that is not in accordance with the law. *La Compagnie Price Limitée* seems a reasonable result; the fundamental issue was how the taxpayer’s inventory of spare parts would be treated. Since there were only two realistic possibilities, inventory or depreciable capital property, the amendment sought by the minister seems unlikely to have seriously prejudiced the taxpayer.

The *Belle-Isle* decision is somewhat more problematic. Substituting recapture on the sale of the building for taxation of the gain on the shares seems a significant departure from the original assessment. Of all of the *Minden* cases, *Belle-Isle* seems to us to be the one that quite possibly involved a change in the fundamental basis of the assessment under appeal, which should not be protected by the curative provisions.39

**THE FARRIS CASES**

In *Farris v. MNR*,40 the minister sought, after a reply had been filed, to amend the reply and claim an additional amount of approximately $45,000 that had been

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39 There is, however, no indication in the decision that the applicable limitation period had passed.
40 63 DTC 1221 (Ex. Ct.).
omitted from the original assessment. Kearney J dismissed the claim for additional tax, holding that

[there is no provision that I know of in the Act whereby the Minister is empowered to file a cross-appeal from his own assessment.]

No authority is cited in support of this proposition, nor is there any discussion of the underlying rationale.

The next decision to examine this point was *Harris v. MNR*. The minister had allowed a deduction for rent, and the Crown proposed that if the taxpayer’s appeal were successful, the matter be referred back to the minister in order to eliminate the rental allowance and replace it with a (lower) provision for capital cost allowance. Thurlow J rejected this suggestion:

No appeal to this Court from the assessment is given by the statute to the Minister and since in the circumstances of this case the disallowance of the $775.02 while allowing $525 would result in an increase in the assessment the effect of referring the matter back to the Minister for that purpose would be to increase the assessment and thus in substance allow an appeal by him to this Court. The application for leave to amend is therefore refused.

The *Harris* decision was followed by Cattanach J in *Consolidated Building Corporation Ltd. v. MNR*. The fact situation there was essentially the same as in *Harris*, and the court refused to refer the matter back to the minister to reduce the deduction originally allowed:

In my view, the Minister wrongly allowed a deduction of $81,159.15 as rent which is in excess of the deduction of $60,000 to which I believe the appellant to be entitled. For the reasons outlined by Thurlow J. upon this same point in the *Harris* case, I do not propose to allow the appeal and refer the matter back to the Minister to disallow the rent deduction and to allow a proper deduction for capital cost allowance.

41 Ibid., at 1228.
42 64 DTC 5332 (Ex. Ct.).
43 In *British Columbia Power Corporation Limited v. MNR*, 66 DTC 5310 (Ex. Ct.), Sheppard DJ concluded that the minister was permitted to cross-appeal to seek to tax an amount not taxed in the assessment under appeal, but the cross-appeal was subsequently withdrawn. This decision seems to be definitely out of the mainstream of authorities. The Tax Appeal Board reached a different conclusion in connection with appeals under the Estate Tax Act in *Inman Estate v. MNR*, 69 DTC 180.
44 Supra note 42, at 5337.
45 65 DTC 5211 (Ex. Ct.).
46 Ibid., at 5220.
In *Bronze Memorials Limited [No. 2] v. MNR*, the taxpayer had sold a property in 1958 and the minister included the entire gain in its income for 1958. The taxpayer appealed successfully to the Exchequer Court on the basis that it was entitled to a five-year reserve calculated on an accrual basis. The minister assessed the taxpayer for 1959 to 1962, bringing the amounts actually received into income on a cash basis. The taxpayer successfully appealed those reassessments to the Exchequer Court:

In my view, the Minister had no right to so reassess on a cash or received basis, and predicated on the pleadings and the evidence in this case there is no power in this Court to refer these reassessments back to the Minister for further reassessment on a receivable or accrual basis to tie in with the way that the Minister may assess this gain in the taxation year 1958 of the appellant, in the event the appellant's said appeal to the Supreme Court of Canada is not successful. Also to do so in effect would be to allow an appeal to the Minister from his own reassessments, on these appeals therefrom by the appellant taxpayer.

In *Vineland Quarries and Crushed Stone Ltd. v. MNR*, Cattanach J allowed the minister to amend his pleading. The case involved a claim by a quarry operator to enhanced capital cost allowance. The minister disallowed that claim on the basis that the taxpayer was principally engaged in the business of mining and allowed a deduction for equipment used in an "industrial mineral mine." The minister moved to amend the pleading to plead, in the alternative, that if the taxpayer were successful on the main issue, it should not be entitled to the deductions already allowed since it would not then be in the business of operating an "industrial mineral mine." After citing *Harris* and *Minden*, Cattanach J permitted the amendment:

In effect the Minister says that for a reason he thinks to be correct he assessed the appellant to income tax at "X" dollars. The appellant says that the reason assigned by the Minister was incorrect. The Minister then says if the Court should hold the basis for his assessment of "X" dollars is erroneous, then for what the Court might find to be the correct reason, he would assess the appellant at "X" minus "Y" dollars.

While the logic of this decision is somewhat difficult to follow, we think that it stands for the proposition that if a taxpayer succeeds in an appeal, the minister is entitled to reverse deductions previously allowed to the taxpayer if those deductions are themselves fundamentally inconsistent with the basis upon which the taxpayer was successful.

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47 69 DTC 5420 (Ex. Ct.).
48 At the date of this judgment, an appeal by the minister from the prior judgment was pending before the Supreme Court of Canada.
49 Supra note 47, at 5422-23, per Gibson J.
50 70 DTC 6043 (Ex. Ct.).
51 Ibid., at 6046.
In *Klie v. MNR*,\(^52\) the assessment under appeal had allowed the taxpayer restricted farm losses. The minister sought to amend the reply to deny the taxpayer any loss from his farming operation. The Tax Review Board denied the amendment:

The latitude given the Minister in pleading in the alternative, in my view, permits the Minister to plead only new facts which support his assessments. Although it may at times be difficult to draw the line, I do not believe that it is open to the Minister to introduce new facts in his pleadings which would radically change the legal basis of his assessments. *Fundamental changes in the pleadings which destroy, contradict or ignore the assumptions on which the assessments were originally made*, could, in my opinion, result in changing an assessment which can only be effected by reassessment [emphasis added].\(^53\)

The Tax Review Board followed *Harris* and *Vineland Quarries* in *CFTO TV Ltd. v. MNR*:

> It is the Minister who assesses tax. The Board can only adjudicate on an appeal of a taxpayer and I am certain no taxpayer would appeal to have his income increased with a resultant increase in tax. If the Minister wishes to have an appellant's tax increased he only has to issue an assessment for the total tax and the taxpayer has the right to dispute the same before this Board or in the Federal Court [emphasis added].\(^54\)

This appears to be the first decision to point out that the minister has a remedy if he or she is dissatisfied with an assessment—the minister can reassess. As will be seen in the discussion below, this factor is one of the principal considerations underpinning the policy behind the *Continental Bank* rule.

In *Cooper v. MNR*,\(^55\) the Tax Court of Canada held that it could not implement an agreement between the minister and the appellant that would have had the effect of increasing the taxpayer's tax payable in one of the years under appeal, since this would amount to the minister's appealing an assessment. Subsection 169(3) now permits the minister to reassess outside the normal reassessment period “for the purposes of disposing of an appeal,” but only with the consent of the taxpayer.\(^56\)

In *The Queen v. McLeod*,\(^57\) one of the two cases relied upon by the Supreme Court of Canada in *Continental Bank* on the “basis” issue, the taxpayer had claimed

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\(^{52}\) 79 DTC 254 (TRB). The taxpayer appealed, with a modest degree of success, but this point was not raised in the reasons for judgment on appeal: 81 DTC 5061 (FCTD).

\(^{53}\) Ibid., at 257 (TRB), per Cardin chair.

\(^{54}\) 80 DTC 1066, at 1075 (TRB), per DeBrule QC.

\(^{55}\) 87 DTC 194 (TCC). For similar reasoning, see *Shiewitz v. MNR*, 79 DTC 340, at 341 (TRB); *Boyko et al. v. MNR*, 84 DTC 1233, at 1237 (TCC); and *The ECE Group Ltd. v. MNR*, 92 DTC 2019 (TCC). The *Cooper* decision was appealed to the Federal Court Trial Division and the taxpayer's appeal was allowed: 88 DTC 6525 (FCTD).

\(^{56}\) Added by SC 1993, c. 24, section 100(2) applicable on royal assent, June 10, 1993.

\(^{57}\) 90 DTC 6281 (FCTD). Oddly enough, the only case that has expressly followed *McLeod* is the Supreme Court's decision in *Continental Bank*. 
to deduct his farming losses, and the minister had disallowed them entirely on the basis that the taxpayer was not engaged in the business of farming. The taxpayer succeeded in the Tax Review Board and the minister appealed to the Federal Court Trial Division. On that appeal, the minister alleged for the first time that the taxpayer’s losses were restricted by section 31 of the Act. Collier J refused to allow the minister to rely upon section 31:

As a result of these cases, the Minister is not restricted on appeal to pleading the assumptions made on assessment, but he is bound by the assessment itself. He cannot, on appeal, attempt to make a case [that] the taxpayer owes more tax than he was originally assessed. The question before me is whether the Minister should be allowed to claim less tax is owing, but on a totally different basis. To allow that, would, in my opinion, be tantamount to allowing the Minister to appeal his own assessment, a notion which has specifically been rejected by the courts [emphasis added].

The cases that he relied upon were *Harris* and *The Queen v. Scheller* (which held that the minister could not attack his or her own assessment by claiming a lesser amount of tax on the basis of a different argument).

In *Lutheran Life Insurance Society of Canada v. The Queen*, the appeal concerned, in part, the deduction of a dividend paid by a fraternal fund. The minister sought to argue, in the alternative, that if the dividend was deductible, certain amounts received by the fund were taxable. The court rejected this argument:

This alternative argument I am not prepared to accept. There are procedural grounds for rejecting it in my view, related to the lack of reference to it in the pleadings or in the reassessments by the Minister. Moreover, it changes the very basis of the reassessments which make no reference to the fraternal assessments as income from insurance and it negates the basis on which the reassessments were made, i.e., that the fraternal dividends were not policy dividends allowable under paragraph 138(3)(a)(iv) [emphasis added].

The second authority relied upon by Bastarache J in *Continental Bank* was *BC Telephone Co. v. The Queen*. This was a case dealing with excise tax in which a matter was, in essence, not raised until the case was before the Federal Court of Appeal. Isaac CJ refused to entertain the argument:

We are in agreement with counsel for the respondent that we should give no effect to this argument. While it was touched upon by counsel for the appellant obliquely during argument in the court below and then dropped for tactical reasons when

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58 McLeod, supra note 57, at 6285-86.
59 75 DTC 5406 (FCTD).
60 91 DTC 5553 (FCTD).
61 Ibid., at 5572, per MacKay J.
questioned about it by the trial judge, it was seriously raised for the first time toward the end of Mr. Millar’s submissions before us. The argument has no support in the pleadings or in the evidence and appears to us to be a belated attempt to put the appellant’s case on a new footing.63

Thus, the BC Telephone case was not decided under the Act, nor does it support a “basis” analysis. It is clearly an authority based on fairness in appellate procedure.

In Minet Inc. v. The Queen,64 the Federal Court of Appeal dealt with an attempt by the minister to raise subsection 56(2) of the Act (indirect benefits) for the first time in that court. The court rejected the minister’s application:

The Respondent made its bed totally outside the ambit of subsection 56(2) when it reassessed the Appellant, but now feels that a resort to it is needed for better comfort. It submits that all the facts are on the record and can justify this late application by us of the subsection. . . .

It is clear that the overriding consideration remains the lack of prejudice to the other party evidenced by the fact that all relevant evidence or material facts necessary to the application of the legal provision are on the record.65

Finally, in The Queen v. Coffen, the Ontario Court of Appeal found that the principle that the minister cannot appeal his or her assessment has no place in a prosecution for tax evasion:

We are also of the view that the rule which prohibits the Minister from appealing his own reassessment had no application to this case. That rule, which was developed for the purposes of the civil assessment procedure, has no application to a criminal prosecution for tax evasion.66

In our view, one can summarize the cumulative result of the Farris cases as follows:

1. These cases affirm that the minister cannot seek to support an assessment on grounds that would increase the tax originally assessed—that is, cannot appeal his or her own assessment or reassessment. This seems to be a “bright line” test unrelated to the “basis” for the original assessment or reassessment. While this rule involves a departure from the normal principles of civil litigation, we think it is justified in the context of the Act as a whole. The minister always has the power to reassess during the normal reassessment

63 Ibid., at 66.
64 98 DTC 6364 (FCA).
65 Ibid., at 6374.
66 98 DTC 6253, at 6254 (Ont. CA), per curiam.
period. If the minister could appeal his or her own assessment or reassessment, it would render the limitation period under the Act nugatory.

2. The subsequent cases essentially involved determining what factors amount to the minister’s appealing his or her own assessment.

3. *McLeod*, which was approved in the reasons for judgment of Bastarache J in *Continental Bank*, expanded the above principle to encompass situations where the minister argued for less tax, but “on a totally different basis.”

4. We think that the cumulative effect of *Klie*, *McLeod*, and *Lutheran Life* is that the minister cannot attempt to change the “fundamental” basis of an assessment or reassessment whether the tax payable would be greater than, equal to, or less than that originally at issue.

5. Where the minister seeks to rely upon grounds that would “destroy, contradict or ignore” the original assumptions upon which the assessment or reassessment was based, this amounts to a fundamental change in the basis of the assessment.

6. Since none of these cases cites a statutory basis for this rule, we think that it has to be said to be based on considerations of procedural fairness and control by the courts of their own processes.

7. Although none of these cases deals specifically with the issue of limitation periods, the issue is foreshadowed in *CFTO TV*, where the Tax Review Board points out that if the minister wants to change an assessment, that is within his or her power (presumably so long as the limitation period has not passed).

To the extent that the *Harris* and *Consolidated Building* decisions hold that there is no power to order the minister to reassess and at the same time deny prior deductions inconsistent with the new basis for reassessment ordered by the court, we think that the decision in *Vineland Quarries* is preferable. Where a court orders a reassessment inconsistent with the assessment under appeal, there seems to be no logical reason why the taxpayer should benefit from deductions wholly inconsistent with the reassessment ordered by the court. Procedural fairness should cut both ways, and the minister should be able to deny the previously allowed, but now inappropriate, deductions.

**THE DECISION IN CONTINENTAL BANK**

The facts in *Continental Bank* were relatively straightforward. The bank had a subsidiary leasing company. The assets of the leasing company were highly depreciated and would have given rise to a great deal of recapture if they had been sold directly. In order to avoid this recapture, the subsidiary transferred the assets to a partnership in a rollover transaction. The subsidiary was then wound up into the bank, again on a rollover basis. The bank then sold its interest in the new partnership to a third party. The effect of the transaction was to convert potential recapture into a capital gain, significantly reducing the tax payable on the transaction.

Revenue Canada (as it then was) was obviously concerned about the transaction and attacked it vigorously. Revenue Canada assessed the subsidiary, denying the
rollover into the new partnership. Just in case it lost that battle (as it did), it assessed the bank on the basis that its sale of the new partnership interest was an adventure in the nature of trade rather than a capital gain.67 In the Supreme Court of Canada, the minister raised the argument that the bank had, in effect, sold the assets of the new partnership directly (rather than its partnership interest) and therefore incurred recapture on the sale:

The appellant, however, set out an alternative argument68 for the first time in this appeal that should be addressed. The appellant argued that if the Court held in the Leasing Appeal that it was the Bank and not Leasing that acted as the vendor when the assets were sold to Central Capital Corporation (“Central”), the reassessment of the Bank in this appeal should be restored on the basis69 that having acquired the leasing assets as properties distributed to it under s. 88(1) of the Act, the Bank is taxable on the recapture of capital cost allowance under s. 13(1) of the Act in the amount of $83,052,657.70

The background to this alternative argument raised by the minister is of some interest. It appears that in the Federal Court of Appeal, Continental Bank Leasing had raised an argument that if there was no valid partnership, then there was no disposition of the leasing assets to the partnership and that on the winding up of the corporation, the leasing assets would have been transferred to the bank on a rollover basis.71 The Federal Court of Appeal did not deal with this argument in its reasons for judgment72 and dismissed Leasing’s application for a reconsideration of the judgment in light of this argument. The minister anticipated that counsel for Continental Bank Leasing would raise it in its appeal to the Supreme Court of Canada. Since the minister’s factum (as appellant in the bank appeal) was due on the same day as the Continental Bank leasing factum (as appellant in its own appeal), the factum contained an anticipatory response:

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67 The assessment of the leasing subsidiary was based on an allegation that there was no valid partnership into which the leasing assets could be rolled since section 174(2) of the Bank Act, RSC 1970, c. B-1, prohibited a bank from owning, directly or indirectly, an interest in a partnership. A majority of the Supreme Court of Canada rejected that argument: Continental Bank Leasing Corporation v. The Queen et al., 98 DTC 6505 (SCC).
68 Translated as “un autre argument.”
69 Translated as “au motif que.”
70 Supra note 1, at paragraph 7, per Bastarache J.
71 We are indebted to S. Patricia Lee of the Department of Justice and John Unger of Torys LLP for providing us with this information and copies of the factums in the Continental Bank appeal in the Supreme Court of Canada. Counsel have differing recollections as to whether Continental Bank Leasing raised this argument at trial, but nothing seems to turn on this point since the Supreme Court’s decision was not based on the prior pleadings.
72 The Queen v. Continental Bank Leasing Corporation et al., 96 DTC 6355 (FCA).
51. If the conclusion of this Court in the related appeal of Leasing is that the Respondent, not Leasing sold leasing assets to Central Capital, such assets having been transferred to the Respondent under subsection 88(1) of the Act, the Appellant’s position is that the Respondent was then taxable on the recapture of capital cost allowance by virtue of paragraph 88(1)(f) and hence the assessment of the Respondent is supportable on the basis of subsection 13(1) of the Act.

As it turns out, Continental Bank Leasing did raise the argument in its factum, but the majority of the Supreme Court did not find it necessary to consider it.\(^\text{73}\)

In Continental Bank, on the procedural issue, Bastarache J (with whom L’Heureux-Dubé J concurred) held:

The Crown is not permitted to advance a new basis\(^\text{74}\) for reassessment after the limitation period has expired. The proper approach was expressed in The Queen v. McLeod. In that case, the court rejected the Crown’s motion for leave to amend its pleadings to include a new statutory basis for Revenue Canada’s assessment. The court refused leave on the basis that the Crown’s attempt to plead a new section of the Act was, in effect, an attempt to change the basis of the assessment appealed from, and “tantamount to allowing the Minister to appeal his own assessment, a notion which has specifically been rejected by the courts.”\(^\text{75}\)

The Crown argued that it was advancing an alternative “reason” (or argument) to support the original assessment, not a new basis. Bastarache J rejected this contention:

The appellant argued that the liability of the respondent for the assessment pursuant to s. 13(1) is an alternative reason for its previous assessment, not a new assessment or reassessment. According to the appellant, because the liability for recapture under s. 13(1) would arise solely as a consequence of a finding that Leasing, in the Leasing Appeal, was not the vendor of the assets in the sale to Central, a reassessment on this basis is merely a legal conclusion flowing from the proper application of the statute.

To accept this characterization by the appellant would, in effect, create a situation where the Crown is permitted to raise new arguments\(^\text{76}\) simply because other arguments\(^\text{77}\) failed in the courts below.\(^\text{78}\)

This passage seems to blur the distinction between a “basis” and an “argument” and could be characterized as a question of procedural abuse rather than a substantive rule arising out of the limitation period contained in the Act.

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\(\text{73}\) The minority considered this argument and rejected it: supra note 67, at paragraph 220.

\(\text{74}\) Translated as “fondement.”

\(\text{75}\) Supra note 1, at paragraph 10.

\(\text{76}\) Translated as “arguments.”

\(\text{77}\) Translated as “arguments.”

\(\text{78}\) Supra note 1, at paragraphs 11 to 12.
Finally, Bastarache J wrote:

Taxpayers must know the basis\[^{79}\] upon which they are being assessed so that they may advance the proper evidence to challenge that assessment. Here, it is not clear that there is the proper factual basis\[^{80}\] to support a reassessment on the basis\[^{81}\] proposed by the appellant. . . . Because the Bank was not assessed on the recapture, the evidence relating to the allocation of the purchase price was not adduced at trial. To allow the appellant to proceed with its new assessment without the benefit of findings of fact made at trial would require this Court to become a court of first instance with regard to the new claim.\[^{82}\]

This passage is also somewhat difficult to relate to the “basis” issue. It is easier to characterize it as a critique of procedural fairness on appeal. A litigant cannot raise new issues at trial or on appeal when doing so would prejudice another party who has not had a chance to lay the evidentiary foundation to respond to such issues.

It is perhaps important to note that Bastarache J believed that the amount of tax claimed in the alternative argument remained the same.\[^{83}\] The Crown’s factum, however, indicated at paragraphs 59 and 60 that the amount of the recapture ($84,348,900) was greater than the amount originally assessed on the sale of the partnership interest ($83,052,657). It is not clear whether Bastarache J simply overlooked the discrepancy or whether the Crown was not seeking to impose tax beyond the original amount of the assessment.

McLachlin J (with whom Gonthier, Cory, Iacobucci, and Major JJ concurred) wrote:

I agree with Bastarache, J. that the Minister’s argument that the Bank sold depreciable leasing assets or was otherwise liable for recapture of capital cost allowance pursuant to s. 88(1) of the Income Tax Act, R.S.C. 1952, c. 148, as amended, raised for the first time in this Court, cannot be entertained. The Minister should not be allowed to advance a new basis\[^{84}\] for a reassessment after the limitation period has expired [emphasis added].\[^{85}\]

While one could attempt to describe the “basis” argument set out by Bastarache J as a discretionary rule of procedural fairness on appeal (as qualified by the subsequent passages in his reasons for judgment set out above), we do not think that the majority

\[^{79}\] Translated as “base.”
\[^{80}\] Translated as “étayent l’établissement.”
\[^{81}\] Translated as “base.”
\[^{82}\] Supra note 1, at paragraph 13.
\[^{83}\] “The issue that arises out of this argument is whether the Crown is permitted to substitute its original reassessment of the Bank for an assessment on a different basis that amounts to the same amount of income.” Supra note 1, at paragraph 7, per Bastarache J.
\[^{84}\] Translated as “fondement.”
\[^{85}\] Supra note 1, at paragraph 18.
decision written by McLachlin J is open to that construction. While Bastarache J uses “arguments” (translated as “arguments”) twice in the above quotations, the predominant usage is “basis” (translated as “fondement” or “base”). McLachlin J uses only the word “basis” (translated as “fondement”). In a nutshell, we think that the ratio of Continental Bank is that the minister cannot advance a new basis for a reassessment after the expiration of the applicable limitation period under the Act.

Where, then, do we stand in our attempt to resolve the gap between the Minden cases and the Farris cases? As noted above, the Minden cases were characterized by a considerable deference to the curative provisions of the Act, while the Farris cases were more concerned with issues of procedural fairness. Bastarache J cited only two cases: McLeod and BC Telephone. McLachlin J cited no authority on this point. The Crown, in its factum, cited Minden, Riendeau, and Consumers’ Gas in supporting its right to raise this new basis. In our view, the general tenor of the Farris cases has been clearly embraced by the Supreme Court and should be accepted by the lower courts as the framework for interpreting the Continental Bank rule. While the curative powers of subsections 152(3) and (8) and section 166 relied upon by the Minden cases remain an important factor, the Supreme Court has settled on procedural fairness as the overriding concern.

While we think that the rule enunciated by the Supreme Court in Continental Bank arises naturally out of the prior jurisprudence, it is somewhat difficult to determine whether it was applied correctly on the facts before the court in that appeal. On the one hand, there is clearly a significant difference between an assessment based on the sale of a partnership interest and one based on the sale of depreciable properties. Moreover, the tax involved would have actually been greater than that originally assessed had the depreciable property argument been accepted. On the other side of the equation, the minister was simply responding to an argument raised by the taxpayer, and it is difficult to see that the taxpayer was prejudiced by that response. In retrospect, we think one has to conclude that the decision was a close one and that the Supreme Court might not necessarily come to the same conclusion if another case with similar facts were to be argued before it. That said, we think that the principle that the minister cannot change the basis of an assessment or reassessment is consistent with norms of procedural fairness. Lower courts and the tax profession will have to devise means to interpret and apply that principle.

THE DEPARTMENT OF FINANCE’S RESPONSE TO CONTINENTAL BANK

The reasons for judgment in Continental Bank were released on September 3, 1998. The Department of Finance reacted with what can only be termed lightning speed

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86 Unless one could argue that her use of the word “should” indicates a degree of residual discretion in the court, an argument that we think is somewhat implausible.

87 The distinction between these words will also become important when we analyze the legislative history of subsection 152(9) below.
in the comparatively sedate world of tax policy. On December 23, 1998, it released proposed legislation that was clearly aimed at overruling Continental Bank:

Also released with today’s proposals is a draft amendment to the Income Tax Act to clarify that Revenue Canada may, in the course of an income tax appeal, rely on alternative grounds[88] to support its assessment. This amendment is proposed in light of remarks by the Supreme Court of Canada in the recent case The Queen v. The Continental Bank of Canada.89

The draft legislation and explanatory notes accompanying this press release were terse and direct:

Alternative Grounds Supporting an Assessment

1.(1) Section 152 of the Income Tax Act is amended by adding the following subsection:

(9) Subject to subsection 152(5), an assessment shall not be vacated, varied, or referred back to the Minister for reconsideration and reassessment by reason only of the identification by the Minister of an alternative basis[90] of liability for the assessment.

(2) Subsection (1) applies to appeals disposed of after Royal Assent.

Explanatory note:

New subsection 152(9) is intended to ensure that Revenue Canada may, on an appeal of an income tax assessment, identify the basis or further bases[91] on which Revenue Canada is relying in support of its assessment. This amendment is proposed in light of remarks by the Supreme Court of Canada in the case of The Queen v. Continental Bank of Canada to the effect that the Crown is not permitted to advance a new basis for assessment[92] after the limitation period has expired.

Subsection 152(9) is subject to subsection 152(5) which prevents the Minister from including amounts in a taxpayer’s income which were not included prior to the expiration of the taxpayer’s normal reassessment period. It is also intended that subsection 152(9) be subject to the court protection afforded to taxpayers that an alternative argument[93] cannot be advanced to the prejudice of the right of a taxpayer to introduce relevant evidence to rebut the argument.94

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88 Translated as “fondements.”
90 Translated as “fondement.”
91 Translated as “le fondement ou d’autres fondements.”
92 Translated as “un nouveau motif pour justifier une cotisation.”
93 Translated as “un argument de remplacement.”
94 Supra note 89.
The Department of Finance retreated from this initial position, and the legislation that was ultimately introduced and received royal assent used quite different language. In particular, the word “basis” was dropped from the provision and replaced with the word “argument.”

The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act:

(a) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and

(b) it is not appropriate in the circumstances for the court to order that the evidence be adduced.

The technical notes with the draft legislation were also quite different. The change in language from “basis” to “argument” in our view illustrates a clear intention not to override the decision of the Supreme Court. The reason for the department’s change of language in subsection 152(9) is not clear. At least one paper has suggested that the change was motivated by a decision of the Tax Court of Canada in Milette v. The Queen. In that decision, Judge Lamarre Proulx stated:

[TRANSLATION] In my opinion, it is not certain that the Supreme Court’s view is that the respondent cannot, in the Reply to the Notice of Appeal, provide reasons that differ from those given in the notice of assessment if the basis for the assessment remains

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95 The marginal note, however, reads, “(9) Alternative basis for assessment”; “basis” is translated as “argument.”

96 Translated as “argument.”

97 Added by SC 1999, c. 22, section 63.1(2), applicable to appeals disposed of after June 17, 1999.

98 Canada, Department of Finance, Revised Explanatory Notes Relating to Income Tax (Ottawa: Department of Finance, March 1999), clause 63.1:

New subsection 152(9) of the Act is intended to ensure that the Minister of National Revenue may advance alternative arguments in support of an income tax assessment after the normal reassessment period has expired. This amendment is proposed in light of remarks by the Supreme Court of Canada in the case of The Queen v. Continental Bank of Canada to the effect that the Crown is not permitted to advance a new basis for assessment after the limitation period has expired.

The limitations found in paragraphs 152(9)(a) and (b) are intended to import the Court protection afforded to taxpayers that an alternative argument cannot be advanced to the prejudice of the right of a taxpayer to introduce relevant evidence to rebut the argument.

Subsection 152(9) is subject to other limitations in the Act, including subsection 152(5) which prevents the Minister from including amounts in a taxpayer’s income which were not included prior to the expiration of the taxpayer’s normal reassessment period.


100 99 DTC 527 (TCC).
the same. It seems to me that one must not confuse argument and basis and that those concepts can be distinguished in certain circumstances.\textsuperscript{101}

While this decision was undoubtedly helpful to the Department of Finance, we do not think that one can take it as the sole basis for the change in language. To say that arguments and bases can be distinguished “in certain circumstances” is not very useful in determining how to make that distinction. It seems that we have to conclude that the Department of Finance determined that the public policy behind the \textit{Continental Bank} decision was sound and that new subsection 152(9) should not reverse the decision, but simply ensure that the Crown could raise new arguments, subject to the court’s overriding jurisdiction, so long as the original basis for the assessment or reassessment did not change.

\section*{The Post-\textit{Continental Bank} Jurisprudence}

In \textit{The Queen v. Hollinger Inc.}, the Federal Court of Appeal held that it did not have to deal with the \textit{Continental Bank} issue because there was no evidence that the taxation year in question was statute-barred. However, it then went on in obiter to endorse a very narrow interpretation of the \textit{Continental Bank} rule and seems to have concluded that subsection 152(9) had the effect of reversing that decision:

\begin{quote}
With respect, I do not read this statement of Bastarache, J. as imposing a formal procedure or a procedural restriction of the kind suggested by the respondent. . . .

I am comforted in this view by the recent legislative amendment in Bill C-72 brought to section 152 of the Act to overrule the decision of the Supreme Court in \textit{Continental Bank} on this point. Subsection 152(9) assented to on June 17, 1999 allows for an alternative argument in support of an assessment to be advanced at any time after the normal reassessment period, subject to a discretion given to the Court to refuse it if prejudice could result to the taxpayer from the late change.\textsuperscript{102}
\end{quote}

In \textit{General Motors Acceptance Corporation of Canada, Limited v. The Queen},\textsuperscript{103} the taxpayer alleged that the minister was raising statutory provisions in support of the reassessments under appeal that were different from those that originally formed the basis of those reassessments. The motions judge refused to strike the disputed provisions of the reply:

\begin{quote}
What Bastarache, J. feared, and what he was concerned with, in \textit{Continental Bank, supra}, aside from a new argument coming at the eleventh hour, was that an assessment was created by a new fact situation that was not considered by the court of first instance. I do
\end{quote}

\textsuperscript{101} Ibid., at 536.

\textsuperscript{102} 99 DTC 5500, at 5504-5 (FCA), per Létourneau JA. This matter was not raised before the Tax Court of Canada since the \textit{Continental Bank} decision had not been released at the date of the Tax Court reasons for judgment.

\textsuperscript{103} 99 DTC 975 (TCC).
not believe he denied that neither the Crown nor the taxpayer may, in a court of first instance, prepare pleadings in the alternative. It is not unusual for a taxpayer to file an appeal in the general procedure after the normal reassessment period, as in the appeals at bar. Counsel for the respondent, on further reflection of the facts of an action, may reasonably arrive at different conclusions of law from that made by the Minister's officials.

In the appeal at bar, the Attorney General is making neither new assumptions of fact nor introducing new issues that would negate the assessments under appeal and create a wholly new set of assessments. The respondent has a factual basis to plead paragraphs 8(k), 8(m), 9(a), 14, 16 and 17 of the amended reply to the notice of appeal [emphasis added].

While this decision seems to give a broader interpretation of the *Continental Bank* rule than the *Hollinger* decision, it still leaves the exact parameters of the rule unclear.

In *Chan v. The Queen*, the taxpayer had settled a dispute with the trustees of a family trust and, in exchange for releasing the trustees, received a number of shares previously held by the trust. The original assessment treated the taxpayer as having disposed of the shares; the reply, which was filed after the expiration of the normal reassessment period, treated the taxpayer as having disposed of his capital interest in the trust, incurring a capital gain equal to the value of the shares he received. The Tax Court rejected the taxpayer’s reliance upon *Continental Bank* and held that subsection 152(9) was designed to, and had the effect of, overruling the *Continental Bank* rule. The Court further analyzed the situation as follows:

Counsel argues in the alternative that, if subsection 152(9) does apply, the subsection does not allow the Minister to advance a factual basis for reassessment different from the factual basis assumed by the Minister in making the original assessment (in this case disposition of 3,500 shares of NCTL). Counsel asserts that the amending legislation permits an alternative argument only if it can be supported by the facts assumed by the Minister when the original assessment was made. Reliance on a different view of the facts is not, on this theory, permitted. Again, I do not agree. I can find nothing in either the language or the purpose of the legislation which supports the restriction which the Appellant seeks to place on the language of subsection 152(9) “the Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period . . . ”. It is difficult to imagine a rational basis for reading such a restriction into the subsection.

This decision is troubling, and the underlying facts are not entirely clear. It seems that the taxpayer settled with his father, a trustee of the trust, by receiving the

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104 Ibid., at 982-83, per Rip TCCJ.
105 99 DTC 1215 (TCC).
106 Ibid., at 1219, per Boner TCCJ: “The answer to the first of the procedural arguments is found in legislation enacted to overrule what was said on this point by the Supreme Court of Canada in *Continental Bank*.”
107 Ibid.
proceeds from the disposition of 3,500 shares (being his proportionate share of the assets in the trust). He reported the transaction as a capital gain on the disposition of the shares. The reassessment merely disputed the adjusted cost base of the shares. If, in fact, the trust had distributed the shares to the taxpayer and they had then been sold, that would have been the correct treatment. Suggesting that there was no distribution by the trust to the taxpayer but rather a sale of his interest in the trust seems to involve a fundamental recharacterization of both the facts and the law applicable to those facts.

In Smith Kline Beecham Animal Health Inc. v. The Queen, the minister attempted to bolster an existing part XIII withholding tax assessment by relying upon former paragraph 245(2)(b), which deemed certain payments to be subject to withholding tax. The court rejected the taxpayer’s contention that the Continental Bank rule prohibited reliance on this new provision:

In my view Continental Bank was never authority for the proposition that the Minister is, when defending an appeal from an assessment after the expiry of the subsection 152(4) period, confined within a conceptual prison called “basis of assessment” comprising only the facts and statutory provisions relied upon by the assessor. . . . What the Respondent seeks is an amendment to the Reply which will permit him to do precisely what the plain language of subsection 152(9) permits, namely, advance an alternative argument in support of the Part XIII assessment. He seeks to argue in the alternative that the existing assessment of tax is supported by provisions of the Act other than those relied upon by the assessor and this he is entitled to do.

Pedwell v. The Queen involved a unique fact situation. The appellant had been originally reassessed for appropriating the proceeds of two property sales from a corporation of which he was a shareholder. He subsequently persuaded the minister that the second sale did not involve any appropriation. He appealed the issue of the first sale to the Tax Court. The Tax Court concluded that the first sale was not an appropriation but ordered the minister to reassess the second sale as an appropriation. The Federal Court of Appeal concluded that the Tax Court judge did not have jurisdiction to make such an order:

[W]hile it is open to the Minister to change the basis of assessment before the limitation period expires, where he does not do so, in my respectful opinion, the Tax Court Judge is bound by the assessment at issue before the Court. Fairness requires that the taxpayer be given a reasonable opportunity to contest a new basis of assessment. If the Tax Court Judge decides on a basis of assessment not at issue during the court proceedings, the taxpayer is deprived of that opportunity. . . .

108 The decision does not identify to whom the shares were sold if there was a sale.
109 2000 DTC 1526 (TCC).
110 Ibid., at paragraphs 14 and 17, per Bonner TCCJ.
111 2000 DTC 6405 (FCA).
I do not say that the Minister might not base an assessment on a scheme consisting of more than one transaction. However, taxation is transaction-based (or perhaps deemed transaction-based) and if more than one transaction is to form the basis of assessment, the assessment must reflect that fact. Where the basis of the Minister’s assessment is one transaction, the Court cannot, *ex post facto*, broaden the scope of the assessment to include other transactions.112

*Trzop v. The Queen*113 involved the aftermath of the well-known Supreme Court of Canada decision in *Antosko et al. v. The Queen*.114 In *Trzop*, the taxpayer had been successful in obtaining deductions for certain amounts of interest paid on debentures held by him. The minister subsequently reassessed him on a capital gain on those debentures since the deductions had the result of making his adjusted cost base negative. The court rejected the application of the *Continental Bank* rule to this situation:

The Minister has not now sought either to support the original reassessments, or to raise a new issue. She has simply computed the tax payable for the years in question, applying what the Supreme Court has now determined to be the correct interpretation of subsection 20(14) of the Act. The deeming of a disposition, and a gain on that disposition, are the logical and inevitable consequences of the Appellant being entitled to the deductions he sought.115

In *Sauvé et al. v. The Queen*,116 the minister had originally assessed a part of a damages award as a capital gain. At trial, the minister’s counsel suggested that the payment was really taxable as interest. The court held that subsection 152(9) permitted this recharacterization:

[C]ounsel for the respondent, relying on the new subsection 152(9) of the Act, argued that the amount was actually received as interest and must be included in the appellants’ income on that basis and not as a taxable capital gain, although he acknowledged that the amount of the assessment cannot be increased in any way. This question also arises in somewhat different terms with regard to the interest received on the $6,000 in compensatory damages, part of which (after deducting the legal fees) was considered business income and not simply interest. Here, treating the income as coming from one source rather than the other had absolutely no consequences.

On this question, which is something of a preliminary one, I believe that the respondent can indeed rely on the provisions of the new subsection 152(9) to advance a new argument in support of the assessment, which means—as has been held many times—in support of the very amount of tax assessed.117

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112 Ibid., at paragraphs 17 and 24, per Rothstein JA.
113 2000 DTC 2364 (TCC).
114 94 DTC 6314 (SCC).
115 Supra note 113, at paragraph 18, per Bowie TCCJ.
117 Ibid., at 2006, per Dussault TCCJ.
In *Marina Homes Ltd. et al. v. The Queen*,\(^{118}\) the taxpayers had been assessed for failing to comply with requirements to pay. The court held that there were no valid assessments because there was no amount payable to the tax debtor at the date the requirements to pay were issued. The minister subsequently attempted to raise an argument that there had been transfers to the taxpayers by the tax debtor and that the assessments could be supported under section 160 of the Act. The court rejected this conclusion:

> In my opinion, in this case the alternative basis for an assessment under s. 160 does fundamentally alter the basis of the assessments for Marina and Denver, and such a change is a matter for the Minister to determine by formal action with proper notice, not a matter for this Court to institute.\(^{119}\)

It is interesting to note that there is no limitation period on assessments under section 160.\(^{120}\)

We think that the overall result of these post-*Continental Bank* cases can be summarized as follows:

1. In *Pedwell*, the Federal Court of Appeal established one of the “bright line” tests for the application of the *Continental Bank* rule: the minister cannot substitute a wholly new transaction as the basis of an assessment. By necessary implication, one must conclude that the court did not think that subsection 152(9) overruled the *Continental Bank* decision.
2. The decisions in *General Motors Acceptance*, *Smith Kline Beecham*, and *Trzop* in our view stand for the proposition that the minister can rely on new statutory provisions that can be seen to relate to, or arise out of, the original fact situation upon which the assessment or reassessment was based without violating the *Continental Bank* rule.
3. *Marina Homes* illustrates that the minister cannot raise a wholly new charging provision of the Act (in that case, section 160) to defend an assessment. This decision goes somewhat beyond the *Continental Bank* principle since there is no limitation period on section 160 assessments. Nevertheless, the court held that if the minister wished to rely upon section 160, he or she would have to issue a new assessment under that provision and have the matter heard on its merits.
4. We think that the *Chan* and *Sauvé* decisions are, with respect, suspect. While the facts are somewhat unclear in both cases, it is very difficult to see how the new grounds advanced by the minister could be said to relate to the

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\(^{118}\) 2001 DTC 5046 (FCTD).

\(^{119}\) Ibid., at paragraph 26, per MacKay J.

\(^{120}\) However, the decision of the Supreme Court of Canada in *The Queen v. Markevich et al.*, 2003 DTC 5185, may impose a six-year limitation period on such assessments.
original bases for these assessments. Chan turned from a straightforward valuation issue dealing with the sale of shares into a complex inquiry into the distribution of trust assets and the alleged disposition of an interest in that trust. This new position advanced by the minister should have involved some complex questions concerning the interaction of several of the trust rules in sections 104 through 108 of the Act, but the decision is largely silent on these issues. In Sauvé, the minister attempted to defend an amount assessed as a capital gain by arguing that it was actually interest, assuring the court that the actual amount of tax imposed would not be increased (as it should have been under the Act if the disputed amount was interest). As will be discussed below, we think that this amounts to condoning an assessment not authorized by the Act. Both of these cases appear to involve changes of bases as fundamental as, if not more than, that in Continental Bank.

**ANCHOR POINTE, LOEWEN, AND BLANCHETTE**

A trilogy of recent decisions, Anchor Pointe,\(^\text{121}\) Loewen,\(^\text{122}\) and Blanchette,\(^\text{123}\) has brought the Continental Bank rule clearly back into the forefront of taxpayers’ concerns. One of these cases, Loewen, is on its way to the Federal Court of Appeal and will perhaps result in a more detailed analysis by that court of the operation of the Continental Bank rule.

In Anchor Pointe, the taxpayer had invested in a seismic structure similar to that involved in the Global decision.\(^\text{124}\) The taxpayer had been allowed a deduction for the cash it paid for the seismic data, but no deduction was allowed for the portion of the purchase price that was represented by a promissory note. The taxpayer’s notice of objection had been held in abeyance pending the decision of the court in Global.\(^\text{125}\) The uncontradicted evidence was that the original assessment was based solely on the valuation of the seismic data. The Federal Court of Appeal concluded that the seismic data in question did not fit the definition of Canadian exploration expense (CEE) since they had not been purchased for the purposes of exploration. After that decision was rendered, the Anchor Pointe assessment was confirmed; the principal basis for the confirmation was this new point that came out of the Global decision.\(^\text{126}\) The taxpayer moved to expunge certain portions of the Crown’s reply,

\(^{121}\) Anchor Pointe Energy Limited v. The Queen, 2002 DTC 2071 (TCC).

\(^{122}\) Loewen v. The Queen, 2003 DTC 686 (TCC).

\(^{123}\) Blanchette et al. v. The Queen, 2003 DTC 881 (TCC). While Blanchette was actually decided in October 2001, the English translation was not released until the spring of 2003.

\(^{124}\) Global Communications Limited v. The Queen, 99 DTC 5377 (FCA).

\(^{125}\) We understand that this was a unilateral decision on the part of the Canada Revenue Agency insofar as there was no agreement with the taxpayer to hold the notice of objection in abeyance.

\(^{126}\) The Crown conceded that the assumptions related to the CEE point were made after the original assessment: “The assumptions in issue, respondent’s counsel acknowledges, ‘were made
including three paragraphs dealing with assumptions of fact related to the CEE argument raised at the confirmation level.

While Rip TCCJ stated that “[o]rdinarily I would have adjourned this application to have it heard by the trial judge,” he decided to rule on these issues because the documents related to the CEE question were extremely voluminous (25 boxes) and his ruling could materially affect the length of time involved in examinations for discovery. He concluded that assumptions could not be made after the date of the original assessment:

Once a Notice of Objection is filed, the Minister, in accordance with subsection 165(3) of the Act, must take one of four actions after reconsidering an assessment: vacate the assessment, confirm the assessment, vary the assessment or reassess. Each is a separate and distinct process. While the confirmation of an assessment may be part of the assessment process, it would be a distortion of language to call a confirmation an assessment. Confirmation is the action of ratifying or verifying an assessment, without an assessment there can be no confirmation of the assessment. The Minister first must assess an amount of tax and then, if the taxpayer objects, the Minister may confirm that the assessed tax amount is correct. When the Attorney General states in pleadings that “in assessing, the Minister assumed the following facts . . .” it is the facts the Minister assumed “in assessing” that must follow, not facts he or she assumed subsequently on reconsidering the assessment in the objection or appeal stage.

Rip TCCJ struck out the offending assumptions as an abuse of process.

The taxpayer was unsuccessful in the remainder of its motion. The gist of its argument was that the CEE point was a new “basis” for assessment within the Continental Bank rule, which was made while the taxation year in question was statute-barred. The court held that it did not have to examine the Continental Bank issue since a confirmation was part of the assessment process and caused the limitation period in subsection 152(4) to be suspended:

While the Minister considers the assessment, the limitation periods in subsections 152(4) and (4.01) are stayed: subsection 165(5). Parliament recognizes that the Minister may have to vary or vacate the assessment under objection or reassess or confirm the assessment and the Minister should not have to fight a deadline. However, since the confirmation is part of the assessment procedure, it is only common sense that the limitations

by the Minister in reconsidering his reassessments and were made prior to the confirmation.’” Anchor Pointe, supra note 121, at paragraph 23. In Holm et al. v. The Queen, 2003 DTC 755, at paragraph 21 (TCC), Bowman ACJ characterizes these as assumptions that “could not possibly have been made.”

127 Anchor Pointe, supra note 121, at paragraph 17.

128 Technically, there is a fifth possibility: the minister can do nothing and the taxpayer can appeal to the Tax Court after the expiration of 90 days (paragraph 169(1)(b) of the Act). This is what happened in Loewen, supra note 122.

129 Anchor Pointe, supra note 121, at paragraph 24.
in subsections 152(4) and (4.01), which include the normal reassessment period, be suspended until one of the four actions described in subsection 165(3), including a confirmation, is made by the Minister.130

Accordingly, the Crown could select a new “basis” for the assessment at the confirmation level. As a result, the material facts supporting the CEE point could be pleaded, but not as assumptions.

_Actor Pointe_ was the subject of both an appeal and a cross-appeal before the Federal Court of Appeal.

The court (Rothstein JA) first dismissed the Crown’s appeal. It held that paragraphs 10(q), (r), and (z) of the minister’s reply were factually untrue and therefore could not be pleaded as assumptions:

Reassessment and confirmation are distinct actions engaged in by the Minister. Reassessment implies changing a previous assessment or reassessment. Confirmation implies that the previous assessment or reassessment stands unchanged. It is misleading for the Crown to say that the Minister made certain assumptions in reassessing, when those assumptions were made in confirming a reassessment.

The pleading of assumptions gives the Crown the powerful tool of shifting the onus to the taxpayer to demolish the Minister’s assumptions. The facts pleaded as assumptions must be precise and accurate so that the taxpayer knows exactly the case it has to meet. There is no reason why the requirement for precision and accuracy does not apply to the Crown accurately stating the circumstances in which the assumptions arose, that is, on an assessment, reassessment or confirmation. For these reasons, I think Rip J. was correct when he found paragraphs 10(q), (r) and (z) to be inaccurate and struck them from the Reply.131

The court agreed with the motion judge that matters of law could not be pleaded as assumptions and went on to state that where assumptions contained mixed questions of fact and law, the underlying factual components should be separately pleaded:

I agree that legal statements or conclusions have no place in the recitation of the Minister’s factual assumptions. The implication is that the taxpayer has the onus of demolishing the legal statement or conclusion and, of course, that is not correct. The legal test to be applied is not subject to proof by the parties as if it was a fact. The parties are to make their arguments as to the legal test, but it is the Court that has the ultimate obligation of ruling on questions of law. . . .

The Minister may assume the factual components of a conclusion of mixed fact and law. However, if he wishes to do so, he should extricate the factual components that are being assumed so that the taxpayer is told exactly what factual assumptions it must demolish in order to succeed. It is unsatisfactory that the assumed facts be buried in the conclusion of mixed fact and law.132

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130 Ibid., at paragraph 43.
131 _The Queen v. Anchor Pointe Energy Ltd._, 2003 DTC 5512, at paragraphs 22 to 23 (FCA).
132 Ibid., at paragraphs 25 to 26.
In a somewhat troubling passage, the court seemed to endorse the concept that assumptions may be made at the notice of objection level:

If paragraphs 10(q) and (r) had been properly pleaded, they would be unobjectionable. However, paragraphs 10(q), (r) and (z) were not accurately pleaded. Rip J. was correct in striking them out. As I read his reasons, Rip J.’s sole reasons for striking paragraphs 10(q), (r) and (z) were inaccuracy and pleading conclusions of law. I do not understand him to say that assumptions of fact made on confirming a reassessment cannot be pleaded. The Minister, as a result of reading the Notice of Objection filed by a taxpayer or a subsequently decided case such as *Global*, may make assumptions of fact. I see no reason why such assumptions may not be included in the Crown’s Reply. However, the assumptions must be pleaded accurately.133

In our view, this passage is troubling because there is no real analysis of the underlying policy concerns. The underlying policy reason for the reverse onus rule134 is clear: where facts are peculiarly within the knowledge of the taxpayer, it is simply unfair to force the minister to prove those facts. If the minister makes assumptions that are not in fact correct, the taxpayer has the knowledge to demonstrate that error. The underlying premise of the rule, however, is that the minister makes such factual assumptions in raising an assessment (which, in our view, can be done on an initial assessment, an initial reassessment, or a reassessment arising out of a notice of objection). Where the assumptions arise in the course of confirming an original assessment or reassessment as part of the notice of objection procedure, the fairness of the process is questionable at best. The notice of objection process can take several years in more complex cases (slightly more than six years in the *Anchor Pointe* case). To allow the minister to sit back and cherry pick developments from recent cases and use them to bolster the rationale for the original assessment or reassessment in the guise of assumptions the taxpayer must then disprove seems harsh. Clearly the Crown should be able to plead such facts and arguments (subject, that is, to the issue of statute-barring, which is discussed below) as long as the onus is on the Crown to adduce evidence to prove such assertions. Where, however, the Crown can cast such afterthoughts as assumptions, this seems to us to go well beyond the “level playing field” rationale underlying the original rule and to skew the process clearly in favour of the Crown.

There is some ambiguity in the above-quoted passage from *Anchor Pointe*. While it is probably implicit in the use of the word “assumptions” that such post-assessment or post-reassessment pleadings would benefit from the reverse onus rule, there is no clear statement or expression of the rationale for such a rule. In an appropriate case, the court should be asked to revisit this issue and explore the appropriateness of such an apparent extension of the historical rule.

133 Ibid., at paragraph 28.
134 For a discussion of the history, policy, and working of the reverse onus rule, see Innes and Moorthy, supra note 10.
In the case of the taxpayer’s cross-appeal, the court first disagreed with the motion judge’s finding that the notice of objection process suspended the operation of the normal limitation period:

I am unable to agree with Rip J. that the expiry of the normal reassessment period is stayed or is extended until the Minister takes action under subsection 165(5). The implication of such an interpretation is that because a taxpayer files a Notice of Objection, the Minister has an unlimited time to reassess the taxpayer to increase tax payable after the normal reassessment period.135

This seems to be a very reasonable approach. To hold otherwise would severely strain the language and scheme of the legislation and would render the Continental Bank rule largely moot.

The court dismissed the cross-appeal, however, on the basis that the Crown was entitled to rely upon new arguments arising out of the Global decision:

Anchor Pointe tries to distinguish between a new basis of assessment and a new argument in support of an assessment. I do not find that semantical argument productive. The question is whether the Minister is purporting, through reliance on the Global decision, to increase the amount of Anchor Pointe’s income that was not included in an assessment or reassessment made within the normal reassessment period.

In my opinion, he was not. This case is unlike cases such as Pedwell v. The Queen, 2000 D.T.C. 6050 (F.C.A.), where the Minister sought to take into account different transactions than the ones that formed the basis of the reassessments that were made within the normal reassessment period. . . .

On confirming the reassessment, the Minister does not seek to increase that amount. He is not introducing a new transaction. He is only relying on an additional argument, that there is no CEE deduction allowed where the acquisition of the seismic data is for resale or licensing [emphasis added].136

While the court was aware that the new ground put forward by the minister would, technically speaking, result in a greater amount of tax payable, it seemed content with counsel’s representation that no additional tax would be payable:

Crown counsel concedes that the Minister cannot increase tax payable after expiry of the normal reassessment period. I agree with Crown counsel.137

Loewen138 involved a disallowance of a portion of the capital cost allowance in connection with a syndication of software. The taxpayer was seeking an order allowing its appeals on the basis that the Crown had pleaded assumptions that did

135 Anchor Pointe, supra note 131, at paragraph 33.
136 Ibid., at paragraphs 38 to 40.
137 Ibid., at paragraph 34.
138 Supra note 122.
not, in fact, form part of the assessment process; or, in the alternative, striking out the Crown’s reply, without leave to refile; or, in the further alternative, deleting the offending portions of the reply.

The taxpayer argued that the assessments under appeal were based on two issues:

1. valuation (although the matter is not clear, it appears that the valuation issue may have been raised to support an argument that the deduction was “unreasonable” within the meaning of section 67 of the Act); and
2. lack of availability for use.

On appeal, the Crown raised three additional arguments (along with the concomitant, alleged assumptions):

1. The parties to the transaction were dealing at less than arm’s length (and therefore, a readjustment of the purchase price was permitted under section 69 of the Act).
2. The software was not acquired for the purpose of earning or producing income (and therefore, capital cost allowance [CCA] with respect to the software was denied under the provisions of part XI of the Income Tax Regulations).
3. The promissory note that formed part of the purchase price for the software was contingent (and therefore, no CCA was allowable with respect to that portion of the purchase price).

Bowman ACJ examined the evidence in detail and found as a matter of fact that the assessor had assumed

- that the parties were dealing at arm’s length,
- that the software was acquired for the purpose of earning or producing income, and
- that there was no evidence that the promissory note was contingent.

The court examined the application of the Continental Bank principle to the pleadings in question as well as subsection 152(9), which was introduced in response to that decision:

Some of the broad principles that have emerged since Continental Bank are:

1. The decision in Continental Bank stands for the proposition that the Crown cannot advance, after the limitation period has expired, a fundamentally different basis of assessment that amounts in essence to a different assessment. This is a fortiori true at an appellate level, but it also applies to trial courts.
2. Subsection 152(9) of the Act does not overrule Continental Bank. It does not sanction the substitution of a wholly different basis of assessment. It permits the Crown to put forward new arguments in support of the existing basis of assessment.
3. Subsection 152(9) is particularly relevant at the trial level because it contemplates the possibility of an appellant adducing evidence. At an appellate level new evidence
is rarely, if ever, adduced and the rule stated in *S.S. Euphemia* has been quite adequate to prevent new arguments being raised in the appeal courts.139

Without in fact saying it, Bowman ACJ seems to have concluded that subsection 152(9) is, at best, declaratory of the common law and, at worst, a completely unnecessary provision.

Turning to the issues pleaded, the court struck out the issue touching on part XI of the Regulations since this amounted to a new basis for assessment.140 The court let stand issues based on the allegations that there was a less than arm’s-length relationship between the parties and that the promissory note was contingent, holding that such issues are based on arguments that support the assessments as made, that is to say, the deduction of CCA on a more restricted basis than the appellant claimed. These arguments could be raised even without subsection 152(9).141

Bowman ACJ closed this complex and lengthy judgment with his familiar admonition to counsel to get down to the business of litigation and avoid the “quagmire” that can arise when “the procedural tail [wags] the substantive dog.”142

In *Blanchette*,143 Garon CJ dealt with a case where the minister had originally assessed on the basis that the taxpayers were partners and in the reply took the position that there was no partnership or, in the alternative, that the taxpayers were limited partners. The court rejected the taxpayers’ claim that this was a complete change of basis. The underlying facts in *Blanchette* are not completely clear from the reported decision. The taxpayers appear to have invested in a form of tax shelter partnership that generated losses giving them tax relief. The new points raised by the minister were aimed at denying the losses by virtue of the fact that there was no reasonable expectation of profit or that, if the taxpayers were limited partners, the losses claimed could not exceed their “at-risk amounts.” While Garon CJ put a great deal of emphasis on subsection 152(9), it is not clear that his decision was based primarily on that provision. Ultimately, he summarized the difficulties that the courts have faced in dealing with what constitutes a new basis:

I would add that there was suggested to me on behalf of the applicants *no formula or logical dividing line that would make it possible to determine whether an alternate argument was fundamental* or not for the purposes of subsection 152(9) of the Act. Although I

139 Ibid., at paragraph 61.
140 In addition, the court, ibid., at paragraph 105, struck out a reference to regulation 1102(1)(c).
141 Ibid., at paragraph 102.
142 Ibid., at paragraph 113.
143 Supra note 123. See one additional case cited in *Blanchette: La Compagnie Price Limitée v. The Queen*, supra note 38 (French only).
do not have to decide the question, I nevertheless do not believe that the Minister of National Revenue could advance, in a Reply to a Notice of Appeal concerning a given assessment, an argument that would be utterly unrelated to the element of the assessment that is the subject of a dispute between the parties [emphasis added].144

THE CIVIL LITIGATION RULE

The area of civil litigation that is closest to the subject of our inquiry is the amendment of claims to assert new causes of action145 following the expiration of a limitation period. The starting point for the law in this area is that the courts have no inherent jurisdiction to extend a statutory limitation period:

If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have the power to allow such an amendment, but certainly as a general rule it will not do so.146

The Supreme Court of Canada elaborated on the “peculiar” or “special” circumstances concept in Basarsky v. Quinlan.147 In that case, an action had been commenced for wrongful death; subsequently, and after the expiration of the applicable limitation period, the plaintiff moved to amend his pleadings to add claims under The Fatal Accidents Act148 on behalf of the widow and children of the deceased. The amendment was refused by the trial judge and the Alberta Court of Appeal but was allowed by the Supreme Court of Canada:

In my view, the special circumstances which would warrant a court to allow such an amendment exist here. All the facts relating to the tort of the respondents and their liability for the death of Onishenko were pleaded in the original statement of claim. The respondents have admitted responsibility for the death of Onishenko. On the examination for discovery of the appellant which took place on June 9, 1969, counsel for the respondents examined as to the age of Onishenko’s widow, whether she had employment, the number of children and their ages as well as to the employment and earnings of the deceased, all matters relevant only to an action under The Fatal Accidents Act.149

144 Blanchette, supra note 123, at paragraph 26.
145 The rule also extended to the addition of new parties after the expiration of a limitation period, but this situation is obviously less analogous to income tax litigation since there can be only one party to an assessment or reassessment.
148 RSA 1955, c. 111.
149 Supra note 147, at 385, per Hall J.
Subsequent decisions have attempted to enumerate guidelines for the application of the “special circumstances” rule:150

1. the new claim must rest upon the same factual situation or event;
2. the new claim must in some way arise out of, be derived from, or be dependent upon the original claim;
3. the delay in making the new claim has been incurred in good faith; and
4. no substantial prejudice or hardship will result to the defendant by reason of the delay.

Other courts have emphasized that this is a discretionary remedy where the particular facts of the case are the most important consideration.151 “[T]he lack of prejudice to the defendants . . . is the golden thread that runs through most, if not all, of the authorities.”152

While this line of authorities will obviously be helpful in identifying exceptions to the rule in Continental Bank, we are left with the difficulty that there are no separate “causes of action” under the Act. Can this jurisprudence assist in determining what amounts to a new “basis” for an assessment? We think that these cases support the proposition that where the grounds advanced by the minister

- do not rest upon the same factual situation or event, or
- do not in some way arise out of, or are not derived from or dependent upon, the original assessment,

those grounds likely amount to a new basis. It is possible that grounds that meet these criteria might still amount to a new basis for assessment, but the minister may be able to advance that new basis if he or she can meet the “delay” and “prejudice” test.

THE FUTURE OF THE CONTINENTAL BANK RULE

Any attempt to interpret the meaning of the rule in Continental Bank must start from the premise that an assessment is more than a piece of paper or a monetary amount of tax owing. While there was some support for the latter position in the early Minden cases, subsequent jurisprudence culminating in Continental Bank makes it clear that an assessment is the totality of the facts, statutory provisions, and common law principles integral to that assessment or reassessment at the time it was issued. This is not a novel concept. It was first enunciated by Cattanach J in 1946, citing a 1926 decision of the High Court of Australia:

151 Deaville v. Boegeman (1984), 48 OR (2d) 725, at 730 (CA).
152 Ward v. Wetton (1983), 33 CPC 11, at 17 (Ont. HCJ), per Master Peppiatt.
An “assessment” is not a piece of paper; it is an official act or operation; it is the Commissioner’s ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called “a notice of assessment.” . . . But neither the paper sent nor the notification it gives is the “assessment.” That is and remains the act of operation of the Commissioner.

It is the opinion as formed, and not the material on which it was based, that is one of the circumstances relevant to the assessment. The assessment, as I see it, is the summation of all the factors representing tax liability, ascertained in a variety of ways, and the fixation of the total after all the necessary computations have been made [emphasis added].

The attempt to determine the basis for an assessment must be predicated on considerations of procedural fairness. That procedural fairness has its roots in a conjunction of factors:

1. The Act contains a limitation period. There is a strong societal interest in finality of income tax assessments.
2. The very low threshold for opening statute-barred years (for example, a misrepresentation that is attributable to neglect or carelessness on the part of a taxpayer will suffice) operates to ensure that taxpayers cannot abuse the protection afforded by the limitation period.
3. Where the minister tries to use the appeal process to rectify his or her own error and, in effect, reassess outside the limitation period, this amounts to an abuse of the processes of the courts.
4. Where the minister raises substantive new grounds for an assessment outside the limitation period, this prejudices that taxpayer’s legitimate interest for certainty in the assessing process.
5. Subsections 152(3) and (8) and section 166 cannot cure the minister’s failure to raise such grounds before the expiration of the limitation period since this is a question of jurisdiction to tax.

How are we to determine what forms part of the basis of an assessment? In our view, the jurisprudence from the Minden cases, the Farris cases, and the post-Continental Bank cases makes it clear that only matters that are “fundamental” to an assessment form part of the basis. This accords with the meaning of “basis” itself:

153 Cattanach J in Pure Spring Co. Ltd. v. Minister of National Revenue (1946), 2 DTC 844, at 857 (Ex. Ct.), quoting The King v. Deputy Federal Commissioner of Taxation (SA); Ex Parte Hooper (1926), 37 CLR 368, at 373 (HC), per Isaacs J.
154 As long ago as 1921, it was recognized that the curative provisions of the Act would not validate jurisdictional errors: Charles Percy Plaxton and Frederick Percy Varcoe, A Treatise on the Dominion Income Tax Law (Toronto: Carswell, 1921), 255.
1. A foundation upon which something rests.
2. The chief constituent; the fundamental ingredient: . . .
3. The fundamental principle.155

It also accords with the meaning of “fondement.”
“Basis” must be contrasted with “argument”:

A course of reasoning aimed at demonstrating truth or falsehood: . . .
A fact or statement put forth as proof or evidence; a reason: . . .
A set of statements in which one follows logically as a conclusion from the others.156

Thus, an argument is a line of reasoning or evidence put forward to support a position. In the case of an assessment, it is that underlying position that forms the basis of the assessment.

For this reason, as well as the clear language of subsection 152(9) and its legislative history, we think that those cases that suggest that this provision overrules the decision in Continental Bank are incorrect. The better view is that expressed by Bowman ACJ:

2. Subsection 152(9) of the Act does not overrule Continental Bank. It does not sanction the substitution of a wholly different basis of assessment. It permits the Crown to put forward new arguments in support of the existing basis of assessment.157

How are we to determine which aspects of an assessment are fundamental? Clearly not every aspect of an assessment can be said to form part of the “basis” of the assessment. Trivial irregularities, typographical errors, and the like are not fundamental to an assessment and will be cured by the combined effect of subsections 152(3) and (8) and section 166 of the Act.158

Where the inquiry becomes difficult is on the level of what details form part of the basis of an assessment, or perhaps more important, what points of evidence and law the minister can raise after the expiration of the applicable limitation period without changing the basis of the original assessment. On the one hand, we have taxpayers arguing that reliance on any new provision of the Act constitutes a change in basis (such as the reliance upon former paragraph 245(2)(b) in Smith Kline Beecham); on the other, we have the minister proposing to defend the assessment of a capital gain on the basis that the amount is actually interest but will be taxed at capital gains rates (Sauvé). We think that a principled approach to this

156 Ibid.
157 Loewen, supra note 122, at paragraph 61.
issue leads one to determine the basis of an assessment in accordance with considerations of procedural fairness. Was it reasonable to anticipate that the minister would seek to defend an assessment by adducing the factual or legal grounds in question? Would it prejudice the taxpayer and result in an abuse of process to allow the minister to assert those grounds after the expiration of the applicable limitation period? We think that Bowman ACJ embraced this approach in *Loewen* when he characterized the issue as permitting arguments “that support the assessments as made, that is to say, the deduction of CCA on a more restricted basis than the appellant claimed.” This position in turn accords with the definition of assessment adopted by Cattanach J as the “summation of all the factors representing tax liability, ascertained in a variety of ways.” In summary, we think that a change in the basis of an assessment occurs only where the minister asserts grounds to support the assessment that, viewed objectively, a taxpayer could not reasonably have expected to meet.

How do we determine whether a position advanced by the minister changes a fundamental aspect of the assessment under appeal? At the margins of this inquiry, we have two “bright line” rules and one, somewhat less clear but still valuable, principle:

1. Where the minister advances a position that would result in an increase in the tax payable, this will not be permitted. Such a position amounts to a clear change in the basis of the assessment.
2. Where the minister seeks to defend the assessment using a transaction other than the one upon which the assessment was based, this will not be allowed since it is clearly a change in the basis of the assessment.
3. Where the minister advances a position that would result in less tax payable, we think that this may often be evidence that there has been a change in basis.\(^{161}\)

A difficult problem arises where the minister agrees to impose less tax than would be technically applicable under the new ground being raised. This was the situation in *Collins, Sauvé*, and *Anchor Pointe*. Put simply, the difficulty with the minister proceeding in this fashion is that it is illegal:

> [I]t is clear from the language of the statute that any attempt by the Minister to assess or reassess outside the limits imposed would be declared by the courts to be invalid and illegal. Such was the finding in *Lechter v. M.N.R.*, 64 DTC 5311 (Ex. Court), in *Bronze Memorials Limited (No. 2) v. M.N.R.*, 69 DTC 5420 and in *Galway v. M.N.R.*, 74 DTC 6247. In the *Galway* case, the Chief Justice of the Federal Court said at p. 6249:

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159 Supra note 122, at paragraph 102.

160 *Pure Spring Co. Ltd.*, supra note 153, at 857.

161 With the caveat that where the decrease in tax payable arises simply because the minister has decided not to pursue certain aspects of the assessment (for example, has conceded that one of three stock transactions was a capital gain while continuing to argue that the remaining two were on income account), this would not amount to a change of basis.
It seems obvious that the Minister cannot, on a re-assessment, do anything other than assess in accordance with the authority conferred on him by the Income Tax Act.

The Chief Justice to add [sic] at p. 6250:

In those circumstances, we have grave doubt as to whether the Minister is legally entitled to re-assess for a part of the amount of tax in question. If he is not legally entitled to do so, the Court cannot require him to do so.162

In our view, a court cannot condone the minister’s acting in excess of his or her jurisdiction in order to avoid facing the issue that the ground now being raised would result in an increase in tax payable outside the applicable limitation period. Accordingly, we must conclude that Collins, Sauvé, and Anchor Pointe were in error on this point.

While these guides are helpful, we still need assistance in the broad middle ground where tax is neither increased nor decreased and the minister does not substitute one transaction for another. In our view, a good starting point is the decision of the Tax Review Board in Klie:

Fundamental changes in the pleadings which destroy, contradict or ignore the assumptions on which the assessments were originally made, could, in my opinion, result in changing an assessment which can only be effected by reassessment [emphasis added].163

Where a position advanced by the minister would tend to destroy, contradict, or ignore the original factual and legal basis upon which the assessment was based, this is an attack on the fundamental aspects of the assessment and amounts to a change in the basis of the assessment. Thus, to the three principles set out above, we would add a fourth—raising legal or factual grounds that cannot reasonably be seen to relate to, or arise out, of the grounds164 upon which the assessment was based. We also think that these tests are reasonable in the context of the “special circumstances” rule discussed above in the context of normal civil procedure.

Having posited a four-fold test for determining whether positions advanced by the minister offend the Continental Bank rule, we can next consider how this test would operate in the recent trilogy of cases that we have examined.

The decision of the Federal Court of Appeal in Anchor Pointe involved a position advanced by the minister that the taxpayer’s use of the seismic data did not qualify for the CEE deduction that the taxpayer claimed. It was common ground that this position emerged as a result of the Global decision, which was released long after the original reassessment was made. The basis of the Anchor Pointe reassessment

162 Canadian Marconi Company v. The Queen, 89 DTC 5370, at 5374 (FCTD), per Joyal J. See also In re Galway v. MNR, 74 DTC 6355 (FCA); and Harvey v. The Queen, 94 DTC 1910 (TCC).

163 Supra note 52, at 257 (TRB).

164 “Grounds” would include both assumptions and other factual or legal considerations forming part of the assessment or reassessment.
was that the taxpayer was not entitled to the CEE deduction it claimed in excess of the cash portion of its cost. The position advanced at trial would have resulted in no deduction for CEE, which would have increased the tax payable. The minister’s undertaking not to collect more tax was in excess of the jurisdiction granted under the Act and should not have been accepted by the court. Since this issue does not seem to have been raised before either the Tax Court or the Federal Court of Appeal, we think it would be appropriate for the Federal Court of Appeal to reconsider this problem in a subsequent decision.

In Loewen, Bowman ACJ struck one position advanced by the minister since it would have increased the tax payable. He found that two other positions—

1. an assertion that the parties were dealing at less than arm’s length, invoking section 69 of the Act; and
2. an argument that the promissory note was contingent, thus preventing a deduction by virtue of paragraph 18(1)(e) of the Act—

were arguments and not bases for assessment. We agree that the minister’s new reliance upon section 69 of the Act cannot be said to form a new basis. It does not destroy, contradict, or ignore any aspect of the original reassessment. Nor, in our view, does it add an element that could not be said to relate to, or arise out of, the original reassessment. The cost of the software was clearly at issue, and that cost would be affected if the parties dealt at less than arm’s length. Viewing the circumstances objectively, the taxpayer could not seriously suggest that it was not reasonable to anticipate that the minister would raise the issue of arm’s length in support of the assessment.

The second ground, however, seems somewhat more problematic. We are not troubled by the fact that the contingency issue arose out of a case decided long after the original reassessment. The fact that a subsequent court decision suggested that the promissory note in Loewen may have been contingent cannot be said to prejudice the taxpayer, any more than a reverse fact situation could be said to prejudice the minister. Litigants have to take the state of the case law as they find it, and parties cannot be estopped from relying on cases in their favour that have been decided after the commencement of proceedings. It is the reliance upon paragraph 18(1)(e) (dealing with contingent amounts) that is troubling. This was a provision that never formed part of the original reassessment. If it can be said to relate to, or arise out of, the original reassessment, that linkage is remote at best. However, if we return to first principles, it is difficult to see that the taxpayer was prejudiced by this additional ground. The taxpayer knew all along that his CCA claim was being challenged, and one of the aspects that he had to prove was his cost; contingency goes directly to the question of cost. While the contingency issue in Loewen is probably very close to the line, on balance if we apply the test we have posited on the basis of the first principles of procedural fairness, we think that the decision of Bowman ACJ was correct. We think that if Bowman ACJ had explicitly applied the
“special circumstances” rule in the context of tax litigation, he would have been clearly justified in allowing this pleading even if it were found to be a new basis for an assessment.

While the facts in Blanchette are somewhat unclear, the result seems to be analogous to that in Loewen. The taxpayers were seeking tax shelter deductions through a partnership. It was not unreasonable to expect that the minister would seek to attack those deductions through related provisions of the rules governing partnerships.

We can now summarize our view of the future of the Continental Bank rule and the related issues of arguments and assumptions as follows:

1. An assessment is the summation of all the factors representing tax liability, ascertained in a variety of ways.
2. The minister cannot change the basis of an assessment outside the applicable limitation period.
3. The basis of an assessment is determined in accordance with considerations of procedural fairness.
4. A change in the basis of an assessment occurs only where the minister asserts grounds to support the assessment that, viewed objectively, a taxpayer could not reasonably have expected to meet.
5. Where the minister advances a position that would result in an increase in the tax payable, this will not be permitted. Such a position amounts to a clear change in the basis of the assessment.
6. Where the minister seeks to defend the assessment using a transaction other than the one upon which the assessment was based, this will not be allowed since it is clearly a change in the basis of the assessment.
7. Where the minister advances a position that would result in less tax payable, we think that this may often be evidence that there has been a change in basis.
8. The minister cannot support an assessment with a ground that would result in an increase in tax as a matter of law and undertake not to attempt to collect the greater amount; such an undertaking is beyond the minister’s statutory jurisdiction and should not be condoned by the courts.
9. Where a position advanced by the minister would tend to destroy, contradict, or ignore the original factual and legal basis upon which the assessment was based, this is an attack on the fundamental aspects of the assessment and amounts to a change in the basis of the assessment.
10. A change in basis also occurs where the minister raises legal or factual grounds that cannot reasonably be seen to relate to, or arise out of, the grounds upon which the assessment was based.
11. The courts have the discretion to allow the minister to advance a new basis for an assessment if the minister can meet the requirements of the “special circumstances” rule.
12. Subsection 152(9) has not overruled the Continental Bank principle; it is essentially declaratory of the common law position.
13. An “argument” is a legal or factual means of defending an assessment that does not amount to a change of basis.

14. The decision of the Federal Court of Appeal in Anchor Pointe that ministerial assumptions can be made at the notice of objection stage is inconsistent with the considerations of procedural fairness underlying the Continental Bank rule and should be revisited (if the decision means that such assumptions would benefit from the reverse onus rule).

In the result, we think that the minister has considerable latitude to raise new arguments to support assessments or reassessments. Apart from the “bright line” tests set out above, we think that the courts will find a change of basis only where there is clear evidence of procedural unfairness to the taxpayer concerned. This will occur rarely and will probably arise out of significant changes in the underlying facts or reliance upon provisions of the Act (or common law rules) wholly unrelated to the original assessment (for example, section 160 in the Marina Homes case). In cases that are close to the line, the courts may well invoke the “special circumstances” rule to permit the minister to advance a new basis for an assessment where there is no prejudice to the taxpayer.

One final point has to be considered, and that is whether the minister should issue a further reassessment when he or she decides to change the basis of the original assessment or reassessment within the applicable limitation period. While there is probably no statutory requirement that a further reassessment be issued, we think that, as a matter of policy, the minister should take this route. The notice of objection procedure under the Act is designed to provide an independent avenue of review and avoid unnecessary appeals before the courts. Where, during the course of that review (or after it but within the limitation period), the minister decides to change the original basis of the assessment, it tends to make the entire notice of objection process appear futile, or worse. In such cases, appeals officers are made to look like advocates for the minister rather than independent reviewers. In the appeals renewal initiative announced by the Canada Revenue Agency (Revenue Canada at the time), one of the stated goals was greater transparency:

INCREASED TRANSPARENCY

“If an internal review procedure is to function effectively, it must function, and be seen to function, as a genuine “hard look” at the relevant law and facts by someone not previously involved in the case and who is wholly independent of the original decision maker”

Tax Law Review Committee, UK

Currently, documents are provided to taxpayers on a limited basis, at their request. The Appeals Branch, under the Appeals Renewal Initiative, will instruct its officers to make all relevant documents available to taxpayers at the outset of the objection stage to help them better understand the Department’s assessment. This will also help to reinforce the commitment to fairness and impartiality.
Revenue Canada’s Appeals Branch and the Verification, Enforcement and Compliance Research (VECR) Branch have concluded a protocol which confirms the objectivity of appeals officers and their independence in making decisions.165

Changing the basis for an assessment during or after the notice of objection level will have a direct tendency to defeat that goal and tend to encourage taxpayers to get to the Tax Court as soon as possible. Thus, in our view, as a matter of policy the minister should always reassess when he or she proposes to change the basis of an assessment. In this way, the taxpayer will have the chance for a further review at the notice of objection level, which will increase the perception of fairness and transparency.

In our view, much can be learned from the way these issues have been dealt with in general civil litigation. While there are aspects of tax litigation that require some different procedural approaches, they are reasonably limited in scope. We should depart from the general principles of civil litigation only where there are clear and compelling reasons to do so. The underlying concern must always be one of procedural fairness. The extreme positions advocated by both taxpayers and the minister in recent years are inconsistent with an attempt to arrive at basic procedural fairness. To this extent, they reflect the dynamic of much recent tax jurisprudence. In light of the strict literalism shown in many recent judgments of the Supreme Court of Canada, Continental Bank evidences more of a balancing of interests.166 That same moderation can be seen in the majority decision of the Federal Court of Appeal in OSFC Holdings Ltd. v. The Queen.167 We think that a further move in the direction of a balancing of interests is overdue in the Supreme Court of Canada and would likely be welcomed by many Canadians, if not by those at the extreme opposite ends of the spectrum of tax opinion.

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166 Similarly, the decision in Backman v. The Queen, 2001 DTC 5149 (SCC).
167 2001 DTC 5471 (FCA).