Part I - Statement of the Case

1. The appellant is Peter Eickmeier, a defendant in a case in the Ontario Court of Justice brought against him on 138 counts alleging offences pursuant to sections 327 (1)(a) and (d) of the *Excise Tax Act*. Each set of 69 charges relates to monthly GST reporting periods between September 1995 and May 2001. It is alleged that the defendant attempted to obtain $5,206,889.88 in refunds by making false claims for Input Tax Credits, which are credits claimed by a registrant for GST paid or payable on purchases. Revenue Canada and Canada Customs and Revenue Agency (now known as Canada Revenue Agency) issued $3,289,112.87 in refunds.

2. The summons was dated August 27, 2004, and on July 13, 2005, the Crown elected to proceed by indictment on all counts.

3. At the preliminary inquiry, the defendant was committed for trial on all counts before the court contrary to the *Excise Tax Act* and on a global charge that he did between September, 1, 1995 and June 28, 2001 defraud the public of a sum of money exceeding $5,000.00 contrary to the provisions of s. 30(1)(a) of the *Criminal Code*.

4. It is that order for committal to which an application for *certiorari* was made. That application was dismissed.

5. It is this order for dismissal of the application for *certiorari* to which this appeal relates.

Part II - Summary of the Facts

6. In August 1995, Sheffield International Corporation (Sheffield) was incorporated, and its office was located in Toronto.

7. Sheffield's business activity, initially, was metal sales.

8. In October 1995, Sheffield purchased two billets of steel from a metal company for $182,325 plus GST and obtained a GST refund for the GST paid or owing.

9. There was no further business for Sheffield until June 1996. Peter Eickmeier then started using Sheffield, to buy and sell computer software.

10. Sheffield, with Peter Eickmeier as manager, bought software from Peter Eickmeier (who used the trademark *Heavy Metal Software*™) and resold it to Frontier Metals, Inc. (Frontier Metals), a New York corporation in Buffalo, related to Peter Eickmeier, where a Mr. Singh was alleged to be operating a division that licensed the software to customers.

11. Sheffield claimed and received refunds for the GST that it owed for the software it purchased from Peter Eickmeier.

12. Canada Revenue Agency (CRA) audited Sheffield in 2000 and raided the residences of each of the defendants in December 2003 and found no evidence of software (other than invoices and oral and written statements from Peter Eickmeier). Peter Eickmeier told the auditor that software was not kept by Sheffield because to do so would be a violation of the principle of selling all the

rights in respect of the software. Consequently, it would be illegal to keep copies of the software. [Exhibit book 37, Tab 197, page 3-339]

13. CRA found no documentary evidence of any payment for the software, either from Sheffield to Peter Eickmeier or from Frontier Metals to Sheffield. But there was money flowing from Sheffield to Frontier Metals, which was disbursed mainly to companies owned partly or wholly by Peter Eickmeier as loans, partly to Peter Eickmeier as cash, partly to pay the personal living expenses of Peter Eickmeier [Transcript Volume 12, page 94, line 30; page 95, line 10], and partly to other destinations.

14. Peter Eickmeier filed his own GST returns late and claimed bad debts for unpaid amounts from Sheffield, thereby enabling him to claim that he owed no money to Canada Revenue Agency for GST.

15. There was an undated scribbled flow chart on an envelope found at the residence of Peter Eickmeier containing the words "payment never happens" [see Exhibit Book 12, Tab 188, page 3785] but the flow chart did not resemble any transaction that occurred in the case at bar. And there were many transaction flow charts carefully prepared on a computer (none of which were alleged to be incriminating) that were also found at the residence of Peter Eickmeier [two examples at Exhibit book 9, Tab 152, pages 5298 and 5300].

16. In 2002, Graycliff Ltd., a company owned by Peter Eickmeier, sold licences for fixed quantities of software for sound tracks to a trade-show company. These licences for fixed quantities of sound tracks were printed on

paper. The software that Peter Eickmeier sold to Sheffield and resold to Frontier Metals had no licences in paper form. So, when the auditor had requested licences, they were not available. The prosecution alleged that this represented an evolution in fraud, even though they alleged nothing illegal about the trade-show-company transactions.

Part III - Issues and the Law

Issue

17. Would it be a reasonable inference to find that Peter Eickmeier was engaged in the orchestration of sham transactions, the purpose of which was to defraud the government and public of money (GST refunds)? The judgment of Justice Watson says that it would be. [Judgment para. 153]

Introduction

18. A sham transaction is a false display of a transaction. To constitute a sham transaction, there must be a display of a transaction, and the apparent transaction must be false. So, if the transaction purports to be a sale, it must not be a sale to be a sham transaction. Moreover, to defraud the government and public of money, one must obtain money (GST refunds) without doing all that is legally required to be entitled to that money. And the legal requirement for obtaining GST refunds includes being engaged in a "commercial activity" as defined in s. 123(1) of the *Excise Tax Act*. [s. 169(1) of the *Excise Tax Act*]

19. It is my submission that, in determining whether the displays of transactions were of false or real transactions, and in determining whether money (GST refunds) was obtained without doing all that was required to make one legally entitled to that money, Justice Watson erred by not using the definitions of the terms "commercial activity," "business," "sale," and "supply", found in s. 123 (1) of the *Excise Tax Act*, and accordingly failed to realize that it would not be a reasonable inference to find that Peter Eickmeier was engaged in the orchestration of sham transactions, the purpose of which was to defraud the government and public of money (GST refunds).

20. Had she used the definitions of these terms in s. 123(1) of the *Excise Tax Act*, she would have realized that what she thought was "the orchestration of sham transactions" were actual transactions as contemplated by Part IX of the *Excise Tax Act*. And she would have realized that GST refunds were obtained or claimed only after all things required to be done to make one legally entitled to those GST refunds had been done, including being engaged in a "commercial activity" as defined by s. 123(1) of the *Excise Tax Act*.

21. Using the correct definitions of "commercial activity", "business", "supply", and "sale" contained in Part IX of the *Excise Tax Act* is essential for a proper interpretation of the sections of the *Excise Tax Act* that are relevant to the charges. And using dictionary definitions of any of these terms gives an interpretation that is vastly different from the interpretation using the definitions in the *Excise Tax Act*.

All references to sections refer to sections of the *Excise Tax Act* unless otherwise noted.

22. In para. 147 of her judgment, Justice Watson referred to the definition of "commercial activity", which contains the word "business", and noted that it includes "any business carried on by the taxpayer", but she did not follow through by looking at the definition of "business", which includes an "undertaking". This omission on her part results in a major change in the meaning of "commercial activity" for corporations because it changes the correct meaning, which includes "undertaking", which is a meaning that is not inherently commercial, to "business", which is a meaning that is inherently commercial, and implies an activity engaged in for profit. So, it makes the meaning of "commercial activity" inherently commercial, and inherently engaged in for profit, when it is not inherently commercial, and not inherently engaged in for profit, in the case of a corporation.

23. Her failure to use the definition of "business" in s. 123(1) is shown in para. 145 of her judgment. There, she made a finding that the evidence of the sound-track transactions was "relevant as to whether Sheffield bought and sold an existing product, whether or not if there was a product, the product had a *bona fide* market and whether or not there was any real expectation that payments would be made for the purported purchases by companies outside of Canada, in other words, whether or not there was a *bona fide* business or commercial activity being carried on."

24. However, when the definitions in s. 123(1) are used, Part IX of the *Excise Tax Act* does not require any market or any expectation that payments would be made, for a corporation to be engaged in a "commercial activity" and entitled to GST refunds. Nor does it require carrying on any business or any commercial activity, in the ordinary sense of those words, for a corporation to be carrying on a "business" within the meaning of Part IX of the *Excise Tax Act*, or being engaged in a "commercial activity" within the meaning of Part IX of the *Excise Tax Act*, and being entitled to GST refunds.

25. Consequently, her finding is inconsistent with the definition of "business" and hence the definition of "commercial activity", each of which are defined in s. 123(1).

26. Accordingly, Justice Watson did not properly direct her mind to the evidence, because she did not address the issue of whether the evidence was relevant to Part IX of the *Excise Tax Act* interpreted by using the definitions contained in s. 123(1).

27. Justice Watson's failure to use the definition of "business" in s. 123(1) of the *Excise Tax Act* is also shown in para. 147 of her judgment where she makes the following statement: "The Crown's position has always been that the transactions engaged in by the defendants were sham transactions, that is, the transactions were constructed to create a false impression or appearance of valid commercial activity the sole purpose of which was to defraud the government of public money." Further on in para. 147 she continues: "The Crown's case is that based upon the evidence called it would be a reasonable

inference for a trier of fact to find that Sheffield was not really in the business of selling metal or software and that any paperwork generated was generated solely to further a sham being perpetrated on the government and public in order to extract money for the defendant's own purposes."

28. Then, in para. 153, Justice Watson found in favour of these positions of the Crown, i.e., in para. 153 of her judgment, she makes the following finding: "...I find that I have no difficulty concluding that it would be a reasonable inference to find that Mr. Eickmeier was engaged in the orchestration of sham transactions, the purpose of which was to defraud the government and public of money", i.e., that Sheffield was engaged in carrying on an undertaking, i.e., that Sheffield was engaged in carrying on a business as defined in s. 123(1), i.e., that Sheffield was engaged in a "commercial activity" as defined in s. 123(1).

29. And if Sheffield was engaged in a commercial activity so defined, what evidence is there that the transactions were sham transactions? The definition of "sale" in s. 123(1) includes any transfer of the ownership. No consideration is required for sales from Sheffield to Frontier Metals to make them fall within the definition of "sale" in s. 123(1). So, what evidence is there that the ownership was not transferred to anyone? All the "paperwork" shows that the ownership was transferred. And there is no evidence of the ownership not being transferred. So, there is no evidence of any transactions being sham transactions because the only requirement for each of these transactions to be

a sale within the meaning of s. 123(1) is that it constitute a transfer of the ownership.

30. If Justice Watson had directed her mind to the definition of "business" in s. 123(1), she would have realized that, for corporations, any undertaking is a "business", and any business carried on is a "commercial activity" within the meaning of s. 123(1). So, any undertaking carried on is a "commercial activity" within the meaning of s. 123(1). So, all this evidence shows is that Sheffield was carrying on a "commercial activity" within the meaning of s. 123(1) and making "sales" within the meaning of s. 123(1). It is not inculpatory. It is exculpatory. This is so, even if the transactions were constructed to create an impression or appearance of valid commercial activity the sole purpose of which was to obtain public money from the government (which is not admitted). And in such a case, it would not be a "false" impression; it would be a true impression, because it would be a "commercial activity" as defined in s. 123(1). And any such public money obtained from the government would not be obtained by defrauding the government. Rather, it would be obtained by strictly complying with the provisions and requirements of Part IX of the *Excise Tax Act*.

31. Justice Watson's failure to use the definition of "business" in s. 123(1) is also shown in para. 152 of her judgment where she makes the following finding: "the evidence is, in my opinion, clearly and strongly in support of a reasonable inference that Mr. Eickmeier perpetrated a scheme to defraud Canada Revenue Agency and the public of GST refunds", which implies

that Sheffield was engaged in carrying on an undertaking, which implies that Sheffield was engaged in carrying on a business as defined in s. 123(1), which implies that Sheffield was engaged in a "commercial activity" as defined in s. 123(1). Then she continues with the following finding: "The evidence called strongly supports a reasonable finding that Sheffield International was never involved in a 'commercial activity' and that the paperwork generated was for the purpose of maintaining the appearance of commercial activity in order to defraud the government and public of GST refunds."

32. If Justice Watson had been directing her mind to the definition of "business" in s. 123(1), she would have realized that by making that latter finding she was finding the impossible. For Sheffield was clearly engaged in carrying on an undertaking, and therefore a "business" as defined in s. 123(1), and therefore a "commercial activity" as defined in s. 123(1), and so the paperwork generated would naturally be consistent with the appearance of a "commercial activity" as defined in s. 123(1), i.e., it would be consistent with the appearance of an undertaking being carried on.

33. But is it possible that Parliament would enact legislation where taxpayers could receive tax benefits from transactions where there is no business purpose whatever and where the sole purpose of the transaction is to get a tax benefit? *Canada Trustco* allowed a tax benefit from a transaction where there was no business purpose, where Parliament had specified precisely what conditions had to be satisfied to achieve a particular result. In that case, the transaction was constructed to create an impression or

appearance of valid commercial activity; yet the sole purpose of the transaction was to obtain public money from the government. And the *Supreme Court of Canada* still allowed *Canada Trustco Mortgage Co.* to receive that public money from the government, namely Capital Cost Allowances of $120,000,000.00.

34. See especially *Canada Trustco*, para. 11,

"Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe"

and *Canada Trustco*, para. 12,

"[A]bsent a specific provision to the contrary, it is not the courts' role to prevent taxpayers from relying on the sophisticated structure of their transactions, arranged in such a way that the particular provisions of the Act are met, on the basis that it would be inequitable to those taxpayers who have not chosen to structure their transactions that way. [Emphasis added.]"

and *Canada Trustco*, para. 12,

"It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision."

35. In the preliminary inquiry, there was direct evidence adduced proving that Peter Eickmeier and Sheffield were each engaged in a "commercial activity" as defined in s. 123(1) of the *Excise Tax Act* and were engaged in carrying out "sales" as defined in s. 123(1) of the *Excise Tax Act* that gave rise to GST refunds pursuant to the provisions of S. 229(a) of the *Excise Tax Act*, and that all GST refunds claimed by Sheffield were claimed lawfully and pursuant to the provisions of s. 229(a) of the *Excise Tax Act*., and that all GST

refunds received by Sheffield were obtained lawfully and pursuant to the provisions of s. 229(a) of the *Excise Tax Act*. (Peter Eickmeier did not claim any GST refunds for himself.) And there was no evidence adduced to rebut this.

36. The conclusion of Justice Watson, "...I find that I have no difficulty concluding that it would be a reasonable inference to find that Mr. Eickmeier was engaged in the orchestration of sham transactions, the purpose of which was to defraud the government and public of money" [Judgment p. 48, para. 153], is rebutted by the provisions of Part IX of the *Excise Tax Act* set out as follows:

The Law

37. The relevant parts of Part IX of the *Excise Tax Act*, including all relevant definitions, have been set out in Schedule B. <u>All references herein to sections refer to sections of the *Excise Tax Act* unless otherwise noted.</u>

38. Since "profit" is not defined in the *Excise Tax Act*, the dictionary definition must be used. In the expression "without a reasonable expectation of profit", an expectation of <u>any</u> profit would negate this phrase. So, if there is a reasonable expectation of profit as defined by <u>any</u> dictionary definition of "profit", then the expression "without a reasonable expectation of profit" is negated. So, an individual carrying on a "business", as defined in s. 123(1), would be engaged in a "commercial activity", as defined in s. 123(1), if he had a reasonable expectation of profit. And the Oxford English Reference Dictionary (Second Edition, 1996) gives the following definitions of "profit": "an advantage

or benefit", and "financial gain; excess of returns over outlay". Webster's Ninth New Collegiate Dictionary (1986) includes the following definition of "profit": "the excess of returns over expenditure in a transaction or series of transactions; especially the excess of the selling price of goods over their cost".

Argument:

39. These provisions of the *Excise Tax Act* (set out in Schedule B) contradict the conclusion of Justice Watson, because there is no evidence to rebut the allegations, supported by business records adduced as evidence and audited by CRA auditor Ashish Patel [Exhibit book 44], who testified about them, [Transcript Volume 1, pages 70 to163, Volume 2, pages 1 to 161, and Volume 5, pages 1 to 14] and by invoices referred to by computer analyst Derek Mercer who testified about them [Transcript Volume 9, especially pages 100-101] [Exhibit book 36, tab 177-186] [Exhibit book 17, tab 288, pages 549-599, tab 290] (a) that Sheffield was engaged in a commercial activity and (b) that Peter Eickmeier made "taxable supplies" to Sheffield so that Sheffield had Input Tax Credits on which to base its GST refunds. I will now deal with each of these two allegations.

Allegation (a): that Sheffield was engaged in a commercial activity.

40. Using the definitions in s. 123(1), with the terms so defined in quotation marks, s. 141.1(2) gives us the following: Sheffield is a "person" that made "supplies" by way of "sale" of "personal property" that was acquired by Sheffield exclusively for the purpose of making "supplies" of that property by

way of "sale" in the course of a "business" of Sheffield, and Sheffield is a corporation, not an individual. Therefore Sheffield is deemed to have made the supplies in the course of "commercial activities" of Sheffield. [s. 141.1(2) and s. 123(1)]

41. Using the definitions in s. 123(1), since "business" includes an undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit [s. 123(1)], there is no need for there to be any evidence of payment to Sheffield or receipt of any money by Sheffield for Sheffield to be entitled to GST refunds. Sheffield was still engaged in an undertaking, even if such undertaking were not engaged in for profit. So, Sheffield was engaged in a "business" within the meaning of s. 141.1(2).

42. Using the definitions in s. 123(1), since "sale", in respect of property, includes any transfer of the ownership of the property [s. 123(1)], even if there were no consideration therefor, there is no need for evidence of any payment to Sheffield, or any evidence of an end-use customer or any customer whatsoever beyond Frontier Metals (the purchaser) for Sheffield to be entitled to GST refunds. So, Sheffield was engaged in making "sales" within the meaning of s. 141.1(2).

43. In fact, for Sheffield to be engaged in a "commercial activity" there is no need for evidence of Sheffield having a reasonable expectation of profit, because the definition of "commercial activity" of a corporation does not require having a reasonable expectation of profit. [It does, however, require a

reasonable expectation of profit for an individual to be engaged in a "commercial activity".] [s. 123(1)]

44. So, whether the undertaking in which Sheffield was engaged was with a reasonable expectation of profit, Sheffield is defined to be engaged in a "commercial activity" by the definition of "commercial activity" [s. 123(1)]; and, in addition, Sheffield is deemed by the provisions of s. 141.1(2) to have made supplies in the course of commercial activities of Sheffield, and therefore to have been engaged in a "commercial activity" even if "commercial activity" were not so defined.

45. Regardless of the intention of Sheffield in being engaged in its undertaking, its undertaking is within the definition of "commercial activity". And even if its undertaking were not within the definition of "commercial activity", its undertaking would still be deemed to be a "commercial activity" by virtue of s. 141.1(2). So, Sheffield was both engaged in a "commercial activity" and deemed to be engaged in a "commercial activity".

46. Consequently, even being "engaged in the orchestration of" any "transactions, the purpose of which was to deprive the government and public of money" (which is not admitted) would still constitute being engaged in a "commercial activity" for the purposes of Part IX of the *Excise Tax Act*.

Allegation (b): that Peter Eickmeier made "taxable supplies" to Sheffield so that Sheffield had Input Tax Credits on which to base its GST refunds.

47. "Taxable supply" means a supply that is made in the course of a "commercial activity". [s. 123(1)] And a "commercial activity" of an individual (Peter Eickmeier) includes a business carried on by the individual with a reasonable expectation of profit. [s. 123(1)]

48. And "profit" includes "advantage" and "benefit". [See definition above] And advantages or benefits to Peter Eickmeier arising from his business included enabling Sheffield (which was managed by Peter Eickmeier) to invest money (from GST refunds) in businesses owned by Peter Eickmeier, and actually investing money in these businesses. [Judgment page 36, para. 112].

49. In addition, George Misiak testified that some of the money derived from Sheffield's GST refunds was used to pay personal living expenses of Peter Eickmeier. [Transcript Volume 12, page 94, line 30; page 95, line 10] and to pay cash to Peter Eickmeier [Judgment page 36, para. 112]. So, this is an advantage or benefit to Peter Eickmeier arising from his business, and a financial gain arising from his business since his business enabled Sheffield to get the money to make such payments, and it was his business that earned those payments.

50. Since Peter Eickmeier was managing Sheffield, he could have had Sheffield pay him any amounts that he chose. And there is no evidence that he didn't have Sheffield pay him at least one cent at some time. And both the enabling of Peter Eickmeier to have Sheffield pay Peter Eickmeier money, and

the actual payment of the money earned by his business are advantages or benefits to Peter Eickmeier arising from his business, and are therefore profit.

51. Since there is no evidence of any costs or expenses in the business of Peter Eickmeier to offset the advantages or benefits, there is no evidence that there was no net profit.

52. In addition, there is no evidence that the sales by Peter Eickmeier did not have a higher selling price than the cost price.

53. So, the "sales" by Peter Eickmeier to Sheffield gave rise to profit to Peter Eickmeier in at least four ways:

(a) Peter Eickmeier received the advantages and benefits arising from Sheffield receiving money (GST refunds) and thereby being able to invest that money in his businesses, and the actual investing in his businesses;

(b) Peter Eickmeier received the advantages and benefits arising from Sheffield receiving money (GST refunds) and thereby being able to either pay money to Peter Eickmeier or pay his personal living expenses, and actually paying that money;

(c) Peter Eickmeier, being the manager of Sheffield, received an advantage or benefit from his business insofar as it enabled Sheffield to receive money (GST refunds) and thereby enable Peter Eickmeier to

have Sheffield pay Peter Eickmeier money if Peter Eickmeier so chose, and the actual payment of that money; and

(d) Peter Eickmeier sold to Sheffield for a price that exceeded the cost price.

54. Therefore, the "sales" by Peter Eickmeier to Sheffield gave rise to a reasonable expectation of profit to Peter Eickmeier. Consequently, the "sales" by Peter Eickmeier to Sheffield were "supplies" that were made in the course of a "commercial activity", and so were "taxable supplies". And the acquisition of "taxable supplies" by Sheffield gives rise to Input Tax Credits. [s. 123(1) and s. 169(1)]

55. In addition, using the definitions in s. 123(1), s. 141.1(2) gives us the following: Peter Eickmeier is a "person" that made "supplies" by way of "sale" of "personal property" that was acquired by Peter Eickmeier exclusively for the purpose of making "supplies" of that property by way of "sale" in the course of a "business" of Peter Eickmeier. And for the reasons set out above, Peter Eickmeier had a reasonable expectation of profit. Therefore Peter Eickmeier is deemed to have made the supplies in the course of "commercial activities" of Peter Eickmeier. [s. 141.1(2), including the provisions of s. 141.1(2)(a)(iii).] So, Peter Eickmeier was both engaged in a "commercial activity" and deemed to be engaged in a "commercial activity".

56. So, in accordance with s. 169(1), Sheffield acquires software and, during a reporting period of Sheffield during which Sheffield is a registrant, tax in

respect of the supply becomes payable by Sheffield, and the amount determined by the following formula becomes an input tax credit: A x B where A is the tax in respect of the supply that becomes payable by Sheffield during the reporting period; and B is the extent (expressed as a percentage) to which Sheffield acquired the software for supply in the course of commercial activities of Sheffield.

57. Thus, Sheffield acquired Input Tax Credits for 100% of the tax that became payable when it acquired software from Peter Eickmeier for resale to Frontier Metals. And, accordingly, Sheffield is entitled to GST refunds for the full amount of these Input Tax Credits pursuant to s. 229(a).

58. "Net Tax" is defined in s. 225(1) and "Net Tax Refund" is defined in s. 228(3).

59. Similarly, the metal transaction also gave rise to Input Tax Credits, because metal company made a "taxable supply" to Sheffield that was acquired by Sheffield exclusively for the purpose of making a "supply" of that property by way of "sale" in the course of a "business", so that Sheffield had Input Tax Credits on which to base its GST refunds. Since the metal company is a corporation, there need be no evidence of its business having a reasonable expectation of profit. Accordingly, Sheffield was entitled to GST refunds for the full amount of these Input Tax Credits.

60. In the case at bar, the charges of fraud require that Sheffield obtain GST refunds without being engaged in a "commercial activity" in respect of

those refunds, or that Sheffield be not entitled to the GST Input Tax Credits that it was claiming by virtue of Peter Eickmeier not being engaged in a "commercial activity" and therefore not being entitled to charge GST, or by virtue of the metal company not being engaged in a "commercial activity" and therefore not being entitled to charge GST.

61. But, none of these conditions has been met, regardless of what intention the defendants had when the undertakings of Sheffield, Peter Eickmeier, Frontier Metals, and the metal company were carried on.

62. Based on the foregoing analysis of the provisions of the *Excise Tax Act*, responses dealing with the six reasons given by Justice Watson for her decision are set out individually as follows:

63. (a) Justice Watson: "There were purportedly purchases and sales of many millions of dollars of software, yet no evidence, other than the paperwork generated, of any product, nor payment for any product."

64. Response: This reason shows that the judge erred by not using the definitions of the terms "commercial activity," "business," "sale," and "supply," found in s. 123(1). As explained above, there is no need for any payment to Peter Eickmeier or to Sheffield for Sheffield to be entitled to GST refunds. Sheffield is still engaged in a "commercial activity" and is entitled to Input Tax Credits, and the resulting GST refunds. The "commercial activity" arises from Sheffield being in "business", i.e., an undertaking, whether for profit [s. 123(1)]. In addition, from para. 40

above, Sheffield is deemed by the provisions of s. 141.1(2) to have made supplies in the course of commercial activities of Sheffield, and therefore to have been engaged in a "commercial activity" even if "commercial activity" were not so defined.

65. And Sheffield's right to GST refunds arose from Sheffield receiving, from Peter Eickmeier, "supplies" that were "taxable supplies" because they were provided by Peter Eickmeier while he was engaged in a "commercial activity" which arose from him being engaged in a "business", i.e., an undertaking, with a reasonable expectation of profit [s. 123(1)], namely, (1) Peter Eickmeier received the advantage and benefit arising from Sheffield receiving money (GST refunds) and (a) being able to invest that money in his businesses, pay his living expenses, pay him money, and actually paying these monies, and (b) enabling Peter Eickmeier to have these monies paid out by Sheffield, and (2) Peter Eickmeier sold to Sheffield for a price that exceeded the cost price, and there is no evidence that he didn't have a net profit of at least one cent.

66. The other issue is the one of "evidence, other than the paperwork generated, of any product". This issue was explained to CRA auditor Ashish Patel at the time of his audit in a letter in evidence. Ashish Patel was informed that software was not kept by Sheffield because to do so would be a violation of the principle of selling all the rights in respect of the software. Consequently, it would be illegal to keep copies of the

software. [Exhibit book 37, Tab 197, page 3-339] And, at the time of the raid, 2 1/2 years after the business was discontinued, there would not be any software being kept at the residences of either defendant. There would be no reason for the defendants to have large sums of money invested in something of no value to them 2 1/2 years after Sheffield discontinued doing business.

67. (b) Justice Watson: "There was a notation located in his residence that indicates that no payment was ever to be made for the software. (See Exhibit book 12, Tax 188 page 3885.)"

68. Response: This reason shows that the judge erred by not using the definitions of the terms "commercial activity," "business," "sale," and "supply," found in s. 123(1). As explained above, there is no need for any payment to Peter Eickmeier or to Sheffield for Sheffield to be entitled to GST refunds. Sheffield is still engaged in a "commercial activity" and is entitled to Input Tax Credits, and the resulting GST refunds. So a notation suggesting a scenario without payment is not inculpatory. Besides, the notation does not resemble any transaction in the case at bar.

69. (c) Justice Watson: "The companies doing the purported sales and purchases all involve the same parties. Heavy Metal and Frontier Metals are Peter Eickmeier. Peter Eickmeier on the evidence is clearly substantially involved in Sheffield."

70. Response: This reason shows that the judge erred by not using the definitions of the terms “commercial activity,” “business,” “sale,” and “supply,” found in s. 123(1). Peter Eickmeier being related to Frontier Metals does not prevent Sheffield from qualifying for GST refunds. And there is no evidence that Peter Eickmeier has legal control of Sheffield. And even if he did, that does not prevent Sheffield from qualifying for GST refunds. In *Canada Trustco*, the vendor and sub-lessee are the same party (TLI), and the *Supreme Court of Canada* did not object.

71. (d) Justice Watson: “Peter Eickmeier was a GST registrant and either failed to report or if he did report, reported nil GST for Heavy Metal.”

72. Response: This reason shows that the judge erred by not using the definitions of the terms “commercial activity,” “business,” “sale,” and “supply,” found in s. 123(1). Peter Eickmeier filing his GST returns late and with nil GST owing does not prevent Sheffield from qualifying for GST refunds. There is no need for any payments that would give rise to something other than “nil GST for Heavy Metal”. And there is no evidence that there was anything wrong with these nil GST returns.

73. (e) Justice Watson: “While the documents from Sheffield disclose transactions where Heavy Metal sold to Sheffield who in turn sold to Frontier, the actual money in the main flowed against the GST current. There was no money flowing from Frontier to Sheffield to Heavy Metal except operating expenses. The money goes from Sheffield to Frontier.”

74. Response: This reason shows that the judge erred by not using the definitions of the terms “commercial activity,” “business,” “sale,” and “supply,” found in s. 123(1). As explained above, there is no need for any payment from Frontier Metals to Sheffield for Sheffield to be entitled to GST refunds. . Sheffield is still engaged in a “commercial activity” and is entitled to Input Tax Credits, and the resulting GST refunds. So an absence of payments from Frontier Metals to Sheffield is not inculpatory. Nor is evidence of money flowing from Sheffield to Frontier Metals inculpatory, regardless of the reason for that flow of money.

75. If Sheffield, while not owing money to Frontier Metals, pays money to Frontier Metals, there arises, by operation of law, a constructive trust in which the transferee (Frontier Metals) is the trustee, and the transferor (Sheffield) is the beneficiary. There is no evidence that the money ever remained at the Frontier Metals account. In fact, CRA investigator George Misiak prepared a detailed accounting of where the money went. [Exhibit No. 62, and Judgment para. 120] So, these payments were, by operation of law, transfers of money to a trustee (Frontier Metals) to hold in trust for a beneficiary (Sheffield) and to pay out on behalf of the beneficiary (Sheffield).

76. (f) Justice Watson: “I agree with the Crown submission that the evidence would support a reasonable inference that the nature of the fraud, specifically the evidence generated to support the appearance of valid commercial activity also improved with the passage of time.

> Although I find that I do not need to use the trade-show-company evidence which I found to be admissible similar act [sic] evidence at this preliminary hearing in order to commit for trial, in other words, there was ample other evidence called to warrant committal, it is evidence indicative of an evolving scheme to defraud as Mr. Eickmeier became more educated through the audit process as to what Revenue Canada would seek to justify engagement in a valid commercial activity."

77. Response: This reason shows that the judge erred by not using the definitions of the terms "commercial activity," "business," "sale," and "supply," found in s. 123(1). Justice Watson clearly does not use the term "commercial activity" as defined in s. 123(1). There was no need on the part of Peter Eickmeier to generate evidence to support the appearance of valid commercial activity, since, as explained above, there always was "commercial activity" within the meaning of s. 123(1), i.e., an undertaking carried on. There is nothing shown to be illegal about the trade-show-company transactions. So, the trade-show-company transactions are other examples of transactions carried on by Peter Eickmeier without any impropriety.

78. This argument shows that there is no basis for the charges, and the judge erred by not using the definitions of the terms "commercial activity," "business," "sale," and "supply," found in s. 123(1).

79. At para. 28 of his endorsement, Justice Quinn states that "the preliminary inquiry justice did not make any findings inconsistent with the statutory definitions." However, she did make findings inconsistent with the statutory definitions because her findings create the following impossibility:

80. In para. 27 of his Endorsement, Justice Quinn states that a purposive interpretation of "commercial activity" excludes a pretence of a commercial activity. But, even without a purposive interpretation, a pretence of anything is, by definition, not that thing, because an intrinsic element of a pretence is that it be false. A pretense is a false claim or a false display of something. However, there is a problem with a pretence of a "commercial activity" as defined in s. 123(1). Since a "commercial activity" (for a corporation) as defined in s. 123(1) includes a business carried on, and a business, as defined in s. 123(1), includes an undertaking, it follows that, using the definitions in s. 123(1), all undertakings are businesses, and all businesses carried on are commercial activities (for a corporation). So, all undertakings carried on are commercial activities (for a corporation). And claiming to be engaged in a commercial activity is an undertaking. So is putting on a display of being engaged in a commercial activity.

81. So, if one claims to be engaged in a commercial activity, or puts on a display of being engaged in a commercial activity, since the very making of the claim or putting on of the display is in itself an undertaking, it is therefore a commercial activity. So, the claim or putting on of the display <u>cannot</u> <u>not</u> be a

commercial activity. So, it must be a commercial activity and therefore cannot be false. So, it cannot be a pretence, because an intrinsic element of a pretence is that it be false. So, one is left with a paradox where, for a corporation, it is impossible to pretend to be engaged in a commercial activity because the very act of pretending includes the making of a claim or the putting on of a display, either of which undertakings is a commercial activity within the meaning of s. 123(1).

82. So, when, according to Justice Quinn in para. 27 of his Endorsement, "the preliminary inquiry justice, effectively, found that, in this case, there was only a pretence of a commercial activity", she found that Sheffield International Corporation was doing something that is impossible to do. Consequently, her finding is inconsistent with Part IX of the *Excise Tax Act*, which includes the definitions in s. 123(1).

83. This situation arises from the very wide definition of "commercial activity" found in s. 123(1). This wide definition arises from Parliament's intention to ensure that everyone, other than those specifically made exempt, must pay GST, and that no one can escape the net. It is a powerful tool for tax collectors. But what is used to collect taxes cannot be set aside when money is legislated to flow in the other direction, unless there is legislative authority to qualify this wide definition.

84. Despite this wide definition of "commercial activity" contained in Part IX of the *Excise Tax Act*, the prosecution will say that a purposive interpretation of "commercial activity" does not include the undertaking carried on by

Sheffield. The prosecution will say that there is something fraudulent about the undertaking carried on by Sheffield, such as sham transactions, that precludes it from being engaged in a commercial activity, even though they will not be able to provide any evidence that Sheffield was not engaged in an undertaking. In fact, the charge against the defendants in the case at bar implies engagement in an undertaking. And the word "undertaking" contained in the definition of "business" in s. 123(1) is not qualified or restricted. So it includes all undertakings that can possibly exist.

85. Nevertheless, the prosecution will say that a purposive interpretation of the word "undertaking" will prevent the undertaking carried on by Sheffield from being an undertaking as contemplated by Parliament when it enacted Part IX of the *Excise Tax Act*. It is because of this inclination of lawyers to allege that there are restrictions in words that have no restrictions that Parliament has added three grammatical intensives to the word "undertaking", as follows: First there is the intensive word "any" as in "undertaking of any kind". Then there is the intensive word "whatever" as in "undertaking of any kind whatever". Finally, for those who are so influenced by the word "commercial" in the term "commercial activity" that they believe that there must be something commercial inherent in the term "commercial activity", there is the intensive phrase "whether the activity or undertaking is engaged in for profit", as in "undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit". These three grammatical intensives add nothing to the meaning of "undertaking", but they emphasize three times the fact that "undertaking" is without any qualification whatever when it appears

in the definition of "business", which is contained in the definition of "commercial activity" as these two terms are defined in s. 123(1).

86. Moreover, from *Canada Trustco*, para. 12, we have:

> "It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision."

87. So, Sheffield was engaged in a commercial activity regardless of what undertaking it was engaged in, because a "commercial activity" as defined in s. 123(1) includes an undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit. And a pretence of a "commercial activity" as defined in s. 123(1) is an impossibility (for corporations). There is no such thing (for corporations). So, evidence of such a pretence cannot even exist.

88. The prosecution says that the transactions were sham transactions. But, to be entitled to a GST refund, Part IX of the *Excise Tax Act* requires only that there be a "sale", which, in s. 123(1), is defined as a transfer of the ownership of the property. There is no requirement that the "sale" be for consideration in the case of sales by Sheffield to Frontier Metals. However, in the case of sales by Peter Eickmeier or the metal company to Sheffield, there is a need for a price on which to base the input tax credit for the GST paid or payable. But there is no need for the price to be paid. So, evidence of non-payment is not relevant and does not support the prosecution's allegation of "sham" in the case of sales to Sheffield.

89. If Parliament had wanted to make payment necessary to qualify registrants for GST refunds, it would have done so expressly. Where Parliament wanted to introduce non-payment into the eligibility requirements for tax benefits, it did so expressly, as, for instance in s. 78(1)(a) of the *Income Tax Act* which makes an unpaid amount in respect of a deductible expense taxable in the third year after the year in which it was deducted, and s. 78(4) of the *Income Tax Act* which makes an unpaid amount in respect of salary not deductible unless it is paid within 180 days of the end of the taxation year in which it is incurred. In neither case is the deductible amount, whether expense or salary, considered to be a sham.

90. This is similar to *Canada Trustco*, where the *Supreme Court of Canada* found at para. 75, that "Where Parliament wanted to introduce economic risk into the meaning of cost related to CCA provisions, it did so expressly, as, for instance, in s. 13(7.1) and (7.2) of the [Income Tax] Act, which makes adjustments to the cost of depreciable property when a taxpayer receives government assistance." At para. 77, the *Supreme Court of Canada* noted that the Minister of National Revenue had properly abandoned the submission that the transaction was a sham before the Federal Court of Appeal.

91. In addition, as shown above at para. 40, Sheffield is deemed by the provisions of s. 141.1(2) to have made supplies in the course of commercial activities of Sheffield, and therefore to have been engaged in a "commercial activity" even if "commercial activity" were not defined to include any undertaking carried on by the taxpayer. And, as shown above at para. 55,

Peter Eickmeier is deemed to have made the supplies in the course of "commercial activities" of Peter Eickmeier. [s. 141.1(2), including the provisions of s. 141.1(2)(a)(iii).]

92. The prosecution says that there was no product being sold, but there is no evidence to support such an allegation. All of the evidence adduced was irrelevant to the issue of whether there was a product, particularly when one uses the definition of "sale" in s. 123(1), which includes any transfer of the ownership of the property. So, evidence that the investigators from Canada Revenue Agency were unable to find any evidence of payment by Sheffield for the product bought, or of payment received by Sheffield for the product sold by Sheffield International Corporation is irrelevant to the issue of whether such a product existed, since there is no requirement for payment for a "sale" that gives rise to an Input Tax Credit. An invoice, however, is required to satisfy the provisions of s. 223(1)(a). The prosecution assumes for the sake of argument that the transactions are shams, not admitting that the prosecution bears the onus of proving this if that is a necessary part of its case, and not admitting that there is no evidence of the transactions being shams.

Part IV – Order Requested

93. The applicant requests that the judgment of Justice Ann J. Watson for committal of the appellant be quashed, and that the order of The Honourable Mr. Justice J. W. Quinn for dismissal of the certiorari application to quash the committal order be quashed.

Schedule A – Authorities to be Cited

Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54 (*Canada Trustco*)

Schedule B – Relevant Legislative Provisions

In s. 123(1) of the *Excise Tax Act*, the following definitions occur and apply to all relevant parts of the *Excise Tax Act*, including s. 123 itself:

> S. 123(1) **Definitions** — In section 121, this Part and Schedules V to X,
>
> **"business"** includes a profession, calling, trade, manufacture or undertaking of any kind whatever, whether the activity or undertaking is engaged in for profit, and any activity engaged in on a regular or continuous basis that involves the supply of property by way of lease, licence or similar arrangement, but does not include an office or employment; [Emphasis added]
>
> **"commercial activity"** of a person means
>
> (a) a business carried on by the person (other than a business carried on without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the business involves the making of exempt supplies by the person,
>
> (b) an adventure or concern of the person in the nature of trade (other than an adventure or concern engaged in without a reasonable expectation of profit by an individual, a personal trust or a partnership, all of the members of which are individuals), except to the extent to which the adventure or concern involves the making of exempt supplies by the person, and
>
> (c) the making of a supply (other than an exempt supply) by the person of real property of the person, including anything done by the person in the course of or in connection with the making of the supply; [Emphasis added]
>
> **"person"** means an individual, a partnership, a corporation, the estate of a deceased individual, a trust, or a body that is a society, union, club, association, commission or other organization of any kind; [Emphasis added]
>
> **"personal property"** means property that is not real property;
>
> **"property"** means any property, whether real or personal, movable or immovable, tangible or intangible, corporeal or incorporeal, and includes a right or interest of any kind, a share and a chose in action, but does not include money;

"sale", in respect of property, includes any transfer of the ownership of the property and a transfer of the possession of the property under an agreement to transfer ownership of the property; [Emphasis added]

"supply" means, subject to sections 133 and 134, the provision of property or a service in any manner, including sale, transfer, barter, exchange, licence, rental, lease, gift or disposition; [Emphasis added]

"taxable supply" means a supply that is made in the course of a commercial activity;

S. 133 of the *Excise Tax Act* reads as follows:

Agreement as supply — For the purposes of this Part, where an agreement is entered into to provide property or a service,

(a) the entering into of the agreement shall be deemed to be a supply of the property or service made at the same time the agreement is entered into; and

(b) the provision, if any, of property or a service under the agreement shall be deemed to be part of supply referred to in paragraph (a) and not a separate supply.

S. 141.1(2) of the *Excise Tax Act*, which came into effect on April 1, 1997, reads as follows:

For the purposes of this Part,

(a) where a person makes a particular supply by way of sale of personal property or a service that was acquired, imported, brought into a participating province, manufactured or produced by the person exclusively for the purpose of making a supply of that property or service by way of sale in the course of a business of the person or in the course of an adventure or concern of the person in the nature of trade, except where

(i) the particular supply is an exempt supply,

(ii) para. (b) applies in respect of the particular supply, or

(iii) the person is an individual or a partnership, all of the members of which are individuals, who carries on the business or engages in the adventure or concern without a reasonable expectation of profit,

> the person shall be deemed to have made the particular supply in the course of commercial activities of the person; and
>
> (b) where a person makes a supply by way of sale of personal property or a service that was acquired, imported, manufactured or produced by the person exclusively for the purpose of making an exempt supply of the property or service by way of sale, the person shall be deemed to have made the supply otherwise than in the course of commercial activities. [Emphasis added]

From October 1, 1992 until April 1, 1997, the opening words of

para. 141.1(2)(a) read as follows:

> (a) where a person makes a particular supply by way of sale of personal property or a service that was acquired, imported, manufactured or produced by the person exclusively for the purpose of making a supply of that property or service by way of sale in the course of a business of the person or in the course of an adventure or concern of the person in the nature of trade, except where

S. 169(1) of the *Excise Tax Act*, para. (c), reads as follows:

> Subject to this Part, where a person acquires property or a service or brings it into a participating province and, during a reporting period of the person during which the person is a registrant, tax in respect of the supply, importation or bringing in becomes payable by the person or is paid by the person without having become payable, the amount determined by the following formula becomes an input tax credit: A x B where A is the tax in respect of the supply, importation or bringing in, as the case may be, that becomes payable by the person during the reporting period or that is paid by the person during the period without having become payable; and B is (a) ... (b) ... and (c) in any other case, the extent (expressed as a percentage) to which the person acquired or imported the property or service or brought it into the participating province, as the case may be, for consumption, use or supply in the course of commercial activities of the person. [Emphasis added]

S. 169(4) of the *Excise Tax Act* reads as follows:

> A registrant may not claim an input tax credit for a reporting period unless, before filing the return in which the credit is claimed,
>
> (a) the registrant has obtained sufficient evidence in such form containing such information as will enable the amount of the input tax credit to be determined, including any such information as may be prescribed; and
>
> (b) where the credit is in respect of property or a service supplied to the registrant in circumstances in which the registrant is required to report the tax payable in respect of the supply in a return filed with the Minister under this Part, the registrant has so reported the tax in a return filed under this Part.

"Net Tax" is defined in s. 225(1) of the *Excise Tax Act*. s. 225(1) of the *Excise Tax Act* reads as follows:

> Subject to this Subdivision, the net tax for a particular reporting period of a person is the positive or negative amount determined by the formula
>
> A – B
>
> where
> A is the total of
> (a) all amounts that became collectible and all other amounts collected by the person in the particular reporting period as or on account of tax under Division II, and
> (b) all amounts that are required under this Part to be added in determining the net tax of the person for the particular reporting period; and
> B is the total of
> (a) all amounts each of which is an input tax credit for the particular reporting period or a preceding reporting period of the person claimed by the person in the return under this Division filed by the person for the particular reporting period, and
> (b) all amounts each of which is an amount that may be deducted by the person under this Part in determining the net tax of the person for the particular reporting period and that is claimed by the person in the return under this Division filed by the person for the particular reporting period.

"Net Tax Refund" is defined in s. 228(3) of the *Excise Tax Act*. s. 228(3) of the *Excise Tax Act*, para. (b), reads as follows:

> Where the net tax for a reporting period of a person is a negative amount, (a) ... and (b) in any other case, the person may claim in the return for that reporting period the amount that net tax as a net tax refund for the period, payable to the person by the Minister.

S. 229 (a) of the *Excise Tax Act*, reads as follows:

> Where a net tax refund payable to a person is claimed in a return filed under this Division by the person, the Minister shall pay the refund to the person with all due dispatch after the return is filed.

S. 78(1)(a) of the *Income Tax Act* reads as follows:

Unpaid amounts

78. (1) Where an amount in respect of a deductible outlay or expense that was owing by a taxpayer to a person with whom the taxpayer was not dealing at arm's length at the time the outlay or expense was incurred and at the end of the second taxation year following the taxation year in which the outlay or expense was incurred, is unpaid at the end of that second taxation year, either

(*a*) the amount so unpaid shall be included in computing the taxpayer's income for the third taxation year following the taxation year in which the outlay or expense was incurred, or

(*b*) where the taxpayer and that person have filed an agreement in prescribed form on or before the day on or before which the taxpayer is required by section 150 to file the taxpayer's return of income for the third succeeding taxation year, for the purposes of this Act the following rules apply:

(i) the amount so unpaid shall be deemed to have been paid by the taxpayer and received by that person on the first day of that third taxation year, and section 153, except subsection 153(3), is applicable to the extent that it would apply if that amount were being paid to that person by the taxpayer, and

(ii) that person shall be deemed to have made a loan to the taxpayer on the first day of that third taxation year in an amount equal to the amount so unpaid minus the amount, if any, deducted or withheld therefrom by the taxpayer on account of that person's tax for that third taxation year.

(4) Where an amount in respect of a taxpayer's expense that is a superannuation or pension benefit, a retiring allowance, salary, wages or other remuneration (other than reasonable vacation or holiday pay or a deferred amount under a salary deferral arrangement) in respect of an office or employment is unpaid on the day that is 180 days after the end of the taxation year in which the expense was incurred, for the purposes of this Act other than this subsection, the amount shall be deemed not to have been incurred as an expense in the year and shall be deemed to be incurred as an expense in the taxation year in which the amount is paid.

Where s. (1) does not apply

(5) Subsection 78(1) does not apply in any case where subsection (4) applies.