Gifts, Partial Gifts, Split Receipting, and Valuations

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Introduction: The Meaning of "Gift"

Common Law

The meaning of "gift" has important implications under the *Income Tax Act (Canada)*,[1] and the term appears in several sections in the Act. In particular, it appears in sections 110.1 and 118.1, which grant a deduction or a credit for the fair market value of a gift made to a qualified donee.

The Act does not define the term "gift," although, as discussed below, the proposed amendments dealing with partial gifts and split receipting begin to ascribe some statutory parameters to the term. However, over the years, the courts have developed a comprehensive body of jurisprudence, and there have been many Canadian decisions under the Act on the meaning of "gift."

Outside the Act, an *inter vivos* gift is generally a gratuitous transfer of property from its owner to another person with the intention that the transfer have a present effect and that title to the property pass to the donee.[2] This gift may be effected only by delivery of the gift property to the donee, by transfer by deed, or by declaration of trust. The donee must also accept the transfer of the property. A testamentary gift, on the other hand, is a gift that the donor intends to be effective only on his or her death.[3]

The classic definition generally adopted by Canadian courts for tax purposes and historically relied on by the Canada Revenue Agency (CRA)[4] is that a gift is the voluntary transfer of property owned by a donor to a donee in return for which no benefit or consideration flows to the donor. However, as will be seen, the courts have indicated that this is a general definition and is not to be applied strictly in particular cases. Since many of the Canadian cases addressing the meaning of "gift" for tax purposes are, at least in part, partial-gift cases, there is a degree of overlap in the discussion of these two topics.

One charitable gift case, *Gaudin v. MNR*,[5] was considered by the Royal Commission on Taxation.[6] The Carter commission's recommendations made it clear that partial gifts should be recognized for tax purposes. In *Gaudin*, the taxpayer sold a house worth $3,000 to a church for $1,500. The Tax Appeal Board held that he clearly intended the difference to be a charitable donation to the par-

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ish. However, his gift was not recognized by the department, and his appeal was turned down by the board on the ground that there could be no quid pro quo for an amount paid as a gift. The further ground of the board's decision was that gifts in kind were not generally deductible. The Carter commission took exception to both reasons for the denial of Dr. Gaudin's partial gift to the church. The commission questioned why the result of a discounted sale to a charity should be any different from the same transaction structured as a sale of a partial interest in the property accompanied by a deed of gift of the balance. The Carter commission's comments on the *Gaudin* decision have not been discussed in subsequent gift cases, and the *Gaudin* decision itself has rarely been considered.[7] However, as described below, Canadian tax courts appear to have consistently been able to apply the same commonsense approach as the Carter commission did and reduce the amount of a gift that involved benefit or consideration only by the value of the benefit or consideration received.

In *Aspinall v. MNR*,[8] for example, the Montreal chapter of the National Ballet Guild of Canada promoted a special event to be held in conjunction with an opera performance. The taxpayer attended the performance and the subsequent event and made a payment of $150 to the Ballet Guild. It was understood that the $150 payment represented $40 for the price of admission to the opera performance and $25 for the cost of attending the special event; the balance of $85 would be considered a gift to the Ballet Guild, a cultural organization. The Ballet Guild issued a receipt in the amount of $42 so that the amounts deducted from the income of the various contributors did not exceed the profits realized by the Ballet Guild from the event. The taxpayer sought to deduct the entire $85 as a charitable donation. However, the minister of national revenue only allowed a deduction of $42 and objected to any additional amount being deducted on the basis that it was not voluntary and was not without consideration.

The Tax Appeal Board held as follows:

> *A gift must be voluntary and made with the intention that nothing will be received in return.* It must be made to the person who is to receive it and it must be accepted. If the foregoing conditions were met according to the evidence, we would have to declare that there was a gift in this case, regardless of how it was made.[9]

The board found that when the taxpayer subscribed to the special event, his intention was to make a gift to the Ballet Guild. The taxpayer was also free to attend the opera performance without having to pay an extra sum to attend the reception. The board found that the contribution was twofold: one subscription was made for charitable purposes and the other for entertainment purposes. The entire amount intended to be for charitable purposes—namely, $85—was properly deductible.

It should be noted that the definition adopted by the board requires that the taxpayer have the *intention* that nothing will be received; it does not require that nothing *in fact* be received. In this case, since the taxpayer received partial con-

sideration for his $150—namely, entertainment or the right to entertainment—the board was making it clear that it was appropriate to separate and identify the gift portion and the non-gift portion of single payments. It should also be noted that the minister's position was that there was a partial gift to the charity; the disagreement was simply as to amount.

In contrast, in *Tite v. MNR*,[10] the taxpayer purchased a Robert Bateman print from the Canadian Wildlife Federation for $450 and received a tax receipt in the amount of $250. The minister of national revenue took the position that the payment of $450 for the print could not be considered a gift, since the print had a value of at least $450. The Tax Court of Canada found that there was a contractual obligation to pay the $450; the payment and the gift were inextricably involved with the purchase of the print. The court found that no gift was made under the Act: "[I]t is not possible to make a 'gift' if some valuable consideration such as goods or services is received in return."[11] It is not clear whether the court was focusing more on the taxpayer's contractual obligation to make the gift and on the fact that the making of the gift was of a secondary nature in the taxpayer's mind than on the fact that valuable consideration had been received by the taxpayer. The court did not go on to address the issue of partial gifts because the print could not be purchased in the first-run market for less than $450.

In *The Queen v. Zandstra*,[12] certain taxpayers paid sums of money to their children's religious school, which was a registered charitable organization, and claimed part of those sums as a charitable donation. The taxpayers contended that about $200 of the amount paid was for tuition, while the balance of approximately $300-$400 was a charitable donation. The minister contended that the $300-$400 was paid as consideration for the education of the taxpayers' children and that the balance was a charitable donation. In essence, the minister and the taxpayers agreed that the portion of the amount that exceeded the tuition portion of the payment was a gift. The dispute was that the taxpayers claimed that the actual tuition paid was $200 per family, while the minister claimed that the secular tuition costs were $200 per child.

The court, in deciding whether a gift was made, quoted from various dictionary definitions:

> "Gift" is defined in *Halsbury* as follows:
>
> > A gift *inter vivos* may be defined shortly as the transfer of any property from one person to another *gratuitously* while the donor is alive and not in expectation of death… .
>
> Then in *Black's Law Dictionary*, "gift" is defined as:
>
> > A voluntary transfer of personal property without consideration.
>
> and:

> A parting by owner with property without pecuniary consideration. . .

The *Shorter Oxford Dictionary* defines “Giving” as:

> … A transfer of property in a thing, voluntarily and without any valuable consideration.[13]

The court also indicated that the rationale of the *McPhail* decision,[14] which is outlined below, applied to these facts. The court found that even if it accepted the evidence of the taxpayers that the payments were voluntary and not pursuant to a contractual obligation, it was clear that each of the parents had received approximately $200 of consideration per child—namely, the education of their children in the religious school. The minister had allowed the excess of $200 per child paid to the school as a partial gift, and the court’s reasons are not inconsistent with that treatment.

In *Federal Commissioner of Taxation v. McPhail*,[15] the High Court of Australia had to decide whether a payment made by the taxpayer to the trustee of a fund set up to maintain the school of his son was a gift. The school administrators had given parents the option of paying part of the tuition fees to the fund instead of to the school directly, so that the parents would be eligible for a tax deduction. The taxpayer agreed to this option and signed an undertaking to that effect. He made one payment to the school and one payment to the fund. At issue was whether the payment to the fund could be considered a gift. The court held as follows:

> But it is, I think, clear that to constitute a “gift,” it must appear that the property transferred was transferred voluntarily and not as the result of a contractual obligation to transfer it and that no advantage of a material character was received by the transferor by way of return. In my opinion, neither of these conditions was fulfilled in the present case.[16]

The court went on to hold that because the taxpayer gave an undertaking to the school to contribute to the fund, and because the school had an obligation to provide educational facilities for the taxpayer’s son, the payment was not voluntary. In addition, because the taxpayer made the payment with the expectation that in return he would receive a corresponding concession in the fees charged for the education of his son, the payment was not gratuitous. Therefore, there was no valid gift.

It is very important to note that although *Zandstra* and *McPhail* describe gifts as being without consideration or advantage, they vitiate the impugned gift only to the extent of the consideration or advantage. In *Zandstra*, the court determined that the value of the consideration and the excess was a valid gift. In *McPhail*, the court found that the advantage received was at least equal to the impugned gift.

Subsequently, the Federal Court of Australia, in *Leary v. Federal Commissioner of Taxation*,[17] elaborated on the twofold test of no obligation and no advantage

outlined in *McPhail*. The facts in *Leary* were, however, materially different and, as summarized, can only be described as an aggressive tax-avoidance scheme. At issue was a payment of $10,000 made by the taxpayer to a public benevolent institution. The taxpayer had borrowed $8,500 of the payment from a lender. After the taxpayer made the donation, the benevolent institution was required to transfer almost 99 percent of the $10,000 donation to a party related to the lender, who subsequently transferred the amount to the original lender. By the terms of the loan agreement, the taxpayer had the right to purchase the loan for a nominal sum after he made the donation to the benevolent institution. He exercised this option. The taxpayer then sought to deduct the $10,000 donation as a gift.

In its decision, the Federal Court of Australia delivered three separate concurring judgments against the taxpayer. All three judges considered whether the payment was voluntary, whether the taxpayer received any material advantage, and whether the gift was made by way of benefaction. Two of the judges stressed that in deciding whether a transfer was a gift, the substance or the reality of the transaction should be considered rather than the application of any rigid or mechanical rules. One of the judges considered the nominal amount of the benefit enjoyed by the recipient organization contrasted with the amount of the gift claimed:

> Once the conclusion is reached that the question whether, as a matter of reality and ordinary language, the payment is properly to be classified as a gift, falls to be determined by reference to the overall arrangements and transactions which constituted its context, it is apparent that the present case is not a borderline one in which that essential question requires to be resolved by a nice weighing of conflicting considerations. *As a matter of both ordinary language and reality, the payment of the $10,000 in the present case falls nowhere near the boundary between what is and what is not a gift. It is contrary to both ordinary language and reality to suggest that the taxpayer made a gift of $10,000 to the Order or that the Order received a gift of $10,000 from the taxpayer. Humpty Dumpty, for whom words meant what he chose them to mean, might have described the payment as a gift of $10,000 to the Order.* Ordinary language and reality would see the outlay of $10,000 as being made by the taxpayer so that he might enjoy the benefit of being entitled to redeem the $8500 loan for some $17 while obtaining the anticipated advantage of a tax deduction of the full amount of $10,000. Nor would ordinary language or reality see the Order as having received a gift of $10,000. Ordinary language and reality would see the Order as having received $120 as the price of being a party to a tax avoidance scheme utilizing its privileged position under the Act. The payment of $10,000 to the Order was one step in a series of related transactions undertaken by all parties to them for self-interested commercial or fiscal reasons.[18]

In *Leary*, the court recognized that the taxpayer had gained an advantage as a result of his payment. He became entitled to purchase the loan of $8,500 at 14 percent interest for a nominal sum and to keep his $10,000 deduction, while the recipient of the gift benefited only nominally in the amount of $120. The court declined to adopt a strict rule that any advantage or consideration would vitiate an entire gift. The question remained one of amount.

In *The Queen v. McBurney*,[19] the taxpayer claimed as a charitable deduction the payments made to three charities, which operated the religious schools that his children attended. The minister denied a deduction for that part of the payments which was attributable to the proportion of the operating costs of the schools applicable to the taxpayer's children. The trial judge had found that the payments were deductible because they did not represent tuition fees.

The Federal Court of Appeal held that there was nothing in the Act to suggest that the term "gift" was to be used in a technical rather than an ordinary sense. The court referred approvingly to the Australian decisions of *Leary* and *McPhail* and to the Canadian decision of *Zandstra*. In fact, the court in *McBurney* adopted the views expressed by the court in the *McPhail* case. The court rejected the argument that because the taxpayer was under no legal obligation to make the payments they were to be regarded as gifts and went on to consider whether an advantage was received and to quantify that advantage. The court concluded that the minister had been correct in disallowing a portion of the payment and recognizing only a partial gift.

In *Burns v. The Queen*,[20] the issue was whether certain sums of money paid by the taxpayer to the Canadian Ski Association (CSA) were properly deductible as gifts. The CSA, a registered Canadian amateur athletic association (RCAAA), was responsible for the training of the national ski team. During the relevant years, the taxpayer's daughter was a member of the Southern Ontario Division of the CSA. The defendant paid the CSA certain sums of money through its Southern Ontario Division and claimed these amounts as gifts to an RCAAA. The minister of national revenue disallowed the deductions on the ground that the amounts did not qualify as gifts because the taxpayer made the payments with the expectation that he would receive a benefit or consideration—namely, the training of his daughter by the CSA. The taxpayer argued that, absent any contractual relationship between the Southern Ontario Division and himself, he was entitled to rely on such receipts and deduct these contributions. During trial, the taxpayer had agreed that he would not have paid the fees if his daughter had not been part of the training squad.

The Tax Court of Canada allowed, in part, the taxpayer's deductions.[21] However, the Federal Court Trial Division, whose decision was later affirmed by the Federal Court of Appeal, held as follows:

> In view of the circumstances of this particular case, I find that the payments made by the defendants to the C.S.A. were not "gifts" within the meaning of section 110 of the *Income Tax Act*. Indeed, these payments were made for the purpose of securing a material advantage for the defendant.[22]

The court found that the taxpayer, by making the payments to the CSA, had confirmed an implicit agreement with the CSA: he would pay money to the CSA, and the CSA would allow his daughter to practice in its training squad.

After noting that the analogy between the *McBurney* decision and the present one was striking and that it had no hesitation in applying the rationale of that decision as well as the dictionary definitions outlined in *Zandstra*, the court made these comments:

> I would like to emphasize that one essential element of a gift is an intentional element that the Roman law identified as *animus donandi* or liberal intent… . The donor must be aware that he will not receive any compensation other than pure moral benefit; he must be willing to grow poorer for the benefit of the *donee* without receiving any such compensation. In my view, the defendant believed he was paying for his daughter's ski training and he considered that to be the benefit. Consequently, the defendant did not have the *animus donandi* or liberal intent required to allow the payments he made to the C.S.A. to be considered "gifts" under subparagraph 110(1)(a)(ii) of the Act.[23]

Although the court did not expressly quantify the amount of the advantage as at least equal to the amount of the gifts in question, it did say that evidence was that the taxpayer would not have paid these amounts but for his daughter's participation and that he was paying for the ski training.

In *Woolner v. AG of Canada et al.*,[24] the taxpayers made donations to their church and designated part of their donations to a church fund that was used to provide all students in the congregation with bursaries to attend denominational schools. The church issued tax receipts for those contributions. The church's policy was that every student who applied for a bursary and who was a member or the child of a member of the church would receive a full bursary. Each of the taxpayers had at least one child attending the school. However, there was little if any direct correlation between the amount contributed by a particular taxpayer and the amount of the bursary his or her child received. Indeed, many parents of children who received full bursaries had contributed little or nothing, and many donors to the fund did not have children who received a bursary. The church receipted and the taxpayers claimed the full amount of their contributions to the church fund. The minister disallowed the entire contribution and, with Solomonic wisdom, the Tax Court of Canada permitted the deduction of the gift portion reasonably allocable to religious education.

The Tax Court judge found that the payments were voluntary and were not pursuant to a contractual obligation but that the taxpayers did receive a consideration: a secular education for their children in a denominational school. The Tax Court noted that the benefit received by the taxpayers was the same as the benefit received by the taxpayer in *McBurney*. However, the court found that the donations made by the taxpayers over and above the average cost per student of their secular education were "gifts" within the meaning of the Act.

The court expressly rejected the Crown's contention that even though such an approach was supported by the CRA's *Information Circular* 75-23,[25] this was an administrative concession that was not legally sanctioned.[26]

The Federal Court of Appeal affirmed the Tax Court of Canada decision and held as follows:

> In our view, the *Zandstra* case cannot be distinguished from the circumstances of this case. The taxpayers in this case made their contributions to the Church with the anticipation that their children would be provided with a bursary. While a parent could theoretically not pay any money to the Church for their child to receive a bursary, all parents would also presumably understand that if each and every parent refused to donate money to the Church, there would be insufficient money available to provide students with bursaries.[27]

The Federal Court of Appeal was also asked by the Crown to find that even partial receipting was inappropriate in the case of religious schools. However, the court expressly adopted the Tax Court's reasons in allowing the partial gift to the religious school to be recognized as a gift at law.

Finally, it should be noted that not every benefit or advantage received by the donor will invalidate a gift. Courts have recognized that a benefit that is not material, such as the receipt of a tax receipt for a charitable donation,[28] will not invalidate every gift. Some courts even expressly consider whether there has been a "material benefit" instead of inquiring whether there has been a "benefit."[29] The CRA's long-standing published position is that a nominal benefit received by the donor does not disqualify a gift. A benefit was formerly considered to have a nominal value if its fair market value did not exceed the lesser of $50 and 10 percent of the amount of the gift.[30] This position was slightly modified in the CRA's *Income Tax Technical News* no. 26, which accompanied the December 2002 draft legislation on split receipting and partial gifts, to be the lesser of $75 and 10 percent of the gift.[31]

Civil Code[32]

At common law, the general view is that a gift includes only property transferred voluntarily, without any contractual obligation and generally with no advantage of a material character returned to the transferor. In stark contrast, article 1806 of the Civil Code of Quebec[33] provides that a gift in Quebec is a contract by which ownership of property is transferred by gratuitous title:

> Gift is a contract by which a person, the donor, transfers ownership of property by gratuitous title to another person, the donee; a dismemberment of the right of ownership, or any other right held by the person, may also be transferred by gift.

Article 1810 of the Civil Code states, "A remunerative gift or a gift with a charge constitutes a gift only for the value in excess of that of the remuneration or charge."

Therefore, it is possible for a transferor to transfer part of the rights of ownership without any material advantage returned (for example, by way of a gift) and

to transfer the other part separately for consideration. Essentially, in Quebec, it appears to be expressly contemplated that a gift can be made by the transfer of property to a charity at a price below its fair market value with a resulting gift of the difference to the charity. This difference between the common law and the Civil Code gave rise to the possibility that a transaction that would clearly be characterized as a gift in Quebec could be challenged as a gift in the rest of Canada.

Subsections 248(30) to (33), as discussed below, were added to the Act to clarify the circumstances in which taxpayers and donees may be eligible for tax benefits available under the Act.[34] These amendments implicitly confirm that the common law will recognize partial gifts and that the Civil Code permits remunerative gifts. The amendments place certain parameters around and restrictions on both and specify the tax attributes of the property involved.

At least one author has argued that these amendments reflect a lack of understanding of the constitutional division of legislative authority in Canada, since it is outside the legislative competence of the federal legislature to interfere with or make laws in relation to the property and civil rights of a province.[35] Perhaps the real issue to be mindful of is that it is possible that a gift can be recognized for the purposes of the Act and subsequently called into question as a valid gift under provincial law.

Interestingly, in at least two Quebec cases, a court has dissociated the concept of a gift under the Act from the civil-law definition by affirming, for income tax purposes, a strict and narrow interpretation of the common-law definition.

In *The Queen v. Littler*,[36] the taxpayer, a resident of Quebec, sold some of his shares in a company to his sons for $24, an amount slightly above the stock exchange price. At the time of sale, the taxpayer had been in the process of negotiating the sale of the majority of the shares of the company, and a few weeks later a takeover bid was made to all shareholders for $68 per share. The minister assessed the taxpayer for gift tax in respect of the sale of the shares on the ground that he was deemed to have made a gift to his sons under subsection 137(2) of the pre-1972 Act.[37] The trial judge held that there was no gift made (1) because the takeover bid did not occur until after the sale to the sons and (2) because the bid was for a majority interest, whereas the sale to the sons was for a minority interest.

On appeal, the Federal Court of Appeal dissociated the concept of a gift under the Act from that in the civil law of Quebec by adopting its common-law meaning. In fact, the court rejected the minister's argument that the civil law of Quebec should apply. The majority of the court was of the opinion that the only transfer of property was by the sale of the shares; any additional benefit or advantage conferred on the sons was not property and therefore was not a gift. The court concluded as follows:

> A contract of sale, which is, by definition, a transfer of property for a consideration, cannot be a gift, which is, by definition, a disposition of property without consideration… .
>
> While, speaking loosely, one might say that a gift was made by way of sale at an undervaluation (the gift being the benefit so conferred), in my view, the word gift in a taxing statute must be taken as referring to what is known to the law as a gift, namely, the gratuitous transfer of property, and the difference between value and price is not "property" and is not something that can be transferred.[38]

The court noted that if the decision of the Quebec Court of Appeal in *Charlebois v. The Queen*[39] did hold that a sale at an undervaluation was an indirect gift for the purposes of the Civil Code, it should not be taken to extend the application of the Act in Quebec beyond what it would be in another province.

In *Gervais v. The Queen*,[40] the plaintiff purchased a property from his father for less than its fair market value. A few years later, the plaintiff sold the property to a third party. The plaintiff contended that paragraph 20(6)(c) of the Act, which provided that when a taxpayer had acquired property by gift, the capital cost to him would be deemed to have been the fair market value, applied to the benefit received from his father. The minister assessed on the basis that there was no gift.

The court followed the *Littler* decision and held as follows:

> In the present case we are dealing with a taxing statute which must be applied in the same manner throughout Canada and as the former Chief Justice Jackett stated, in dealing with different sections of the *Income Tax Act* even if the sale at an undervaluation constituted an indirect gift for the purposes of Article 712 of the Quebec *Civil Code* this should not be taken to extend the application of section 111 of the *Income Tax Act* in a litigation in that case in the Province of Quebec beyond what it would be in another Province. I believe the same must apply to the interpretation given to section 20(6)(c) of the Act in effect at the time in the present case and that I am governed by the decision in the *Littler* case. *Although the benefit conferred by the deed of sale would probably be considered as a gift in Quebec law, for income tax purposes in which the law must be interpreted consistently throughout Canada, the word "gift" in section 20(6)(c) of the Act must be given the strict and narrow interpretation given to it in the Littler case, for income tax purposes*.[41]

In *Vancouver Society of Immigrant and Visible Minority Women v. MNR*,[42] the issue was whether the organization was considered a charitable organization under the Act, given its purpose and its activities. In making this determination, the court unanimously approved the relevance of certain case law that had been derived from trust law, on the basis that the concept of "charitable activities" under the Act implicitly relied on the common law for guidance. Members of the court later disagreed on the application of the common law to these facts. The decision is important to this issue because of comments made by the dissent.

Gonthier J (dissenting) noted that it was well known that the Act did not define the term "charity" other than to say that a charity was a charitable organization or charitable foundation. The Act appeared to envisage a resort to the common law for a definition of "charity" in its legal sense as well as for the principles that should guide the court in applying that definition. The court also said,

> I note in passing that the definition of "charity" or "charitable" under the ITA may not accord precisely with the way those terms are understood in the common law provinces, due to judicial decisions and provincial statutory incursions into the common law. *The ITA's conception of charity, by contrast, is uniform federal law across the country*.[43]

Thus, the court could be seen either to be using the "federal common law" to trump any provincial common law, or to be introducing a definition of the term that was independent of provincial common law. In effect, this could mean that the common-law definition of a charity has been dissociated from the private law of the provinces, including Quebec.[44] Therefore, just as it can be argued that a definition of "charity" has developed under federal common law for the purposes of the Act independent of the word's meaning under provincial common law or civil law, we are arguably seeing, especially with the partial gift and split-receipting proposals, the development of a meaning of "gift" under the Act separate from its meaning under provincial law.

The *Federal Law-Civil Law Harmonization Act, No. 1*[45] enacted new section 8.2 of the *Interpretation Act*,[46] which provides as follows:

> Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in other provinces.

Therefore, concepts with established private-law meanings that are not defined in the Act should be interpreted in accordance with provincial law. The potential problem remains of determining which provincial law to apply when they differ. Is it the selected governing law? The law of the residence of the charity? Of the donor? What if the charity operates across Canada? Fortunately, the 2002 amendments dealing with split receipting have largely made these questions irrelevant with respect to the meaning of "gift."

Conclusion

The courts have generally interpreted the term "gift" as meaning the voluntary transfer of property owned by a donor to a donee in return for which there is generally no benefit or consideration of a material nature that flows to the donor.[47] However, as seen, some benefit or consideration flowing to the donor as a result of the gift has not always disqualified a gift. A benefit or advantage received by

a donor will usually disqualify the gift only to the extent thereof. The advantage that is received from a tax credit or deduction is not considered a benefit. It is also clear that the definition of "gift" under the Civil Code is also quite different from the definition under the common law. Recent amendments to the Act have attempted to broaden the definition of "gift" under the Act so that it more clearly accords with the civil law and with the common-law jurisprudence.

Split Receipting and Partial Gifts

The concept of split receipting allows the donor of a property who receives an advantage from making the gift—as in, say, a bargain sale—to qualify for a charitable tax receipt if the fair market value of the property transferred by the donor exceeds the amount of the advantage. If the price paid by a taxpayer for property purchased from a charity exceeds the fair market value of the property—a premium purchase—this concept also allows the taxpayer to obtain a charitable tax receipt for the excess paid.

The CRA's long-standing position in respect of split receipting prior to 2002 is outlined in *Interpretation Bulletin* IT-110R3.[48] At paragraph 3 of IT-110R3, the CRA provides that a gift, for the purposes of sections 110.1 and 118.1 of the Act, is a voluntary transfer of property without valuable consideration. Paragraph 3 of IT-110R3 provides that a gift will be made if three conditions are satisfied:

(a) some property—usually cash—is transferred by a donor to a registered charity;

(b) the transfer is voluntary; and

(c) the transfer is made without expectation of return. No benefit of any kind may be provided to the donor or to anyone designated by the donor, except where the benefit is of nominal value.

IT-110R3 notes that there will be exceptions to this general rule in recognition of certain widely accepted fundraising practices. Paragraph 5 provides, in part, the following:

For many years the difference between the purchase price of a ticket to attend a "dinner, ball, concert or show" and the fair market value of the food, entertainment etc., available to a ticket purchaser has been considered to be a gift. This exception to the general rule will not be extended to anything that is not a dinner, ball, concert, show or a like event. A "like event" is an event which provides services and consumable goods, the equivalent of which are readily available in the marketplace and which by their very nature are necessarily purchased with the intention that they be used on a specific date in the near future by the ticket purchaser (and guests) and which, if not used, have no resale value.

At paragraph 6, IT-110R3 makes it clear that to calculate the gift portion, the charity may consider that two payments have been received: one for the fair market value of the admission and the second as a gift to the charity.

For valuation purposes, paragraph 7 of IT-110R3 provides as follows:

> The fair market value of admission to a fund-raising dinner, ball, concert or show should be determined by making a comparison to the regular or usual charge for attendance at the same or a similar function or event for which a donation is not solicited. In the absence of a comparable event, the value is the estimated price that would have been charged for a function or event of this nature carried out as a profit-making venture.

Therefore, IT-110R3 gives effect to the decision in *Aspinall*,[49] where the Tax Appeal Board found that if a taxpayer pays an amount to attend an event with the intention that part of the amount paid will cover the cost of attending the event and that the excess will be a donation for charitable purposes, then the taxpayer is entitled to a charitable gift receipt for the amount intended to be for charitable purposes. The taxpayer is not disentitled to a deduction despite the fact that the taxpayer may have received a benefit—namely, the entertainment.

The concept of split receipting also appears in the 30-year-old *Information Circular* 75-23.[50] In IC 75-23, the CRA outlines its position in respect of the proper receipting practice for tuition fees and charitable donations paid to privately supported religious schools.

Split receipting has also been acknowledged by way of legislative amendments relating to the gifting of easements of property. The 1995 budget had introduced incentives for the donation of ecologically sensitive land. In addition to donating the title of a property, landowners could donate covenants, easements, and servitudes. Normally, the value of donated property is the price that a purchaser would pay in an open market. Because there was no market for covenants, easements, and services, the value of such restrictions on land was difficult to establish. To provide certainty in these valuations, the 1997 budget introduced a measure[51] to deem the value of these gifts to be not less than the resulting decrease in the value of the land.[52]

The December 2002 Changes

Both the CRA and the Department of Finance issued releases on this topic in December 2002.

The CRA's Release

In *Income Tax Technical News* no. 26,[53] the CRA reported on its review of what constituted a gift for the purposes of the Act. The review was said to be a result of several court decisions that had called into question the traditional meaning of "gift" under the common law, which had disqualified a gift if partial consideration had been received.

The key elements in the CRA's new interpretive approach are as follows:

1) There must be a voluntary transfer to the donee of property with a clearly ascertainable value.
2) Any advantage received or obtained by the donor or a person not dealing at arm's length with the donor in respect of the transfer must be clearly identified, and its value must be ascertainable. If its value cannot be reasonably ascertained, no charitable tax deduction or credit will be allowed.
3) There must be a clear donative intent to enrich the donee even though the donor may receive an advantage.

Income Tax Technical News no. 26 sets out the CRA's views on the subject of split receipting and partial gifts in the context of fundraising dinners, charity auctions, lotteries, concerts, shows, sporting events and golf tournaments, and the sale of annual memberships. Notably, it revokes the CRA's previous position on gifts of charitable annuities.[54]

The CRA indicates that the current de minimis threshold outlined in IT-110 is revised to provide that the amount of the advantage received by the donor that does not exceed the lesser of 10 percent of the value of the property transferred to the charity and $75 will not be regarded as an advantage for the purposes of determining the eligible amount as set forth in the proposed definition. The CRA is prepared to administratively provide for a de minimis threshold, which will simplify matters for both donors and donees when such advantages are of insignificant value.[55]

The CRA says that underlying its position on recognizing gifts in situations other than those in which there is an outright transfer of property for no consideration is the requirement that there be a clear donative intent to make a gift. In contrast, the draft legislation released a few days later seems to clearly de-emphasize the issue of intention, or animus donandi, in what is now new subsection 248(30).

The Legislative Amendments

On December 20, 2002, the Department of Finance proposed amendments that could only be described as relieving and confirmatory amendments that would expressly permit split gifts throughout Canada and ensure an appropriate allocation of tax attributes on partially gifted property.[56] The department added subsections 248(30), (31), (32), and (33) to the Act to clarify the circumstances in which a taxpayer could be eligible for tax benefits even if the taxpayer received consideration in return. Although the amendments were not perfect, they were generally very well received by the sector. On December 5, 2003 and February 27, 2004, the Department of Finance released draft legislation aimed at charitable tax shelters, and those anti-avoidance measures necessarily required amendments to the December 20, 2002 draft legislation.[57] Most recently, the Department of Finance released draft legislation on July 18, 2005, which consolidates the proposed amendments from 2002, 2003, and 2004, and introduces further amendments.[58] The July 18, 2005 draft legislation will be reviewed here.

The amendments limited the amount of a creditable or deductible charitable or similar gift to the "eligible amount" of the gift.[59] Similarly, the political contribution tax credit[60] was to be limited to the "eligible amount" of the monetary contribution.

The amendments address the question of donative intent, a concept that, as discussed above, courts have looked for in determining the existence of a gift. Subsection 248(30) provides that a gift is not disqualified by an advantage if the amount thereof does not exceed 80 percent of the fair market value of the transferred property. That is, a taxpayer can transfer a $1,000 property to a charity for up to $800 and recognize the discount as a gift. Alternatively, a taxpayer can receive property worth up to $800 from a charity for a donation of $1,000 and recognize the difference as a gift. Thus, donative intent will cease to be relevant in the vast majority of gifts-in-kind or consideration-back situations. Further, if the 80 percent threshold is exceeded, the provision allows the donor to try to satisfy the minister that he or she had the intention to make a gift. This is a generally well-received approach to this issue.

Subsection 248(31) defines the eligible amount of a gift or monetary contribution as the amount by which the fair market value of the property that is the subject of the gift or monetary contribution exceeds the amount of the advantage. Although the subsection, perhaps wisely, does not seek to define "gift," it expressly recognizes split receipting and partial gifts.

Subsection 248(32) defines the amount of the advantage received by a taxpayer. This includes any property, service, compensation, or other benefit that the taxpayer or a person or partnership with whom the taxpayer does not deal at arm's length and may be entitled to receive that is in consideration for, in gratitude for, or in any way related to the gift or monetary contribution. An advantage may exist even though it is not received at the time of the gift or contribution. The advantage may have been received prior to the time of the gift, or it may be contingent or receivable in the future. It is not necessary that the advantage be received from the donee. The subsection also includes as an advantage any limited-recourse debt in respect of the gift or contribution. Therefore, new subsection 248(32) attempts, quite boldly, to capture any conceivable related advantage the donor may receive.

As originally proposed in December 2002, subsection 248(32) was focused on advantages received as partial consideration or in gratitude for the gift or contribution. When the language was further amended to capture those charitable tax shelters that were considered abusive, limited-recourse debt was added to the list of advantages. Unfortunately for those charities and donors who were not participating in the targeted charitable tax shelters, the amendments were also broadened so that the advantage need only be in partial consideration for, in gratitude for, *or in any other way related to* the gift or contribution. Given that the subsection looks at advantages given by persons other than the donee, whether or not the donee is aware of them, and advantages enjoyed by persons

other than the donor as well as contingent advantages, it is unfortunate that the required nexus between the advantage and the gift was not clearly described as a significant defining factor of the advantages that charities needed to account for.

Subsection 248(32) defines the amount of an advantage by reference to its "value," whereas subsection 248(31) looks at the "fair market value," of the donated property. Some observers pointed this out after the December 2002 release, but the wording was not amended in any of the following drafts. The reason is unclear, since the two terms are generally considered synonymous.[61] However, there is a line of shareholder benefit cases that value the benefit as the actual cost and forgone opportunity cost to the corporation not limited to the fair market value of the benefit itself.[62]

Subsection 248(32) contemplates a donor receiving an advantage from someone other than the donee charity. It does not specify who must grant the advantage. This leads to some uncertainty, especially given the broad language describing the required nexus as "in any other way related to" the gift. It is entirely conceivable that an advantage may be granted without the charity's knowledge by a person not known to the charity. There is clearly nothing in the Act that requires the charity to make any inquiry or investigation before issuing a receipt for the amount of the gift, although the donor may not be entitled to a deduction or credit in respect of the entire amount.[63] Proposed subsection 248(40) would have imposed a positive inquiry obligation on charities before receipting any amount greater than $5,000. However, this proposal was withdrawn in response to concerns raised by charities about the awkwardness of treating major donors this way. The Department of Finance's November, 2005 comfort letter withdrawing the proposal confirms that charities only need to seek relevant information regarding advantages if the need for such information is apparent in particular circumstances.

Similarly, subsection 248(32) contemplates that the advantage could be received or enjoyed by someone other than the donor. Again, unless the donee confers the advantage or is otherwise aware of it, there is no onus of inquiry on the charity. One writer has questioned whether, in a situation presumably taken to an unintended extreme, the eligible amount of a private corporate gift could be reduced by the value to the shareholder of selecting the recipient organization.[64] As noted, this would be an unusual result given that the value of selection is ignored along with the tax benefit in a direct-gift situation.

Under the draft legislation, an advantage can include "any property, service, compensation, use or other benefit… received, obtained or enjoyed." These are precisely the types of advantages that reduced the amount of gifts in the cases discussed above in the absence of these amendments. Thus, apart from tax-shelter situations involving limited-recourse debt, little has changed, and subsections 248(30) to 248(33) only confirm the appropriate recognition of partial gifts, introduce deeming rules to avoid the need to prove donative intent, and specify the tax cost of property received by the donor. There is no basis for concern that

these amendments override the earlier case law on issues such as the value of the tax benefit,[65] religious education,[66] donor-advised funds,[67] or the administrative position on building naming rights. It would be helpful if the CRA and Finance could expressly confirm this point, since it has raised some concern in the community.

It is expected that the CRA and the courts will have to apply the "contingent benefit" language very cautiously. Subsection 248(32) applies to benefits that a donor or a non-arm's-length party may contingently enjoy in the future. These very broad words could be used by an unreasonable auditor (were there any) to question gifts to children's hospitals from parents and grandparents; gifts to cancer research from those affected, their families, and those at risk; gifts to art galleries and museums from those who visit art galleries and museums; and gifts to places of worship from those who may find themselves in need of counseling or burial. The answer to expressed concerns such as these is that such an advantage cannot be considered to be in consideration or gratitude for the gift, nor can the gift be considered to be related to the benefit enjoyed, since such benefits are received without knowledge of past giving or expectation of the future gift. Even the broad words "or in any way related to" require a relationship or nexus between the gift and the advantage.

Finally, new subsection 248(33) provides that the cost to a taxpayer of property acquired in the course of making a gift is the fair market value of the property at the time that the gift is made. The fair market value of such property is also relevant in computing the amount of the advantage received by the donor.

As a result of these split-receipting changes, the content of receipts as required in regulation 3501 is to be amended to include the amount of any advantage and the eligible amount of the gift.

Charitable Tax Shelters

The February 18, 2003 federal budget extended the definition of "tax shelter" in section 237.1 of the Act to include, among other things, a reference to deductions either from income or from tax payable (for example, charitable tax credits) in section 237.1 of the Act. The 2003 budget also added the concept of "gifting arrangements" to the "tax shelter" definition. A gifting arrangement is essentially any arrangement in which statements or representations are made that make it reasonable to assume that a participant will make a gift of property acquired under the arrangement. Prior to the 2003 budget, a tax shelter was any *property* in respect of which it was represented that a potential purchaser would be able to claim, within four years, deductions from income or taxable income that equaled or exceeded the net cost of the property to the purchaser. The definition of "tax shelter" did not expressly apply to *arrangements* that were promoted as providing tax benefits. The 2003 budget eliminated this technical distinction: promoters would be required to register a gifting arrangement as a tax shelter if representations were made that a potential purchaser would be able to claim, within four

years, any combination of deductions in computing income or taxable income and federal tax credits that in total equaled or exceeded the purchaser's net cost of the property.

These amendments applied in respect of property acquired and gifts, contributions, and representations made after February 18, 2003. The relevant legislation was released on March 19, 2003. The effect of the amendments was to ensure that the promoters of buy-low, donate-high transactions involving charitable donations would be required to register with the CRA, which would facilitate the CRA's ability to identify and review these transactions.

In addition, the amendments introduced rules that restrict the amount of the gift in buy-low donate-high arrangements as well as leveraged gift arrangements.[68]

The End of Buy-Low, Donate-High Valuations

Subsections 248(35) to (39) appear certain to be the end of buy-low, donate-high tax shelters. Subsection (35) provides that the fair market value of gifted property is deemed to be its cost to the donor if it was acquired under a gifting arrangement tax shelter. The deemed fair market value of cost will also apply in two non-tax-shelter circumstances: if the gifted property was acquired by the donor within the three years preceding the gift, or if the taxpayer acquired the property less than 10 years before the day that the gift was made and it is reasonable to conclude that one of the main reasons for the acquisition of the property was to gift it to a qualified donee. The three-year hold period for profitable gifts is similar to the practice of the Canadian Cultural Property Export Review Board (hereinafter, "Cultural Review Board") discussed below. The deemed fair market value of cost that is not limited in time for property acquired with the intention of making a gift goes beyond the rules applicable to cultural property and appears to be a legislative overturning of the Federal Court of Appeal's decision 10 years earlier in *Friedberg*[69] on the issue in the portion of that case that was not appealed to the Supreme Court of Canada. Fortunately for the wealthy donor class and our major galleries and museums, the new rules will not catch a *Friedberg* situation because they do not apply to gifts of cultural property.[70]

The deeming rules do not apply if the gift was made as a consequence of death, nor do they apply to gifts of inventory, Canadian real property or immovables, cultural property, ecological property, or public securities. A further exception to the rules is made for gifts of a share of capital stock, so long as the share was issued by the corporation to the donor, the corporation was controlled by the donor or persons related to the donor at the time of the gift, and subsection (35) would not have applied in respect of the consideration for which the share was issued had that consideration been donated instead. Finally, gifts of property by a corporation are also generally excluded so long as the corporation acquired the property from a controlling shareholder or a person related to a controlling shareholder, and subsection (35) would not have applied had the property not

been transferred to the corporation and had the shareholder made the gift to the qualified donee when the corporation so made the gift.[71]

Subsection 248(36) was introduced in order to prevent a donor from artificially increasing the cost base by acquiring the donated asset from a person or partnership who is not at arm's length. If subsection 248(35) would otherwise apply and the property was acquired from a person not at arm's length within the three or ten year period as would be applicable under subsection (35), then the cost of the asset for the purpose of subsection (35) would be the cost base of that non-arm's length person prior to the disposal of the property.

Subsections 248(38) and (39) are designed to prevent taxpayers from avoiding subsection 248(35) by making intervening transfers of the property prior to the gift or by selling the property to the charity and donating the proceeds.

Gifts to Foreign Charities

The December 20, 2002 amendments will largely end the ability of a charitable foundation to make gifts to foreign charities provided that its disbursement quota is met.

The Act requires a registered charity to spend a disbursement quota each year. The disbursement quota must be spent on direct charitable program activities or be transferred to qualified donees. Until now, charitable foundations could give funds to any organization, including foreign charities, provided that the funds were used for charitable purposes or charitable activities.

Originally, the CRA had confirmed by private correspondence that as long as the disbursement quota was met by a foundation, the foundation could disburse these funds to any other organization irrespective of its residence.[72] However, in *Registered Charities Newsletter* no. 9, dated June 17, 2000, the CRA indicated that it had reviewed its position and this interpretation was incorrect:

> A charity can transfer funds to organizations that are not qualified donees only if these latter organizations are using the funds on behalf of the charity and to carry out the charity's own activities.

This position was challenged by a private foundation in the Ontario Superior Court of Justice. The applicant requested a declaration that the disbursement of funds to foreign charities after the disbursement quota was met was entirely legal. However, the issue was never adjudicated. A settlement was reached between the parties in August 2000 permitting the foundation to continue to make such gifts, provided that they were limited to 10 percent of its total donations. At the time of settlement, counsel for the Department of Justice indicated that the Department of Finance would be seeking to amend the Act to prohibit such gifts even if the charity met its annual disbursement quota.[73]

As a result, paragraphs 149.1(2)(c), 149.1(3)(b.1), and 149.1(4)(b.1) were introduced. The amendments provide that the registration of charitable organizations, public foundations, and private foundations may be revoked if the organization or foundation makes a gift (other than in course of charitable activities carried on by it) to persons or entities that are not qualified donees. A qualified donee is a person or entity to which a tax-deductible or tax-creditable gift may be made under the Act and does not generally include foreign charities.

The Taxation Act (Quebec)

The Quebec Department of Finance has an interesting and effective way of dealing with some gifts of art under the *Taxation Act (Quebec)*.[74] The amendments discussed below were introduced in 1995 and are applicable to some gifts of art made after May 9, 1995. These rules were recently extended to apply to Quebec amateur athletic associations in 2004.[75]

Under the TAQ, where an individual or a corporation makes a gift of art to a specified donee that does not acquire the work of art in connection with its primary mission, the individual is deemed not to have made a gift unless the donee disposes of the work of art within five years of the gift.[76] The fair market value of the gift of art is determined when the donee disposes of the work of art. At that time, the fair market value of the gift is deemed to be the lesser of the amount received by the donee for the gift and the gift's fair market value.[77]

For this purpose, a "specified donee" includes a registered charity, a Canadian amateur athletic association, a housing corporation, the United Nations, or a prescribed foreign university, but does not include a recognized arts organization.[78] A work of art is also defined widely to include a print, an etching, a drawing, a painting, a sculpture, or any work of a similar nature, including a rare manuscript or a rare book, stamp, or coin.[79]

These provisions are intended to eliminate art flip transactions by placing restrictions on when a donor may claim a deduction for gifts of art to charities that are not in the "art business." The provisions also try to introduce a mechanism to determine the fair market value of the gift, but valuation remains an issue.

More recently, the Quebec Department of Finance indicated that Quebec's tax legislation would be amended to incorporate, "with adaptations based on its general principles," most of the federal measures, including the introduction of subsections 248(35) to (37). Specifically, Quebec's tax legislation will be amended to incorporate the deemed fair market value rule in subsection 248(35), provided that subsection 248(36), which sets out exceptions to the application of subsection 248(35), includes donations of works of art to Quebec museum-related institutions and donations of the bare property of cultural property or works of art. The artificial-transactions provision in subsection 248(37) will be incorporated into Quebec's legislation. These measures will apply to any taxation year that is not statute-barred.[80]

The proposed amendments to the Act dealing with the definition of a "gifting arrangement" will also be incorporated into Quebec's legislation, but they will apply on the same dates as provided for under the Act—namely, after February 18, 2003. In addition, measures announced in the February 18, 2003 federal budget dealing with limited-recourse debt and measures released on December 20, 2002 dealing with split receipting will also be introduced into Quebec's tax legislation.[81]

Gift Valuation Cases and Issues

Fair Market Value

The term "fair market value" has been the subject of a number of decisions. However, over time, the general definition of the term has remained remarkably consistent. The generally accepted definition of "fair market value" is that it is the highest price available in an open and unrestricted market between informed and prudent parties, acting at arm's length and under no compulsion to act, expressed in terms of cash.[82]

Another way of defining the term is to say that it means the price obtained in the ordinary market—namely, a market not distorted by special economic factors, in which sellers are ready but "not too anxious" to deal with purchasers who are ready and able to purchase.[83]

Most recently the Federal Court of Appeal in *Nash*[84] restated the definition in *Hudson*[85] as "… the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business is a market not exposed to any stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell."

Cultural Property Rules

The *Cultural Property Export and Import Act*[86] restricts the export of art and other objects that are important to Canada's cultural heritage. The objects of that legislation are furthered by the Act, which provides favourable tax treatment to donations of certified cultural property to designated institutions. Under the Act and the CPEIA, there are specific rules for determining the fair market value of donated property.

To qualify, the property donated must have been determined by the Cultural Review Board to be of outstanding significance by reason of its close association with Canadian history, its aesthetic qualities, or its value in the study of the arts or sciences, and it must be of such importance that its loss to Canada would significantly diminish the national heritage. The recipient institution must be one designated under the CPEIA, which includes libraries, public galleries, museums, and similar institutions.

By virtue of subsection 118.1(10) of the Act, the fair market value of the object for the purposes of an individual's section 118.1 credit or a corporation's section 110.1 deduction is deemed to be the fair market value determined by the Cultural Review Board. A receipt that attests to the fair market value of the object and to the meeting of the criteria set out in sections 29(3)(b) and (c) of the CPEIA is issued by the Cultural Review Board. The taxpayer, if dissatisfied with the original determination of the fair market value, may ask the Cultural Review Board for a re-determination of the fair market value.[87] If the taxpayer is still dissatisfied with the re-determination of the fair market value, the taxpayer may appeal to the Tax Court of Canada.[88] The Crown does not appear to have the right to ask for a re-determination or to appeal to the Tax Court of Canada.

The advantage of having a gift qualified as a cultural property is that no capital gain is realized on its donation to a designated cultural institution and the donor receives a donation credit for the full fair market value of the property.[89]

Valuation issues have arisen in respect of the donation of cultural property, especially in cases where a property is acquired and shortly thereafter donated to an institution at a value that exceeds the purchase price. In *The Queen v. Friedberg*,[90] two collections of ancient textiles were gifted to the Royal Ontario Museum (ROM), one in 1978 and one in 1980. The owner of the first collection was willing to sell it to the ROM for approximately $70,000. (The collection was appraised by three experts to be worth approximately $500,000.) The taxpayer made a gift of money to the ROM, and the ROM used the money to acquire the first collection from the third-party seller. The taxpayer claimed the appraised value of the collection as a deduction. The owner of the second collection sold it to the taxpayer for $12,000. The taxpayer then donated it to the ROM and claimed a deduction of $230,000. The trial judge allowed both deductions.

In respect of the first collection, the Federal Court of Appeal concluded that because the taxpayer had never owned the collection, he could not have made a gift of the collection. The taxpayer had simply made a gift of money to the ROM, with which the museum acquired the collection from a third party. In respect of the second collection, however, the Federal Court of Appeal indicated that all documents showed that the original owner had transferred title of the property to the taxpayer, who had subsequently donated the collection to the ROM. The Federal Court of Appeal did not see any basis for interfering with the finding of fact that the fair market value of the gift was $230,000, even though the taxpayer had purchased it for $12,000.[91]

It should be noted that the Cultural Review Board reserves the right to be informed of the purchase price of cultural property whenever it deems that this information might be relevant in making its determination. If the property in question was acquired by the donor within three years of the application for certification, the institution must provide copies of any relevant documents that outline the nature of the transaction and, if the donor acquired the property by purchase, the purchase price.[92]

Recent Valuation Case Law

In *The Queen v. Malette*,[93] the taxpayer and his wife and son had donated certified cultural property consisting of 981 paintings by one artist to the Art Gallery of Algoma. The works had been purchased three months earlier from the artist at a price to be determined, which was eventually set at 25 percent of the value to be certified by the Cultural Review Board. Pursuant to the CPEIA, the taxpayer requested a determination by the Cultural Review Board of the fair market value of the paintings. The Cultural Review Board found the fair market value of the works to be $293,246. The taxpayer appealed to the Tax Court of Canada.

The minister called two experts. The first expert testified that the aggregate fair market value of each individual work was $821,427.50, but the expert applied a volume or market absorption discount to each work and arrived at a final fair market value of $141,402.34. The expert justified the application of this discount by reference to the volume of works involved and to the sales history of the artist's work, which averaged two works on paper and six paintings on canvas annually. This expert's opinion was supported by another recognized expert. However, both the taxpayer and the minister agreed that if no discount was applied, the fair market value of the works was $828,000.

The Tax Court judge held that a bulk discount could not be applied in determining the fair market value of the works. The judge relied on the fact that the legislation referred to the gift of an "object" in the singular and cited the decision of Mogan J in *Whent v. The Queen*,[94] which he believed stood for the proposition that blockage discounts could not be applied in determining the fair market value of cultural property:

> It is in the light of Mogan, J.'s analysis, its acceptance by the Federal Court of Appeal and the individual references to each "object" in the governing Canadian legislation, that the Court rejects the concept of a blockage effect with reference to a donation to a public gallery such as occurred here. Donations of art to public galleries often consist of a large number of works. Such donations are to be encouraged so that the works are presented and shown to the public. It is difficult to imagine that a donation of ten or many more paintings by a famous international artist such as Renoir would be discounted. Rather, they would be applauded generally. It is equally difficult to imagine that they would be subject to a block discount to determine their fair market value. On the contrary, the value of the gallery would be multiplied by the critics and the public.
>
> No doubt it is for these reasons that the legislation refers to an object individually.[95]

The Federal Court of Appeal held that the Tax Court judge overlooked the taxpayer's concession that if a blockage discount could be applied, then this was an appropriate situation in which to apply such a discount. The court noted that blockage discounts are an accepted principle of proper valuation methodology, and stated the following:

> In this instance, however, both parties accept that as a result of the high number of works by [this artist] which would have come onto the relevant market at once and their historically low rate of absorption, the value of the works had to be discounted by the percentages determined by [the expert] to arrive at their respective fair market value. The only issue before Beaubier, J. was therefore whether, as a matter of statutory construction, blockage discounts can be applied in ascertaining the fair market value of cultural property.[96]

The Federal Court of Appeal went on to apply a blockage discount to the value of the works. The court also stated that the use of the word "object" in the singular was not relevant given that the *Interpretation Act* provides that in construing federal statutes, words in the singular include the plural and words in the plural include the singular. Additionally, the court noted that the Tax Court judge had misread the *Whent* decision as supporting the view that blockage discounts could not be applied as a matter of statutory construction. Rather, the Tax Court judge in *Whent* was said to have decided that such a discount was not appropriate in the particular circumstances. The court concluded that the fair market value of property was the discounted value certified by the Cultural Review Board, which was $293,246.

In *Klotz v. The Queen*,[97] the taxpayer donated 250 original prints to Florida State University and claimed the sum of $258,400 as the fair market value of the charitable donation. Mr. Klotz was one of over 600 Canadians participating in this particular art print-gifting program.[98] The prints were bought in the United States for about $300 per print and immediately donated to a US university.[99] The promoters had acquired the prints from artists and had paid no more than US$50 for each print. In this case, the taxpayer purchased 250 prints for $75,000, donated them, and received a receipt for $258,400, or approximately $1,000 per print. The taxpayer never saw the prints, never had physical possession of them, and had no role in choosing them. The taxpayer had completed a similar transaction in the previous year that was not before the court.

The issue before the Tax Court of Canada was the fair market value of the prints at the date they were donated. The taxpayer argued that the prints were worth $1,000 or more each. The minister claimed that the prints were worth at most $300 each, which was the amount that the taxpayer had paid for them.

An expert who testified on behalf of the taxpayer valued the prints at $1,000 or more each. A second expert attested to the first expert's methodology. The minister did not call an expert witness. The taxpayer's principal expert had participated in the gifting program and appears to have paid less for her prints than the taxpayers paid for theirs.

The Tax Court of Canada rejected her report on several grounds. The court was concerned that even if the retail market was the proper market to consider, the report and testimony did not support the values determined. There was virtually no evidence of actual sales, and price lists or asking prices were unreliable. The depth of the retail market may not have supported the number of identical prints

involved. Over 80 percent of the prints were valued at exactly $1,000 (a very important number in early personal-use property donation schemes), which made the report suspect. The valuations seemed unaffected by the artist, the medium, the size of the edition, or how long they had been offered for sale.

The court rejected the suggestion that each print should be valued individually. It valued the totality of the gift as a gift en masse of a large number of prints. By approaching the matter in this way, the court could maintain that it was not applying a blockage discount to the aggregate of the individual retail values; it thus sidestepped the need to comment on the *Malette* decision before it was overturned by the Federal Court of Appeal.

Having rejected the expert evidence, both as to value and as to the appropriate market in which to value the prints, and having decided that in this case the single gift of 250 prints was to be valued in the mass art donation program market, the court found that the best evidence of what the 250 prints would sell for was the amount that they actually sold for—$75,000.[100] The court concluded,

> I continue to be of that view [that the best evidence of fair market value is the price at which the object was bought]. It is one thing serendipitously to pick up for $10 a long lost masterpiece at a garage sale and give it to an art gallery and receive a receipt for its true value. It is another for [the promoter] to buy thousands of prints for $50, create a market at $300 and then hold out the prospect of a tax write-off on the basis of a $1,000 valuation. [Counsel for the taxpayer] presented the appellant's case with consummate skill and persuasiveness but ultimately his case foundered on the shoals of common sense.[101]

The *Klotz* decision was affirmed by the Federal Court of Appeal on May 2, 2005, with leave to appeal to the Supreme Court of Canada refused on April 20, 2006. It was dismissed orally from the bench by the Federal Court of Appeal. The court declined to interfere with the trial judge's findings of fact that the market in which the art was to be valued was the very market created by the mass market art donation programs and that, in the circumstances, the best evidence of the fair market value of the prints was the price paid by the taxpayer.

At issue in *Carr v. The Queen*[102] was the value of a sailboat gifted to a charity. Apparently, the CRA was reviewing over 100 donations of boats to the charity in question. The gift had been valued by a third party, at the request of the taxpayer, at $41,000. The minister alleged that the boat was worth not more than $27,000, the taxpayer's asking price for the boat before he decided to make a gift of it. At trial, the taxpayer did not call an expert valuator but relied on the asking price of similar boats offered for sale on the Internet. The minister called two experts.

The minister's leading valuation expert testified that in valuing the taxpayer's boat, he looked at the sales of other boats of similar size and age and arrived at an average retail price of $13,700; with some adjustments, the expert determined that the fair market value of the taxpayer's boat was $18,000. In reassessing the taxpayer, the minister indicated that the value of $27,000, which was the asking

price when the boat was for sale, was accepted by the CRA as the fair market value.

After referring favourably to the decision in *Klotz*, the court said,

> In my view, the method used by [the CRA's expert], although not perfect, is much more reliable than the appellant's as it is based on an average of actual selling prices. They are the real value obtained for comparable boats, as opposed to asking prices, which are what the appellant referred to. Furthermore, [the CRA's expert] revised the initial value he had given and adjusted it to take into account certain factors that he was unaware of at the time of the appraisal. Still, he did not appraise the boat at more than $18,000.[103]

The court concluded that there was ample evidence to allow it to find that the boat's value did not exceed $27,000.

In *Maréchal v. The Queen*,[104] the Tax Court again considered the issue of art valuation, this time in the context of a donation of a single piece of cultural property. The taxpayer had provided valuation evidence to the Cultural Review Board to support an $8,000 value. The taxpayer had purchased the work less than a year earlier for approximately $1,700. The Cultural Review Board valued the work at $5,000. The taxpayer, representing himself, appealed to the Tax Court and relied on the same valuation documentation produced to the Cultural Review Board. The Crown's expert appraised the work at $3,500. Bowman ACJ, who had earlier decided *Klotz*, restated in *Maréchal* his position that "a very useful starting point in valuing property is what was paid for it and, in the absence of reliable market comparables, it may well be determinative."[105]

Bowman ACJ then approvingly referred to the following paragraph from the Crown expert's report:

> Therefore, in my opinion, the best evidence of true "fair market value" is the price the donor paid for the work in conjunction with a certain appreciation factor depending on the fluctuation of the open market. This removes the problem of "artificially inflated evaluations" that are in excess of the price at which the work was actually bought. The only way an elevated price can be justified following a "bargain purchase" is if at the same time of the donation, a similar work is sold by an established gallery/dealer (or other appropriate market including auction) at the established higher price and reliable invoices made available.[106]

The Crown's expert applied a fluctuation factor of over 100 percent to arrive at her $3,500 appraised value. The court judiciously declined to determine a fair market value for the object and held that the evidence did not show that the value was greater than the $5,000 determined by the Cultural Review Board. This decision is under appeal.

The *Maréchal* decision represents a potentially significant clarification of or progression in the Tax Court's approach to art valuation as described in *Klotz*. First,

the court acknowledges the significance in *Klotz* of the absence of reliable market comparables. Second, the court agrees that fair market value can significantly exceed cost if there is cogent evidence that similar works are sold by established galleries or dealers at greater prices.

In *Nash v. The Queen*,[107] at issue was the valuation of gifts of art made pursuant to a buy-low, donate-high scheme. In that case, each of the appellants had purchased a group of limited edition art prints from CVI Art Management Inc. (CVIAM), had donated the prints to qualified donees, and had been issued receipts valuing their gifts at more than three times their purchase price. The appellants had participated in these transactions on the advice of their financial planners. Although the prints purchased by the appellants were all different, they had many characteristics in common; all were newly printed, professionally produced, and of very good quality. The minister of national revenue reassessed the appellants on the basis that the amount of the donations made was equal to the price paid to purchase the prints.

At trial, the appellants called two experts. The minister called no one. The first expert witness had significant business credentials in the North American limited edition print market, and he provided considerable information about that market. He reviewed previous appraisal reports and a number of prints identical to those donated to the charities. He concluded that each of the prints in question was desirable and saleable and that the values set out in the appraisal reports were generally approximate to the prices paid for similar prints on the retail market. He also opined that the North American limited edition print market (which numbers annual sales in the millions) had not been affected by large donations of prints made either in Canada or the United States.

The second appellant expert witness testified that after inspecting comparable property and completing subsequent research, including an analysis of the market for the artists' works and the sale of comparable properties, she believed that the fair market value of the property donated was approximately equal to the value claimed as charitable donations.

In her report, she used the "market comparison approach," which entailed examining and comparing similar transactions that had taken place in appropriate marketplaces. The expert indicated in her report that the appellants had purchased the prints at reduced prices in response to an opportunity provided by CVIAM. She then discussed blockage discounts and concluded that there was not an adequate number of prints in any one of the donations to suggest the need to calculate a reduced value due to quantity. Consequently, she approached each work as a separate property and indicated what each work would command in the marketplace.

In its decision, the Tax Court of Canada summarized part of that expert's testimony:

> She emphasized that the open and free market, the market in which fair market value according to the definition would be found, would be that retail market. She said that that is the place that the highest price an asset might reasonably be expected to bring would bring, if sold. She said that she had looked at the circumstances in which the Appellants had acquired their Prints and concluded that it was not the normal market. She said:
>
>> That is not the normal way artwork is sold. It was kind of an artificial market. It didn't exist over a period of time. Going to a financial planner to purchase artwork is not really the norm.[108]

In giving evidence, the expert described in detail the nature of the work of the artists in question; she took into account the size of editions, the quality of paper and ink, and the strength of the colour values. She also took into account the experience and the reputation of the artist.

There was also evidence that the CRA's appraiser had initially agreed with the taxpayer's valuation range in respect of one of the collections of prints.

The minister's position was that the fair market values of the prints donated by the appellants were the prices paid by the appellants for those prints. The written submissions of the minister provided, in part, as follows:

> They bought their prints from CVI Art Management Inc. ("CVIAM"). In the years under appeal, CVIAM was certainly the normal, if not exclusive, vendor of the groupings of prints in question. For those groupings, CVIAM charged its customers, other than the Appellants, prices that were the same as, or similar to, those it charged the Appellants. *In making sales of those groupings of prints, CVIAM established the highest, reasonably attainable prices that those groupings could fetch at the times the Appellants donated their prints*.[109]

The Tax Court of Canada agreed with all of the submissions contained in the appellants' submissions to the court. The court found that the appellants' expert evidence created not only a prima facie case but an impressively strong case. The court noted that the fact that no evidence was adduced by the minister in circumstances where the onus had clearly shifted to the minister, both on the quantitative valuations and on the underlying issue of the appropriate market in which to value the prints, entitled the taxpayer to succeed.

The *Nash* decision was reversed by the Federal Court of Appeal,[110] with leave to the Supreme Court of Canada refused on April 20, 2006. The Federal Court of Appeal gave detailed reasons for overturning the trial judge in the particular circumstances. The Court began with the description of fair market value in *Henderson Estate*:

> "… the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course

> of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell."

The Court found the trial judge's first error was in determining that each print was to be valued separately, not each taxpayer's group of prints. In determining whether individual items making up a group or the group of items was to be valued, the appellate court said it will depend upon a careful consideration of the circumstances in which the groups of items are being acquired and disposed of:

- If the evidence is that groups are not sold in the same market as individual items, the value of a group will not be the aggregate of the values of the individual items.
- If groups of items are sold in the same market as individual items, the value of the group may be the aggregate of the values of the items in the group. The Court said common shares may be valued in this way.
- If there is no evidence of a normal market for the ordinary course sale of groups of items, the ordinary retail market for individual items could be a proxy. However, adjustment for blockage or volume could be needed if there would be a depressive effect on the retail market by the sale of such groups.

In the *Nash* taxpayers' particular circumstances, the Court found there was a market for the sale of the groups of art prints – the one created by the promoter's almost 500 group sales over a three-year period.

The Court found the trial judge's second error was to accept a fair market value of almost three times the cost of the groups of art prints with no credible explanation of the increase. The Court accepted that cost will be an unreliable basis for estimating value if the asset has been held for a period of time. However, if an asset is acquired and disposed of very close in time, cost will be a good indicator of value absent credible and reasonable evidence to the contrary.

The Court also made favourable references to the *Klotz* decision in its discussion of *Nash*, citing the decision approvingly.[111]

Art flips and buy-low, donate-high schemes were not the only charitable donation tax shelters to come before the courts of late. *Doubinin v. The Queen*[112] and *Webb v. The Queen*[113] both involved the same donation shelter, the Association for the Betterment of Literacy and Education (ABLE), but the cases ended very differently for the taxpayers involved. The taxpayer was successful in *Doubinin* to the extent of his cash gift. The cases involved different tax years; the ABLE program may have changed during that time, which may explain in part the different outcomes. Also, Mr. Doubinin appears from the evidence to have been merely a tax shelter purchaser, whereas Mr. Webb, who was entirely unsuccessful, appears to have been more closely associated with, and knowledgeable about, the program. Most significantly, the partially successful taxpayer was considered credible, whereas the unsuccessful taxpayer was not.

From *Doubinin*, it appears that the ABLE program involved a cash donation from a taxpayer to a registered charity coupled with the possibility of a third party making a further donation (approximately three times the size of the original donation) on the taxpayer's behalf. Since there was no evidence that the further donation was made, even though it was receipted, the taxpayer wisely abandoned the further amount. He was successful in pursuing his initial donation, and the court did not deal with whether an ABLE participant whose third-party-funded additional gift would be wholly successful.

From *Webb*, it appears that the ABLE program may have changed in later years. Instead of making an initial gift followed by a third-party-funded additional gift, Mr. Webb made a single donation of $30,000. Even though it could not produce concrete documentary evidence, the Crown contended that the ABLE program involved undisclosed circuitous steps that returned three-quarters of the donation to the donor. The court held that although Mr. Webb had not actually received that amount, he had certainly anticipated receiving it at the time he made the donation; that was sufficient to permit the court to conclude that there was a complete lack of donative intent, which disqualified the entire gift, not just three-quarters of it. Because the value of the receipt for three-quarters of the donation exceeds one-quarter of the donation, it appears that consideration (the portion of the receipt anticipated to exceed the actual net gift) disqualified the 25 percent intended net donation as a creditable gift. This case may be the exception that proves the general rule that the value of a tax receipt for a donation is not consideration that reduces the amount of the gift. The decision has not been appealed.

Non-Existent Gift Schemes

A number of recent cases tell the saga of taxpayers who have, knowingly or unknowingly, participated in fraudulent charitable gifting schemes. One of those fraudulent schemes involved the Ordre Antonien Libanais des Maronites.[114] A CRA investigation had revealed that the charity had fraudulently issued false charitable receipts. Under the scheme, the charity issued receipts for an amount that was on average five times higher than the actual amount of the gift. More than a thousand taxpayers were denied the charitable donations credit they had claimed on the basis of false receipts issued by the charity. Most of the issued receipts had been backdated to the end of the year for which the taxpayers were filing their tax returns. For example, when a receipt was issued for $7,000, but the taxpayer had donated only 20 percent of the amount, or $1,400, the taxpayer received a charitable donation credit of $3,400, which resulted in an actual profit of $2,000 to the taxpayer—a win-win situation for the donor and the charity, but a lose-lose situation for the fisc and for Canadian taxpayers as a whole.

Another recent fraudulent scheme leading to a number of reported cases involved Rabbi Leon Edery. Using the Or Hamaarav Sephardic Congregation, the Abarbanel Sephardic Learning Centre, and the Mincha Gedolah Synagogue, Rabbi

Edery embarked on a scheme to raise money for these registered charities. The scheme involved the issuing of receipts for charitable donations far in excess of the amounts actually contributed. This was accomplished in two ways; either the full amount shown on the charitable receipt was donated and between 80 and 90 percent was returned to the donor, or the donor would give between 10 and 20 percent of the amount shown on the receipt. Rabbi Edery was found guilty of tax evasion and sentenced to 12 months' house arrest. Taxpayers who had participated in the scheme were generally unsuccessful in their appeals, both on the merits and on the ground of being reassessed outside the reassessment period.[115] The occasional case upheld the reassessment period in the taxpayer's favour when the Crown could not show knowledge of the scheme.[116]

Conclusion

Recent legislative and administrative changes, together with recent court decisions, have caused the law of charitable giving to evolve significantly. The Act now expressly recognizes a taxpayer's ability to make a partial gift, and the CRA has a new consistent policy on split receipting. Significant amendments have been introduced to counter charitable gift shelters that restrict the ability to make profitable gifts or leveraged gifts. However, the application of these amendments by CRA and the courts should be carefully followed to ensure that, notwithstanding that these amendments are intertwined with other amendments aimed at charitable gift tax shelters, entirely legitimate charitable gift structures are not caught by the broad net of the anti-avoidance measures. Retail tax shelter donation programs' own success were found to be their Achilles heel; they made so many sales, they created their own bulk sale market. How valuation principles will be applied to charitable tax shelters that did not involve mass produced art prints or assembled collection of art remains to be seen.

NOTES

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1. RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the Act"). Unless otherwise stated, statutory references in this paper are to the Act.
2. *Kingsmill v. Kingsmill* (1917), 41 OLR 238 (HC).
3. *Re Duff*, [1949] OWN 320 (HC). A gift made in contemplation of death—*donatio mortis causa*—is a special type of inter vivos gift.
4. Until recently the Canada Customs and Revenue Agency, and formerly Revenue Canada.
5. 55 DTC 385 (TAB).

6. Canada, *Report of the Royal Commission on Taxation*, vol. 3 (Ottawa: Queen's Printer, 1966), 225-26.
7. The *Gaudin* decision was cited in *Zandstra*, *infra* note 13; *Rickerd v. The Queen*, 80 DTC 1838 (TRB); and *Consolidated Truck Lines Ltd. v. MNR*, 68 DTC 399 (TAB).
8. 70 DTC 1669 (TAB).
9. *Ibid*. at 1670 (emphasis added).
10. 86 DTC 1788 (TCC).
11. *Ibid*. at 1791.
12. 74 DTC 6416 (FCTD).
13. *Ibid*. at 6419.
14. *Infra* note 15.
15. (1968), 117 CLR 111 (HC).
16. *Ibid*. at 116.
17. Sub nom. *Leary v. FC of T*, 80 ATC 4438 (FC).
18. *Ibid*. at 4455-56 (emphasis added).
19. 85 DTC 5433 (FCA); rev'g. 84 DTC 6494 (FCTD).
20. 90 DTC 6335 (FCA); aff'g. 88 DTC 6101 (FCTD); rev'g. 83 DTC 557 (TCC).
21. The court did not allow the taxpayer to deduct $1,500 paid in connection with his daughter's European summer ski camp because the evidence showed that it did not fit into any classification that could possibility be called a gift.
22. *Supra* note 20 at 6102 (FCTD).
23. *Ibid*. at 6105.
24. 99 DTC 5722 (FCA); aff'g. 99 DTC 3527 (TCC) (full case report at 2000 DTC 1956 (TCC)).
25. *Information Circular* 75-23, "Tuition Fees and Charitable Donations Paid to Privately Supported Secular and Religious Schools," September 29, 1975.
26. The Tax Court of Canada referred to *Koetsier v. MNR*, 74 DTC 1001 (TRB).
27. *Supra* note 24 at paragraph 11 (FCA).
28. See *The Queen v. Friedberg*, 92 DTC 6031, at 6032 (FCA).
29. See *Woolner*, *supra* note 24, and *Burns*, *supra* note 21.
30. *Interpretation Bulletin* IT-110R3, "Gifts and Official Donation Receipts," June 20, 1997.
31. *Income Tax Technical News* no. 26, December 24, 2002.
32. For a fuller discussion, see David G. Duff, "The Federal Income Tax Act and Private Law in Canada: Complementarity, Dissociation, and Canadian Bijuralism" (2003), vol. 51, no. 1 *Canadian Tax Journal* 1-63.
33. Civil Code of Quebec, SQ 1991, c. 64, as amended.

34. Canada, Department of Finance, *Legislative Proposals and Explanatory Notes Relating to Income Tax* (Ottawa: Department of Finance, December 2002), 453.

35. Blake Bromley, "Comments on the December 20, 2002 ITA Amendments on Split Receipting" [Winter 2003] *Focus on Philanthropy: A Guide to Charitable Giving for Professional Advisors* (Calgary Foundation).

36. 78 DTC 6179 (FCA); aff'g. 76 DTC 6179 (FCTD).

37. The gift tax provisions were repealed, effective for 1972 and subsequent taxation years.

38. *Supra* note 36 at 6181-82 (FCA).

39. [1974] Que. CA 99.

40. 85 DTC 5004 (FCTD).

41. *Ibid*. at 5008 (emphasis added).

42. 99 DTC 5034 (SCC).

43. *Ibid*. at paragraph 28 (emphasis added).

44. The province of Quebec does not use the term "charity"; rather, it uses the concepts of "social trust" and "socially beneficial purpose"; see articles 1256, 1266, and 1270 of the Civil Code.

45. SC 2001, c. 4.

46. RSC 1985, c. I-21, as amended.

47. The question of whether a genuine gift has been made under the Act can have serious consequences for taxpayers. In *The Queen v. Bromley*, [2004] 3 CTC 58 (BC Prov. Ct.), the individual taxpayer was a lawyer who, through a series of transactions, made gifts to a charitable foundation. An audit by the CRA led to the disallowance of the tax credits and the imposition of penalties. The taxpayer was then charged with 23 counts of tax evasion and with making false or deceptive statements. The court found that the issue of what constituted a gift was unclear and acquitted the taxpayer on all charges.

48. *Supra* note 30. The CRA's previous position, which is similar in some respects to its current position, was contained in the former *Interpretation Bulletin* IT-110R2, "Deductible Gifts and Official Donation Receipts," May 14, 1986.

49. *Supra* note 8.

50. *Supra* note 25.

51. See subsections 118.1(12) and 110.1(5) of the Act.

52. Interestingly, in CRA document no. 2003-0005165, March 25, 2003, the issue was whether a purchaser was entitled to include the excess of the purchase price over the fair market value of a property in computing the purchaser's charitable tax credit. A charitable organization would grant a conservation easement to another charity, sell the land with the easement to a purchaser, and immediately thereafter reacquire the conservation easement from the other charity. This would be done to protect ecologically sensitive land. The CRA opined that on the basis of the draft gifting legislation released on December 20, 2002 (*supra* note 35), if the fair market value of the advantage to a taxpayer does not exceed 80 percent of the amount paid by the taxpayer to a qualified donee, the taxpayer

may include the difference as an eligible amount of a gift in computing the taxpayer's charitable tax credit or deduction.

53. *Supra* note 31.

54. In *Income Tax Technical News* no. 26, *ibid*., the CRA provides that if an amount is contributed to a charitable organization by a donor, and if the advantage received by the donor is a stream of guaranteed payments for a period of time, the eligible amount will be equal to the excess of the amount contributed by the donor over the amount that would be paid at that time to an arm's-length third party to acquire an annuity to fund the guaranteed payments. Notwithstanding the withdrawal of the CRA's administrative position, charitable annuities are likely to continue as a means of fundraising. For the CRA's comments on the amount of advantage of an annuity stream received by a donor on giving cash to a charity, see CRA document no. 2003-0008195, October 27, 2003, and CRA document no. 2003-0009195, November 18, 2003.

55. IT-110R3, *supra* note 31 at paragraph 11, provides that the benefit is considered to have a nominal value if its fair market value does not exceed the lesser of $50 and 10 percent of the amount of the gift.

56. *Supra* note 34.

57. See Canada, Department of Finance, *News Release* no. 2003-61, December 5, 2003, with the accompanying "Draft Amendments to the Income Tax Act," and Canada, Department of Finance, *Legislative Proposals and Draft Regulations Relating to Income Tax* (Ottawa: Department of Finance, February 2004).

58. See Canada, Department of Finance, *Legislative Proposals Relating to Income Tax* (Ottawa: Department of Finance, July 2005) (herein referred to as "the draft legislation").

59. Proposed sections 110.1 and 118.1 of the Act.

60. Proposed subsection 127(3) of the Act.

61. See *Steen v. The Queen*, 88 DTC 6171 (FCA); aff'g. 86 DTC 6498 (FCTD).

62. See *Youngman v. The Queen*, 90 DTC 6322 (FCA); and *The Queen v. Fingold*, 97 DTC 5449 (FCA).

63. Consider, for example, how parents may wish to encourage good giving habits in their children. For a real-world example, see *The Queen v. Antoine Guertin Ltée*, 88 DTC 6126 (FCA); rev'g. in part 81 DTC 5268 (FCTD). Consider also that the benefit of the tax credit or deduction is a benefit received from someone other than the donee; however, it is most unlikely to be regarded as an advantage for this purpose.

64. Bromley, *supra* note 35.

65. *Friedberg*, *supra* note 28.

66. *Woolner*, *supra* note 24.

67. Donor-advised gifts were allowed in *Curlett v. MNR*, 66 DTC 5200 (Ex. Ct.) and were approved in *MacKenzie v. MNR*, 52 DTC 346 (TAB).

68. The rules applicable to leveraged gift arrangements are discussed in the author's 2004 Canadian Tax Foundation article; *supra* note 1.

69. *Supra* note 28.

70. Canada, Department of Finance, 2003 Budget Plan, February 18, 2003, 339-40.

71. See the opening words of paragraph 248(35)(b) and subsection 248(37).

72. James M. Park, "New Developments and Challenges with Canada Customs and Revenue Agency" (2001) vol. 16, no. 3 *The Philanthropist* 175-92.

73. See Wolfe D. Goodman, "Some Issues Relating to the Treatment of Private Foundations Under the Income Tax Act" (2001) vol. 16, no. 2 *The Philanthropist* 100-3.

74. RSQ, c. I-3 (herein referred to as "TAQ").

75. Québec, Ministère des Finances, 2004-2005 Budget, Additional Information on the Budgetary Measures, March 30, 2004, 53.

76. TAQ sections 752.0.10.11.1 (individual) and 714.1 (corporation).

77. TAQ sections 752.0.10.11.2 (individual) and 714.2 (corporation).

78. Gifts of art to recognized arts organizations are still governed by the general rule under the TAQ; the charitable credit or deduction is equal to the gift's fair market value at the time of the donation. See TAQ section 752.0.10.1.

79. These rules also do not apply in respect of an ecological gift; gifts of certain securities; a gift of inventory, real property located in Canada, or cultural property; or a gift of bare ownership of cultural property or a work of art.

80. Québec, Ministère des Finances, *Information Bulletin* 2003-7, "Technical Modifications To Increase the Integrity and the Consistency of the Tax System," December 12, 2003, paragraph 4.4.

81. *Ibid*.

82. See *Glenex Industries Inc. v. The Queen*, 97 DTC 291 (TCC); *Husky Oil Limited v. The Queen*, 95 DTC 316 (TCC); *Henderson Estate and Bank of New York v. MNR*, 73 DTC 5471 (FCTD); and *Min. of Finance (BC) v. Mann Estate*, [1973] CTC 223 (BCCA); aff'd. [1974] CTC 222 (SCC).

83. *The Queen v. Duguay*, [2002] 1 CTC 8 (FCA).

84. *A G Canada v. Nash,* Quinn and Tolley, 2005 DTC 5696 (FCA).

85. *Supra* note 82.

86. RSC 1985, c. C-51, as amended (herein referred to as "CPEIA").

87. CPEIA section 32(5)(a).

88. CPEIA section 33.1(1).

89. Subparagraph 39(1)(a)(i.1) of the Act.

90. *Supra* note 28. At the time of this decision, it should be noted that the eligibility for and the amount of the deduction were theoretically the responsibility of the CRA. However, it was agreed that when the Cultural Review Board issued a cultural property tax certificate, it would also consider the estimated fair market value of the object. During the relevant period, the Cultural Review Board had not enunciated a specific policy regarding the valuation of cultural property for income tax purposes, though appraisals at fair market value were generally required to be submitted along with applications for certification.

The Cultural Review Board was also not involved in certifying the monetary value of objects.

91. See *Aikman et al. v. The Queen*, 2002 DTC 6874 (FCA); aff'g. 2000 DTC 1874 (TCC), where the court held that the replacement cost was not necessarily a good indication of fair market value. Rather, the "cost" of an object means the price at which the object changed hands in an arm's-length situation. The court agreed that the fair market value of the gift as certified by the Cultural Review Board was correct. Examples of other valuation cases include *Conn v. MNR*, 86 DTC 1669 (TCC); *Conn v. MNR*, 86 DTC 1682 (TCC); and *Zelinski et al. v. The Queen*, 2000 DTC 6001 (FCA). See also *Interpretation Bulletin* IT-407R4 (Consolidated), "Dispositions of Cultural Property to Designated Canadian Institutions."

92. Canadian Cultural Property Export Review Board, "Information and Procedures Update Relating to the Certification of Cultural Property for Income Tax Purposes," July 2002.

93. 2004 DTC 6415 (FCA); rev'g. 2003 DTC 1078 (TCC).

94. Sub nom. *Pustina et al. v. The Queen*, 96 DTC 1594 (TCC).

95. *Supra* note 93 at paragraphs 18-19 (TCC).

96. *Ibid*. at paragraph 17 (FCA).

97. 2004 DTC 2236 (TCC). This decision was affirmed by the Federal Court of Appeal on May 2, 2005, with leave to appeal to the Supreme Court of Canada refused on April 20, 2006.

98. The associate chief justice referred to it as a program (ibid., at 2238, note 1): "I use the word 'program' because of its neutrality. Not everyone is so restrained. Professor Vern Krishna calls the 'buy-low, donate-high' arrangements a 'swindle' or a 'scam' in the publication 'Canadian Current Tax.' Professors Daniel Sandler and Tim Edgar of the Faculty of Law, University of Western Ontario, in the *Canadian Tax Journal* refer to 'art flips' and use such terms as 'brazen' and 'rip off.' Revenue Canada (now the CCRA), not as a rule known for the use of hyperbole or intemperate language, speaks in a news release of 'art scams.' Language of this sort adds a touch of colour to an otherwise rather dry topic but it contributes little to a dispassionate analysis of the legal and factual questions involved. Indeed, I am not sure that I know just what 'scam' means in the context of taxation but I presume it implies something dishonest or fraudulent. Unlike in the case of 'sham' we do not yet have a judicial definition."

99. It appears that by acquiring and disposing of the prints in the United States, the taxpayer may have avoided the additional cost of 7 percent GST.

100. In *Klotz*, *supra* note 110 at paragraphs 47-53, Bowman ACJ considered the US approach to valuation. He referred to a US decision in which the court found that the most appropriate market for valuation purposes was the most active marketplace for the particular item involved. In that case, the most active marketplace was the marketplace in which the taxpayers purchased the items for gifting purposes. However, he also indicated that in the United States there was a specific regulation referring to the market in which the item is "most commonly sold to the public." He also referred to US authority for the proposition that the best evidence of value is the actual sale of the very property—or, in other words, the actual price paid by the taxpayers.

101. *Ibid*. at paragraph 56.

102. 2004 TCC 434. This decision has not been appealed.

103. *Ibid*. at paragraph 37.

104. 2004 DTC 3227 (TCC). This decision was affirmed by the Federal Court of Appeal on April 11, 2005.

105. *Ibid*. at paragraph 10.

106. *Ibid*. at paragraph 17.

107. 2004 DTC 3391 (TCC). *Nash* was heard together with *Quinn v. The Queen*, 2004 DTC 3328 (TCC) and *Tolley v. The Queen*, 2004 DTC 3360 (TCC). The *Nash* decision was reversed by the Federal Court of Appeal on November 21, 2005 (supra note 84), with leave to appeal to the Supreme Court refused on April 20, 2006.

108. *Nash*, *supra* note 84 at paragraph 44.

109. *Ibid*. at paragraph 54 (emphasis added).

110. 2005 D.T.C. 5696 (FCA).

111. *Ibid*. at paragraphs 33-5.

112. 2004 TCC 438. This decision was affirmed by the Federal Court of Appeal on September 15, 2005.

113. 2004 TCC 619.

114. This scheme has resulted in a number of unsuccessful court appeals. See *Bassila v. The Queen*, 2003 DTC 5504 (FCA), aff'g. 2003 DTC 851 (TCC); *Daou et al. v. AG of Canada*, 2004 DTC 6384 (FCA), aff'g. [2003] 4 CTC 2881 (TCC); *Chamoun v. MNR*, 2004 DTC 6073 (FCA), aff'g. 2004 DTC 2262 (TCC); *Nassif v. The Queen*, [2004] 2 1CTC 2495 (TCC); and *Merhi v. The Queen*, [2001] 3 CTC 2361 (TCC).

115. See *Kadoch v. The Queen*, [2003] 2 CTC 2633 (TCC); *Soberano v. The Queen*, [2002] 2 CTC 2045 (TCC); *Benarroch v. The Queen*, [2003] 2 CTC 2423 (TCC); *Boutarieh v. The Queen*, [2001] 2 CTC 2536 (TCC); and *Halajian v. The Queen*, [2004] 2 CTC 2450 (TCC).

116. See *Benitah v. The Queen*, [2003] 2 CTC 2567 (TCC); *Benmergui v. The Queen*, [2003] 2 CTC 2428 (TCC); and *Bentolila v. The Queen*, [2003] 3 CTC 2775 (TCC).