Federal Court of Appeal | Cour d'appel fédérale

Date: 20191205

Dockets: A-135-18
A-132-18
A-133-18
A-134-18

Citation: 2019 FCA 299

CORAM: **NOËL C.J.**
RIVOALEN J.A.
LOCKE J.A.

BETWEEN:

GEORGE MARKOU
SIMONETTA OLIVANTI
WILLIAM H. HENDERSON
GERRY PETRIELLO

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Montréal, Quebec, on October 17, 2019.

Judgment delivered at Ottawa, Ontario, on December 5, 2019.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: RIVOALEN J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] These are consolidated appeals brought by George Markou, William H. Henderson, Simonetta Olivanti, and Gerry Petriello (collectively, the appellants) from a judgment of the Tax Court of Canada (2018 TCC 66, 2018 D.T.C. 1056) wherein Paris J. (the Tax Court judge)

dismissed the appeals against Mr. Henderson and Ms. Olivanti's reassessments for the 2001 taxation year, and Mr. Markou and Mr. Petriello's reassessments for the 2002 taxation year. A total of 193 other donors with outstanding appeals before the Tax Court of Canada (TCC) have agreed to be bound by the result of these four lead appeals.

[2] The Tax Court judge concluded that the Minister of National Revenue (the Minister) had correctly disallowed the appellants' tax credits claimed under section 118.1 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act). The Minister denied the tax credits on the basis that the amounts transferred to a charitable foundation were not gifts within the meaning of section 118.1 of the Act.

[3] The appellants argue that the Tax Court judge erred in concluding that the appellants did not have the required "donative intent" based on *Maréchaux v. The Queen*, 2009 TCC 587, 2009 D.T.C. 1379 [*Maréchaux* TCC], where the same donation program was at issue. As this Court endorsed *Maréchaux* TCC in the appeal that followed (*Maréchaux v. Canada*, 2010 FCA 287, 2010 D.T.C. 5174, leave to appeal to S.C.C. refused, 34073 [June 9, 2011] [*Maréchaux* FCA]), the appellants ask that the Court repudiate this prior decision and allow the appeals.

[4] The Crown contends that the Tax Court judge correctly held that he was bound to follow *Maréchaux* TCC as endorsed in *Maréchaux* FCA and submits that there is no valid reason why this Court should overrule its prior decision as no binding precedent or relevant statutory provisions were overlooked.

[5] For the reasons that follow, I would dismiss the appeals.

[6] Pursuant to the consolidation order issued on June 12, 2018, these reasons will be filed in docket A-135-18 and a copy thereof will be filed in dockets A-132-18, A-133-18 and A-134-18.

[7] The provisions of the Act that are relevant to the analysis are set out in the appendix to these reasons.

FACTUAL BACKGROUND

[8] The appellants participated in a "leveraged donation" scheme, the details of which are set out in full at paragraphs 9 to 24 of the Tax Court judge's reasons (the Reasons). The following summary suffices for present purposes.

[9] The scheme, known as the "Donation Program for Medical Science and Technology" (the Program), was promoted and operated by Trinity Capital Corporation (Trinity). Participants pledged an amount to the John McKellar Charitable Foundation (the Foundation), a Canadian registered charity. Part of the pledged amount was paid in cash – 30% in 2001 and 32% in 2002 (the cash contribution) – and the remainder was funded by non-interest bearing loans arranged for under the Program with one or a number of subsidiaries of Trinity. The total of the cash contributions and the loans exceeded the pledged amounts by 10% in 2001 and 17% in 2002. This excess was paid to the lenders as a "security deposit", a "loan transaction fee", and premiums on a "deposit accretion insurance policy". The cash contributions were conditional on the loan approval, failing which they were to be returned to the participants. The charitable donation tax receipt reflected the pledged amount.

[10] Through a pre-arranged series of operations, the lenders obtained the funds used to make the loans to the participants through daylight loans. The funds flowed in a circular fashion from the lenders to the Foundation, then to a number of entities and back to the lenders who reimbursed their daylight loans over the course of one day. The loan agreements provided that the participants could assign the deposit accretion insurance policy and the security deposit to the lenders shortly after the loan was issued, in full satisfaction of the loan. All four appellants did so in this case (Reasons, at paras. 29, 35, 41 and 47).

[11] The total purported donations amounted to approximately $18 million in 2001 and $106 million in 2002, of which only 1% and 1.5% remained available to the Foundation and were presumably put to charitable use (Further Agreed Statement of Facts, Exhibit A-3, Appeal Book, vol. 4, p. 632, at para. 222 a) and p. 633, at para. 223 b)). The balance was transferred to the Mackenzie Institute for the Study of Terrorism (Mackenzie), a registered charity, and Cornell University (Cornell), a prescribed university under Schedule VIII (section 3503) of the *Income Tax Regulations*, C.R.C., c. 945. Trinity arranged with Mackenzie and Cornell that the funds were to be used to purchase medical intellectual property as well as medical equipment from a British Virgin Islands corporation, Charterbridge Holdings International Ltd. (Charterbridge), at a price "far in excess of the fair market value of the property" (Reasons, at para. 22). Charterbridge then transferred most of those proceeds to the Trinity subsidiaries acting as lenders in the Program who then repaid their daylight loans.

[12] The Program was promoted on the basis that participants stood to obtain a return well in excess of their cash contribution as a result of making the donation depending on their province

of residence. For example, a participant residing in Ontario could expect a net receipt of $16,410, in return for a pledge of $100,000, being the difference between the projected tax benefit of $46,410 and a cash contribution of $30,000. The promotional materials presented this net receipt as the "Cash Flow Advantage" (Joint Book of Documents, Exhibit A-2, Appeal Book, vol. 2, p. 405):

Tax Credit and Cash Flow Advantage
From Charitable Donations - Ontario

Donation Amount	$100,000	$250,000	$500,000
Personal Contribution	$30,000	$75,000	150,000
Tax Credit	$46,410	$116,025	232,050
Cash Flow Advantage	$16,410	$41,025	82,050
	54.70%	54.70%	54.70%

THE APPELLANTS' TRANSACTIONS

[13] William H. Henderson, a resident of Ontario, participated in the Program in 2001 by making a purported donation of $100,000 for which he claimed federal and provincial tax credits totalling $40,160. His cash contribution was in the amount of $30,000 (Partial Agreed Statement of Facts, Exhibit A-1, Appeal Book, vol. 2, pp. 280-281, at paras. 55-65).

[14] Simonetta Olivanti, a resident of Quebec, participated in the Program in 2001 by making a purported donation of $50,000. With respect to her portion of the purported donation – *i.e.*, $41,397.34, the rest was transferred to her spouse – Ms. Olivanti claimed federal and provincial tax credits totalling $24,157.23. The cash contribution was in the amount of $15,000 (Partial Agreed Statement of Facts, Exhibit A-1, Appeal Book, vol. 2, p. 282, at paras. 70-85 and Further Agreed Statement of Facts, Exhibit A-3, Appeal Book, vol. 4, p. 610, at para. 131).

[15] George Markou, a resident of Ontario, participated in the Program in 2002 by making a purported donation of $11,000,000 for which he claimed federal and provincial tax credits totalling $4,420,500. His cash contribution was in the amount of $3,520,000 (Partial Agreed Statement of Facts, Exhibit A-1, Appeal Book, vol. 2, pp. 287-288, at paras. 85-96).

[16] Gerry Petriello, a resident of Quebec, participated in the Program in 2002 by making a purported donation of $50,000 to the Foundation, for which he claimed a federal tax credit of $14,499 and the maximum provincial tax credit, the exact amount of which is not apparent from the record. His cash contribution was in the amount of $16,000 (Partial Agreed Statement of Facts, Exhibit A-1, Appeal Book, vol. 2, pp. 288-289, at paras. 101-116 and Further Agreed Statement of Facts, Exhibit A-3, Appeal Book, vol. 4, p. 611, at para. 136).

[17] The Tax Court judge noted that two of the appellants testified that they understood that their entire donation (the cash and loan portions) would be used for medical research and believed the Foundation to be a *bona fide* charity. They also confirmed that they were not aware of the circular flow of funds to which the loaned amounts were put (Reasons, at para. 49).

THE TAX COURT DECISION

[18] The Tax Court judge first rejected the appellants' contention that the non-interest bearing loans that they received to fund most of their purported donations was not a benefit (Reasons, at paras. 68-78). Amongst other things, he relied on statements made by this Court in *Maréchaux* FCA, at paragraph 9, that it is "self-evident that a person who has the use of borrowed money, repayable in twenty years time, without having to pay interest has thereby

received a significant benefit" and, at paragraph 11, that "the 'put option' was a significant benefit provided to the donor by the lender in return for the payment" (Reasons, at para. 77).

[19] Having determined that the appellants each received a benefit in return for their donation, the Tax Court judge then asked whether the cash contribution could qualify as a split gift under either common law or civil law (Reasons, at para. 79). Beginning with common law, he reviewed cases establishing that the receipt of a material benefit vitiates a gift (*Peter v. Beblow*, [1993] 1 S.C.R. 980, 101 D.L.R. (4th) 621 and *McNamee v. McNamee*, 2011 ONCA 533, 106 O.R. (3d) 401), as well as the case law cited by the appellants (*Watson v. Bradshaw*, (1881) 6 O.A.R. 666 (Ont. C.A.); *City of Dartmouth v. Hoque*, (1981) 46 N.S.R. (2d) 162, 126 D.L.R. (3d) 127 (N.S.S.C. App. Div); *McNamee* (supra); *V.J.F. v. S.K.W.*, 2016 BCCA 186, 85 B.C.L.R. (5th) 68; *Neville v. National Foundation for Christian Leadership*, 2013 BCSC 183, [2013] B.C.J. No. 211 (QL) (affirmed in 2014 BCCA 38, 350 B.C.A.C. 7); *Coleman v. Canada*, 2010 TCC 109, [2010] D.T.C. 1096 and *Ballard v. Canada*, 2011 FCA 82, 332 D.L.R. (4th) 530). The conclusion that he drew from his review is that "the question whether the receipt of any consideration at all by a donor vitiates a gift at common law" had not been finally determined (Reasons, at para. 95).

[20] The Tax Court judge then turned to the tax jurisprudence. After noting that this Court in *French v. The Queen*, 2016 FCA 64, 397 D.L.R. (4th) 746 [*French*], appeared to accept that the jurisprudence had not conclusively settled the issue of whether split gifts could be made (Reasons, at para. 96), he noted that, on the other hand, *The Queen v. Friedberg*, [1992] 1 C.T.C. 1, 92 D.T.C. 6031 (Fed. A.D.) [*Friedberg*], as applied in *Webb v. The Queen*, 2004 TCC 619,

[2005] 3 C.T.C. 2068, stood for the proposition that any consideration at all in relation to a gift vitiates the gift (Reasons, at paras. 97-98).

[21] However, the Tax Court judge went on to hold that it was not necessary in this case to determine whether split gifts could be made under the Act as it read at the time, because even if it was the case, the purported gifts in this case could not be split (Reasons, at para. 99). Specifically, he held that a split gift requires that "the gift portion of a transaction be separated from the non-gift portion, and that the gift portion be supported by donative intent" (Reasons, at para. 100). Referring to *Maréchaux* TCC, he adopted the finding by Woods J. (as she then was) that the cash contribution formed an inseparable part of the donation and that donative intent imbued no part of the transfer.

[22] The Tax Court judge then addressed split gifting under civil law. He began by acknowledging that although the civil law recognizes various categories of partial gifts (e.g. remunerative gifts), donative intent must necessarily attach to the gift portion (Reasons, at para. 101). Insofar as the required existence of the intent to make a gift is concerned, the civil law and the common law operate the same way (Reasons, at para. 102).

[23] The Tax Court judge then proceeded to review the relevant articles of the *Civil Code of Quebec* (CCQ). He first noted that a gift is the transfer of ownership by gratuitous title (art. 1806). Gratuitous title is in turn present when one party obligates itself to another "without obtaining any advantage in return" (art. 1381). It follows that gratuitous title involves two elements – *i.e.*, an intention to benefit another person and the absence of any advantage in return

(Reasons, at para. 105). On this last point, the Tax Court judge referred to the decision of the Quebec Court of Appeal in *Martin c. Dupont*, 2016 QCCA 475, J.E. 2016-566 [*Martin*], at paragraph 30 where it was held that a donation "[TRANSLATION] implies the intent to grow poorer without receiving anything in return, apart from expecting gratitude from the donee" (Reasons, at para. 106).

[24] The Tax Court judge then turned to the notion of remunerative gifts or gifts with a charge under article 1810 CCQ, which provides that such gifts are recognized "only for the value in excess of that of the remuneration or charge". The Tax Court judge concluded from this review that under the civil law even a partial gift must be accompanied by a donative intent (Reasons, at para. 108).

[25] Because none of the appellants had the requisite donative intent in making their cash contribution, the Tax Court judge concluded that no gift could be recognized, whether the term "gift" in section 118.1 of the Act is given its common law or civil law meaning. As held in *Maréchaux* TCC and confirmed in *Maréchaux* FCA, each purported gift "was just one interconnected transaction and no part of it can be considered a gift that was given in expectation of no return" (Reasons, at para. 109).

[26] Finally, the Tax Court judge rejected the contention that the Minister, in stating that the appellants lacked the requisite donative intent, was abusing the process of the court in light of Consent Judgments recognizing as gifts the cash contributions of other participants engaged in the same Program. The Tax Court judge first held that these Consent Judgments pertained to

donations made after split gifting provisions in the Act came into force, on December 21, 2002. He further pointed to the 80% threshold provision (subsection 248(30)) and concluded that where this threshold is not exceeded, the lack of donative intent is no longer an obstacle to allowing a tax credit. It follows that the Minister, in agreeing to the Consent Judgments, did not necessarily recognize that the participants had the requisite intent to donate (Reasons, at paras. 112-113).

[27] The Tax Court judge went on to dismiss the appeals, holding that no part of the total amount was transferred with donative intent.

POSITION OF THE APPELLANTS

[28] In support of their appeals, the appellants make various arguments relating to the conditions for a valid gift, at common law and civil law. They also point to several errors that, in their view, warrant this Court's intervention.

[29] According to the appellants, while the meaning of "gift" is conceptually different at common law and civil law, both legal systems effectively recognize the same transactions as gifts. The essential components of a gift are an intention to donate (*animus donandi*), a sufficient act of delivery and acceptance by the donee. The appellants cite a series of cases in support of their position that the common law has long accepted that a valid gift may be made even when the donor receives some form of benefit or consideration from the donee. The appellants assert that the theory according to which the presence of consideration vitiates a gift at common law is

a “recent innovation of revenue officials” (Appellants’ Memorandum of Fact and Law, at para. 30).

[30] The appellants submit that the Tax Court as well as this Court have long recognized split gifts as valid gifts. They say that *The Queen v. Zandstra*, [1974] 2 F.C. 254, 74 D.T.C. 6416 (T.D.) and *The Queen v. McBurney*, [1985] 2 C.T.C. 214, 85 D.T.C. 5433 (Fed. A.D.), leave to appeal to the S.C.C. refused, 19636 (February 28, 1986), approving the former, support this proposition.

[31] Further, the appellants argue that this Court has considered gifts in the context of complex commercial transactions, including those securing tax benefits by design. They submit, *inter alia*¸ that *Canada v. Langlois*, 2000 CanLII 16504 (FCA), [2000] F.C.J. No. 1806 (QL) (Fed. A.D.), *Klotz v. Canada*, 2005 FCA 158, [2005] 3 C.T.C. 78, leave to appeal to the S.C.C. refused, 30981 (April 20 2006) and *Canada (AG) v. Nash*, 2005 FCA 386, [2006] 1 C.T.C. 158, leave to appeal to the S.C.C. refused, 31291 (April 20 2006) establish that although gifts in these cases were made as part of a pre-arranged series of transactions, it was never “seriously questioned that they were anything other than gifts” (Appellants’ Memorandum of Fact and Law, at para. 45).

[32] Regarding *Maréchaux* TCC, the appellants point to the fact that the parties did not argue the question whether the donor could claim a split gift reflected by the cash contribution. The Court consequently was offered a “dichotomous choice between two extreme positions”: to allow the tax credit for the donation as a whole, or not at all (Appellants’ Memorandum of Fact

and Law, at para. 49). Nevertheless, the Court offered, "in some circumstances, it may be appropriate to separate a transaction into two parts… [but] [o]n the particular facts of this appeal… [t]here is just one interconnected arrangement" (Appellants' Memorandum of Fact and Law, at para. 50 citing *Maréchaux* TCC, at paras. 48-49). According to the appellants, *Maréchaux* TCC (as affirmed in *Maréchaux* FCA) departs significantly from the prior case law and should not be followed.

[33] The appellants go on to briefly mention two decisions illustrating, in their opinion, how the courts utilize the existence of consideration to decide arbitrarily whether a transaction gave rise to a valid gift. They cite *Kossow v. Canada*, 2013 FCA 283, [2014] 2 C.T.C. 1, leave to appeal to S.C.C. refused, 35756 (May 15, 2014) where this Court dismissed the taxpayer's appeal largely on the basis that the facts were substantially similar to those considered in *Maréchaux* FCA and should be resolved the same way (Appellants' Memorandum of Fact and Law, at para. 59). They also cite *Canada v. Berg*, 2014 FCA 25, [2014] 3 C.T.C. 1 [*Berg*] in which this Court reversed the first instance decision holding that the "falsely inflated charitable gift receipts" as well as the "pretence documents" justifying the receipts constituted consideration vitiating the donation (Appellants' Memorandum of Fact and Law, at para. 61 citing *Berg*, at paras. 28-29).

[34] Relying on the Explanatory Notes issued by the Department of Finance, the appellants argue that the legislative amendments pertaining to split gifting were intended to clarify the law and ensure consistency between the common law and civil law. They also submit that nothing suggests that any form of consideration necessarily vitiates a gift. They further posit that

following these amendments, this Court, in *French*, undermined the notion that any consideration vitiates a gift by holding, in the context of a motion to strike, that it was not plain and obvious that split gifting in common law provinces was excluded from the meaning of gift prior to the amendments (Appellants' Memorandum of Fact and Law, at paras. 64-65 and 68 citing *French*, at para. 42).

[35] Lastly, the appellants identify a series of errors that they say were committed by the Tax Court judge. They first say that his conclusion that the appellants lacked donative intent is inconsistent with the uncontested facts and gives rise to an extricable error of law. Although the Tax Court judge reached this conclusion based on *Maréchaux* TCC, Woods J. in this decision did not use the word "intent" and did not actually consider whether donative intent supported all or part of the donation. According to the appellants, the Tax Court judge made an extricable error of law by giving the *Maréchaux* decisions "a scope which it did not have" (Appellants' Memorandum of Fact and Law, at para. 81).

[36] The appellants further argue that the Tax Court judge erred in adopting the *obiter dictum* in *Maréchaux* TCC according to which the transactions were interconnected, as this finding was itself grounded in a misinterpretation of the case law, which has repeatedly recognized charitable gifts made in the context of interconnected transactions.

[37] Finally, the appellants contend that the Consent Judgments necessarily imply that the cash contributions were made with *animus donandi* since they recognize that the donors, who had made donations after December 20, 2002, could claim tax credits for that portion. The

appellants opine that "[f]or the TCC to have held otherwise in this case is paradoxical and, worse, necessarily implies that all of the Consent Judgments issued by the TCC… were unlawful" (Appellants' Memorandum of Fact and Law, at para. 90).

[38] In conclusion, the appellants ask this Court to repudiate *Maréchaux* FCA (Appellants' Memorandum of Fact and Law, at para. 93) and refer the matter back to the Minister for reconsideration and reassessment on the basis that they are entitled to a tax credit computed by reference to the pledged amount, or alternatively, their cash contribution.

POSITION OF THE CROWN

[39] The Crown first points out that while the appellants also claim to be entitled to tax credits computed by reference to the pledged amount, the arguments they advance seek only the recognition of their cash contribution. Specifically the appellants do not challenge the Tax Court judge's conclusion that the interest-free loans represented a substantial benefit in their hands and therefore could not validly form part of the gift. It follows that the only issue on appeal is whether the cash contributions were valid gifts for the purposes of the Act (Crown's Memorandum of Fact and Law, at paras. 38-40).

[40] According to the Crown, no error was shown to have been committed by the Tax Court judge in holding that the cash contributions could not be viewed as gifts. Whether split gifts can validly be made at common law is not an issue that needs be decided in this case, since the purported donations can only be viewed as one interconnected transaction (Crown's Memorandum of Fact and Law, at para. 42). The Court would have to overrule *Maréchaux* FCA

in order to hold that the cash contributions are gifts at common law, and the Crown submits that this is not warranted. Relying on *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149 [*Miller*], the Crown submits that this Court in *Maréchaux* FCA did not overlook any case law it ought to have followed or ignore relevant statutory authority (Crown's Memorandum of Fact and Law, at para. 56).

[41] In deciding *Maréchaux* FCA, this Court properly considered the leading case on the meaning of gift at common law: *Friedberg* (Crown's Memorandum of Fact and Law, at para. 57). The case law relied upon by the appellants are either civil law cases that do not speak to the meaning of "gift" at common law, but involve the federal gift tax, donations to religious schools for which the Department of National Revenue had an administrative position specifying that these donations could be treated as part tuition payment and part gift or an *ad hoc* departmental position accepting split gifts in the context of particular transactions. As none of the cases cited by the appellants are binding on this Court or hold that transactions which arguably comprise a gift must be split into a gift and non-gift portion, it cannot be said that this Court has overlooked cases that it ought to have followed in deciding *Maréchaux* FCA (Crown's Memorandum of Fact and Law, at paras. 61-65).

[42] Turning to the split gifting provisions, the Crown submits that they were not overlooked as the alleged gifts in *Maréchaux* FCA – like the ones in issue here – were made before the date those provisions came into effect (December 21, 2002) (Crown's Memorandum of Fact and Law, at para. 66).

[43] The Crown further submits that no palpable or overriding error or extricable error of law was made by the Tax Court judge in holding that the appellants lacked the required donative intent, as they only agreed to make the purported gifts if they obtained the loans. According to the Crown, this benefit was obtained in return for the whole amount of their donation. The situation is the same as in *Maréchaux* TCC and *Maréchaux* FCA as well as in *Berg*; in the *Maréchaux* decisions, because there was only one interconnected transaction of which no part can be said to be a gift made without the expectation of a return, and in *Berg* because the taxpayer had no intention to be impoverished by the donation, but rather sought to enrich himself. Moreover, irrespective of their donative intent, the appellants did not make valid gifts, argues the Crown, as under the common law, any consideration expected by the donor vitiates a gift (Crown's Memorandum of Fact and Law, at paras. 68-71).

[44] As for civil law, the Crown maintains that the Tax Court judge properly held that a donor who receives a benefit for making a donation must nevertheless have a donative intent regarding the portion for which no benefit is received. In the case at hand, this gives rise to a mixed question of fact and law and the Tax Court judge made no palpable and overriding error nor an extricable error of law in holding that the donative intent was lacking. The Crown further argues that the Tax Court judge correctly recognized that the civil law accepts split gifts, such as gifts with a charge or remunerative gifts, but that this does not do away with the requirement of a donative intent for the portion that purports to be a gift. Since the cash contributions were conditional on the loan application approvals, the Tax Court judge did not err in finding that the appellants lacked donative intent (Crown's Memorandum of Fact and Law, at paras. 76-81).

[45] The Crown finally submits that no inference can be drawn from the Consent Judgments on which the appellants rely as they relate to donations made after the split gifting provisions (subsections 248(30)-(32) of the Act) came into force. The Tax Court judge found that the Consents did not contain any admission by the Crown concerning the appellants' donative intent, and that such an admission could not be inferred. This is a question of mixed fact and law and the Tax Court judge made no palpable and overriding error nor an extricable error of law (Crown's Memorandum of Fact and Law, at para. 82).

[46] The Crown therefore asks that the appeals be dismissed with costs. In the alternative, should this Court find that the cash contributions were valid gifts, the Crown requests that the matter be sent back to the Tax Court so that it can determine whether General Anti-Avoidance Rule applies to the Program (Crown's Memorandum of Fact and Law, at paras. 89-90).

ANALYSIS AND DISPOSITION

[47] The issue before the Court is whether the Tax Court judge erred in concluding that the appellants lacked donative intent based on *Maréchaux* TCC as confirmed by this Court in *Maréchaux* FCA. This turns on a pure application of the doctrine of *stare decisis*. Specifically, the issue is whether the Tax Court judge correctly held that he was bound by *Maréchaux* FCA. No error was made as the Tax Court judge was indeed bound to follow the rule stated in *Maréchaux* FCA and reached the only conclusion that was open to him on the facts of this case.

[48] I agree with the Crown that the issues of whether split gifts could validly be made at common law prior to 2002 when the split gifting provisions came into effect, or whether the

alleged donations can be treated as split gifts under the CCQ, do not arise on the facts of this case. As just said, the Tax Court judge was bound to follow *Maréchaux* TCC, as confirmed by *Maréchaux* FCA, which held that the contractual arrangements pursuant to which the appellants made their alleged gifts cannot give rise to a split gift as the two portions are inextricably tied.

[49] This conclusion is not only one that the Tax Court judge was bound to reach given *Maréchaux* FCA, but one which necessarily flows from section 2.2 of the loan agreements which made each of the appellants' entire donation conditional on the loan being approved by the lender (Reasons, at para. 110). As a result, the participants envisaged making only one gift. It is in that context that their donative intent must be assessed.

[50] In this respect, the Tax Court judge was also bound to hold that "no part of [the interconnected transaction] can be considered a gift that the appellant[s] gave in the expectation of no return" (Reasons, at para. 100), as had been held in *Maréchaux* TCC (at para. 49) and confirmed by *Maréchaux* FCA (at para. 12) (see also *French*, at para. 38).

[51] It follows that there was no gift whether the matter is considered from a common law or a civil law perspective. In this respect, this Court can do no better than to adopt as its own the Tax Court judge's reasons at paragraphs 80 to 111.

[52] Mindful of the fact that *Maréchaux* FCA stands in the way of their appeal, the appellants ask that this decision be overruled. It is well established that this Court will not overrule a prior decision unless it can be shown that in rendering it, the Court overlooked binding precedents or

ignored relevant statutory authority (see *Miller*, at paras. 8-10). No such demonstration has been made.

[53] As to the "precedents" which according to the appellants were not followed, I agree with the Crown that none are binding on this Court or undermine *Maréchaux* FCA in any way (Crown's Memorandum of Fact and Law, at paras. 60-65). Equally, no relevant statutory provision was overlooked. Although the appellants do point to the split gifting provisions (subsections 248(30)-(32) of the Act), they were not overlooked, as they had no application to the case being decided. There is therefore no basis on which *Maréchaux* FCA could be disregarded. It follows that the Tax Court judge correctly held that he was bound by that decision. This suffices to dispose of the appeal.

[54] Although it is not necessary to do so, I believe it useful to add that there is no basis for the appellants' further contention that "it is possible to make a '"profitable" gift' due to the favourable tax consequences that some gifts provide" (Appellants' Memorandum of Fact and Law, at para. 73(f) citing *Friedberg*, at p. 6033). I do not believe this to be an accurate reading of *Friedberg*. As the reasons indicate, what caused the donation to be "profitable" in that case was the fact that Mr. Friedberg was able to buy cultural property (ancient textiles) at a bargain price (*Friedberg*, p. 6033):

> Where the actual cost of acquiring the gift is low, and the fair market value is high, it is possible that the tax benefits of the gift will be greater than the cost of acquisition.

[55] Contrary to what the appellants assert, the donation in *Friedberg* did not give rise to a "profitable gift" when regard is had to the value of the gifted property. In this respect, the Court

explained that it was bound to accept that the gifted property had the unusually high fair market value stated by Mr. Friedberg's experts given the trial court's finding to that effect and the fact that the Crown had not seen fit to counter Mr. Friedberg's expert evidence with expertise of its own (*Friedberg*, p. 6035).

[56] Absent this bargain price ($12,000 for property that was found to have a fair market value of $229,437), the gift would not have been "profitable" as the tax benefits derived from cultural property gifts, although very favourable, could not have exceeded the value of the gifted property.

[57] When the value of the gifted property is taken into account, Mr. Friedberg would have been impoverished by $60,359.25 – that is the difference between the value of the gifted property ($229,437) and the tax benefit ($169,077.75). Specifically, Mr. Friedberg would have paid no tax on an otherwise taxable capital gain of $108,718.50 ($229,437 - $12,000 = $217,437 ÷ 2) and would have obtained a deduction – a deduction rather than a tax credit was available at the time – of $229,437 in computing his income, thereby giving rise to a total tax benefit of $169,077, assuming a 50% marginal tax rate ($54,359.25 for the capital gain exemption and $114,718.50 for the deduction).

[58] The other decision cited by the appellants in support of the proposition that gifts can be profitable when the tax benefits are taken into account (*Staltari v. The Queen*, 2015 TCC 123, [2015] 5 C.T.C. 2140 [*Staltari*]) is also a case where the donor was in fact impoverished by reason of the gift that he made.

[59] In that case, the gifted property had been long-held which explained the increase in value. It was land having an uncontested fair market value of $1,935,000 when gifted and an adjusted cost base of $293,820.98. Based on these figures, Mr. Staltari would have been able to claim a capital gain exemption of the otherwise taxable capital gain ($1,641,179.02 ÷ 2 = $820,589.51) thereby giving rise to a tax benefit of $410,294.76, assuming a marginal tax rate of 50%. Factoring in a combined federal and provincial tax credit of $777,057.78, Mr. Staltari would have been impoverished by $747,647.46 ($1,935,000 – [$777,057.78 + $410,294.76]).

[60] As *Friedberg* makes clear, the fact that a tax benefit is received as a result of making a gift cannot, in and of itself, invalidate the gift as to hold otherwise would mean that Parliament would have spoken in vain in providing for tax benefits consequential on making qualified gifts. However, where a person anticipates receiving tax benefits that exceed the amount or value of an alleged gift, the donative intent is necessarily lacking. Impoverishment being an essential element of a gift under both the civil law and the common law, the purported gift constituted by the cash contribution would fail on this account as well (*Martin*, at paras. 28-31; *R. v. Burns*, 88 D.T.C. 6101, at p. 6105, affirmed in *Burns v. R*, 90 D.T.C. 6335; *Berg*, at para. 29; *Canada v. Castro*, 2015 FCA 225, 2015 D.T.C. 5113, leave to appeal to S.C.C. refused, 36781 (April 14, 2016), at para. 42, and Canada, Department of Finance, "Explanatory Notes Relation to the Income Tax Act, The Excise Tax Act and Related Legislation" (October 2012)), Joint Book of Authorities, Tab 11, pp. 476-477).

[61] Finally, the four Consent Judgments signed by the Minister involving other participants in the Program for taxation years subsequent to the enactment of subsections 248(30)-(32) of the

Act are of no assistance to the appellants. Consent Judgments have no precedential value and it is hazardous to draw any inference from them. I therefore decline the appellants' invitation to do so. I also refrain from expressing any view on the suggestion by the Tax Court judge that donative intent may no longer be required under the split gifting provisions where the 80% threshold provided for in paragraph 248(30)(*a*) is not exceeded (Reasons, at para. 113). The answer to this question is better left to be determined in a factual context capable of giving rise to the application of these provisions.

[62] I would dismiss the appeals with one set of costs in the lead appeal.

"Marc Noël"
Chief Justice

"I agree.
Marianne Rivoalen J.A."

"I agree.
George R. Locke J.A."

APPENDIX

***Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.)**	***Loi de l'impôt sur le revenu,* L.R.C. 1985, c. 1 (5e supp.)**
PART I	**PARTIE I**
Income Tax	**Impôt sur le revenu**
DIVISION E	**SECTION E**
Computation of Tax	**Calcul de l'impôt**
SUBDIVISION A	**SOUS-SECTION A**
Rules Applicable to Individuals	**Règles applicables aux particuliers**
Definitions	**Définitions**
118.1 (1) In this section,	**118.1 (1)** Les définitions qui suivent s'appliquent au présent article.
…	[…]
"total charitable gifts" of an individual for a taxation year means the total of all amounts each of which is the fair market value of a gift (other than a gift the fair market value of which is included in the total Crown gifts, the total cultural gifts or the total ecological gifts of the individual for the year) made by the individual in the year or in any of the 5 immediately preceding taxation years (other than in a year for which a deduction under subsection 110(2) was claimed in computing the individual's taxable income) to	« total des dons de bienfaisance » Quant à un particulier pour une année d'imposition, le total des montants représentant chacun la juste valeur marchande d'un don (à l'exclusion de celui dont la juste valeur marchande est incluse dans le total des dons à l'État, le total des dons de biens culturels ou le total des dons de biens écosensibles du particulier pour l'année) qu'il a fait au cours de l'année ou d'une des cinq années d'imposition précédentes (mais non au cours d'une année pour laquelle il a demandé une déduction en application du paragraphe 110(2) dans le calcul de son revenu imposable) aux entités suivantes, dans la mesure où ces montants n'ont été ni déduits dans le calcul de son revenu imposable pour une année d'imposition se terminant avant 1988, ni inclus dans le calcul d'un montant déduit en application du présent article dans le calcul de son impôt payable en vertu de la présente partie pour une année d'imposition antérieure :
(a) a registered charity,	**a)** organismes de bienfaisance enregistrés;
(b) a registered Canadian amateur athletic association,	**b)** associations canadiennes enregistrées de sport amateur;

(c) a housing corporation resident in Canada and exempt from tax under this Part because of paragraph 149(1)(i),

(d) a Canadian municipality,

(e) the United Nations or an agency thereof,

(f) a university outside Canada that is prescribed to be a university the student body of which ordinarily includes students from Canada,

(g) a charitable organization outside Canada to which Her Majesty in right of Canada has made a gift during the individual's taxation year or the 12 months immediately preceding that taxation year, or

(g.1) Her Majesty in right of Canada or a province,

to the extent that those amounts were

(h) not deducted in computing the individual's taxable income for a taxation year ending before 1988, and

(i) not included in determining an amount that was deducted under this section in computing the individual's tax payable under this Part for a preceding taxation year;

c) sociétés d'habitation résidant au Canada et exonérées, en application de l'alinéa 149(1)i), de l'impôt payable en vertu de la présente partie;

d) municipalités du Canada;

e) Organisation des Nations Unies ou institutions qui lui sont reliées;

f) universités situées à l'étranger, visées par règlement et qui comptent d'ordinaire, parmi leurs étudiants, des étudiants venant du Canada;

g) œuvres de bienfaisance situées à l'étranger et auxquelles Sa Majesté du chef du Canada a fait un don au cours de l'année d'imposition du particulier ou au cours des douze mois précédant cette année;

g.1) Sa Majesté du chef du Canada ou d'une province.

PART XVII

Interpretation

Definitions

Intention to give

248 (30) The existence of an amount of an advantage in respect of a transfer of property does not in and by itself disqualify the transfer from being a gift to a qualified donee if

(a) the amount of the advantage does not exceed 80% of the fair market value of the transferred property; or

b) the transferor of the property establishes to the satisfaction of the Minister that the transfer was made with the intention to make a gift.

PARTIE XVII

Interprétation

Définitions

Intention de faire un don

248 (30) Le fait qu'un transfert de bien donne lieu à un montant d'un avantage ne suffit en soi à rendre le transfert inadmissible à titre de don à un donataire reconnu si, selon le cas:

a) le montant de l'avantage n'excède pas 80 % de la juste valeur marchande du bien transféré;

b) le cédant établit à la satisfaction du ministre que le transfert a été effectué dans l'intention

de faire un don

Eligible amount of gift or monetary contribution

(31) The eligible amount of a gift or monetary contribution is 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, if any, in respect of the gift or monetary contribution.

Montant admissible d'un don ou d'une contribution monétaire

(31) Le montant admissible d'un don ou d'une contribution monétaire correspond à l'excédent de la juste valeur marchande du bien qui fait l'objet du don ou de la contribution sur le montant de l'avantage, le cas échéant, au titre du don ou de la contribution.

Amount of advantage

(32) The amount of the advantage in respect of a gift or monetary contribution by a taxpayer is the total of

Montant de l'avantage

(32) Le montant de l'avantage au titre d'un don ou d'une contribution monétaire fait par un contribuable correspond au total des sommes suivantes :

(a) the total of all amounts, other than an amount referred to in paragraph (b), each of which is the value, at the time the gift or monetary contribution is made, of any property, service, compensation, use or other benefit that the taxpayer, or a person or partnership who does not deal at arm's length with the taxpayer, has received, obtained or enjoyed, or is entitled, either immediately or in the future and either absolutely or contingently, to receive, obtain, or enjoy

a) le total des sommes, sauf celle visée à l'alinéa b), représentant chacune la valeur, au moment du don ou de la contribution, de tout bien ou service, de toute compensation ou utilisation ou de tout autre bénéfice que le contribuable, ou une personne ou une société de personnes qui a un lien de dépendance avec lui, a reçu ou obtenu, ou a le droit, immédiat ou futur et absolu ou conditionnel, de recevoir ou d'obtenir, ou dont le contribuable ou une telle personne ou société de personnes a joui ou a le droit, immédiat ou futur et absolu ou conditionnel, de jouir, et qui, selon le cas :

(i) that is consideration for the gift or monetary contribution,

(i) est accordé en contrepartie du don ou de la contribution,

(ii) that is in gratitude for the gift or monetary contribution, or

(ii) est accordé en reconnaissance du don ou de la contribution,

(iii) that is in any other way related to the gift or monetary contribution, and

(iii) se rapporte de toute autre façon au don ou à la contribution;

(b) the limited-recourse debt, determined under subsection 143.2(6.1), in respect of the gift or monetary contribution at the time the gift or monetary contribution is made.

b) la dette à recours limité, déterminée selon le paragraphe 143.2(6.1), relative au don ou à la contribution au moment où il est fait.

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NAMES OF COUNSEL AND SOLICITORS OF RECORD

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