Dockets: 2013-355(IT)G
2013-3488(IT)G

BETWEEN:

LYNN CASSAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Kenneth Gordon (2014-384(IT)G), Stephen Chu (2014-802(IT)G),
Katherine Lee Sang (2014-803(IT)G), Howard Platnick (2014-804(IT)G),
and Dana Tilatti (2014-806(IT)G) on February 8 to 12, 2016,
February 15 to 19, 2016, February 22 to 25, 2016 and
June 29 and 30, 2016, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellants:	Al Meghji, Mary Paterson, Pooja Mihailovich and Adam Hirsh
Counsel for the Respondent:	Daniel Bourgeois, Andrew Miller, and Josh Kumar

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JUDGMENT

In accordance with the attached Reasons for Judgment, the appeals from the reassessments made under the *Income Tax Act* ("ITA") for the 2009, 2010 and 2011 taxation years are allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

1. The eligible amount of the gift made by the Appellant to TGTFC (as defined in the Reasons for Judgment) in 2009 is nil.

2. The interest paid or payable by the Appellant in the Appellant's 2009, 2010 and 2011 taxation years on the Unit Loan (as defined in the Reasons for Judgment) is deductible under paragraph 20(1)(c) of the *Income Tax Act* (the "ITA") in computing the income of the Appellant for those taxation years.

3. The Fees (as defined in the Reasons for Judgment) incurred by the Appellant in the Appellant's 2009, 2010 and 2011 taxation years are deductible in computing the income of the Appellant for those taxation years in accordance with the applicable provisions of the ITA.

4. The 2009 LP (as defined in the Reasons for Judgment) is not deemed by subsection 12(9) of the ITA to accrue as interest any amount in respect of the Linked Notes (as defined in the Reasons for Judgment) for its 2009, 2010 and 2011 taxation years.

Signed at Ottawa, Canada, this 8th day of September 2017.

"J.R. Owen"

Owen J.

Docket: 2014-384(IT)G

BETWEEN:

KENNETH GORDON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of
Lynn Cassan (2013-355(IT)G and 2013-3488(IT)G),
Stephen Chu (2014-802(IT)G), Katherine Lee Sang (2014-803(IT)G),
Howard Platnick (2014-804(IT)G) and Dana Tilatti (2014-806(IT)G) on
February 8 to 12, 2016, February 15 to 19, 2016,
February 22 to 25, 2016 and June 29 and 30, 2016, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellants:	Al Meghji, Mary Paterson, Pooja Mihailovich and Adam Hirsh
Counsel for the Respondent:	Daniel Bourgeois, Andrew Miller, and Josh Kumar

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JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessments made under the *Income Tax Act* for the 2009 and 2010 taxation years is allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

1. The eligible amount of the gift made by the Appellant to TGTFC (as defined in the Reasons for Judgment) in 2009 is nil.

2. The interest paid or payable by the Appellant in the Appellant's 2009 and 2010 taxation years on the Unit Loan (as defined in the Reasons for Judgment) is deductible under paragraph 20(1)(c) of the *Income Tax Act* (the "ITA") in computing the income of the Appellant for those taxation years.

3. The Fees (as defined in the Reasons for Judgment) incurred by the Appellant in the Appellant's 2009 and 2010 taxation years are deductible in computing the income of the Appellant for those taxation years in accordance with the applicable provisions of the ITA.

4. The 2009 LP (as defined in the Reasons for Judgment) is not deemed by subsection 12(9) of the ITA to accrue as interest any amount in respect of the Linked Notes (as defined in the Reasons for Judgment) for its 2009 and 2010 taxation years.

Signed at Ottawa, Canada, this 8th day of September 2017.

"J.R. Owen"

Owen J.

Docket: 2014-802(IT)G

BETWEEN:

STEPHEN CHU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of Lynn Cassan (2013-355(IT)G and 2013-3488(IT)G), Kenneth Gordon (2014-384(IT)G), Katherine Lee Sang (2014-803(IT)G), Howard Platnick (2014-804(IT)G) and Dana Tilatti (2014-806(IT)G) on February 8 to 12, 2016, February 15 to 19, 2016, February 22 to 25, 2016 and June 29 and 30, 2016, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellants:	Al Meghji, Mary Paterson, Pooja Mihailovich and Adam Hirsh
Counsel for the Respondent:	Daniel Bourgeois, Andrew Miller, and Josh Kumar

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JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessments made under the *Income Tax Act* for the 2009 and 2010 taxation years is allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

1. The eligible amount of the gift made by the Appellant to TGTFC (as defined in the Reasons for Judgment) in 2009 is nil.

2. The interest paid or payable by the Appellant in the Appellant's 2009 and 2010 taxation years on the Unit Loan (as defined in the Reasons for Judgment) is deductible under paragraph 20(1)(c) of the *Income Tax Act* (the "ITA") in computing the income of the Appellant for those taxation years.

3. The Fees (as defined in the Reasons for Judgment) incurred by the Appellant in the Appellant's 2009 and 2010 taxation years are deductible in computing the income of the Appellant for those taxation years in accordance with the applicable provisions of the ITA.

4. The 2009 LP (as defined in the Reasons for Judgment) is not deemed by subsection 12(9) of the ITA to accrue as interest any amount in respect of the Linked Notes (as defined in the Reasons for Judgment) for its 2009 and 2010 taxation years.

Signed at Ottawa, Canada, this 8th day of September 2017.

"J.R. Owen"

Owen J.

Docket: 2014-803(IT)G

BETWEEN:

KATHERINE LEE SANG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of Lynn Cassan (2013-355(IT)G and 2013-3488(IT)G), Kenneth Gordon (2014-384(IT)G), Stephen Chu (2014-802(IT)G), Howard Platnick (2014-804(IT)G) and Dana Tilatti (2014-806(IT)G) on February 8 to 12, 2016, February 15 to 19, 2016, February 22 to 25, 2016 and June 29 and 30, 2016, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellants: Al Meghji, Mary Paterson, Pooja Mihailovich and Adam Hirsh

Counsel for the Respondent: Daniel Bourgeois, Andrew Miller, and Josh Kumar

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JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessments made under the *Income Tax Act* for the 2009 and 2010 taxation years is allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

1. The eligible amount of the gift made by the Appellant to TGTFC (as defined in the Reasons for Judgment) in 2009 is nil.

2. The interest paid or payable by the Appellant in the Appellant's 2009 and 2010 taxation years on the Unit Loan (as defined in the Reasons for Judgment) is deductible under paragraph 20(1)(c) of the *Income Tax Act* (the "ITA") in computing the income of the Appellant for those taxation years.

3. The Fees (as defined in the Reasons for Judgment) incurred by the Appellant in the Appellant's 2009 and 2010 taxation years are deductible in computing the income of the Appellant for those taxation years in accordance with the applicable provisions of the ITA.

4. The 2009 LP (as defined in the Reasons for Judgment) is not deemed by subsection 12(9) of the ITA to accrue as interest any amount in respect of the Linked Notes (as defined in the Reasons for Judgment) for its 2009 and 2010 taxation years.

Signed at Ottawa, Canada, this 8th day of September 2017.

"J.R. Owen"

Owen J.

Docket: 2014-804(IT)G

BETWEEN:

HOWARD PLATNICK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of Lynn Cassan (2013-355(IT)G and 2013-3488(IT)G), Kenneth Gordon (2014-384(IT)G), Stephen Chu (2014-802(IT)G), Katherine Lee Sang (2014-803(IT)G) and Dana Tilatti (2014-806(IT)G) on February 8 to 12, 2016, February 15 to 19, 2016, February 22 to 25, 2016 and June 29 and 30, 2016, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellants:	Al Meghji, Mary Paterson, Pooja Mihailovich and Adam Hirsh
Counsel for the Respondent:	Daniel Bourgeois, Andrew Miller, and Josh Kumar

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JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessments made under the *Income Tax Act* for the 2009 and 2010 taxation years is allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

1. The eligible amount of the gift made by the Appellant to TGTFC (as defined in the Reasons for Judgment) in 2009 is nil.

2. The interest paid or payable by the Appellant in the Appellant's 2009 and 2010 taxation years on the Unit Loan (as defined in the Reasons for Judgment) is deductible under paragraph 20(1)(c) of the *Income Tax Act* (the "ITA") in computing the income of the Appellant for those taxation years.

3. The Fees (as defined in the Reasons for Judgment) incurred by the Appellant in the Appellant's 2009 and 2010 taxation years are deductible in computing the income of the Appellant for those taxation years in accordance with the applicable provisions of the ITA.

4. The 2009 LP (as defined in the Reasons for Judgment) is not deemed by subsection 12(9) of the ITA to accrue as interest any amount in respect of the Linked Notes (as defined in the Reasons for Judgment) for its 2009 and 2010 taxation years.

Signed at Ottawa, Canada, this 8th day of September 2017.

"J.R. Owen"

Owen J.

Docket: 2014-806(IT)G

BETWEEN:

DANA TILATTI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeals of Lynn Cassan (2013-355(IT)G and 2013-3488(IT)G), Kenneth Gordon (2014-384(IT)G), Stephen Chu (2014-802(IT)G), Katherine Lee Sang (2014-803(IT)G) and Howard Platnick (2014-804(IT)G) on February 8 to 12, 2016, February 15 to 19, 2016, February 22 to 25, 2016 and June 29 and 30, 2016, at Toronto, Ontario

Before: The Honourable Justice John R. Owen

Appearances:

Counsel for the Appellants:	Al Meghji, Mary Paterson, Pooja Mihailovich and Adam Hirsh
Counsel for the Respondent:	Daniel Bourgeois, Andrew Miller, and Josh Kumar

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JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal from the reassessments made under the *Income Tax Act* for the 2009 and 2010 taxation years is allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that:

1. The eligible amount of the gift made by the Appellant to TGTFC (as defined in the Reasons for Judgment) in 2009 is nil.

2. The interest paid or payable by the Appellant in the Appellant's 2009 and 2010 taxation years on the Unit Loan (as defined in the Reasons for Judgment) is deductible under paragraph 20(1)(c) of the *Income Tax Act* (the "ITA") in computing the income of the Appellant for those taxation years.

3. The Fees (as defined in the Reasons for Judgment) incurred by the Appellant in the Appellant's 2009 and 2010 taxation years are deductible in computing the income of the Appellant for those taxation years in accordance with the applicable provisions of the ITA.

4. The 2009 LP (as defined in the Reasons for Judgment) is not deemed by subsection 12(9) of the ITA to accrue as interest any amount in respect of the Linked Notes (as defined in the Reasons for Judgment) for its 2009 and 2010 taxation years.

Signed at Ottawa, Canada, this 8th day of September 2017.

"J.R. Owen"

Owen J.

Citation: 2017 TCC 174
Date: 20170908
Dockets: 2013-355(IT)G
2013-3488(IT)G

BETWEEN:

LYNN CASSAN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2014-384(IT)G,

AND BETWEEN:

KENNETH GORDON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2014-802(IT)G,

AND BETWEEN:

STEPHEN CHU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2014-803(IT)G,

AND BETWEEN:

KATHERINE LEE SANG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2014-804(IT)G

AND BETWEEN:

HOWARD PLATNICK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2014-806(IT)G

AND BETWEEN:

DANA TILATTI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Owen J.

I. Introduction

[1] These are appeals by Lynn Cassan, Kenneth Gordon, Dana Tilatti, Howard Platnick, Steven Chu and Katherine Lee Sang (collectively, the "Appellants") of reassessments fixing the income tax consequences of their participation in a structure called the EquiGenesis 2009-II Preferred Investment Limited Partnership and Donation Program (the "Program") that was created and marketed by EquiGenesis Corporation ("EquiGenesis") in 2009. The appeals were heard on common evidence.

[2] The basic components of the Program vis-à-vis the Appellants are an investment, substantially funded by a loan, in limited partnership units of a limited partnership and a transfer of money to a charitable foundation, also substantially funded by a loan. EquiGenesis promoted the Program on the basis that a participant in the Program would be entitled to a non-refundable charitable donation tax credit for the 2009 taxation year and to deductions from income for interest and fees payable over 19 years.

[3] The Minister of National Revenue (the "Minister") reassessed the 2009 and 2010 taxation years of the Appellants[1] to deny the non-refundable charitable donation tax credit claimed in respect of the Program for the 2009 taxation year and to deny the deductions from income claimed in respect of the Program for the 2009 and 2010 taxation years. The Minister also included in income each Appellant's proportionate share of income the Minister says was deemed by subsection 12(9) of the *Income Tax Act* (Canada) (the "ITA")[2] and paragraph 7000(2)(d) of the *Income Tax Regulations* (the "ITR") to be realized by the limited partnership.

II. <u>The Evidence</u>

[4] The parties filed a statement of agreed facts (partial), a copy of which is attached as Appendix A to these reasons. The structure of the Program is shown graphically in Appendix B to these reasons.

[5] Six fact witnesses and three expert witnesses testified for the Appellants:

1. Kenneth Gordon, the sole shareholder of EquiGenesis, a participant in the Program and one of the Appellants;

2. Dana Tilatti, a participant in the Program and one of the Appellants;

3. Howard Platnick, a participant in the Program and one of the Appellants;

4. Steven Chu, a participant in the Program and one of the Appellants;

5. Katherine Lee Sang, a participant in the Program and one of the Appellants;

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[1] In addition, Lynn Cassan was reassessed for her 2011 taxation year after filing a notice of objection to the initial assessment for the year, claiming deductions for the interest and loan-related fees for that year and a limited partnership loss of $3,309. The reassessment denied the claimed deductions and added $145,400 of income. A subsequent reassessment removed the $145,400 of income for the reason described in paragraph 163 below.

[2] Unless otherwise noted all statutory references are to the provisions of the ITA.

6. Lynn Cassan, a participant in the Program and one of the Appellants;

7. Howard Rosen, a principal of FTI Consulting Inc. (“FTI”), who was qualified as an expert in business valuation and corporate finance;

8. Jerrold Marriott, the president of Eastmount Financial Consulting Limited (“Eastmount”), who was qualified as an expert in credit rating and structured finance capital markets; and

9. Andrew Scott Davidson, the managing Director of Duff & Phelps (“D & P”), who was qualified as an expert in business and security interests.

[6] Three fact witnesses and one expert witness testified for the Respondent:

1. Mary Zhang, a private banker working with TD Wealth private clients;

2. Louis Tilatti, the spouse of Dana Tilatti and a participant in similar programs offered by EquiGenesis in 2005, 2010 and 2012;

3. Christine Spettigue, an auditor with the Canada Revenue Agency (the “CRA”) involved in the audit of the Program; and

4. Howard Edward Johnson, a corporate finance advisor with Campbell Valuation Partners Limited (“CVPL”), who was qualified as an expert in the valuation of debt instruments, in the valuation of equity securities and in corporate finance.

A. The Fact Witnesses

(1) Kenneth Gordon

[7] Mr. Kenneth Gordon testified first for the Appellants. He is the president, sole owner, sole shareholder, sole director and senior officer of EquiGenesis. [3] Mr. Gordon is a lawyer and a member of the Law Society of Upper Canada. Mr. Gordon is also one of the 59 taxpayers who participated in the Program (I will refer to these 59 taxpayers collectively as the “Participants” and individually as a “Participant”).

[8] Mr. Gordon described the role of EquiGenesis and himself in connection with the Program as follows:

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[3] Lines 15 to 17 of page 45 of the transcript of the hearing held at Toronto, Ontario, from February 8, 2016 to February 25, 2016 (the “Transcript”).

> Q. . . . What is EquiGenesis's role in connection with the '09 program?
>
> A. EquiGenesis played a variety of rules [*sic*]. It was the creator, the structurer, the distributor, and it was the manager. So we played all those functions and we — we did so and we have a compliment [*sic*] of people in our office who are specifically trained to be able to properly implement and manage these programs throughout their entire life.
>
> Q. Let's talk about you in particular, what has your role been day-to-day in these programs?
>
> A. My role has been to specifically oversee everything that happens related to from beginning to end of these programs. So I am intimately involved in the structuring, in the reviewing and drafting of documents and overseeing drafting of documents by counsel, in the preparation of marketing materials, in overseeing the marketing process with clients and potential clients and their advisors and I am extremely involved on a day-to-day basis in the ongoing management of these programs, some of which extend like the one today, the '09 program, for up to 20 years.[4]

[9] Mr. Gordon described the history of the Program and the structure and operation of the Program. The basic structure used in the Program was first employed in 2003 and then again in 2004, 2005 and 2006. According to Mr. Gordon, no program was offered in 2007 or 2008 because the 2005 and 2006 programs were under audit by the CRA and it was not considered prudent to offer new programs until these audits were completed.[5]

[10] In early 2009, the taxpayers participating in the 2005 and 2006 programs, including Mr. Gordon, were advised in writing by the CRA that the audit of those programs had been terminated and that no reassessments were to be issued.[6]

[11] After meeting with the auditor to obtain an understanding of the reasoning behind the decision not to reassess, Mr. Gordon decided to proceed with the creation of the Program on the basis that it should follow the structure of the 2005 and 2006 programs as closely as possible.[7] Mr. Gordon stated that EquiGenesis offered further programs in 2010, 2011 and 2012 on the same basis.[8]

[12] In cross-examination, Mr. Gordon testified that the term of the program for 2010 had been shortened to 10 years and that an additional option on maturity had

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[4] Lines 1 to 22 of page 53 of the Transcript.
[5] Lines 12 to 22 of page 48 of the Transcript.
[6] Exhibit A-1 is a copy of such a letter to Mr. Gordon.
[7] Lines 15 to 28 of page 51 and lines 1 to 5 of page 52 of the Transcript.
[8] Lines 6 to 8 of page 52 of the Transcript.

been added.[9] The additional option involves an exchange of the limited partnership units issued to participants in the 2010 program for mutual fund trust units and a donation of the latter to a charity.[10] Mr. Gordon stated that this option could not be added to the Program because of conditions laid down in paragraph 38(a.3) of the ITA.[11]

[13] Each Participant in the Program was required to purchase a minimum of ten limited partnership units (the "LP Units") in the EquiGenesis 2009-II Preferred Investment Limited Partnership (the "2009 LP") for $36,140 per LP unit. Of the total purchase price of $36,140 per LP Unit, $32,000 was funded by a loan (a "Unit Loan") from aIncome 2009 Finance Trust ("FT") and the balance of $4,140 was funded by the Participant from the Participant's own resources.

[14] FT acquired the funding for the initial advances of the Unit Loans from a credit facility provided by third-party lenders.[12] In cross-examination, Mr. Gordon stated that at the time each of the Unit Loans was advanced he was not aware of either the identity of the third-party lenders or the details of the loans made by them to FT.[13]

[15] To obtain a Unit Loan, a Participant was required to complete a unit loan application and assignment form (a "ULAA Form").[14] The ULAA Form was prepared by FT's counsel in consultation with EquiGenesis' counsel.[15] The form required the Participants to disclose within ranges specified on the form the Participants' gross personal annual income, their gross household annual income, their assets and their liabilities.[16]

[16] In cross-examination, Mr. Gordon stated that he was not required to provide any document to support his income or net worth as disclosed on his ULAA Form.[17] Mr. Gordon also stated that he did not disclose liabilities associated with his participation in previous programs on the basis that these liabilities would not have any impact on the net worth he disclosed on the form and on the basis of his

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[9] Lines 1 to 10 of page 451 of the Transcript.
[10] Lines 11 to 28 of page 451 and lines 1 to 6 of page 452 of the Transcript.
[11] Lines 25 to 28 of page 452 and lines 1 to 16 of page 453 of the Transcript.
[12] The third-party lenders are named on page 10 of the document at Tab 14 of the Joint Book of Documents ("Joint Book").
[13] Lines 19 to 28 of page 278 and lines 1 to 4 of page 279 of the Transcript.
[14] The ULAA Forms completed by the Participants are found at Tab 27 of the Joint Book.
[15] The primary concern of EquiGenesis' counsel was to ensure that the ULAA Form did not materially vary from the form used in the 2005 and 2006 programs: lines 9 to 12 of page 105 of the Transcript.
[16] The forms did not require precise numbers. Rather, the Participant had to tick the box showing the appropriate range for that particular item.
[17] Lines 13 to 22 of page 325 of the Transcript.

belief that FT was focussing on the borrower's ability to meet the cash flow requirements with regard to the loan.[18]

[17] Article 2.02 of the ULAA Form provided for additional advances to the Participant that would be added to the principal amount of that Participant's Unit Loan. Mr. Gordon explained the purpose of this provision as follows:

> The purpose of that section is to provide the opportunity for the lender at its sole discretion to make annual additional advances which would be added to the principal of the outstanding loan and would be used to pay interest from the prior year.
>
> . . .
>
> The intention was that interest -- there was a mechanism in place at the sole discretion of the lender that would allow it the opportunity to, if appropriate, to make additional advances to fund the interest from the prior year, and this would happen every year before the end of February to satisfy the Income Tax Act requirement that interest was paid within 60 days of year end.[19]

[18] Articles 2.03 and 2.06 of the ULAA Form stated that the principal amount of the Unit Loan bore interest at 7.85% per annum and that the Unit Loan matured on February 15, 2019. Articles 2.04 and 2.05 of the ULAA Form described the loan arrangement fee and the loan maintenance fee respectively. Article 2.07 of the ULAA Form stated that the Unit Loan would be evidenced by a promissory note, and Mr. Gordon testified that each Participant executed a promissory note.[20] The form of promissory note used stated that the Unit Loan matured on February 15, 2019.[21]

[19] Mr. Gordon explained the February 15, 2019 maturity date of the Unit Loans as follows:

> Q. You said that the loan matures at February 15th, 2019, earlier in your evidence?
>
> A. Yes.
>
> Q. We see that at article 2.06 on page 26 [of the ULAA Form]?
>
> A. Correct.

---

[18] Lines 12 to 28 of page 326, lines 1 to 28 of page 327, lines 1 to 17 of page 328 and lines 1 to 21 of page 329 of the Transcript.
[19] Lines 16 to 20 and lines 25 to 28 of page 106 and lines 1 to 4 of page 107 of the Transcript.
[20] Lines 21 through 25 of page 109 of the Transcript.
[21] See, for example, the promissory note executed by Mr. Gordon found at Tab 143 of the Joint Book.

> Q. What happens at maturity?
>
> A. At maturity the loan becomes fully payable, both all principal and accrued interest to that date, and must be paid in full.
>
> Q. It's a 20-year program so why is it designed so that the loan matures halfway through?
>
> A. Although the program was intended to potentially reach 20 years it's essential from a tax perspective that the debt mature in a period within the first 10 years so there had to be bona fides terms of re-payment [*sic*] within 10 years, and that was what drove the requirement to have the debt paid in full by that date.[22]

[20] Mr. Gordon testified that the Participants were advised that the Unit Loan had to be repaid on maturity and that they were not given any written or verbal assurance that the loan would be renewed or extended.[23] He pointed to statements to this effect made in Article 5 of the ULAA Form and in the confidential offering memorandum for the Program (the "COM").[24]

[21] With respect to EquiGenesis' role on the maturity of the Unit Loan, Mr. Gordon stated:

> Q. What did EquiGenesis tell participants about EquiGenesis's role in potentially refinancing the loans?
>
> A. We told them that there was the potential at 10 years prior, just prior to the date the loan matured, that we would, to the extent possible, investigate options, but no options had been, have been investigated yet and no options have been considered at the time.[25]

[22] In cross-examination, Mr. Gordon stated that if a sufficient number of Participants wanted to refinance the Unit Loan, EquiGenesis would do what it could on a best efforts basis to assist in finding a replacement lender.[26] Mr. Gordon also stated that on maturity the loans for the 2003, 2004, 2005 and 2006 programs

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[22] Lines 6 to 22 of page 107 of the Transcript.
[23] Lines 23 to 26 of page 107 and lines 17 to 22 of page 108 of the Transcript.
[24] Lines 23 to 28 of page 107, lines 1 to 9 of page 108, lines 12 to 28 of page 111, page 112, and lines 1 to 10 of page 113 of the Transcript. The COM is at Tab 4 of the Joint Book. Mr. Gordon referred to pages 10, 62 and 64 of the COM in his testimony.
[25] Lines 12 to 20 of page 109 of the Transcript.
[26] Lines 10 to 28 of page 380 and lines 1 to 5 of page 381, lines 16 to 28 of page 382 and lines 1 to 10 of page 383 and lines 8 to 12 of page 384 of the Transcript.

had been replaced with new loans from special-purpose entities and that over 90% of the participants in the 2003 program had refinanced.[27]

[23] Under the terms of the Unit Loan, the 7.85% annual interest had to be paid by the Participant no later than February 28 of the year following the year in which the interest accrued. For example, the interest that accrued on a Unit Loan during 2011 had to be paid by February 28, 2012. If the interest was not paid by a Participant by a certain deadline, the Participant was deemed to have requested an additional cash advance from FT equal to the amount of that interest, subject to the discretion of FT to refuse the additional advance.

[24] Mr. Gordon explained the intention behind the additional advances and the means employed to make the advances as follows:

> Q. Mr. Gordon, can you explain for the Court how these additional advances work?
>
> A. The additional advances are intended to facilitate the participants' obligation to fund interest every year within 60 days of year end so as to avoid violating the Limited Recourse Debt Rules and creates [*sic*] a mechanism that provides the ability of the lender to -- on an annual basis -- determine whether or not the client or the participant or I should say the borrower is creditworthy enough or at least not in default of any of its obligations and therefore entitled to receive an advance.
>
> To the extent that the lender has approved the participants for the advance, then, every year prior to February 28th, the lender will make two advances. One advance in an aggregate amount in respect of the participants who borrowed in respect of the partnership loan and that advance is made on an aggregate basis from the lender to the general partner of the partnership, which is authorized under the loan documentation as an agent to receive those funds on behalf of each of the participants.
>
> The amount the GP will receive is an aggregate amount equal to the combined amount of interest owing on each of the borrowers pursuant to their partnership loans for the prior fiscal period. The lender will advance that amount to the general partner. The general partner will receive that amount and re-pay [*sic*] it back to the lender on behalf of each of the borrowers who have borrowed under the loan agreements.
>
> The lender will receive that amount, account for it as a payment on account of the prior 12 months' interest during the prior fiscal period and then will immediately increase the loan amount, the principal of the borrower's loan amount to account

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[27] Lines 27 to 28 of page 389, pages 390 to 392 and lines 1 to 21 of page 393 of the Transcript. The loans for the 2006 program were replaced shortly before the hearing of these appeals in February 2016.

> for that additional advance. That is how the interest is paid annually within 60 days of year end for each of the borrowers who purchased limited partnership units.[28]

[25] Mr. Gordon stated that while a request to FT for an advance was made automatically if a Participant did not pay the prior year's accrued interest by the deadline, the advance itself was not automatic but was at the discretion of FT.[29] Mr. Gordon provided a detailed explanation of the steps taken to effect each year's advances, including the role played by TD Canada Trust, which was described as follows:

> Q. Tell us about the bank and the bank's role in this process?
>
> A. The bank played a significant role in this process in that the funds and the transaction for this closing all took place in the early years at the branch of the TD Canada Trust here in Toronto. All of the parties involved in the transaction have bank accounts at the same branch of the TD Canada Trust.
>
> What would happen is the representatives of Finance Trust would initially deposit the advance amount in cash from Finance Trust into their account at the TD Bank. Then the TD Bank would walk those funds through the appropriate transaction paying them from the lender, Finance Trust, to either EquiGenesis or the GP as the case may be and then paying those funds back to the lender and documenting the entire process on a manual basis, the deposits, the transfers, the receipts, and so on.
>
> The process is fully documented as the cash originating from Finance Trust flows through each of the relevant parties and eventually back to Finance Trust.[30]

[26] In more recent years, the bank has employed electronic processing managed by FT, which eliminates the need for the parties to attend at the bank branch to effect the annual advances.[31]

[27] Each Participant pledged to FT his or her LP Units as security for the Unit Loan and this security interest was perfected by delivery of the LP Unit certificates to FT. In addition, the 2009 LP and its general partner, the EquiGenesis 2009–II Preferred Investment GP Corp. (the "GP"), entered into a priority agreement with FT that gave FT priority over the 2009 LP and GP with respect to any claim over the LP Units.[32]

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[28] Lines 22 to 28 of page 176, page 177 and lines 1 to 2 of page 178 of the Transcript.
[29] Lines 26 to 28 of page 179 and lines 1 to 19 of page 180 of the Transcript.
[30] Lines 7 to 26 of page 182 of the Transcript.
[31] Lines 8 to 28 of page 183 and lines 1 to 4 of page 184 of the Transcript.
[32] Lines 26 to 28 of page 188 and lines 1 to 20 of page 189 of the Transcript. The priority agreement is found at Tab 43 of the Joint Book.

[28] Each Participant was required to pay to FT a one-time loan arrangement fee of $125 per LP Unit purchased by the Participant (the "LA Fee"). Commencing on February 1, 2011, each Participant was required to pay to FT an annual loan maintenance fee of $30 per LP Unit purchased (the "LM Fee") and to pay to the GP an annual administration fee of $95 per LP Unit purchased (the "Admin Fee"). Of this $95, $25 was an agent service fee paid to the individuals who sold the Program to taxpayers and $70 was retained by the GP for the ongoing administration of the Program.[33] I will refer to the LA Fee, the LM Fee and the Admin Fee collectively as the "Fees".

[29] For each LP Unit issued to the Participants, the 2009 LP used $1,565 to cover issue costs for the LP Units and invested $34,575 in debt instruments (the "Linked Notes")[34] issued by Leeward Alternative Financial Asset 2009 Corporation ("Leeward"), a corporation formed under the laws of the British Virgin Islands ("BVI").

[30] On the maturity of the Linked Notes on December 31, 2028, Leeward is required to pay the 2009 LP the principal amount of the Linked Notes (i.e., $34,575 per LP Unit issued to Participants) and a return on the principal amount determined at that time as the greater of two amounts. Each such amount is calculated by reference to a notional portfolio of assets, which I will refer to as "Portfolio A" and "Portfolio B". As security for its obligations under the Linked Notes, Leeward granted the 2009 LP a security interest over all of its assets pursuant to the terms of a general security agreement.

[31] For each LP Unit issued, Leeward lent $32,000 of the amount received from 2009 LP for the Linked Notes to aIncome 2009 Deposit Trust ("DT") and DT immediately lent the same amount to FT. Each of these loans bears interest at 7.85% per annum and matures on December 31, 2028. DT granted Leeward a security interest over all its assets and FT granted DT a security interest over all its assets.

[32] Although Mr. Gordon stated that he did not have knowledge of FT's activities, he agreed that since FT was a special-purpose entity created to participate in the Program it was logical to assume that FT used the proceeds of the loan from DT to repay the third-party lenders.

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[33] Lines 19 to 26 of page 171 of the Transcript.
[34] One of the Linked Notes is found at Tab 44 of the Joint Book.

[33] In cross-examination, Mr. Gordon stated that the funds advanced by FT passed sequentially through each party's bank account at TD.[35] Rather than each Participant having a bank account, the General Partner received the funds advanced by FT in its capacity as agent for the Participants.[36]

[34] For each LP Unit issued, Leeward invested $2,575 in Class D notes (the "Man Notes") issued by AHL Investment Strategies SPC, a Cayman Islands corporation managed by Man Investments Limited ("Man"). The return on the Man Notes was dependent on the return realized on an underlying pool of assets managed by Man.

[35] A Participant who agreed to acquire LP Units was given the opportunity to borrow from FT a second amount equal to $10,000 per LP Unit purchased by the Participant (the "TGTFC Loan") on the condition that the amount of the TGTFC Loan be transferred by the Participant to The Giving Tree Foundation of Canada ("TGTFC"). Of the 59 Participants in the Program 58 chose to take advantage of this aspect of the Program (I will refer to these 58 Participants collectively as the "TGTFC Participants" and individually as a "TGTFC Participant" and I will refer to this aspect of the Program as the "TGTFC Program").

[36] The TGTFC Loan matured on February 15, 2019 and bore interest at 7.85% per annum. Each TGTFC Participant was required to pay to FT in respect of this loan a one-time loan arrangement fee of $35 per LP Unit purchased by that Participant. FT acquired the funding for the initial advance of the TGTFC Loans from the credit facility provided by the third-party lenders.

[37] Of the total interest on the TGTFC Loan of 7.85% per annum, each TGTFC Participant was required to pay 3.75% per annum in cash from his or her own resources no later than February 28 of the following year. The balance of 4.1% per annum was also payable no later than February 28 of the following year. However, if the 4.1% was not paid by a TGTFC Participant by a certain deadline, that participant was deemed to have requested an additional cash advance from FT equal to the amount of that interest, subject to the discretion of FT to refuse the additional advance.

[38] Mr. Gordon stated that the only substantive difference between the Unit Loan and the TGTFC Loan was the requirement that a TGTFC Participant pay a portion of the interest accruing on the TGTFC Loan from his or her own resources and not from an advance by FT.

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[35] Lines 20 to 28 of page 280 and lines 1 to 3 of page 281 of the Transcript.
[36] Lines 15 to 18 of page 277 of the Transcript.

[39] In cross-examination, Mr. Gordon was asked about his understanding of the credit review conducted by FT prior to advancing Unit Loans or TGTFC Loans. He stated that his understanding at the time of the closings in 2009 was that FT conducted credit checks and PPSA searches of all Participants.[37] However, after his first examination for discovery he was advised by a representative of FT that FT did not perform credit checks of the Participants with respect to the first two of the four closings for the purchase of LP Units. Instead, credit checks were being performed by FT by the end of October 2009, which was after the first two closings, for which PPSA (Personal Property Security Act) searches were done in the absence of credit checks.[38] He was also advised by FT that it had not performed credit checks prior to making additional advances to Participants in 2010 and 2011.[39] Mr. Gordon stated that he had no personal knowledge of FT performing credit checks[40] and was not able to provide documentary evidence of credit checks performed by FT.[41]

[40] Each TGTFC Participant transferred the amount of his or her TGTFC Loan and a further $200 per LP Unit purchased by the TGTFC Participant (for a total of $10,200 per LP Unit purchased by the TGTFC Participant) to TGTFC under the terms of a pledge executed by the TGTFC Participant and TGTFC (I will refer to the total amount transferred to TGTFC by the TGTFC Participants as the "Transferred Property"). TGTFC issued each TGTFC Participant a charitable donation receipt in an amount equal to the face value of the amount transferred by that Participant to TGTFC.

[41] The pledge required TGTFC to invest 98.04% of the face amount transferred to it by a TGTFC Participant in debt obligations (the "TGTFC Notes") issued by Leeward. This equated to an investment in TGTFC Notes of $10,000 per LP Unit purchased by the TGTFC Participant.

[42] As well, the pledge required TGTFC to hold the TGTFC Notes until maturity on December 31, 2028. In cross-examination, Mr. Gordon stated that the agreement of TGTFC to lend Leeward 98.04% of the Transferred Property was essential to the structure. He also stated that by participating in the Program TGTFC recognized that it was a closed structure:

> The charity always had an option to take funds that it received as a donee and invest the way they wanted to. By participating in this structure they recognized it

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[37] Lines 24 to 26 of page 323 of the Transcript.
[38] Lines 2 to 27 of page 324 of the Transcript.
[39] Lines 4 to 20 of page 405 of the Transcript.
[40] Lines 23 to 27 of page 404 of the Transcript.
[41] Lines 27 to 28 of page 320 and lines 1 to 8 of page 321 of the Transcript.

> was a closed structure. It was a structured finance vehicle and as such it was intended to match the elements of two earlier versions previously done. So in respect of that element, to the extent that the charity received donations through this structure, they agreed to invest them as laid out in the original memorandum of understanding.[42]

[43] Leeward issued TGTFC two TGTFC Notes, on December 15, 2009 and December 30, 2009 respectively.[43] The TGTFC Notes each bore interest at the rate of 4.75 % per annum. Leeward was required to pay TGTFC an amount equal to 1.75% of the TGTFC Notes in December 2010 and an amount equal to 3.75% of the TGTFC Notes on December 31 of each subsequent year until maturity.[44] The balance of the interest payable on the TGTFC Notes accrued and was payable by Leeward to TGTFC on maturity. In cross-examination, Mr. Gordon confirmed that the amount of Leeward's liability to TGTFC for every $102,000 transferred to TGTFC by a TGTFC Participant (that is, per 10 LP Units purchased by a TGTFC Participant) would be $134,402 (or $13,440.20 per LP Unit).[45]

[44] Mr. Gordon explained how the 3.75% per annum (or $375 per $10,000 of TGTFC Loan) was paid to TGTFC, as follows:

> Q. What happens to the $375 in respect of the donation loan interest?
>
> A. Two separate things happen in respect of that money. First, I will walk you through the legal flow of those funds as anticipated by the diagram. Then I will secondarily tell you exactly how those funds flow from a practical perspective.
>
> The $375 of the $500 is intended to flow from the donor directly to Finance Trust. Finance Trust will receive that money and account for it to reduce the interest owing on an annual basis on the donation loan. Finance Trust then immediately, at the same time, has a matching obligation to pay that $375 to Deposit Trust on account of the loan agreement entered into between Finance Trust and Deposit Trust.
>
> Similarly, Deposit Trust has a matching obligation to pay $375 to Leeward on account of the loan agreement entered into between Deposit Trust and Leeward. Then immediately Leeward has a matching obligation to pay the same $375 through to The Giving Tree on account of its commitment by issuing the charity investment note which requires a 3.75 percent annual payment. The 3.75 percent on a $10,000 original investment is exactly 3.75 percent.

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[42] Lines 10 to 19 of page 286 of the Transcript.
[43] A copy of the December 15, 2009 TGTFC Note is found at Tab 78 of the Joint Book.
[44] If December 31 was not a business day then the payment was to occur on the last business day immediately preceding December 31.
[45] Lines 16 to 28 of page 298 and lines 1 to 7 of page 299 of the Transcript.

> It means that notionally the $375 flows through each of these parties. What actually happens is, after the funds are collected and they are aggregated in EquiGenesis's trust account, each of the relevant parties — being the lender — sorry, Finance Trust, Deposit Trust, and Leeward sign what we refer to as an omnibus direction.[46]

[45] To secure its obligations under the TGTFC Notes, Leeward granted TGTFC a security interest over all of its assets, which had priority over any other security interest granted by Leeward, with the result that the TGTFC Notes ranked ahead of the Linked Notes.[47] Mr. Gordon explained the importance of the security provided to TGTFC as follows:

> A. . . . We felt it was essential when this structure was put together that there be very specific security arrangements in place that would put the charity in first position and would put the partnership in second position to be certain they would be able to receive what they are entitled to be paid under their contracts. This document outlines all of those security arrangements.
>
> Q. Why is it important that the charity be in first position?
>
> A. The parties agreed that, by the charity participating in this structure and by agreeing to commit to entering into a contract with Leeward, in return the charity would be the first entity entitled to be paid out of all of the assets incorporated into this structure. That would provide the charity sufficient certainty to be able to realize on the full value of what they were owed under the charity note.[48]

[46] Each TGTFC Participant executed a direction which instructed TGTFC how to disburse 90% of its annual cash income from the TGTFC Notes purchased using that participant's transfer to TGTFC. The direction included a list of charities and each TGTFC Participant was required to pick a maximum of four charities from that list and designate the percentage to be paid annually by TGTFC to that particular charity. Mr. Gordon stated that to the end of 2015 TGTFC had received cash payments under the TGTFC Notes totalling $2.3 million and that TGTFC had retained $232,000 and distributed the balance as set out in the directions from the TGTFC Participants.[49]

[47] Leeward lent to DT the proceeds from issuing the TGTFC Notes and DT immediately lent the same amount to FT. These loans have a maturity date of

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[46] Lines 16 to 28 of page 172 and lines 1 to 17 of page 173 of the Transcript. An example of an omnibus direction is found at Tab 98 of the Joint Book.

[47] Mr. Gordon explained the security arrangements in detail at pages 185 to 204 of the Transcript. In doing so, he referred to a document provided to the Participants titled "Security Arrangements", which is found at Tab 3 of the Joint Book.

[48] Lines 18 to 28 of page 185 and lines 1 to 6 of page 186 of the Transcript.

[49] Lines 3 to 28 of page 254 and lines 1 to 4 of page 255 of the Transcript.

December 31, 2028 and bear interest at 7.85% per annum. As stated above, Mr. Gordon agreed that it was logical to assume that FT used the proceeds of the loan from DT to repay the third-party lenders.

[48] A Participant could exit the Program in one of three ways: on the maturity of the Program on December 31, 2028, by requesting the redemption of the LP Units after the ninth year of the Program, or by selling the LP Units to a third party approved by the 2009 LP and FT.[50] Mr. Gordon described exit on maturity as the “expected route”.[51] The redemption route was available to Participants once annually after the ninth year of the Program.

[49] With respect to selling the LP Units, Mr. Gordon pointed to language in the COM indicating that there was no market for LP Units and that it may be difficult or even impossible for unit holders to sell them.[52] Mr. Gordon stated that no Participant had sold LP Units but that participants in earlier programs had on a few occasions sold partnership units. He described four situations in which participants in earlier programs sold partnership units on their own and two situations in which EquiGenesis was able to find purchasers for the limited partnership units.[53] He further stated that EquiGenesis did not have arrangements with any entity to buy the LP Units at any time.[54]

[50] Mr. Gordon noted that although Participants were not told to expect a capital gain on the disposition of their LP Units, one of the two disposition scenarios (Scenario B) in the term sheets for the Program provided to Participants contemplated a capital gain on the disposition of LP Units. Mr. Gordon described the two scenarios as follows:

> Scenario A was intended to provide an analysis as to the financial repercussions on maturity if a unit holder held the units to maturity. Scenario B was designed to indicate the financial repercussions or results for somebody who was able to sell their units prior to maturity.
>
> In that case, it was assumed that the units themselves were treated as capital property. As a result, the disposition of [*sic*] the sale of those units to a third party would trigger a capital gain income inclusion as opposed to a full income inclusion.[55]

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[50] Lines 13 to 28 of page 222 and lines 1 to 12 of page 223 of the Transcript.
[51] Line 23 of page 222 of the Transcript.
[52] Page 225 and lines 1 to 9 of page 226 of the Transcript.
[53] Line 28 of page 227, page 228 and lines 1 to 12 of page 229 of the Transcript.
[54] Lines 13 to 15 of page 229 of the Transcript.
[55] Lines 27 to 28 of page 226 and lines 1 to 9 of page 227 of the Transcript.

[51] Mr. Gordon described the cash flow results set out on two versions of the term sheet provided to Participants resident in Ontario. The first version assumed a donation to TGTFC while the second version assumed no donation. In light of the various assumptions made in each term sheet, the two scenarios suggested that on the maturity of the Program a taxpayer that transferred property to TGTFC as part of the Program would be cash positive in the amount of $218,000 while a taxpayer that did not transfer property to TGTFC would be cash positive in the amount of $436,000.[56]

[52] In cross-examination, Mr. Gordon was asked about a computer model of the Program that allowed the user to test a variety of variables. During this questioning, Mr. Gordon confirmed that if the Man Notes held by Leeward had an average return of 9.61% per annum to maturity on December 31, 2028 then the value of that investment would be $134,470 per 10 LP Units, which would provide Leeward with sufficient funds to discharge its $134,402 obligation to TGTFC under the TGTFC Notes.[57]

[53] Mr. Gordon also summarized what would be paid on maturity by Leeward to the 2009 LP, as follows:

> The first calculation you do on maturity is you take the value of the notional value owing under the contract and you compare that with the actual value of assets that Leeward has on liquidation, reduce the actual assets that Leeward has on liquidation by the amount owing to the charity to satisfy its obligations on the charity note and the lessor [*sic*] of those two remaining amounts is what will be paid to the partnership.[58]

[54] Accordingly, on the maturity of the Linked Notes on December 31, 2028, the amount that will be paid by Leeward to the 2009 LP will never be greater than the assets of Leeward at that time less the amount payable by Leeward to TGTFC regardless of the amount Leeward owes to the 2009 LP under the Linked Notes. In addition, if the Man Notes perform above the historical return of 18.1% per annum, the potential shortfall appears to increase rather than decrease.[59] If Leeward does not pay the full amount of the return owing to the 2009 LP under the Linked Notes, the 2009 LP is expected to claim a deduction from income under paragraph 20(1)(p) equal to the shortfall.[60]

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[56] Lines 15 to 20 of page 250 of the Transcript.
[57] Lines 17 to 27 of page 302 of the Transcript. These numbers are all based on a TGTFC Participant that purchases 10 LP Units and transfers $102,000 to TGTFC.
[58] Lines 23 to 28 of page 303 and lines 1 to 2 of page 304 of the Transcript.
[59] Lines 16 to 24 of page 306 of the Transcript.
[60] Lines 10 to 16 of page 213 of the Transcript.

[55] In cross-examination, Mr. Gordon stated that there were two authorized representatives of the Participants: EquiGenesis and Osler, Hoskin & Harcourt.[61] He agreed that the costs incurred in assisting the Participants had been quantified in an answer to an undertaking.[62]

(2) Dana Tilatti

[56] Dana Tilatti is a manager for contracts and billing with Unisys Canada.[63] Mrs. Tilatti testified that she and her husband, Louis Tilatti, make their investment decisions jointly and that they participated in similar programs offered by EquiGenesis in 2005 and 2006.[64] She stated that, after the CRA had audited the previous programs and decided not to reassess, she and her husband decided to participate in the Program.[65]

[57] Mrs. Tilatti understood that the Program was closely modelled after the 2005 and 2006 programs offered by EquiGenesis and she believed that she had a fairly good understanding overall of what the Program involved, and this was based on her review of the documents provided by EquiGenesis, which included opinions from FTI and a law firm.[66] In cross-examination, Mrs. Tilatti stated that she had no direct contact with anyone from EquiGenesis and that she obtained information about the Program from her husband, who in turn obtained the information from a representative of EquiGenesis.[67] EquiGenesis provided Mr. Tilatti with a spreadsheet to calculate the optimal number of units to purchase but he instead used a tax preparation program to determine that 10 LP Units satisfied their requirements.[68]

[58] Mrs. Tilatti described the Program as involving two components: an investment component and a charitable donation component. Mrs. Tilatti and her husband decided that she would purchase 10 LP Units, which was the minimum investment allowed.[69]

[59] In cross-examination, Mrs. Tilatti testified that she funded the $361,400 purchase price of 10 LP Units with $41,400 of her own money and a $320,000

[61] Lines 17 to 27 of page 464 of the Transcript.
[62] Lines 4 to 10 of page 465 of the Transcript.
[63] Lines 4 to 5 of page 1004 of the Transcript.
[64] Dana Tilatti participated in the 2006 program and Louis Tilatti participated in the 2005 program: lines 7 to 9 of page 1005 of the Transcript.
[65] Lines 13 to 22 of page 1005 of the Transcript.
[66] Lines 8 to 26 of page 1006, lines 20 to 28 of page 1007 and lines 1 to 3 of page 1008 of the Transcript.
[67] Lines 3 to 28 of page 1030, line 1 of page 1031 and lines 16 to 23 of page 1072 of the Transcript.
[68] Lines 8 to 24 of page 1033 and lines 16 to 25 of page 1038 of the Transcript.
[69] Lines 23 to 28 of page 1008, lines 12 to 28 of page 1029 and lines 1 to 2 of page 1030 of the Transcript.

loan.[70] She signed both the subscription form for the 10 LP Units and the application for the Unit Loan on December 1, 2009.[71] The Unit Loan and the subscription for LP Units were both approved on December 30, 2009.[72] Mrs. Tilatti understood that the interest over the term of the Unit Loan would be approximately $229,000 but that she would not have to use her own money to pay that interest. Instead, the lender would automatically advance an amount to pay the interest on an annual basis.[73] Mrs. Tilatti did not try to negotiate a lower rate of interest for the Unit Loan because "that's how the program was structured" and it was a take it or leave it arrangement.[74]

[60] Mrs. Tilatti's counsel asked her what the 2009 LP did with the money provided by investors and she answered:

> The investment that was provided by the investors and the units, they were — the units were used as a pledge for a loan that was taken out for financing of these units.[75]

[61] Mrs. Tilatti testified that a second loan was provided to her to fund the donation component of the Program and that the LP Units were also used to support that loan.[76]

[62] Mrs. Tilatti described what she hoped to accomplish by participating in the Program:

> . . . my husband and I were looking for an investment component to realize some tax savings, but at the same time were looking to be able to donate to a charity which EquiGenesis allowed us to do.[77]

[63] Mrs. Tilatti's counsel asked her about Scenario A and Scenario B and her intention with respect to the length of time she would participate in the Program:

> Q. What is your understanding of what those scenarios depict?
>
> A. The scenario A assumes that the participants in the program will stay with the program until the program is dissolved at its maturity. Scenario B assumes that the participant does not stay till the end of maturity, that he will exit prior to the maturity date at some point.

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[70] Lines 18 to 28 of page 1027 and lines 1 to 3 of page 1028 of the Transcript.
[71] Lines 16 to 19 of page 1028 of the Transcript.
[72] Lines 1 to 11 of page 1029 of the Transcript.
[73] Lines 16 to 24 of page 1037, pages 1038 and 1039 and lines 1 to 2 of page 1040 of the Transcript.
[74] Lines 22 to 26 of page 1042 and lines 8 to 13 of page 1043 of the Transcript.
[75] Lines 24 to 27 of page 1009 of the Transcript.
[76] Lines 3 to 8 of page 1010 of the Transcript.
[77] Lines 14 to 17 of page 1010 of the Transcript.

> Q. What is your understanding of what scenario — at least back in 2009 when you decided to participate, what was your understanding of what scenario was more likely?
>
> A. Based on the discussions between my husband and I the most likely scenario was scenario A, that we stay with the program till its maturity.
>
> Q. Regardless of your understanding of the likelihood, at the day you decided to participate in the '09 program what was your intention with respect to the length of time you participated in the program?
>
> A. We would have been the total length as it was presented to us in terms of the exhibit that we're looking at.
>
> Q. Are you aware of anyone who would be interested in purchasing the units from you?
>
> A. I am not.[78]

[64] In cross-examination, Mrs. Tilatti stated that she intended to hold the investment for 20 years and that the capital gain contemplated by Scenario B was not considered as a possibility because Scenario B addressed early redemption.[79]

[65] Mrs. Tilatti testified that most of the investment decisions made by her and her husband are long-term decisions and that the 20-year time horizon of the Program fit into the time horizon they had set for themselves.[80]

[66] Mrs. Tilatti's counsel asked her a series of questions regarding the LP Units and her investment in the 2009 LP:

> Q. . . . When you decided to participate in the program had anyone told you that the units would be resold or repurchased?
>
> A. That was not my understanding.
>
> Q. Had anyone told you that the price that you paid would be refunded to you?
>
> A. No.
>
> Q. Had anyone told you what the future price or value of the units would be?
>
> A. No.

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[78] Lines 9 to 28 of page 1011 and lines 1 to 5 of page 1012 of the Transcript.
[79] Lines 24 to 28 of page 1072 and lines 1 to 25 of page 1073 of the Transcript.
[80] Lines 3 to 10 of page 1014 of the Transcript.

> Q. Was it your understanding when you decided to participate in the program that the outcome was certain or uncertain?
>
> A. Since there were some investments made there was a certain element of risk involved in the EquiGenesis 2009 program.[81]

[67] Mrs. Tilatti's counsel asked her about the Unit Loan and the TGTFC Loan (collectively, the "Program Loans") and her understanding of her responsibility concerning those loans:

> A. We were certainly responsible for both loans. Every year in the month of February we had to make a payment, which was shown in the previous exhibit in the amount of $5,000 and, as I said, we were responsible for all the interest payments. It was all on us. It's in our name.
>
> Q. What would happen if you failed to pay? What was your understanding of what would happen if you failed to make a required payment?
>
> A. We were on the hook. We have to pay. We were responsible and we would have to liquidate assets. We are the ones who are responsible for the loans.[82]

[68] Mrs. Tilatti's counsel asked her about the ULAA Form and the fact that she did not list the loans taken out for prior EquiGenesis programs as liabilities:

> The reason why we did not include them here is because the loans that we have taken out for the EquiGenesis programs in the past were offset by the investment in the program. So the net impact was a zero as far as we were concerned and that's why they're not listed here.[83]

[69] Mrs. Tilatti's counsel asked her what would happen if the Unit Loan was not refinanced after 10 years:

> If we could not refinance the loan then we would be on the hook to pay the loan back ourselves. So there was a certain element of risk to it.[84]

[70] In cross-examination, Mrs. Tilatti was asked to reconcile the non-disclosure of the loans from the earlier programs with the potential personal liability for the amount of the Unit Loan:

> Q. You also said that to the extent the investment didn't pay off the way you hoped you would be on the hook for it?

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[81] Lines 26 to 28 of page 1012 and lines 1 to 13 of page 1013 of the Transcript.
[82] Lines 19 to 28 of page 1013 and lines 1 to 2 of page 1014 of the Transcript.
[83] Lines 22 to 27 of page 1015 of the Transcript. See also lines 16 to 26 of page 1065 of the Transcript to the same effect.
[84] Lines 5 to 7 of page 1017 of the Transcript.

A. That's correct.

Q. To me that doesn't make sense. If you understood there was a chance you'd be on the hook for it why did you think you shouldn't list it on this credit application form?

A. This is part of EquiGenesis so they know what our, the loan and the investment are, that's why. It's not something they didn't know. It's not information that wouldn't be known to them. They're aware of all the items and the programs we participated in.

Q. The lender wasn't EquiGenesis; right?

A. The way it's structured the lender knows as well, the way the program is structured. This is nothing new to them, so-to-speak.[85]

[71] Mrs. Tilatti's counsel asked her about the refinancing of a loan provided to her as part of the 2006 program offered by EquiGenesis. After consulting the package of documents provided to her by counsel (Exhibit A-16), she stated that the original loan was from "Income Finance Trust" and that it bore interest at 7.25 percent per annum. In 2016, the original loan was refinanced by a loan from CB 2016 Income Finance Corporation, which bore interest at 6.45 percent per annum.

[72] Mrs. Tilatti's counsel then asked her how she planned to repay the Unit Loan on the maturity of the Program:

A. There is an investment note that is offsetting this loan, so at maturity the note will generate hopefully enough income that will offset the loan so the net amount will be zero. So we will be breaking even. That's the assumption we are investing under and participating in the program.

Q. If the investment does not perform well such that it's not a break-even how do you propose to repay the shortfall?

A. We as the investor in the EquiGenesis program would be responsible for any shortfalls at the maturity date. We will have to pay from our own pocket, in other words.

Q. At this point in time, sitting here today, are you aware of any reason why you wouldn't be able to meet your obligations under the '09 program?

A. I'm not aware of any at this time.[86]

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[85] Lines 27 to 28 of page 1065 and lines 1 to 15 of page 1066 of the Transcript.
[86] Lines 13 to 28 of page 1020 and line 1 of page 1021 of the Transcript.

[73] Mrs. Tilatti stated that the above information about the refinancing of the Unit Loan also applied to the TGTFC Loan.[87] In cross-examination, Mrs. Tilatti stated that she expected EquiGenesis to assist in the refinancing of the Program Loans.[88]

[74] Mrs. Tilatti's counsel asked her about the donation component of the Program. Mrs. Tilatti testified that she elected to have her donation split among four charities after being told not to select more than four.[89] She explained her reasons for picking the four charities as follows:

> The Make-A-Wish Foundation Canada is a very well-known Canadian charity that helps out many sick children and so that's the one that I have selected because of the helping of children and it's a national charity. So that is the reason for selecting that. And the other charity, the Bloorview Kid's Foundation, that I was familiar with.
>
> My former co-worker's daughter was born with a certain condition and she was looked after at the Bloorview Children's Hospital which is not too far from where I work so I knew very specifically about what kind of work they did.
>
> And the other two charities had presence in Ontario and that's what we were looking at, to help kids in Ontario.[90]

[75] Mrs. Tilatti stated that, if the list of charities had related to causes that she did not want to support, she would not have participated in the Program.[91] In cross-examination, Mrs. Tilatti stated that she signed the pledge to TGTFC on December 1, 2009 but that it was "quite possible" that she was not aware of the list of charities until December 20, 2009.[92]

[76] Mrs. Tilatti stated that TGTFC would distribute the money it received to the charities.[93] When asked by her counsel why 98.04% of the amount given to TGTFC was described as a "separate giving of enduring property", she stated that the structure required the money to stay with TGTFC through its investment in Leeward and that the charities get annual payments from the investment.

[87] Lines 23 to 26 of page 1021 of the Transcript.
[88] Lines 15 to 26 of page 1069 of the Transcript.
[89] Lines 6 to 11 of page 1022 of the Transcript.
[90] Lines 14 to 28 of page 1022 of the Transcript.
[91] Lines 1 to 4 of page 1023 and lines 3 to 16 of page 1083 of the Transcript.
[92] Lines 11 to 16 of page 1076, lines 5 to 16 of page 1077, lines 6 to 13 of page 1084 of the Transcript.
[93] Lines 11 to 15 of page 1023 of the Transcript.

[77] In cross-examination, Mrs. Tilatti was asked about the donations listed in her 2006 through 2008 and 2010 through 2013 income tax returns.[94] Counsel also asked about the magnitude of her self-funded charitable donations:

> Q. Is that a fair statement that you have never given — outside of taking on a loan to give to a charity you've never given $50,000 or $100,000 or anything above that from your own pocket to a charity; is that correct?
>
> A. I think so.[95]

[78] In cross-examination, Mrs. Tilatti testified that she applied for the TGTFC Loan on December 1, 2009 and that the loan was approved on December 30, 2009.[96] Mrs. Tilatti understood that the interest rate on the TGTFC Loan was the same as on the Unit Loan – 7.85% – and that her LP Units were posted as security for the TGTFC Loan.[97] She also understood that the total cost of borrowing under the TGTFC Loan was $71,639.32.[98] She confirmed that, as with the Unit Loan, the terms of the TGTFC Loan were offered on a take it or leave it basis.[99]

[79] With respect to the dates of the pledge to TGTFC and the approval of the TGTFC Loan, Mrs. Tilatti had the following exchange with counsel for the Respondent:

> Q. My question is if you made a donation to the charity on December 1st, or how could you have made a donation to the charity on December 1st of $102,000 if your loan hadn't been approved until December 30th?
>
> A. I understand your question, but this program was handled through EquiGenesis and that's why the documents have been addressed the way they have. I'm sure if it was turned down I wouldn't have been able to make that donation and it would have been withdrawn.

[80] Mrs. Tilatti testified that she made an annual payment of $5,000 and that part of this payment was applied to pay 3.75% annual interest on the TGTFC Loan, or $3,750. The remainder of the interest on the TGTFC Loan was paid "from the

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[94] The income tax returns are Exhibits R-23 through R-29.
[95] Lines 23 to 28 of page 1095 of the Transcript.
[96] Lines 25 to 28 of page 1043 and lines 1 to 16 of page 1044 of the Transcript.
[97] Lines 17 to 25 of page 1044 of the Transcript.
[98] Lines 26 to 28 of page 1044 and lines 1 to 13 of page 1045 of the Transcript.
[99] Lines 23 to 26 of page 1045 of the Transcript.

investment".[100] She stated that she had never defaulted on the payments she was required to make.

[81] In cross-examination, Mrs. Tilatti agreed that EquiGenesis filed notices of objection on her behalf for her 2009 and 2010 taxation years. She understood that the payment for this service was covered by the annual fees paid to EquiGenesis.[101] Mrs. Tilatti also stated that EquiGenesis had recently asked her to contribute to the cost of legal fees.[102]

(3) Howard Platnick

[82] Dr. Platnick is a medical doctor. He purchased 65 LP Units in the Program on the recommendation of his accountant.[103] The number of LP Units was picked by his accountant and was based on advice from EquiGenesis.[104] Dr. Platnick understood the number of LP Units to have been based on his projected income for 2010.[105]

[83] Dr. Platnick subscribed for the 65 LP Units on July 30, 2009. The subscription price of the 65 LP Units was $2,349,100. Dr. Platnick understood that to purchase the LP Units he had to apply for a loan, which he did on July 30, 2009, the amount of the loan being $2,080,000. The subscription for the LP Units was approved by EquiGenesis on August 12, 2009 and the Unit Loan was approved by FT on the same date.[106]

[84] Dr. Platnick testified that he met with and received materials from a representative of EquiGenesis and forwarded those materials to his accountant. He made sure that his accountant talked directly to the representative and that his accountant and the representative conversed back and forth. He also forwarded the materials to a relative who is tax lawyer and talked with him to "see what he thought about it". However, he did not read all the documents himself before signing.[107]

[85] Dr. Platnick explained why he decided to participate in the Program as follows:

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[100] Lines 1 to 3 of page 1025 of the Transcript.
[101] Lines 6 to 27 of page 1103 of the Transcript.
[102] Lines 24 to 27 of page 1106 and lines 7 to 11 of page 1107 of the Transcript.
[103] Lines 13 to 18 of page 1123 of the Transcript.
[104] Lines 27 to 28 of page 1150 and lines 1 to 3 of page 1151 of the Transcript.
[105] Lines 21 to 28 of page 1146 and line 1 of page 1147 of the Transcript.
[106] Line 28 of page 1144, page 1145, lines 1 to 17 of page 1146 and lines 16 to 21 of page 1151 of the Transcript.
[107] Lines 23 to 28 of page 1119 and lines 1 to 16 of page 1120 of the Transcript.

> I participated in the program for several factors; one, I had previous experience that was excellent with EquiGenesis. I was happy with their service and product. I had the past experience I just talked about. I won't go into it again. I had high income those years. I liked the design of the program. I liked the fact that there was a charity component where I could give back money directly to some charities that I was comfortable with. And again, putting it together I didn't — I saw this as an opportunity but I sat down with my accountant and I let him make the ultimate decision. I was going by his recommendations.[108]

[86] Dr. Platnick understood that there were two components to the Program – the investment component and the donation component – and that the donation component was optional. He also understood that each component was funded by a loan and that the two loans would mature about halfway through the term of the Program and would have to be refinanced or be paid off.[109] He stated that if the loans were not refinanced he would be responsible for them and would have to pay them off.[110]

[87] In cross-examination, he acknowledged that the interest on his Unit Loan would be approximately $1.5 million over the term of that loan but he stated that "the investments over the period of time would hopefully perform well enough to cover the interest payments".[111] With respect to his knowledge at the time he applied for the loan, he had the following interchange with counsel for the Respondent:

> Q. When you say "now" — at the time, you didn't know that?
>
> A. I didn't know all the exact workings of all the loans and everything. I had a general understanding. I assumed there was some type of security, yes.
>
> Q. If I said you had to put your unit loan that you were purchasing up as security, is that your understanding?
>
> A. Yes, the units.
>
> Q. Is it fair to say you didn't have any knowledge of the lender in this case, Finance Trust?
>
> A. Correct.
>
> Q. Prior to signing on to this loan, you didn't do any independent research of this lender?

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[108] Lines 23 to 28 of page 1122 and lines 1 to 6 of page 1123 of the Transcript.
[109] Lines 4 to 19 of page 1127 of the Transcript.
[110] Lines 20 to 28 of page 1127 and lines 1 to 9 of page 1128 of the Transcript.
[111] Line 28 of page 1151 and lines 1 to 13 of page 1152 of the Transcript.

A. No.[112]

[88] In addition to his $2,080,000 Unit Loan, on July 30, 2009 Dr. Platnick applied to FT for a TGTFC Loan of $10,000 per LP Unit or $650,000. The application was accepted by FT on August 12, 2009.[113] The interest that would be payable over the term of the TGTFC Loan was $467,752.47.[114]

[89] In cross-examination, Dr. Platnick testified that he did not try to negotiate with FT the terms and conditions of the two loans, that the interest rate on the Unit Loan was higher than on his personal lines of credit but did not stand out as unusual, that he probably could not have financed the amount of either loan with his own funds and that he did not seek either loan from a bank. He acknowledged that he simply accepted the deal as presented by EquiGenesis.[115]

[90] At the time he applied for the Unit Loan and the TGTFC Loan, Dr. Platnick had obligations in respect of the 2004, 2005 and 2006 EquiGenesis programs totalling $2,895,489.55.[116]

[91] Dr. Platnick's counsel asked him why he did not disclose loans from earlier programs in his credit application for the Program:

> The way I understood it with the earlier programs is there were loans in an amount let's say a hundred thousand that was invested for a similar amount and it would grow over time, so I viewed it as I wasn't including the hundred thousand invested in my net worth. I wasn't including the loan in the net worth. I looked at it look a wash.[117]

[92] In cross-examination, Dr. Platnick further explained why he did not disclose these amounts on his loan application:

> Q. You didn't view it as you would a personal loan?
>
> A. I viewed it as a personal loan, but I didn't — because there was the corresponding investment that I knew — I was hoping would grow over time, it would cover it off. I didn't include the investment part in my net worth statement. I didn't include the debt showing on the liability side because they would cancel each other out.

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[112] Lines 4 to 19 of page 1153 of the Transcript.
[113] Lines 9 to 28 of page 1155 and lines 1 to 6 of page 1156 of the Transcript.
[114] Lines 19 to 28 of page 1157 and lines 1 to 2 of page 1158 of the Transcript.
[115] Lines 4 to 28 of page 1154, lines 1 to 4 of page 1155 and lines 7 to 26 of page 1158 of the Transcript.
[116] Exhibit R-32.
[117] Lines 16 to 22 of page 1126 of the Transcript.

> Q. Let me just stop you there and ask you what you mean by you didn't include the investment component in your net worth. What does that mean?
>
> A. I would view it that if you borrowed the money and I took that money — the units I had had value at least equal to the loan. That is what I am saying. With the loan, I purchased the units which have equal value to the loan. When this — years later when this thing would wrap up and finish there would be enough in the investment side to cover off the loan.
>
> Q. You viewed your investment being valued as — it was just over 2 million. That is what you borrowed for the units?
>
> A. Yes.[118]

[93] Dr. Platnick stated that he was not personally aware of any credit check performed by FT either at the time he applied for the loans or after that time.[119]

[94] Dr. Platnick's counsel asked him what the 2009 LP did with the funds he invested:

> A. I don't know the exact amounts, I think the funds, some are used for fees for the program but I think the bulk of it, the majority of it, was used for a donation to charity and some of it might have been invested. I don't know the exact numbers.
>
> Q. What do you know about the investment?
>
> A. My understanding is the investment was put in a mutual fund called Man and that that was the main investment vehicle.[120]

Dr. Platnick testified that he researched Man on the Internet to determine its long-term investment returns and concluded that they were "very good, excellent".[121]

[95] Dr. Platnick's counsel asked him about the refinancing of the Unit Loan:

> Q. At the time when you entered into the program what did EquiGenesis tell you about the refinancing process?
>
> A. At the very beginning?
>
> Q. Yes?
>
> A. I don't remember specifically that we had a long conversation on that, but what I did know from the early programs is that, well — well, let me re-phrase. I

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[118] Lines 3 to 25 of page 1171 of the Transcript.
[119] Lines 22 to 28 of page 1172 and lines 1 to 16 of page 1173 of the Transcript.
[120] Lines 16 to 26 of page 1124 of the Transcript.
[121] Lines 1 to 13 of page 1125 of the Transcript.

> understood there would be refinancing at some point and EquiGenesis would assist with it. It wouldn't be my responsibility to start going out to banks or looking for a new mortgage or loan myself.[122]

[96] The foregoing also represented his understanding of the refinancing of the TGTFC Loan.[123]

[97] Dr. Platnick's counsel asked him what his understanding was of the donation component of the Program:

> The donation component, what I understood is similar, there's also a donation loan and the charity doesn't necessarily get the funds immediately, their funds are invested and every year they're getting a percentage similar to like an endowment fund.[124]

[98] Dr. Platnick explained why he participated in the donation aspect of the Program:

> Q. Let's turn to the donation program. You told us earlier that the donation program was optional; did you participate in that aspect of the program?
>
> A. Yes.
>
> Q. Why?
>
> A. I — that was one of the things that attracted me to this product was that there was a large donation to a charity. So although there was an investment and some tax minimization, but there was also a large amount of the, money actually getting through to charities and that was important to me in choosing this program.
>
> Q. Before participating in the EquiGenesis programs had you made donations to charity?
>
> A. I donate to charity every year.
>
> Q. Is there any difference between the charities you — sorry, the donations you made outside of the EquiGenesis program and the donations you made within?
>
> A. I would say no difference except the amount was larger through the EquiGenesis program.
>
> Q. Why was it larger?

[122] Lines 10 to 21 of page 1128 of the Transcript.
[123] Lines 16 to 20 of page 1129 of the Transcript.
[124] Lines 2 to 6 of page 1118 of the Transcript.

> A. Because of the structure of the program and the loans.[125]

[99] In cross-examination, counsel suggested to Dr. Platnick that the cash flow associated with participation in the Program was his main motivation for participating in the Program. He responded as follows:

> I disagree with that. I did this program knowing there was a large charitable donation. Although I didn't necessarily have the name The Giving Tree or the specific charities at the time, I had worked with EquiGenesis on the other programs.
>
> They had come through with reputable charities I was comfortable with. I knew in my conversations with Cori Simms there were going to be reputable charities I could donate to. That was an important component of the program to me. I would say it is not true or accurate that it was mainly the tax savings or deferrals that drew me to this program.[126]

[100] Dr. Platnick's counsel asked him what he knew about TGTFC on July 30, 2009 when he signed the donation loan application:

> Q. If you turn to page 90, this is the last page of the donation loan application and assignment form before the exhibits, can you tell us around what date you signed this document?
>
> A. July 30, 2009.
>
> Q. At that time did you know the name The Giving Tree?
>
> A. I didn't specifically know the name The Giving Tree at that time.
>
> Q. What did you know at that time?
>
> A. I knew that I had done other programs with EquiGenesis prior, very similar in structure and they brought me an excellent roster of charities to collect [*sic*] from, so having that knowledge gave me comfort that they would come through with a similar situation of excellent charities to choose from and I was told that they were working on it and they were going to have the list soon.
>
> Q. How was that information communicated to you?
>
> A. That was communicated directly by Miss Sims [*sic*].
>
> Q. By e-mail? In a letter? In a meeting?

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[125] Lines 22 to 28 of page 1128 and lines 1 to 15 of page 1129 of the Transcript.
[126] Lines 12 to 23 of page 1224 of the Transcript.

> A. I'm not sure. I mean, I think it was maybe more than once it was communicated. Might have been face-to-face. May have been a phone call as well.
>
> Q. When did you learn the name The Giving Tree?
>
> A. I think that was later in the fall, possibly December, early December.[127]

[101] Dr. Platnick testified that he received the list of charities at a later date, that he thought that it was an excellent list of charities and that he would not have participated if the list had contained charities that he did not think should be supported.[128] He testified that the charities would receive funds from the Program over the 19-year term of the Program.[129]

[102] In cross-examination, Dr. Platnick confirmed that at the time he signed the pledge to TGTFC, on July 30, 2009, he was not aware of the name of the foundation and he was not aware of the list of charities.[130] Dr. Platnick signed the direction to TGTFC, in which he selected charities, on December 14, 2009.[131] He could not recall when he learned of the name of TGTFC but he believed it was in late November or early December 2009. He stated that he received the list of charities after the December 1, 2009 date inserted in the pledge to TGTFC that he had signed on July 30, 2009.[132]

[103] Also in cross-examination, Dr. Platnick confirmed that his charitable donations for 2004, 2005, 2007, 2008, 2010 and 2011 were as set out in Exhibits R-34, R-35, R-36, R-37, R-38 and R-40.

[104] Dr. Platnick described his understanding of Scenario A and Scenario B:

> I understood that when the program finished or wrapped up 19 years later that there's two possible outcomes labelled scenario A and scenario B. Scenario A would be an outcome where the investment, some of the investment increase would be taxable as an income. So I would be scenario A paying a higher amount of tax compared to scenario B where there might be a buyer or somebody that purchases the units prior to the end of the program which would generate a capital gains which would be taxed at a different rate.[133]

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[127] Lines 21 to 28 of page 1129 and lines 1 to 21 of page 1130 of the Transcript.
[128] Lines 1 to 13 of page 1131 of the Transcript.
[129] Lines 14 to 17 of page 1131 of the Transcript.
[130] Lines 12 to 26 of page 1194 of the Transcript.
[131] Lines 27 to 28 of page 1195 and line 1 of page 1196 of the Transcript.
[132] Lines 3 to 18 of page 1200 of the Transcript.
[133] Lines 19 to 28 of page 1118 of the Transcript.

[105] Dr. Platnick testified that when he entered into the Program he understood that Scenario A would be more likely even though Scenario B was better from a financial and tax perspective.[134] He "understood that there might not be a buyer for the units at the end, that was — that was an unknown, a bit of a risk".[135] In cross-examination, Dr. Platnick agreed that he was hoping for Scenario B.[136]

[106] With respect to risks associated with his participation in the Program, Dr. Platnick had the following exchange with his counsel:

> Q . . . did anyone ever tell you that the units you were purchasing would be resold or repurchased?
>
> A. No.
>
> Q. Did anyone ever tell you the price you paid would be refunded to you?
>
> A. No.
>
> Q. Did anyone ever tell you what the future price or value of the units would be?
>
> A. No.
>
> Q. When you decided to participate in this program was it your understanding that the outcome was certain or uncertain?
>
> A. Uncertain in the final scenarios, yes.[137]

[107] Counsel asked Dr. Platnick about the refinancing of the 2004 and 2005 EquiGenesis programs in which he participated.[138]

[108] Dr. Platnick confirmed that he owed $853,889.63 at the time of the refinancing of the 2004 program and suggested that, while it was a large number, he could have refinanced this amount on his own but that it would have taken time.[139] In fact, he was given options by EquiGenesis and he elected to have the debt refinanced by a new lender with the assistance of EquiGenesis.[140] The new financing was in place by September 24, 2014. The interest rate on the new debt was 1.25% higher than on the debt it replaced (7.25% versus 6%).

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[134] Lines 1 to 10 of page 1119 of the Transcript.
[135] Lines 13 to 15 of page 1119 of the Transcript.
[136] Lines 17 to 19 of page 1182 of the Transcript.
[137] Line 28 of page 1123 and lines 1 to 12 of page 1124 of the Transcript.
[138] The packages of documents addressing the refinancing of Dr. Platnick's debt in those programs are found in Exhibit A-19 and Exhibit A-20.
[139] Line 28 of page 1132 and lines 1 to 9 of page 1133 of the Transcript.
[140] Lines 16 to 20 of page 1133 of the Transcript.

[109] Dr. Platnick selected the same option to refinance his debt under the 2005 program. The interest rate on the new debt was 0.13% lower than on the debt it replaced (6.62% versus 6.75%).[141]

[110] Dr. Platnick testified that he made annual payments under the Program and that the majority of each payment was used to pay some of the interest on the TGTFC Loan, with the balance being used to pay fees. He stated that he had not defaulted on these annual payments.[142]

[111] In cross-examination, Dr. Platnick testified that he authorized EquiGenesis to file two notices of objection on his behalf.[143] He agreed that he left the filing of the notices of objection to EquiGenesis.[144] He also stated that in 2015 he had sent a cheque to EquiGenesis for legal representation in response to a letter but he could not recall the amount or any other details.[145]

(4) Steven Chu

[112] Dr. Chu is a dentist who purchased 10 LP Units. Dr. Chu appeared to have a very limited understanding of the Program, which he summarized as follows:

> To me, it was just a program that would return over that period of time and your primary deduction would be at the beginning and then there are residuals at the end, subsequent to that. Aside from that, I don't really understand the program.[146]

[113] With respect to the donation component of the Program, Dr. Chu testified:

> If the charity were to receive money and I would receive a tax receipt where both parties benefited, I thought it would be a good thing to do. A lot of the dentists nowadays, they set up — what do you call it — professional corporations which, if I was probably not involved with donating to the charities, I would probably do that.
>
> Because I was already a part of this, I never set up a corporation. I think about three-quarters or two-thirds do that nowadays. I just like the idea that charity got the money just like I liked the idea that the film industry got their money to do — it is something like — if both parties benefited, I just liked the idea. I have done the deals with EquiGenesis before. I was comfortable with them.[147]

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[141] Lines 4 to 28 of page 1136 and lines 1 to 16 of page 1137 of the Transcript.
[142] Lines 19 to 28 of page 1138 and lines 1 to 9 of page 1139.
[143] Lines 19 to 28 of page 1214 and lines 1 to 14 of page 1215 of the Transcript.
[144] Lines 26 to 28 of page 1215 and line 1 of page 1216 of the Transcript.
[145] Lines 2 to 28 of page 1216 and lines 1 to 12 of page 1217 of the Transcript.
[146] Lines 2 to 6 of page 1230 of the Transcript.
[147] Line 28 of page 1230 and lines 1 to 14 of page 1231 of the Transcript.

[114] Dr. Chu testified that he knew nothing about Scenario A or Scenario B. With respect to the risk, he testified:

> You have to sign for a loan for a period of time and your worst case scenario is — they would use the money to invest which in the end would pay off the loan and if there was a short fall [*sic*] you would be responsible for the shortfall.[148]

[115] Dr. Chu suggested that if there was a shortfall he would address it by working or by selling one of his properties. He also understood that, if he refused to pay, "someone would come and collect it".[149]

[116] Dr. Chu testified that he received a package of documents and signed where indicated by tabs. He did not review the documents or understand their contents. He explained his approach as follows:

> Q. Do you often sign documents without reading them or understanding them?
>
> A. With this program, yes, because either you are part of it or you are not part of it. I think it would be equivalent to, for example, if you buy a house or condo and they give you a stack of 12 or 15 pages to sign. If you trust your lawyer, you just sign them. The same thing with this program, it was the same as before. I would just sign them.[150]

[117] Dr. Chu testified that no one told him that his 10 LP Units would be resold or repurchased, that the purchase price of the LP Units would be refunded to him or that the LP Units would have a certain value in the future.[151]

[118] At the time he signed the documents to participate in the Program, Dr. Chu understood that there was at least one loan and that the loan bore interest, which he described as being part of the Program.[152] He also understood that the loan was for the entire term of the Program but that at some point it would have to be renewed or refinanced.[153]

[119] Dr. Chu recalled picking two charities but he did not recall his reasoning for his choices.[154] He did not know when the charities he picked were to receive

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[148] Lines 9 to 13 of page 1232 of the Transcript.
[149] Lines 14 to 26 of page 1232 and lines 17 to 25 of page 1235 of the Transcript.
[150] Lines 17 to 25 of page 1234 of the Transcript.
[151] Lines 1 to 10 of page 1235 of the Transcript.
[152] Lines 11 to 23 of page 1237 of the Transcript.
[153] Lines 12 to 16 of page 1239 and lines 16 to 19 of page 1241 of the Transcript.
[154] Lines 19 to 25 of page 1242 of the Transcript.

money from his donation.[155] He did understand that he would not receive anything back from the charities but that he would be given a tax receipt for $102,000.[156]

[120] Dr. Chu did not understand the reporting he received from EquiGenesis and he simply passed everything on to his accountant.[157] Dr. Chu confirmed that he made annual payments as requested by EquiGenesis but he did not know what the payments were for.[158]

(5) Katherine Lee Sang

[121] Dr. Sang is a medical doctor who purchased 10 LP Units in the Program because that was the minimum purchase allowed.[159] Dr. Sang understood that she was giving money to charity and would be receiving a tax receipt. She described the tax receipt as a major reason for participating in the Program and indicated that she used the tax savings to help fund a trip to Africa.[160]

[122] In cross-examination, she agreed that she had an understanding of the tax savings as a whole and of those from the donation when she signed the documents and that she was looking for this benefit when she signed up for the Program.[161] Dr. Sang had the following exchange with counsel for the Respondent:

> Q. If I put this proposition that while you might have liked the idea of helping a charity or two, the reason that you agreed to participate in this program was because of the tax savings it provided?
>
> A. Definitely, but it also helped the charity, which is an added bonus.
>
> Q. And that Corey Sims [Cori Simms] had told you about ‘05 and the ‘06 program passing audit so you thought this would be a good idea as well?
>
> A. Correct.
>
> Q. In our review of your donated history you hadn’t really seemed to donate more than $75 outside of the EquiGenesis programs, and I put the proposition to you that you would not have paid 102,000 to a charity if it came from your own savings?
>
> A. No.

[155] Lines 3 to 6 of page 1243 of the Transcript.
[156] Lines 17 to 21 of page 1243 of the Transcript.
[157] Lines 22 to 28 of page 1243 and lines 1 to 20 of page 1244 of the Transcript.
[158] Lines 21 to 28 of page 1244 and lines 1 to 7 of page 1245 of the Transcript.
[159] Lines 15 to 20 of page 1271 of the Transcript.
[160] Lines 12 to 28 of page 1253 and lines 1 to 3 of page 1254 of the Transcript.
[161] Lines 10 to 23 of page 1296 and lines 16 to 18 of page 1297 of the Transcript.

> Q. You never would have taken on a personal loan to make such a payment to a charity?
>
> A. No.[162]

[123] Dr. Sang testified that she often gave small amounts to charity and that the Program allowed her to make a large donation because of the TGTFC Loan.[163] In cross-examination, Dr. Sang agreed that, if one ignores the donations under the Program and the 2011 EquiGenesis program, she had donated to charity $20 in 2004 and 2005, nothing in 2006 and 2007, $50 in 2008, $20 in 2009, $60 in 2010, nothing in 2011, 2012 and 2013 and $75 in 2014.[164]

[124] When asked by her counsel how the donation played into her decision to participate in the Program, she replied:

> Very much. Because I've never given that much to charity and that would be a good thing. So I thought it was a win/win situation.[165]

[125] She understood that TGTFC would receive the donation as soon as she received the TGTFC Loan and that TGTFC would disburse the funds to the charities she picked as soon as it was able to do so. She understood that no part of her donation would be returned to her.[166]

[126] In cross-examination, Dr. Sang testified that she accepted the donation amount of $102,000 because that was what the Program required for a purchase of 10 LP Units. Dr. Sang did not know anything about the mandate of TGTFC, did not do due diligence regarding TGTFC on the Internet and did not even know TGTFC was a charity.[167]

[127] Dr. Sang also acknowledged that she did not know which charities the funds would go to when she signed a direction on September 21, 2009.[168] She did recall completing the direction to TGTFC stipulating her choice of charities on December 28, 2009 and agreed that she did not know the charities until that date.[169] She understood that the $102,000 she donated to TGTFC would be distributed to the

[162] Lines 19 to 28 of page 1297 and lines 1 to 9 of page 1298 of the Transcript.
[163] Lines 24 to 28 of page 1259 and lines 1 to 5 of page 1260 of the Transcript.
[164] Lines 14 to 28 of page 1292 and lines 1 to 10 of page 1293 of the Transcript.
[165] Lines 4 to 8 of page 1254 of the Transcript.
[166] Lines 25 to 28 of page 1260 and lines 1 to 6 of page 1261 of the Transcript.
[167] Lines 1 to 9 of page 1288 of the Transcript.
[168] Lines 23 to 28 of page 1289 and lines 1 to 12 of page 1290 of the Transcript.
[169] Lines 13 to 28 of page 1290 and lines 1 to 3 of page 1291 of the Transcript.

charities in the proportions she chose and she had no knowledge of the TGTFC Notes.[170]

[128] Dr. Sang assumed that, when her Unit Loan of $320,000 matured, EquiGenesis would find another lender, but recognized that that was not guaranteed.[171] With respect to the repayment of the Unit Loan and the TGTFC Loan, she had the following exchange with her counsel:

> Q. How do you plan to pay them back?
>
> A. Well, I'm hoping their investments will pay back like in Sentinel Hill, but if not then they will come out of my personal finances.
>
> Q. What would happen if you simply chose not to pay?
>
> A. I think I have to pay.
>
> Q. Why do you think that?
>
> A. Because it's a loan and I did a promissory note that's legally binding.
>
> Q. If you failed to comply with your obligations under that note, what happen [*sic*]? Why do you have to pay?
>
> A. Maybe I go to jail, I don't know. But I would pay it any ways.[172]

[129] Dr. Sang testified that no one told her that her 10 LP Units would be resold or repurchased, that the purchase price of the LP Units would be refunded to her or that the LP Units would have a certain value in the future.[173] She understood that the outcome was uncertain "[b]ecause of fluctuations in investments and nobody knows the future".[174] She stated that she made annual payments to the Program and that she had not defaulted on any payment. When asked what the payments were for, she stated that she was not quite sure.[175]

[130] In cross-examination, Dr. Sang testified that she was not concerned about the lender or the interest rate on the loans because the rate was part of the Program and she trusted EquiGenesis. She agreed that she did not make any attempt to vet the lender, negotiate different terms or look for financing elsewhere. She did not

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[170] Lines 10 to 28 of page 1291 and lines 1 to 5 of page 1292 of the Transcript.
[171] Lines 5 to 10 of page 1263 of the Transcript.
[172] Lines 22 to 28 of page 1263 and lines 1 to 8 of page 1264 of the Transcript.
[173] Lines 12 to 21 of page 1264 of the Transcript.
[174] Lines 22 to 27 of page 1264 of the Transcript.
[175] Line 28 of page 1264 and lines 1 to 7 of page 1265 of the Transcript.

understand the loan applications and did not understand how the interest on the loans would be paid.[176]

[131] Dr. Sang's counsel asked her about Scenario A and Scenario B:

> Q. Now, if you look at the far right-hand side of the document there is a scenario A and a scenario B; do you see that?
>
> A. Yes.
>
> Q. What do those scenarios refer to?
>
> A. I don't really know much about it, but I guess what happens at the end of the program, a couple different scenarios. Doesn't mean much to me. Sorry.[177]

[132] In applying for the two loans, Dr. Sang did not disclose her liability in respect of her participation in Sentinel Hill because she was not aware of the details of that liability.[178] Dr. Sang was also not aware of any credit check or verification performed by FT nor was she asked to provide additional information or updates to FT.[179]

[133] Dr. Sang testified that EquiGenesis prepared her notice of objection on her instructions, that EquiGenesis was paying for legal representation but that in February 2016 she had contributed $50 per LP Unit ($500 in total) toward the cost of such representation.[180] Dr. Sang could not recall if she had provided input on the content of her notice of objection but she agreed that she did not provide any specifics.[181]

(6) Lynn Cassan

[134] Ms. Cassan is a lawyer and a patent and trademark agent who purchased 10 LP Units in the Program. She testified that she could have purchased more but did not want to take on the associated liability.[182]

[135] Ms. Cassan testified that she did not understand the Program very well at all at the time she decided to participate but that now she understands it reasonably well.[183]

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[176] See pages 1272 to 1279 of the Transcript.
[177] Lines 9 to 16 of page 1254 of the Transcript.
[178] Lines 21 to 28 of page 1282 and lines 1 to 4 of page 1283 of the Transcript.
[179] Lines 5 to 19 of page 1283 of the Transcript.
[180] Lines 5 to 14 and 25 to 28 of page 1294 and lines 1 to 20 of page 1295 of the Transcript.
[181] Lines 15 to 24 of page 1294 of the Transcript.
[182] Lines 27 to 28 of page 1308 and lines 1 to 7 of page 1309 of the Transcript.

[136] Ms. Cassan understood the main risk with the Program to be the investment risk because of the leveraged nature of the structure. In deciding to participate, she drew comfort from the report prepared by FTI dated December 15, 2009.[184] She testified that she checked out Man Investments and "they seemed like a very reasonable investment provider based in the U.K."[185]

[137] In cross-examination, Ms. Cassan had the following exchange with counsel for the Respondent regarding the relative importance of the investment and the donation aspects of the Program:

> Q. I want to put to you something and I want your comment on the proposition I'm about to put to you. Wasn't the charity component of this program — prior to deciding to participate, wasn't the charity component for you — and pardon the expression — a no-brainer in the sense that your real concerns were whether the tax deductions that EquiGenesis was advertising, your concern was whether those would work for your personal situation and really the charity component of the program, there wasn't a real decision to make on that front, it was if I do the investment of course I'm going to do the charity?
>
> A. That's what attracted me to the whole program. I wouldn't have ever considered the investment were it not for the charities.
>
> Q. I put it to you it wasn't so much about deciding to participate in the donation program; it was more about — your decision was more about whether I'm going to invest in EquiGenesis or not?
>
> A. To me it looked like a wonderful thing for the charities, a worthwhile thing, and whether or not I wanted to incur that liability and investment risk was the real question.[186]

[138] Ms. Cassan testified that she was responsible for paying the Unit Loan and the TGTFC Loan and that the loans would have to be refinanced before the end of ten years but that no arrangements were in place and EquiGenesis had not indicated to her that it would play a role in the refinancing.[187] She imagined that all the Participants would get together to find a new lender but if that did not happen she believed she could obtain the necessary financing from a bank.[188] She testified that she could not imagine a scenario in which she would not be able to refinance but if such a scenario arose she had the option of redeeming the LP Units or

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[183] Lines 21 to 25 of page 1300 of the Transcript.
[184] Lines 2 to 28 of page 1301 and lines 1 to 3 of page 1302 of the Transcript.
[185] Lines 10 to 16 of page 1302 of the Transcript.
[186] Lines 27 to 28 of page 1358 and lines 1 to 20 of page 1359 of the Transcript.
[187] Lines 27 to 28 of page 1309, lines 1 to 2 of page 1310, lines 25 to 28 of page 1311 and lines 3 to 8 of page 1313 of the Transcript.
[188] Lines 1 to 17 of page 1312 of the Transcript.

finding a buyer for them.[189] In cross-examination, Ms. Cassan testified that it would make sense for EquiGenesis or Mr. Gordon to help facilitate the refinancing of the loans.[190]

[139] In cross-examination, Ms. Cassan testified that she signed the documents required to participate in the Program on December 18, 2009 and that she applied for a Unit Loan on that date.[191] She understood that the Unit Loan bore interest at 7.85%, that the interest on the loan was paid by additional advances and that she would owe approximately $550,000 at the end of the term of the loan.[192] Ms. Cassan testified that she did not do research on FT, that she would not have paid her bank 7.85% interest at the time, that the interest rate was dictated by the structure and that she did not try to negotiate a different interest rate or seek financing elsewhere.[193] Ms. Cassan gave similar responses with respect to the TGTFC Loan.[194] Ms. Cassan also testified that she was not aware of any credit checks being done on her by FT and that FT had not asked her for updates on her financial status on an annual basis.[195]

[140] Ms. Cassan testified that she really liked the charitable structure:

> Q. What did you like about it?
>
> A. I liked that it was for a long time, you know, rather than give a charity a bunch of money and having them blow it or whatever it was like an annuity. So it was safe. It was an ongoing, stable income for the charities so it seemed to me to be ideal.[196]

[141] In cross-examination, Ms. Cassan testified that, apart from giving to TGTFC, she had donated to just over ten charities during 2009 including one donation of $1,500.[197] She also confirmed in general terms the donations she had made from 2004 through 2008 and from 2010 through 2012, which ranged from $100 to $1,555 per year. She made no donations in 2013 and 2014.[198]

[142] Ms. Cassan stated that she understood that she could not donate to TGTFC if she did not purchase LP Units and that her donation to TGTFC was fixed by the

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[189] Lines 23 to 28 of page 1312 and lines 1 to 2 of page 1313 of the Transcript.
[190] Lines 13 to 26 of page 1330 of the Transcript.
[191] Lines 7 to 10 of page 1317 and lines 9 to 11 of page 1318 of the Transcript.
[192] Lines 3 to 6 and lines 17 to 25 of page 1319 and lines 1 to 6 of page 1320 of the Transcript.
[193] Lines 25 to 28 of page 1320, page 1321 and lines 1 to 18 of page 1322 of the Transcript.
[194] Lines 2 to 10 of page 1324 of the Transcript.
[195] Lines 21 to 28 of page 1329 of the Transcript.
[196] Lines 17 to 22 of page 1304 of the Transcript.
[197] Lines 9 to 28 of page 1334 and lines 1 to 26 page 1335 of the Transcript.
[198] Lines 17 to 28 of page 1348, pages 1349 and 1350 and lines 1 to 24 of page 1351 of the Transcript.

number of LP Units she purchased.[199] Ms. Cassan signed the direction to TGTFC on December 21, 2009; she could not recall if on December 18, 2009 she knew the identity of the charities that TGTFC would send money to.[200]

[143] Ms. Cassan recognized that she could obtain certain of the tax benefits of the Program without participating in the donation component:

> Q. So could you have obtained the items on row 2, the total tax deductions, without participating in the charitable donation program?
>
> A. I could have, but it was really the charitable program that attracted me to the program, the whole program. I wouldn't have done it but for the charitable aspect.[201]

[144] Ms. Cassan testified that staying in until the end of the 20-year term of the Program, that is, Scenario A, was the more likely scenario because that was how the program was designed and there was no market in which she could sell the LP Units.[202] She hoped to repay the loans at that time from the investment component of the structure but stated that she would be responsible for any shortfall.[203]

[145] In cross-examination, Ms. Cassan acknowledged that EquiGenesis had provided her a term sheet showing a 15-year scenario but she denied that it was her expectation that she would be in the Program for less than 20 years.[204] She stated that, if she did decide to sell her LP Units before the end of 20 years, Mr. Gordon would be the first person she would call because he is familiar with the Program and he has contacts.[205]

[146] Ms. Cassan testified that no one told her that her 10 LP Units would be purchased from her, that the purchase price of the LP Units would be refunded to her or that the LP Units would have a certain value in the future.[206]

[147] Ms. Cassan testified that she made annual payments in respect of the Program by cheque and that she had never defaulted on a payment.[207]

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[199] Lines 3 to 22 of page 1336 of the Transcript.
[200] Lines 26 to 28 of page 1337, page 1338 and lines 1 to 2 of page 1339 of the Transcript.
[201] Lines 2 to 8 of page 1306 of the Transcript.
[202] Lines 6 to 22 of page 1307 of the Transcript.
[203] Lines 13 to 23 of page 1313 of the Transcript.
[204] Lines 10 to 28 of page 1332 and lines 1 to 3 of page 1333 of the Transcript.
[205] Lines 4 to 19 of page 1333 of the Transcript.
[206] Lines 8 to 22 of page 1309 of the Transcript.
[207] Lines 5 to 22 of page 1315 and lines 4 to 6 of page 1316 of the Transcript.

[148] In cross-examination, Ms. Cassan testified that she appointed EquiGenesis as her representative in dealing with the CRA and acknowledged that two notices of objection were filed on her behalf – one for her 2009 taxation year and one for her 2011 taxation year. She also stated that she did not pay for the filing of the notices of objection but that in 2016 she was asked to pay $50 per LP Unit for legal costs.[208]

(7) Mary Zhang

[149] Ms. Zhang is an employee of TD who works with TD Wealth private clients; she appeared under subpoena. Ms. Zhang described her relationship with Mr. Gordon and her responsibilities with respect to the Program as follows:

> Mr. Gordon and I had a client and a banker professional relationship.
>
> . . .
>
> I would accept the client's directions in order to process the transactions that's directed to me by the client.[209]

[150] Ms. Zhang testified that the EquiGenesis "in trust" account was opened in November 2003, and that the EquiGenesis 2009-II Preferred Investment LP, EquiGenesis 2009-II Preferred Investment GP, aIncome 2009 Finance Trust, aIncome 2009 Deposit Trust and Leeward Alternative Financial Asset 2009 Corporation accounts were all opened in July 2009.[210]

[151] Ms. Zhang identified two cerlox bound volumes. The first contained in Tab 3 a record of all transactions through the FT account from August 6, 2009 to March 1, 2015.[211] The second contained a record of all transactions through the EquiGenesis account from August 6, 2009 to March 1, 2015.[212]

[152] Ms. Zhang testified that the record of the EquiGenesis account showed under the heading "trans[action] description" that 56 of the cheques to be deposited in that account had been returned.

[153] In cross-examination, Ms. Zhang confirmed that a cheque could be returned for a number of reasons but that the most common reason was insufficient funds.[213]

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[208] Lines 12 to 21 of page 1352, lines 10 to 28 of page 1353, lines 1 to 14 and 26 to 28 of page 1354 and lines 1 to 8 of page 1355 of the Transcript.
[209] Lines 1 to 2 and lines 14 to 16 of page 1368 of the Transcript.
[210] Lines 8 to 16 of page 1369 of the Transcript.
[211] That volume is Exhibit R-49.
[212] That volume is Exhibit R-50.
[213] Lines 20 to 28 of page 1375 and lines 1 to 8 of page 1376 of the Transcript.

Ms. Zhang further confirmed that she had not inquired as to whether the obligations represented by the 56 cheques were met at a later time.[214]

(8) Louis Tilatti

[154] Mr. Tilatti is a consulting engineer and is the husband of Mrs. Tilatti. Mr. Tilatti did not participate in the Program but did participate in the 2005, 2010 and 2012 programs offered by EquiGenesis. The Respondent subpoenaed Mr. Tilatti to testify.

[155] Mr. Tilatti was asked about an Excel spreadsheet created by EquiGenesis:

> Q. And could you describe what this e-mail's about?
>
> A. Um, I recall that EquiGenesis developed an Excel program, software program, to help investors in deciding what the appropriate number of units would be for their situation to purchase.
>
> Q. What did that mean to you, "the appropriate number of units for your situation"?
>
> A. Well, I think it's based on your income and your tax situation and what impact 'x' number of units would have on your tax situation.[215]

[156] The spreadsheet recommended a number of LP Units based on the inputs of the user. Mr. Tilatti testified that he looked at the spreadsheet and concluded that it was not as useful as his own tax software.[216] He also stated that he did not use the Excel spreadsheet.[217]

[157] Mr. Tilatti was shown printouts generated by Excel, including one printout showing a recommendation to purchase 10 LP Units. Mr. Tilatti testified that he was not familiar with the printouts, that he had not asked EquiGenesis for the printouts and that the income shown on the printouts did not match his or Mrs. Tilatti's income.[218]

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[214] Lines 13 to 17 of page 1376 of the Transcript.
[215] Lines 13 to 23 of page 1379 of the Transcript.
[216] Lines 5 to 6 of page 1383 of the Transcript.
[217] Line 28 of page 1386 of the Transcript.
[218] Pages 1384 and 1385 and lines 1 to 4 of page 1386 of the Transcript.

[158] Mr. Tilatti was shown a document presenting a 15-year scenario for the Program. Mr. Tilatti testified that he did not ask EquiGenesis for the document and he did not recall receiving it.[219]

(9) Christine Spettigue

[159] Ms. Spettigue is a large case auditor with the CRA and has been employed by the CRA for 23 years. Ms. Spettigue was responsible for issuing the reassessments of the Appellants and the other Participants.

[160] Ms. Spettigue testified that the CRA did not rely on the general anti-avoidance rule in section 245 to deny the tax benefits claimed by the Appellants as a result of their participation in the Program.

[161] Ms. Spettigue indicated that she computed the income inclusion under subsection 12(9) of the ITA and section 7000 of the ITR by referring to the terms of the Linked Notes.[220] In particular, she referred to page 8 of the Linked Note, which describes the calculation of the variable return amount. She explained her approach as follows:

> A. If you turn to page 8 of that note, there is a calculation of the variable return amounts which I think has been talked about before, the portfolio A or portfolio B and how that is calculated. It is also calculated on the basis that —
>
> I think it is 27 that says that it will be calculated as if — four times per year as if it is the maturity date. As that could be the maturity date, I looked at each of the four quarters and picked the maximum amount based on the calculation of portfolio B, which is the Dow Jones Canada Select Dividend Fund I think.
>
> Q. Why did you use portfolio B and not portfolio A?
>
> A. At the 200 percent — because it is calculated at the 200 percent of the Dow Jones amount, we determined that would be the higher amount.
>
> Q. Could you explain how you determined the partnership income for the 2009 and 2010 taxation years?
>
> A. I went to the Dow Jones website and downloaded the actual fund numbers. I looked at — for instance, this particular linked note has the August 12th closing date. If you start at that date and go — then we took the quarterly amounts. In 2009, we just looked at the December one because basically it hadn't started until August.

[219] Lines 16 to 28 of page 1386 of the Transcript.
[220] One of the Linked Notes is found at Tab 44 of the Joint Book.

> Basically, the return amount between — the gain between the August 12 date and the December — end of December date — took the difference and calculated that percentage and what that return amount would be less the ACB of the amounts, of the actual note itself. We calculated a return.[221]

[162] Ms. Spettigue stated that the period ending December 30, 2009 was too short to warrant a calculation and that for the quarter ending September 30, 2010 she used numbers prepared by EquiGenesis, even though she did not believe they yielded the maximum possible amount for the period.[222]

[163] Ms. Spettigue explained why the reassessment to include $145,400 of income in Ms. Cassan's 2011 taxation year was reversed:

> A. Originally, I used the same approach and calculated March being the highest amount. Then as it turned out with consultations with the Department of Justice, we determined we would go with a December 31st year, so I recalculated.
>
> I actually asked my colleague to recalculate it all and determine whether or not it was accurate. As of December 2011 — the March one was really quite high, but by the end of December relative to March, it had fallen off. It actually became a tiny loss, so we did not add any income to anybody's 2011.[223]

[164] Ms. Spettigue explained that she originally miscalculated the Appellants' income inclusions for 2009 and 2010 and described a chart that set out the original and corrected calculations for those years.[224]

[165] In cross-examination, Ms. Spettigue stated that she took over the file from Mr. Guy Alden after he retired in March 2012. She stated that after that date she did not meet with EquiGenesis and did not collect any additional information from EquiGenesis, FT, DT, Leeward, Man or TGTFC.[225]

B. The Expert Witnesses

(1) Mr. Howard Rosen

[166] Mr. Rosen is a chartered accountant (1981), a chartered business valuator (1984) and a principal of FTI. He was qualified as an expert in business valuation

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[221] Lines 3 to 28 of page 1654 and lines 1 to 6 of page 1655 of the Transcript.
[222] Lines 7 to 27 of page 1655 of the Transcript.
[223] Lines 14 to 24 of page 1656 of the Transcript.
[224] Lines 4 to 18 of page 1657 of the Transcript. The chart titled "Regulation 7000 Deemed Interest Income Calculation" is Exhibit R-56.
[225] Lines 21 to 28 of page 1663, page 1664 and lines 1 to 11 of page 1665 of the Transcript.

and corporate finance. Mr. Rosen stated in a statutory declaration that "[m]y opinion today is as set out in each of my 2009 reports".[226]

[167] FTI was retained by EquiGenesis to prepare two reports in 2009 that were provided to the Participants. The first report is dated July 30, 2009 and the second report is dated December 15, 2009 (individually, the "July 30 EquiGenesis Report" and the "December 15 EquiGenesis Report" and collectively, the "EquiGenesis Reports").[227]

[168] FTI was also retained by TGTFC to provide a report to TGTFC (the "TGTFC Report").[228] The TGTFC Report is dated December 15, 2009.[229] All three reports were signed by Mr. Rosen and by Mr. Vimal Kotecha, CA, CBV. I will refer to the EquiGenesis Reports and the TGTFC Report, collectively, as the "FTI Reports".

[169] Under the heading "2. Scope of Services" in the retainer letter from FTI to EquiGenesis dated June 24, 2009,[230] FTI states that it was asked to provide EquiGenesis with "our opinion of the fair market value of certain aspects" of the Program.

[170] The EquiGenesis Reports address the same questions but at different dates. The July 30 EquiGenesis Report provides opinions as at the date of the report while the December 15 EquiGenesis Report provides opinions as at November 30, 2009. Section 1.4 of each of the EquiGenesis Reports describes the opinions requested by EquiGenesis as follows:

> You have requested our opinions, [as of a current date] [as at November 30, 2009], of the following:
>
> > a. The commercial reasonableness of the prescribed interest rates of the various proposed debt instruments, specifically;

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[226] Tab A, paragraph 8 of Exhibit A-10. The Respondent did not challenge Mr. Rosen's impartiality and I was given no reason to believe Mr. Rosen would not carry out his duty to the Court as stated in his Certificate Concerning Code of Conduct for Expert Witnesses dated the 30th day of July 2015. See *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182 at paragraphs 46 to 51. The Court stated at paragraph 47:

> . . . While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.

Having said that, I note that Mr. Rosen may be more accurately described as a participant expert or a non-party expert. See *Kaul v. The Queen*, 2017 TCC 55 at paragraphs 26 to 33.

[227] The EquiGenesis Reports are found at Tabs 3 and 4 of Tab A of Exhibit A-10.

[228] The TGTFC Report is found at Tab 5 of Tab A of Exhibit A-10.

[229] FTI also prepared reports for EquiGenesis programs in 2005, 2006, 2010, 2011 and 2012.

[230] The retainer letter is found at Tab 2 of Tab A of Exhibit A-10.

i. the aIncome 2009 Finance Trust (“Lender”) loan agreements with the Investors / Donors (the “Investor Notes” and “Donor Notes”, respectively);

ii. the Leeward loan agreement with the LP (the “LP Notes”);

iii. the Leeward loan agreement with the Charity (the “Charity Notes”); and,

iv. the Leeward loan agreements (the “Leeward Agreements”) with aIncome 2009 Deposit Trust. (“Lender Affiliate”);

b. The commercial reasonability of the expected rate of return on Leeward’s investment in the Man Notes;

c. The commercial reasonableness of the Investor’s investment in the LP;

d. The ability of the Charity to realize on its security; and,

e. That the fair market value of the Charity Notes, if they were issued as of the date of this report, would be equal to the face value of $10,000 per unit.

[171] Section 2.1 of the EquiGenesis Reports sets out the following conclusions:

Based on the scope of our review, the explanations provided to us, and subject to the assumptions, qualifications and restrictions noted herein, in our opinion [as at the date of this report] as at November 30, 2009:

a. The prescribed interest rates of the various proposed debt instruments are commercially reasonable, specifically:

i. the Investor Notes and Donor Notes with the Lender of 7.85%;

ii. the variable return on the LP Notes;

iii. the Charity Notes of 4.75%; and,

iv. the Leeward loan agreements with the Lender Affiliate of 7.85%;

b. The expected rate of return on Leeward’s investment in the Man Notes is commercially reasonable;

c. The investment in LP units by Investors is commercially reasonable;

d. The Charity will be able to realize on its security at the maturity date; and,

e. The fair market value of the Charity Notes, if they were issued as of the date of this report, would be equal to the face value of $10,000 per LP unit.

[172] The EquiGenesis Reports were based on the assumptions set out in section 6 of the reports.[231] The December 15 EquiGenesis Report added a third assumption to the effect that the data reviewed as at November 30, 2009 had not materially changed as of the date of the report. The two common assumptions are:

> a) The income tax laws prevailing at the valuation date will continue to prevail in the foreseeable future.
>
> b) The Investors will have sufficient net assets and income to allow the Unit and Donation Loan agreements between the Lender and the Investors, having an initial term of no longer than 10 years, to be refinanced for a further term upon their maturity[.]

[173] In addition to these assumptions, Mr. Rosen testified that:

> I would assume for all investors who were not part of EquiGenesis, [except] for Mr. Gordon who was not arm's length to EquiGenesis, but for the investors who were, there is an arm's-length relationship between them and EquiGenesis.
>
> We have Finance Trust and Deposit Trust, the lender and lender affiliate, that are at arm's length to the investors and EquiGenesis. We have Leeward Alternate Finance Asset 2009 Corporation, which we have been calling Leeward, itself another arm's-length party. We have Man Investments, another arm's-length party. Then we have the charitable foundation, yet another arm's-length party. Transactions between arm's-length parties are assumed to take place on an arm's-length basis.[232]

[174] Apart from the effective dates and the assumptions, the only material difference between the two EquiGenesis Reports is that the July 30 EquiGenesis Report had a different scope of review as some of the material agreements were not available at the time that report was prepared. Mr. Rosen read the caveat set out in the report:

> "As of the date of this report" -- the July report "— we have not been provided with certain agreements that relate, in particular, to the charities/donation element of the program and specifically we have not reviewed — "(As read.)[233]

[175] Mr. Rosen stated that the missing agreements were available at the time the December 15 EquiGenesis Report was prepared and that the additional agreements did not alter the opinions expressed in the July 30 EquiGenesis Report.[234] As well,

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[231] Tabs 3 and 4 of Tab A of Exhibit A-10.
[232] Lines 2 to 15 of page 502 of the Transcript.
[233] Lines 27 to 28 of page 497 and lines 1 to 4 of page 498 of the Transcript. The missing agreements are identified at lines 5 to 14 of page 498 of the Transcript and at section 3.2 of the report (Tab 3 of Tab A of Exhibit A-10).
[234] Lines 2 to 16 of page 499 and lines 21 to 24 of page 500 of the Transcript.

the methodology employed to reach the conclusions in the reports did not change.[235]

[176] Mr. Rosen explained the meaning of "fair market value" and "commercial reasonability" as used in the EquiGenesis Reports as follows:

> Q. How do you define fair market value for this mandate?
>
> A. Fair market value is generally accepted in Canada to be 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.
>
> . . .
>
> Q. How did you define "commercial reasonability" in the context of this work?
>
> A. In paragraph 1.5, following this section, I set out commercial reasonability to be the characterization of an investment or aspect of an investment such as the interest rate that is reflective of appropriate arm's-length market factors taking all relevant risks, benefits, and responsibility [in]to consideration.
>
> An investment would be commercially reasonable if it is expected to provide a return commensurate with all the risks of the particular investment considered. The rate of return would be considered commercially reasonable if it was reflective of all of the risks an investor was exposed to in an investment.[236]

[177] Mr. Rosen's opinion regarding the fair market value of the TGTFC Notes is based on his understanding that the notes provided TGTFC with a first charge against all of the assets of Leeward and on his conclusion that the 4.75% interest rate on the TGTFC Notes is commercially reasonable.

[178] With respect to the first point, Mr. Rosen explained that, because of the first charge, TGTFC would initially have, for each $10,000 of principal of the TGTFC Notes (i.e., the TGTFC Note principal amount per LP Unit), security of approximately $44,575 comprising Leeward's investment in the Man Notes of $2,575 per LP Unit and the principal amount of the loans to Participants of approximately $42,000 per LP Unit. This security was expected to grow to just over $200,000 at the end of the Program, at which time Leeward would owe TGTFC about $13,440 per LP Unit.[237]

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[235] Lines 18 to 20 of page 500 of the Transcript.
[236] Lines 25 to 28 of page 492, lines 1 to 3 of page 493 and lines 5 to 19 of page 494 of the Transcript.
[237] Lines 12 to 28 of page 503, page 504 and lines 1 to 19 of page 505 of the Transcript. Mr. Rosen noted that in section 5.22 of the December 15 EquiGenesis Report the amount was misstated as being $211,628. However, the charts at sections 5.16 and 5.22 state the correct number of $202,620.

[179] Mr. Rosen stated that the Man Notes were probably less important, that he "would feel most comfortable putting most of the emphasis on the charity notes, on the investor notes" and that the primary collateral for the TGTFC Notes comes from the loans to the investors.[238]

[180] The expected value of the security held by TGTFC at the end of the 20-year term of the TGTFC Notes was based on assumptions regarding the Man Notes and the loans to the Participants. In particular, Mr. Rosen assumed that the Man Notes would yield an annual return of 15.4%, which was based on historic returns for the AHL Diversified Program over a period of 13 years and eight months,[239] and that the Participants would refinance their loans at the end of the initial 10-year period with loans that would be due no later than December 31, 2028.[240] He also assumed – on the basis of his reading of the relevant agreements - certain cash flows if any portion of the principal or interest owing under the Unit Loans or the TGTFC Loans was repaid prior to maturity.[241]

[181] In cross-examination, Mr. Rosen acknowledged that the predicted return on the Man Notes was based on the return on the Man AHL Diversified plc notes rather than the Class A AHL Diversified CAD[242] notes that Leeward acquired. Mr. Rosen pointed to the explanation in footnote 22 of the EquiGenesis Reports, which highlights the factors that may result in performance differences between the two notes and states that the less than three-year trading history of the CAD notes was insufficient to predict the performance of the Man Notes over 20 years, although it did track the plc notes during that approximately three-year period.

[182] With respect to the second point, Mr. Rosen expressed the opinion that the TGTFC Notes were low risk because of the security attached to the notes and that, in considering whether the 4.75% interest rate on those notes was commercially reasonable, one had to compare the rates on other low-risk 20-year debt. Mr. Rosen stated that as of November 30, 2009, the rate on long-term Government of Canada bonds was 3.85%, which represented the risk-free rate. The rate on 20-year provincial bonds, which he considered to be a very safe investment, was in the

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[238] Lines 18 to 28 of page 508 and lines 5 to 9 of page 513 of the Transcript. Mr. Rosen also concluded that an annual return of 9.6% on the Man Notes would be sufficient in and of itself to discharge the amount owed under the TGTFC Notes: lines 2 to 4 of page 517 of the Transcript and section 5.17 b) of the EquiGenesis Reports.
[239] Lines 7 to 9 of page 517 of the Transcript and section 5.17 a) of the December 15 EquiGenesis Report. Mr. Rosen concluded that the expected return on the Man Notes of 15.4% was commercially reasonable: lines 23 to 27 of page 535 of the Transcript and section 5.18 of the EquiGenesis Reports.
[240] Lines 14 to 18 of page 509 of the Transcript.
[241] Lines 8 to 28 of page 511 and line 1 of page 512 of the Transcript and footnote 24 of the EquiGenesis Reports.
[242] Apparently, these notes became the Class D AHL Diversified CAD notes: line 1 to 3 of page 641 of the Transcript.

range of 4.5% to 4.7%. The rate on 20-year Canadian corporate bonds, which he considered to be a riskier investment, was 5.3%.[243]

[183] Mr. Rosen also looked at the implicit interest rates on 20-year residual bonds, which are bonds that will be redeemed for their face amount on maturity but that do not pay interest while they are outstanding. The implicit interest rate on the Government of Canada residual bond was 4.05% while the implicit interest rates on the provincial and corporate residual bonds ranged from 4.9% to 6.6%. Mr. Rosen viewed the TGTFC Notes as less risky than the provincial and corporate residual bonds because 3.75% of the 4.75% interest rate was paid annually.[244]

[184] Section 5.13 e) of the EquiGenesis Reports states that the internal rate of return (IRR) of the TGTFC Notes is 5.11%. Mr. Rosen stated that this was an error and that the IRR should be 4.75%. He also stated that this error "is not relevant to the ultimate conclusion" that the interest rate of 4.75% was commercially reasonable.[245] This conclusion regarding the reasonability of the interest rate in turn supported the view that each $10,000 of principal of the TGTFC Notes had a fair market value of $10,000.[246]

[185] In addition to assuming the refinancing of the Unit Loans and the TGTFC Loans, section 5.23 of the EquiGenesis Reports addresses a scenario in which the Participants' loans are not refinanced. The conclusion in that case is that the per-LP Unit fair market value of the TGTFC Notes is still $10,000. When asked why he looked at this scenario, Mr. Rosen stated:

> There is no guarantee that the loans will be refinanced or that they will be able to be refinanced. There is no certainty in the future. Because of that, you have to look at what the economic impact is if they cannot be refinanced.[247]

[186] With respect to the 7.85% annual rate of interest on the Unit Loans and the TGTFC Loans, Mr. Rosen opined that 10-year mortgage rates plus an additional premium that takes into account the covenant of each Participant were an appropriate measure of the reasonability of that rate.[248] Mr. Rosen described his analysis and conclusion as follows:

> Based on the risk profile and the characteristics of these loans, the unit loan and the donation loan, in comparison to 10-year conventional mortgages, I concluded that

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[243] Lines 8 to 28 of page 518 of the Transcript.
[244] Lines 1 to 26 of page 519 of the Transcript.
[245] Lines 22 to 23 of page 521 of the Transcript.
[246] Lines 9 to 13 of page 523 of the Transcript. See, also, sections 5.21 to 5.23 of the EquiGenesis Reports.
[247] Lines 19 to 23 of page 510 of the Transcript.
[248] The EquiGenesis Reports state in section 5.3 c) that an additional liquidity premium was not required.

> they were riskier than the rate on the 10-year conventional mortgage and that the rate of 7.85 percent was reasonable.
>
> . . .
>
> Q. What were the rates you observed for conventional mortgages?
>
> A. I observed posted rates, and I observed discounted rates. The discounted rates were about 250 basis points less than the rate on these notes.[249]

[187] Mr. Rosen acknowledged that the EquiGenesis Reports did not enumerate the factors supporting the conclusion that the 7.85% rate was commercially reasonable.[250]

[188] However, the EquiGenesis Reports do indicate that the conclusion is based on two additional assumptions. Section 5.3 b) of the EquiGenesis Reports states in part:

> . . . Our determination of the additional risk premium considers the fact that a complete credit review will be performed initially and prior to any new loan on or after February 15, 2019 on the entire loan amount (which includes loans for interest payments) and that the Investors are individuals with substantial net worth[14]; and[251]

Footnote 14 in the EquiGenesis Reports states:

> We understand that Investors must be "Accredited Investors", as defined in National Instrument 45-106 – Prospectus and Registrations Exception having a net worth in excess of $1 million (excluding their personal residence) or having annual net income of at least $200,000 or annual net family income of at least $300,000 or may otherwise qualify as Accredited Investors pursuant to National Instrument 45-106.

[189] Mr. Rosen acknowledged that he did not conduct a detailed review of the creditworthiness of each Participant.[252]

[190] In cross-examination, Mr. Rosen acknowledged that his analysis of the interest rates on the Unit Loans and the TGTFC Loans was dependent on the assumption that the Participants were creditworthy:

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[249] Lines 12 to 17 and lines 23 to 27 of page 532 of the Transcript.
[250] Lines 13 to 19 of page 531 of the Transcript.
[251] Section 5.3 b) of Tabs 3 and 4 of Tab A of Exhibit A-10.
[252] Lines 11 to 14 of page 528 of the Transcript.

> I think the creditworthiness was the assumption and given that they were creditworthy within the structure would their security provide a risk profile that was consistent with a market instrument that I could measure.[253]

[191] Mr. Rosen went on to describe the "accredited investor" assumption as follows:

> I believe it's safe to say that it was an important assumption and so I gave it weight, yes. I gave it important weight.[254]

[192] Mr. Rosen was also asked about the credit check assumption:

> Q. . . . So what was that assumption based on?
>
> A. I was advised by EquiGenesis that that would be the process.
>
> Q. What do you mean by "complete credit review" in this paragraph?
>
> A. In my opinion that would be a review that was sufficient from the lender's point of view to satisfy themselves that the borrowers were creditworthy.
>
> Q. And to get a level of detail as to how would that be achieved in your experience, are you suggesting that it would be the need to determine the assets and liabilities of these individuals, would that form part of the complete credit review?
>
> A. I think that would depend on who the lender is and I think the lender would be in a position to respond to that specifically, but I think it's safe to say that lender[s] should be reasonably diligent in determining the creditworthiness of borrowers.[255]

[193] Mr. Rosen addresses the creditworthiness of the Participants in a rebuttal report of FTI dated July 30, 2015 (the "FTI Rebuttal Report"), which was prepared in response to an expert report of Campbell Valuation Partners Limited dated June 29, 2015 (the "CVPL Report").[256] The FTI Rebuttal Report is a response to the CVPL Report but only to the extent that the latter report identifies issues in the FTI Reports. I will describe the opinions in the FTI Rebuttal Report in my description of the opinions in the CVPL Report.

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[253] Lines 22 to 26 of page 630 of the Transcript.
[254] Lines 13 to 15 of page 632 of the Transcript.
[255] Lines 20 to 28 of page 632 and lines 1 to 10 of page 633 of the Transcript.
[256] The FTI Rebuttal Report is at Tab B of Exhibit A-10 and the CVPL Report is at Tab 1 of Exhibit R-53.

[194] Mr. Rosen assessed the loans from Leeward to DT and from DT to FT on the same basis as the loans to the Participants.[257] Mr. Rosen described the analysis as follows:

> The ultimate security for these loans, the ultimate risk in these loans was exactly the same as the investments loans made by the investors, for the unit loan and the donation loan. Because the ultimate security and risk was the same, I concluded that the rate would be the same.[258]

[195] Mr. Rosen assessed the return on the Linked Notes issued by Leeward to the 2009 LP by reviewing the average 15-year returns on the investments notionally included in Portfolio A and Portfolio B. The total weighted average compound return for the investments in Portfolio A was 9.90%. The return for the Dow Jones Canada Select Dividend Index (Portfolio B) was 9.96% and 200% (the weighting factor) of that return was 19.92%. Mr. Rosen concluded at section 5.11 of the EquiGenesis Reports that "the anticipated interest rates on LP Notes [Linked Notes] are commercially reasonable".

[196] Counsel for the Appellants asked Mr. Rosen about the value of the Linked Notes prior to their maturity date:

> Q. Is there any way to determine, prior to the maturity date, how much the linked note is actually worth?
>
> A. You can observe it from time to time. Because it doesn't become operable until the maturity date, there is no way to know until maturity date.[259]

[197] Mr. Rosen explained his analysis of the commercial reasonableness of the investments in the 2009 LP as follows:

> . . . In terms of assessing commercial reasonableness of an investment in the LP, it was important to determine if the investors would receive sufficient funds from the investment to retire their obligations and, in addition, to earn a return commensurate with the risk. That is set out in 5.15.[260]

[198] Mr. Rosen testified that the value of the LP Units was dependent on the value of the assets of Leeward available to settle the Linked Notes. This value would be the amount due from DT and the value of the Man Notes less the amount payable to TGTFC on the TGTFC Notes.[261] The value is stated to be $189,180.[262]

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[257] Sections 5.5 to 5.7 of the EquiGenesis Reports.
[258] Lines 13 to 18 of page 533 of the Transcript.
[259] Lines 10 to 15 of page 540 of the Transcript.
[260] Line 28 of page 533 and lines 1 to 5 of page 534 of the Transcript.
[261] Lines 13 to 28 of page 534 and lines 1 to 6 of page 535 of the Transcript.

The analysis of the value of the Man Note uses the return over 13 years and eight months on the AHL Diversified Program to determine the expected return on the Man Notes of 15.4% per annum. On the basis of this value and a total out-of-pocket investment of $13,500 per LP Unit, the compound annual return to Participants is just under 4%.[263]

(2) Mr. Howard E. Johnson

[199] Mr. Johnson was qualified as an expert in the areas of valuation of debt instruments, valuation of equity securities and corporate finance.

[200] Counsel for the Appellant objected to Mr. Johnson being qualified as an expert in credit ratings. In the voir dire, Mr. Johnson did not suggest he was an expert in credit ratings and counsel for the Respondent did not seek to qualify Mr. Johnson as an expert in credit ratings. Counsel for the Appellants submitted that, because Mr. Johnson used a corporate bond rating methodology in his expert report, he should not be qualified as an expert for the purposes of his report. Mr. Johnson stated that credit rating is included in courses in advanced corporate finance and in chartered financial analyst programs, that he used the corporate bond rating methodology as a tool and that he had employed a similar approach in other situations.[264] With respect to the import of the credit rating, he stated:

> . . . the credit rating serves solely for the purpose of establishing where that note falls or the debt instrument falls on the risk-reward spectrum and in helping to identify public market securities that may be somewhat comparable to the fixed income instrument at hand.[265]

[201] In his expert report, Mr. Johnson does not provide an opinion regarding Leeward's credit rating but rather uses his estimation of Leeward's credit rating as part of his valuation methodology. Mr. Johnson does not need to be an expert in credit rating to assume a credit rating so as to apply a valuation methodology that is within his area of expertise. Rather, the accuracy of Mr. Johnson's assumption goes to the weight to be given to his conclusions.[266] I therefore did not accept the Appellants' submission regarding Mr. Johnson's qualification as an expert.

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[262] See section 5.16 of the December 15 EquiGenesis Report. The July 30 EquiGenesis Report incorrectly stated the amount available to be $198,188.
[263] Lines 3 to 20 of page 537 of the Transcript.
[264] Lines 21 to 28 of page 1401 and lines 1 to 12 of page 1402 of the Transcript.
[265] Line 28 of page 1401 and lines 1 to 5 of page 1402 of the Transcript.
[266] Mr. Jerrold Marriott was qualified as an expert in credit rating and counsel for the Appellants tendered his expert report to challenge Mr. Johnson's assumption regarding the credit rating of Leeward.

[202] The CVPL Report addressed five issues. Mr. Johnson states that the first two issues together address the fair market value per LP Unit of the property transferred by a Participant to TGTFC. The first issue is the fair market value[267] of the property and the second issue is the impact on that value of the requirement for TGTFC to invest in the TGTFC Notes all but $200 per LP Unit (or 98.04%) of the amount transferred. The two issues are intertwined and are therefore addressed together.[268]

[203] In Mr. Johnson's opinion, the fair market value of all but $200 of the donation per LP Unit is dependent on the fair market value of the TGTFC Notes. To determine that value, Mr. Johnson considers the interest rate on the TGTFC Notes as well as the callability and liquidity of the TGTFC Notes.[269]

[204] Mr. Johnson's analysis of the interest rate in turn involves consideration of the following:

> a. the terms and conditions [of the TGTFC] Notes;
>
> b. the risk free rate of return available in the market at the date of the issuance of the [TGTFC Notes] in or around December 2009;
>
> c. the yield on Canadian mortgages with comparable remaining terms to maturity;
>
> d. the reported corporate bond spreads by credit rating in 2009 as reported by Reuters;
>
> e. the implied rate of return required on the Man Notes to settle the [TGTFC] Notes when they mature on December 31, 2028;
>
> f. the credit market conditions that prevailed in 2009 and the impact on interest rates;
>
> g. the financial position and risk profile of Leeward[,] being the issuer of the [TGTFC] Notes; and,
>
> h. the financial position and risk profile of the individual Investors.[270]

[205] With respect to the security for the TGTFC Notes, Mr. Johnson expresses the view that the Participants were in substance lending money to themselves.[271]

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[267] Mr. Johnson adopts the same meaning of fair market value as Mr. Rosen: section 6.5 of the CVPL Report.
[268] Sections 6.2 to 6.6 of the CVPL Report.
[269] Section 6.7 of the CVPL Report.
[270] Section 6.8 of the CVPL Report.

Mr. Johnson explains the importance of this viewpoint to his analysis of the security as follows:

> . . . And the essence here is the -- the unit loan and the donation loan ultimately are secured by two items, one you have the Man Notes, the Man Units for $2,575 which will probably change in value over time, and ultimately you have the personal net worth of the investors themselves. So while the investors are high net worth investors there's no specific assets beyond the Man Notes that are securing their obligation to pay the donation loan and the unit loan.[272]

[206] On this point, the CVPL Report states:

> The security against the Charity Notes [TGTFC Notes] is a claim to the present and after-acquired assets of Leeward including a claim against the Investors and their investment in the Units. Referring to the diagram of the Investment Program flow of funds at **paragraph 4.9**, we note the following:
>
> a. the Investor borrows $32,000 per Unit from Finance Trust to invest in the Units. This $32,000 is paid to EquiGenesis LP as part of the subscription proceeds of $36,140 per Unit;
>
> b. EquiGenesis LP uses the subscription proceeds to invest $34,575 in Linked Notes with Leeward. The remaining $1,565 is paid out as fees to third parties. The $34,575 includes the $32,000 in proceeds originally borrowed by the Investor;
>
> c. Leeward uses the $34,575 to invest $2,575 in the Man Notes and lends $32,000 to Deposit Trust;
>
> d. Deposit Trust lends the $32,000 from Leeward to Finance Trust; and,
>
> e. the $32,000 originally borrowed by the Investor from Finance Trust, is thereby returned to Finance Trust through the circular flow of the funds.
>
> Having consideration for the foregoing, of the original investment in the Units of $36,140, $1,565 is paid out in fees to third parties, $32,000 flows back in a circular flow of funds to the lender (i.e. Finance Trust) and only $2,575 is invested in the Man Notes. In effect from a financial perspective, the security of the investment in the Units is only comprised of $2,575 of underlying assets. Therefore, the Charity Notes with a face value of $10,000 are secured by only $2,575 of assets at December 31, 2009.[273]

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[271] Lines 16 to 28 of page 1422 and lines 1 to 4 of page 1423 of the Transcript. Mr. Johnson provides a similar analysis of the TGTFC Loans: lines 5 to 19 of page 1423 of the Transcript.
[272] Lines 24 to 28 of page 1423 and lines 1 to 4 of page 1424 of the Transcript.
[273] Section 6.10 of the CVPL Report.

[207] Mr. Johnson stated that, notwithstanding the wording in the last paragraph, he did not ignore the net worth of the Participants. He explained the position set out in section 6.10 of the CVPL Report as follows:

> No, looking back I should have said $2,575 of specific assets. That's also or there could be significant assets related to an individual's net worth. The challenge, as I'll talk about, is there's no or very little visibility into the net worth of those individual investors over a very long 19-year period. So at the end of that 19 years if and when the investors are called upon to satisfy their obligations some may have significant net worth and others may have little or no net worth and therein lies one of the main issues I have in this program, is the level of uncertainty over such a long period of time for a significant element of the security.[274]

[208] Mr. Johnson expressed the opinion that, given the terms of the TGTFC Notes, the holder was exposed to a moderate level of risk and that an appropriate interest rate had to reflect this risk.[275]

[209] For comparison, Mr. Johnson considered the risk-free interest rate represented by Canadian government bonds and US Treasury securities (4% to 4.42%), the interest rate on conventional 5-year and 10-year Canadian mortgages (5.34% to 6.9%) and the interest rate on publicly traded U.S. corporate bonds (5.66% to 16.89%, depending on the corporation's official credit rating).[276] Mr. Johnson also considered, as a proxy for the risk on the TGTFC Notes, the rate of return (9.1%) required on the Man Notes in order to discharge the TGTFC Notes.[277] Finally, Mr. Johnson considered the credit market conditions in 2009, the financial position and risk profile of Leeward (which he assumed to be equivalent to a B- to BB+ credit rating, using a corporate debt rating methodology[278]) and the financial position and risk profile of the Participants.[279]

[210] Mr. Johnson concludes that the interest rate on the TGTFC Notes should fall within the range of 9.1% to 14.4%. This yields a fair market value of $5,919 (at 9.1%) to $3,470 (at 14.4%). Mr. Johnson then adds a callability discount of $87 (at 9.1%) to $72 (at 14.4%)[280] and a marketability discount of 10% (at 9.1%) to 15%

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[274] Lines 12 to 23 of page 1424 of the Transcript.
[275] Lines 1 to 12 of page 1426 of the Transcript.
[276] Sections 6.12 to 6.21 of the CVPL Report. With respect to the corporate bonds, Mr. Johnson stated that if he had used the Canadian long-term yield as the risk-free rate instead of the US Treasury yield, the derived rate for each risk level would be approximately 0.4% less: lines 1 to 6 of page 1432 of the Transcript.
[277] Sections 6.22 to 6.26 of the CVPL Report. Mr. Johnson notes that the 9.1% does not include management fees: lines 1 to 6 of page 1443 of the Transcript.
[278] Appendix D of the CVPL Report.
[279] Sections 6.27 to 6.41 of the CVPL Report.
[280] Sections 6.46 to 6.50 of the CVPL Report.

(at 14.4%).[281] The result is a per-LP Unit fair market value of the donation to TGTFC in the range of $2,889 to $5,249.

[211] The third and fourth issues addressed by Mr. Johnson consider the value of the economic benefits provided to the Participants by the Unit Loans and the TGTFC Loans over the terms of 9 years and 19 years.

[212] Mr. Johnson first considers the interest rate on the TGTFC Loans, the capitalization of the interest on the loans, the security given to FT, the application form and process, the lack of financial covenants, the credit market conditions in 2009 and his experience with debt and capital markets and concludes that the TGTFC Loans are not commercially reasonable debt instruments.[282]

[213] With respect to the interest rate on the TGTFC Loans, Mr. Johnson observes that the interest rate is 0.5% to 1.25% above the 10-year mortgage rate of 6.60% to 7.35% available in 2009.[283] In his view, a commercial lender would require a higher interest rate premium because the TGTFC Loans were not secured by real property but by $2,575 per LP Unit[284] and because the principal amount of the loans increased rather than decreased during the term of the loans.

[214] Mr. Johnson observed that interest rates on senior secured corporate debt with similar terms to maturity and a credit rating of B- to BB+ would range from 7.16% to 9.49% and that corporate bond spreads reported by Reuters for the same rating implied a range of 12.6% to 14.1%. He concludes that the fair market value of the interest rate on the TGTFC Loans is in the range of 10% to 14%.[285] While he notes that the Unit Loans would demand a higher interest rate because of greater risk, he assumes the same rate for those loans.[286]

[215] On the basis of this range of interest rates, Mr. Johnson concludes that the economic benefit for the TGTFC Loan is between $1,475 (at 10%) and $3,578 (at 14%) per LP Unit. The economic benefit for the Unit Loan is between $5,301 (at 10%) and $12,762 (at 14%) per LP Unit.[287]

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[281] Sections 6.51 to 6.56 of the CVPL Report.
[282] Sections 7.5 and 7.6 of the CVPL Report.
[283] Section 7.10 b. and section 7.5 a. of the CVPL Report.
[284] Mr. Johnson recognized that Participants pledged their LP Units as security for the TGTFC Loans and the Unit Loans and that the TGTFC Loans ranked ahead of the Unit Loans vis-à-vis this security. However, he reasoned that this amounted to security of $2,575 per LP Unit because ultimately a payout on the LP Units was funded by the repayment of the TGTFC Loans and the Unit Loans.
[285] Section 7.12 of the CVPL Report.
[286] Sections 7.23 and 7.24 of the CVPL Report.
[287] Mr. Johnson's analysis is found at section 7 of the CVPL Report.

[216] Mr. Johnson performs a similar analysis for a 19-year term and concludes that the TGTFC Loans and Unit Loans should bear interest over that term of between 13% and 15%. On the basis of this range of interest rates, the economic benefit for the TGTFC Loan is between $4,828 (at 13%) and $5,855 (at 15%) per LP Unit. The economic benefit on the Unit Loan is between $18,857 (at 13%) and $22,593 (at 15%) per LP Unit.[288]

[217] The fifth and final issue is the economic value to Participants of the cash flow generated by the Program. In a nutshell, he concludes that, depending on the term (9 or 19 years), the tax treatment at the end of the term (income or capital gain) and certain other assumptions, the cash flow benefits range from a negative number per LP Unit to $25,080 per LP Unit.[289]

(3) Mr. Jerrold Marriott

[218] Mr. Marriott was qualified as an expert in the areas of credit rating and structured finance capital markets. Mr. Marriot's expert report (the "EFCL Report")[290] focusses on the credit rating assumed by Mr. Johnson in the CVPL Report. The issues raised by Mr. Marriott are summarized in the ECFL Report as follows:

> Mr. Johnson erred in his methodological approach to both the rating of Leeward and the analysis of the fair market value of the Charity Notes [TGTFC Notes], specifically in:
>
> (i) The use of a corporate rating approach in the assessment of Leeward and the Charity Notes;
>
> (ii) The use of US interest rates in establishing risk free rates and comparative bond spreads;
>
> (iii) Failing to recognize the full quantum of security available to support the Charity Notes;
>
> (iv) The use of the required rate of return on the Man Notes as a proxy for the risk of the Charity Notes; and
>
> (v) Overestimating the financial risk of investors/obligors.[291]

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[288] Mr. Johnson's analysis is found at section 8 of the CVPL Report.
[289] Mr. Johnson's analysis and conclusions are found in section 9 of the CVPL Report.
[290] Exhibit A-12.
[291] Section 2.1(a) of the EFCL Report.

[219] The report goes on to state Mr. Marriott's view as to the preferred methodology:

> The factors which should have been considered and the methodology which should have been employed include:
>
> (i) The use of a structured finance rating methodology to assess the credit quality of the Charity Notes [TGTFC Notes];
>
> (ii) The use of appropriate Canadian interest rates in establishing risk free rates and comparative bond spreads;
>
> (iii) The use of Canadian structured finance transactions as potential benchmarks for the establishment of fair market value interest rates;
>
> (iv) Recognition of the first priority security provided to the Charity Notes and the additional recourse available to support the Charity Notes;
>
> (v) Recognizing both assets and liabilities acquired by investors participating in the transaction as well as available data to support investor default projections; and
>
> (vi) The use of a joint probability of default determination on the rating of the Charity Notes.

[220] Mr. Marriott provides a detailed discussion of each of the above points in the balance of his report.

[221] Mr. Marriott concludes that if one had applied his methodology, the TGTFC Notes would have been rated at A and not B- to BB+. Schedule II of the EFCL Report, titled "Summary of Comparative Canadian Structured Finance Transactions", indicates for A-rated structured finance debt with terms of 3 to 5 years interest rate spreads of 1.85% to 3.34%, with all but one issue falling in the 2.63% to 3.34%[292] range. These spreads translate into interest rates ranging from 3.95% to 6.44% if one uses for the risk-free rate, the rate on Canadian government bonds of comparable terms (6.03% to 6.44%, omitting the one outlier).[293]

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[292] The A-rated debt on the chart was issued between February 2008 and February 2010.
[293] Section 4.18 of the EFCL Report explains Schedule II.

(4) Mr. A. Scott Davidson

[222] Mr. Davidson was qualified as an expert in the areas of business valuation and security interests. Mr. Davidson was asked to review and comment on the opinions expressed in the CVPL Report regarding the fair market value of the property transferred to TGTFC and the value of the economic benefits received by the Participants as a result of the TGTFC Loans and the Unit Loans, and to the extent that adjustments are required, to provide such adjustments as at December 1, 2009. As well, Mr. Davidson was asked to comment on the value of cash flow benefits associated with an investment in the 2009 LP and on whether participation in the donation program enhanced these benefits. Mr. Davidson tendered an expert report authored by him and Mr. Chris Polson (the "D&P Report").

[223] Section 3.0 of the D&P Report sets out the conclusions of the report. Mr. Davidson disagrees with Mr. Johnson's assessment of the fair market value of the TGTFC Notes on the grounds that:

1. The low end of Mr. Johnson's range of interest rates for the TGTFC Notes (9.1%) is based on the minimum return required on the Man Notes in order to repay the TGTFC Notes. This rate is an internal rate of return (IRR), which is neither a measure of the risk inherent in the TGTFC Notes nor the rate of return an arm's length investor would require for bearing that risk. The IRR is merely information to be taken into consideration.

2. The high end of Mr. Johnson's range of interest rates for the TGTFC Notes (14.4%) is based on his credit analysis of Leeward and fails to properly consider a number of factors that mitigate the risk of the TGTFC Notes and support a lower rate, including:

    a. The senior claim of the TGTFC Notes over the assets of Leeward;

    b. The financial position and creditworthiness of the Participants, who provide a significant portion of the collateral for the TGTFC Notes; and

    c. The effective cross-guarantee of the obligations of Leeward under the TGTFC Notes by all the Participants, which results from the fact that the collective obligations of the Participants under the TGTFC Loans

and the Unit Loans are pooled in Leeward by virtue of the loans by Leeward to DT.[294]

3. The callability discount of 13 to 24 basis points is too high.

4. The marketability discount is based on studies of restricted stock, which generally exhibit greater price risk (volatility) and are subject to more restrictive limitations on their transfer or sale than the TGTFC Notes. As a result, the illiquidity discount is too high.

[224] Mr. Davidson also concludes that the interest rate charged on the TGTFC Loans and the Unit Loans is within the range of reasonability and therefore no benefit is received by the Participants as a result of these loans, that Mr. Johnson's assessment of the economic benefit from investing in the 2009 LP is subject to a number of assumptions, that apart from the donation receipt none of the economic benefits identified by Mr. Johnson result from the donation to TGTFC and that participation in the donation program diminishes the value of the LP Units.[295]

[225] Mr. Davidson provides an analysis in support of each of his conclusions. With respect to the value of the TGTFC Notes, Mr. Davidson expresses the following views:

1. According to Mr. Marriott's expert report, the use of a corporate bond rating methodology for structured finance instruments such as the TGTFC Notes is not appropriate;[296]

2. Leaving aside the first point, the application of the corporate bond rating methodology is flawed. Specifically, Mr. Davidson disagrees with the market data used to establish the corporate bond yield of 14.4% and points out the lack of an objective framework or analysis justifying the credit rating attributed to Leeward;[297]

3. The circumstances of Leeward support an analysis of the risk associated with the TGTFC Notes that is based on the ratio of Leeward's assets to its obligations under the TGTFC Notes but do not support the debt-to-equity analysis used in the CVPL Report;[298]

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[294] See, also, section 4.2.4 b) ii. of the D&P Report.
[295] See, also, section 6.1.5 of the D&P Report.
[296] Section 6.3.8 of the D&P Report.
[297] Sections 6.3.9 and 6.3.17 of the D&P Report.
[298] Sections 6.3.13 to 6.3.16 of the D&P Report.

4. The 9.1% IRR on the Man Notes required to repay the TGTFC Notes is not a proxy for an appropriate discount rate on the TGTFC Notes. An IRR is a calculation of cash flows that net to a present value of zero and does not reflect the factors that an investor would consider when establishing a discount rate. In addition, the IRR on the Man Notes does not take into account Leeward's other assets, being the amounts owed to it by DT, which are reflective of the TGTFC Loans and the Unit Loans owed by the Participants.[299]

5. The creditworthiness of the Participants is understated because of the failure to treat the LP Units as an asset that offsets the Unit Loans, the utilization of a loan-to-annual-income ratio when there is no expectation that the loans will be repaid from income, the exclusion of the principal residences of the Participants from their net assets and the failure to recognize that Leeward has recourse to the amounts owed by all Participants.[300] With respect to the last point, section 6.3.30 d) of the D&P Report states:

> Most importantly, the ratios exhibited only reflect the collateral (net worth) associated with a single Investor. In actual fact, to satisfy the obligations owing on the Charity Note [TGTFC Notes] the Charity [TGTFC] can look to the totality of Leeward's assets, which include the collateral provided by the entire pool of 59 high net worth Investors. Thus, in the event of a single Investor's default on his or her Donation Loan [TGTFC Loan], the proceeds from other Investors' Unit Loans will be utilized to repay the balance of the defaulting Investors' Donation Loan. Since the assets within Leeward exceed the aggregate Charity Note obligations, this pooled collateral is effectually a form of "cross-guarantee", whereby the net worth of multiple investors provides security against the outstanding balance of the Donation Loan.

6. The callability and marketability discounts are both overstated and are incorrectly applied to the $200 cash component of the donation per LP Unit. The data relied upon to determine the callability discount suggests a discount of 5 basis points (not 13 to 24 basis points). Reliance on the restricted stock study used to determine the illiquidity discount results in an overstatement of the discount because, unlike restricted stock, the TGTFC Notes are transferrable with Leeward's consent (not to be unreasonably withheld); restricted stock is equity and therefore more volatile than a fixed-income investment; the more temporally relevant discount from the study relied upon

[299] Sections 6.3.19 to 6.3.24 of the D&P Report.
[300] Sections 6.3.25 to 6.3.32 of the D&P Report.

> is 8.25% which, for the foregoing reasons, overstates the discount for the TGTFC Notes; and the majority of the interest on the TGTFC Notes is paid annually.[301]

[226] Mr. Davidson disagrees with Mr. Johnson regarding the economic benefits attributed to the Unit Loans and the TGTFC Loans. In reaching this conclusion, Mr. Davidson assumes that the Participants are dealing at arm's length with FT and that therefore the 7.85% interest rate on these loans is an arm's length market rate.[302] Mr. Davidson reiterates his disagreement with the credit rating methodology underlying Mr. Johnson's analysis of the benefits to Participants from the loans, but also observes that it is inappropriate to use the credit rating of Leeward to determine the interest rate on the TGTFC Loans and the Unit Loans because Leeward is not the borrower.[303] Mr. Davidson also states that it is illogical for the rates on the TGTFC Loans and Unit Loans to be so similar to the rate on the TGTFC Notes given the additional collateral (the Man Notes) in Leeward.[304]

[227] Mr. Davidson provides an alternative methodology for computing the fair market value of the donation to TGTFC per LP Unit and the value of the "alleged" economic benefits associated with the loans.[305] These analyses adopt the following meaning of commercially reasonable and fair market value:

> For purposes of this report, our references to commercially reasonable and reasonable can be taken to mean the characterization of an aspect of an investment (such as the interest rate) as a range that is reflective of appropriate arm's length market factors taking all relevant risks, benefits and responsibilities into consideration. A rate of return would be considered reasonable if it was commensurate with all of the risks an investor was exposed to in the investment.
>
> To the extent that the interest rates associated with these securities are deemed to be a reasonable return, then it would follow that the face value of the security would also reflect its fair market value. . . .[306]

[228] Mr. Davidson uses two approaches (identified as Method A and Method B) to value the TGTFC Notes. Method A yields a value of $10,000 while Method B yields a value of $7,950.

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[301] Sections 6.4 and 6.5 of the D&P Report.
[302] Section 6.6.2 of the D&P Report.
[303] Sections 6.6.4 to 6.6.5 of the D&P Report.
[304] Section 6.6.6 of the D&P Report.
[305] Sections 7 and 8 of the D&P Report. The word "alleged" is used in section 7.1.6 of the D&P Report.
[306] Sections 7.1.3 and 7.1.4 of the D&P Report.

[229] Method A assumes that the Man Notes have a value on the valuation day of $2,575 but no future return. In effect, the $2,575 starting value of the Man Notes is treated as if it is put aside on the valuation day thereby reducing the amount at risk under the TGTFC Notes from $10,000 to $7,425.[307] To compensate for the fact that TGTFC does not have direct access to these funds, Mr. Davidson adds a scenario in which the $2,575 is discounted by 10%, increasing the principal at risk under the TGTFC Notes from $7,425 to $7,683. The no-discount and discount scenarios yield interest rates on the adjusted principal of the TGTFC Notes of 6.4% and 6.18% respectively.[308]

[230] Mr. Davidson then compares these rates with the implied yield on 20-year Canadian government bonds (4.22%), the coupon rate associated with structured finance issues in late 2009 (rate of 5.5% to 6.5% based on certain assumptions, including an A credit rating for the TGTFC Notes), the posted and effective residential mortgage rates for 2009 (rate of 5.0% to 6.5% based on certain assumptions and extrapolations) and the implied rate for corporate bonds during December 2009 (rate of 5.87% to 6.56% based on Mr. Davidson's credit rating of A to AA+ for the TGTFC Notes).[309] Mr. Davidson concludes on the basis of these rates that 5.5% to 6.5% is an appropriate range for the market rates available during late 2009.[310] Mr. Davidson then adds a callability discount of 0 to 5 basis points and an illiquidity discount of between 4.125% and 8.25%, which result in a range of 5.82% to 7.22%.[311] As the range computed for the adjusted principal of the TGTFC Notes (6.18% to 6.4%) falls within this range, the fair market value of the TGTFC Notes is their face value of $10,000.[312]

[231] Method B disregards the Man Notes entirely and values the TGTFC Notes with regard only to the collateral provided by the Unit Loans and the TGTFC Loans (realized through Leeward's loans to DT). To do this, the rate of 4.75% on the TGTFC Notes is compared to the market range determined under Method A of 5.5% to 6.5% and the net present value of the TGTFC Notes is computed on this basis. The net present value of the TGTFC Notes is then adjusted to reflect the callability discount range and illiquidity discount range determined under Method

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[307] Section 7.3.7 of the D&P Report.
[308] Section 7.3.11 of the D&P Report.
[309] Sections 7.3.12 to 7.3.54 of the D&P Report. Mr. Davidson observes in section 7.3.54 that a Baa1/BBB+ rating would yield a rate of 7.49%.
[310] Sections 7.3.55 to 7.3.57 of the D&P Report.
[311] Sections 7.3.58 to 7.3.65 of the D&P Report.
[312] Sections 7.3.66 to 7.3.70 of the D&P Report.

A. The result is a fair market value for the TGTFC Notes in the range of $7,201 to $8,651, with a midpoint of $7,950.[313]

[232] Because Method B gives no weight to the Man Notes, Mr. Davidson concludes that the fair market value of the TGTFC Notes must significantly exceed the bottom end of the range:

> Our overall conclusion as to the fair market value of the Charity Note [TGTFC Notes] is that it is well in excess of $7,950 in a range that extends to $10,000 [per LP Unit]. If asked for a specific point estimate we would select an amount at or towards the higher end of that range.[314]

[233] To value the economic benefits of the TGTFC Loans and the Unit Loans, Mr. Davidson compares the rates on those loans with Canadian government bonds of similar maturities (3.38%), 10-year fixed mortgage rates (5.5% to 7.0% after certain adjustments), implied interest rates on 10-year corporate bonds (6.23% to 7.23% after adjustments for a credit rating ranging from A to BBB), and an estimate of the interest rate on a 20-year loan to high-net-worth investors based on discussions with Canadian financial institutions and other available market data (rate of 6.29% to 7.66% based on an extrapolation from short-term rates).[315] Mr. Davidson concludes that the rate on the TGTFC Loans and the Unit Loans is higher than the benchmark rates but is within a range of reasonability. Accordingly, the fair market value of the loans is their face amount, and no benefit is received by the Participants as a result of these loans.[316]

[234] In preparing the analysis and opinions in the D&P Report, Mr. Davidson made the following assumptions in addition to specific assumptions in the body of the report:

> a) The financial and other information relied upon in completing our analysis, as referenced within this D&P Report, is accurate;
>
> b) The Lender conducted the necessary due diligence that it considered appropriate in assessing the creditworthiness of each Investor;
>
> c) The Unit Loans and Donation Loans [TGTFC Loans] issued by the Lender are full-recourse in nature;
>
> d) It was not anticipated that the Investors would repay the principal balance of their loans from the proceeds of their annual income;

[313] Sections 7.4.1 to 7.4.8 of the D&P Report.
[314] Section 7.2.8 of the D&P Report.
[315] Sections 8.1.1 to 8.3.11 of the D&P Report.
[316] Sections 8.4.1 to 8.4.4 of the D&P Report.

> e) The fair market value of the Charity Note [TGTFC Notes] and the economic benefits associated with the Loans [Program Loans] did not change materially between July 1, 2009 and December 31, 2009;
>
> f) The security arrangements associated with the Charity Notes is [*sic*] as we have described. They maintain the primary claim over all of the assets of Leeward;
>
> g) There were no conflicts of interest between the Investors, Leeward, and the Charity in terms of how the funds associated with the Man Notes would be invested during the term of the Charity Note;
>
> h) The default rate observed on Prior EquiGenesis Programs is a reasonable proxy for the default rate anticipated in connection with the 2009 program;
>
> i) Permission to transfer the Charity Notes will not be unreasonably withheld by Leeward;
>
> j) Investors are unlikely to repay their Loans early which, in turn, means that Leeward is unlikely to call the Charity Notes; and
>
> k) The Investors who participated in the 2009 Program were of a reasonably comparable credit quality to the individuals who participated in the Prior EquiGenesis Programs.[317]

C. Position of the Appellants[318]

[235] The Appellants describe the Program as a self-contained structured finance investment program and gifting tax shelter marketed to high-net-worth individuals that was designed to perform within a projected range over its 20-year life. The Appellants submit that the Program was properly implemented, that each element was legally effective, that the Participants were fully at risk for the amounts borrowed to finance their donations to TGTFC, and that the charities chosen by the Participants to receive amounts from TGTFC have received and will continue to receive substantial amounts of “income”.[319]

[236] The Appellants submit that the Minister’s reassessments of the Appellants to include income of the 2009 LP is wrong because the 2009 LP did not have any deemed income under subsection 12(9) of the ITA. The Appellants submit that the amount of income earned by the 2009 LP on the Linked Notes could not be known

[317] Section 10.1.1 of the D&P Report.

[318] The written submissions of the Appellants were 86 pages in length and the written submissions of the Respondent were 151 pages in length. Accordingly, the following summaries only touch on the highlights of these submissions.

[319] The Appellants use the word “income” but it is unlikely that the amounts received by the charities from TGTFC were “income” to those charities.

until the maturity of the Linked Notes, when the obligation to pay out under the Linked Notes crystallizes. Section 7000 of the ITR does not create interest income where none exists and does not require the recognition of phantom income based on the fluctuating value of Portfolio A and Portfolio B from time to time. The Appellant submits that amendments addressing "linked notes" proposed in the 2016 Federal Budget confirm that section 7000 does not impute income to the 2009 LP in the circumstances in issue in these appeals.

[237] The Appellants submit that the interest on the Unit Loans and the Fees should be deductible even if no income is attributed to the 2009 LP in respect of the Linked Notes until the maturity of the Linked Notes.

[238] The Appellants submit that the Participants had a reasonable expectation of gross income at the time they purchased LP Units even if that gross income would not be realized for many years and even if that income was in the form of a taxable capital gain on LP Units. Accordingly, on the basis of the decision of the Supreme Court of Canada in *Ludco Enterprises Ltd. v. Canada*, 2001 SCC 62, [2001] 2 S.C.R. 1082 ("*Ludco*"), the Appellants were entitled to deduct the interest on the Unit Loans because the Unit Loans were borrowed money used for the purpose of earning income from a business or property and the interest was paid pursuant to a legal obligation to pay interest on the Unit loans.

[239] The Appellants submit that the decision in *Swirsky v. The Queen*, 2013 TCC 73, affirmed 2014 FCA 36, can be distinguished because in that case the Tax Court found that there was no evidence that the spouse of the taxpayer believed or expected, at the time she acquired the shares in issue, to earn dividend income from the shares. Here, the Appellants expected to hold the LP Units for the term of the Program and expected, on the maturity of the Linked Notes, to earn income on the LP Units that would assist in the payment of their Unit Loans.

[240] The Appellants submit that, for the same reasons, the Minister was wrong to deny the deduction of the Fees.

[241] The Appellants submit that the donation component of the Program complies with the ITA. Specifically, each of the Appellants had the intention to donate and did in fact donate money to TGTFC, which resulted in impoverishment by the amount donated, and none of the Appellants received any benefit from any person in exchange for the donation. The Appellants submit that the law does not require altruism and does not require that the donation be economically irrational in order for it to qualify as a gift. In addition, the fact that the Appellants may have

been motivated by the tax benefit resulting from their donations to TGTFC does not vitiate their intention to give.

[242] The Appellants submit that once the Appellants paid $10,200 per LP Unit to TGTFC the gift to TGTFC was complete. The requirement for TGTFC to invest 98.04% of the amount received from the Appellants in the TGTFC Notes was designed to create an endowment fund or enduring gift. The Appellants submit that donors are entitled to require a charity to manage donated funds in a particular manner by requiring the charity to create an endowment fund from which only the income will be available for the charity's use.

[243] The Appellants submit that the direction to TGTFC to invest in the TGTFC Notes issued by Leeward did not result in a benefit to the Appellants. The 4.75% rate on the TGTFC Notes, while less than the rates on the Program Loans, was a fair market rate and the Respondent has the burden of proving otherwise.

[244] The Appellants submit that the fair market value of the donations by the Appellants to TGTFC must be considered from the perspective of the Appellants at the time of the donations. Neither the common law nor subsection 248(32) entitles the Minister to substitute her judgment as to what a reasonable rate would have been, and it is sufficient that the rate on the TGTFC Notes was within a range of reasonable amounts. The testimony of Mr. Rosen and Mr. Davidson confirms that the interest rate on the TGTFC Notes was commercially reasonable and that the TGTFC Notes had a fair market value equal to their face value.

[245] The Appellants submit that Mr. Johnson's analysis of the rate on the TGTFC Notes was fundamentally flawed. In particular, the low end of the range was premised on the erroneous assumption that only the Man Notes would be available to repay the TGTFC Notes, does not reflect the risk inherent in the nature of the investment and results in the commercially absurd outcome that a shorter duration results in a higher internal rate of return (IRR). The high end of the range was based on an assessment of Leeward's credit rating using the wrong methodology; Mr. Johnson was not qualified to opine on Leeward's credit rating; and the US interest rates used to determine the discount rate are not indicative of Canadian rates because of differences with regard to inflation, monetary policy and exchange rates.

[246] The Appellants submit that the facts in these appeals are distinguishable from those in *Maréchaux v. The Queen*, 2010 FCA 287 ("*Maréchaux*"), *Kossow v. The Queen*, 2013 FCA 283 ("*Kossow*") and *The Queen v. Berg*, 2014 FCA 25 ("*Berg*") because the TGTFC Loans are not shams, are full-recourse loans as

regards the Appellants and bear interest at a commercially reasonable rate, as confirmed by the evidence of Mr. Rosen and Mr. Davidson. In addition, TGTFC has a first priority security interest in the assets of Leeward, and the Appellants have subordinated their interests to that of TGTFC. Consequently, in contrast to the taxpayers in *Maréchaux*, *Kossow* and *Berg*, the Appellants are truly impoverished. The Appellants submit that this is confirmed by the fact that, by participating in the donation aspect of the Program, the Appellants substantially reduced the return they could otherwise have earned through the investment in the 2009 LP alone and assumed greater risk in the form of a second full-recourse loan.

[247] The Appellants submit that their liability for the amounts payable under their Program Loans is not illusory and that to the date of these appeals any participant who has defaulted has been pursued and, if necessary, sued. The COM advised the Appellants of this liability. The Appellants submit that the Respondent has not established that any portion of the Program Loans is returned to the Appellants or is used to reduce the legal effect or economic impact of the Program Loans or that any circle is broken by the fact that TGTFC must be paid first by Leeward or by the fact that the amount payable under the Linked Notes on maturity may not be sufficient to pay the Program Loans.

[248] Finally, the Appellants submit that the general anti-avoidance rule in section 245 (the "GAAR") cannot apply in respect of subsections 143.2(6.1), (7) and (12) because subsection 143.2(6) was not in force in 2009 but was enacted with retroactive effect in 2013. However, even if the GAAR can apply in such circumstances, the transactions in issue did not misuse or abuse subsections 143.2(6.1), (7) or (12).

D. Position of the Respondent

[249] The Respondent submits that, for one of four alternative reasons, the Appellants are not entitled to the non-refundable charitable donation tax credits claimed under section 118.1 in respect of amounts they transferred to TGTFC in 2009:

> 1. The payments by the Appellants to TGTFC are not gifts for the purposes of section 118.1 of the ITA. The tax credit provided by section 118.1 is intended to defray a portion of the economic cost of a gift but is not intended (i) to be a means by which a taxpayer can turn a profit from a donation, or (ii) to be used to facilitate, enhance or optimize a tax deferral arrangement. The payments by the Appellants to TGTFC were part of an interconnected series of transactions designed to provide cash-flow

benefits, were not voluntary, were not the result of any benefaction or detached and disinterested generosity and did not result in impoverishment.

2. If the payments by the Appellants to TGTFC are gifts for the purposes of section 118.1 of the ITA, under subsection 248(31) the eligible amount of the gifts is nil. Under subsection 248(32) of the ITA, the eligible amount of a gift is reduced by the amount of the advantage, if any, in respect of the gift. The advantage in respect of the gifts of the Appellants exceeds the amount of the gifts so the eligible amount of the gifts is reduced to nil. The advantage to each of the Appellants includes the economic benefit of below market interest rates on the Program Loans as well as the principal amount of the Program Loans because the loans are limited-recourse debts in respect of the gifts under subsection 143.2(6.1) of the ITA.

3. If the payments by the Appellants to TGTFC are gifts and the eligible amount of the gifts is not nil, no amount is included in the "total charitable gifts" of the Appellants because the receipts issued to the Appellants by TGTFC do not satisfy the requirements of subsection 118.1(2) of the ITA and subsection 3501(1) of the ITR. Paragraphs 3501(1)(h.1) and (h.2) of the ITR require the receipt to include a description of the advantage, if any, in respect of the gift and the amount of the advantage (paragraph 3501(1)(h.1)) and the eligible amount of the gift (paragraph 3501(1)(h.2)). The receipts issued by TGTFC did not include this information.

4. If the payments by the Appellants to TGTFC are gifts, the eligible amount of the gifts is not nil and the receipts issued by TGTFC comply with subsection 118.1(2) of the ITA and subsection 3501(1) of the ITR, the non-refundable tax credits of the Appellants resulting from the gifts should be denied under the GAAR. The relevant transactions are avoidance transactions that result in abusive tax avoidance because they defeat the underlying rationale of subsection 118.1(3) of the ITA, circumvent subsection 143.2(7) in a manner that frustrates its object, spirit or purpose and achieve an outcome that subsections 143.2(7) and (12) are intended to prevent.

[250] The Respondent further submits that each of the Appellants failed to include in income his or her share of the interest income that was deemed by subsection 12(9) of the ITA and paragraph 7000(2)(d) of the ITR to accrue to the 2009 LP on the Linked Notes.

[251] Alternatively, the Respondent submits that if no interest is deemed by subsection 12(9) of the ITA and paragraph 7000(2)(d) of the ITR to accrue to the 2009 LP on the Linked Notes then the deduction from income claimed by the Appellants for interest payable on the Unit Loans should be denied because the Unit Loans are not borrowed money used for the purpose of earning income from a business or property.

III. Analysis

[252] I will address the issues raised in these appeals in the order set out above under the heading "Position of the Respondent".

A. The Transfers of Property by the Appellants to TGTFC Were Not Gifts

(1) Introduction

[253] The first position put forward by the Respondent is that the transfers of property by the Appellants to TGTFC were not gifts for the purposes of section 118.1 of the ITA. The Respondent submits that the Appellants did not, and did not have the intent to, impoverish themselves. The Respondent further submits that the Appellants did not transfer the property by way of benefaction or "detached and disinterested generosity" and therefore lacked the liberal intent or *animus donandi* to support the existence of a gift.[320]

[254] The Respondent also submits that the transfers of property to TGTFC were not voluntary. Specifically, while the Appellants voluntarily decided whether to participate in the TGTFC Program, the transfers of property to TGTFC by the Appellants were made pursuant to contractual obligations as part of a preordained series of transactions. In particular, as a condition of receiving the TGTFC Loan, the Appellants were required to execute a pledge under seal providing for the payment of $10,200 per LP Unit to TGTFC, which was in turn obligated to invest all but $200 of the funds in the TGTFC Notes.

(2) The Guiding Principles

[255] To address the Respondent's first position, I have adopted the framework for the analysis of private law principles set out by the Supreme Court of Canada in *Backman v. Canada*, 2001 SCC 10, [2001] 1 S.C.R. 367 ("*Backman*"). In that case,

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[320] Paragraph 309 of the Respondent's Written Submissions. The Respondent appears to use the word "benefaction" as meaning "benevolence". However, benefaction refers to the act or consequence of giving and unlike benevolence does not address the mental state of the transferor or the reason for the transfer. See the discussion in footnote 345, *infra*.

the issue was whether there was a partnership under Canadian law. If there was, the tax result sought by the appellant would be achieved.[321]

[256] The Court made the following statements regarding the use of private law concepts in the ITA:

> The term "partnership" is not defined in the Act. Partnership is a legal term derived from common law and equity as codified in various provincial and territorial partnership statutes. As a matter of statutory interpretation, it is presumed that Parliament intended that the term be given its legal meaning for the purposes of the Act: N. C. Tobias, *Taxation of Corporations, Partnerships and Trusts* (1999), at p. 21. We are of the view that, where a taxpayer seeks to deduct Canadian partnership losses through s. 96 of the Act, the taxpayer must satisfy the definition of partnership that exists under the relevant provincial or territorial law. . . .[322]

[257] The Supreme Court also addressed the distinction between motive and intention where the applicable private law looks at the intention of the taxpayer:

> A determination of whether there exists a "view to profit" requires an inquiry into the intentions of the parties entering into an alleged partnership. At the outset, it is important to distinguish between motivation and intention. Motivation is that which stimulates a person to act, while intention is a person's objective or purpose in acting. This Court has repeatedly held that a tax motivation does not derogate from the validity of transactions for tax purposes: *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622; *Canada v. Antosko*, [1994] 2 S.C.R. 312; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 540. Similarly, a tax motivation will not derogate from the validity of a partnership where the essential ingredients of a partnership are otherwise present: *Continental Bank*, *supra*, at paras. 50-52. The question at this stage is whether the taxpayer can establish an intention to make a profit, whether or not he was motivated by tax considerations. . . .
>
> . . .
>
> . . . to ascertain the existence of a partnership the courts must inquire into whether the objective, documentary evidence and the surrounding facts, including what the parties actually did, are consistent with a subjective intention to carry on business in common with a view to profit.[323]

[Emphasis added.]

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[321] Paragraph 14 of *Backman*. The same approach to the relationship between the existence of the partnership and the result under the ITA was adopted in *Spire Freezers Ltd. v. Canada*, 2001 SCC 11, [2001] 1 S.C.R. 391.
[322] Paragraph 17 of *Backman*.
[323] Paragraphs 22 and 25 of *Backman*. With respect to the implications of a tax motive see also *Walls v. Canada*, 2002 SCC 47, [2002] 2 S.C.R. 684 at paragraph 22.

[258] The Supreme Court of Canada sets out four important principles in these statements. First, legal terms that are not defined in the ITA are to be given their meaning under private law unless a textual, contextual and purposive interpretation indicates otherwise.[324] This principle is adopted by the Federal Court of Appeal in *The Queen v. Friedberg*, [1992] 1 C.T.C. 1, 135 N.R. 61, 92 DTC 6031, relying on that court's earlier decision in *The Queen v. McBurney* [1985] 2 C.T.C. 214, 62 N.R. 104, 85 DTC 5433 ("*McBurney*"). In *Friedberg*, the Court stated (DTC 6032):

> The *Income Tax Act* does not define the word "gift", so that the general principles of law with regard to gifts are utilized by the Courts in these cases. As Mr. Justice Stone explained in *The Queen v. McBurney*, 85 D.T.C. 5433, at p. 5435 [[1985] 2 C.T.C. 214, at p. 218]:
>
> The word gift is not defined in the statute. I can find nothing in the context to suggest that it is used in a technical rather than its ordinary sense.
>
> Thus, a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor (see Heald J. in *The Queen v. Zandstra*, [1974] 2 F.C. 254, at p. 261 [[1974] C.T.C. 503, at p. 509, 74 D.T.C. 6416, at p. 6420]). The tax advantage which is received from gifts is not normally considered a "benefit" within this definition, for to do so would render the charitable donations deductions unavailable to many donors.

[Emphasis added.]

[259] Second, the origin of the legal meaning will depend on the private legal concept involved. In this case, as in *Backman*, the law of gift is a matter within provincial jurisdiction as it involves property and civil rights.[325] This principle is not explicitly addressed in *Friedberg* but has been addressed in other tax cases.[326]

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[324] See, also, paragraphs 29 to 31 of *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915 ("*Will-Kare*") and paragraph 60 of *Neuman v. M.N.R.*, [1998] 1 S.C.R 770 ("*Neuman*"). In *Will-Kare*, the Court split 4 to 3 on the issue of whether to adopt the commercial law meaning or the ordinary meaning of "sale". Justice Iacobucci, writing for the majority, chose the former approach, observing at paragraph 35:

> It would be open to Parliament to provide for a broadened definition of sale for the purpose of applying the incentives with clear language to that effect. Given, however, the provisions merely refer to sale, it cannot be concluded that a definition other than that which follows from common law and sale of goods legislation was envisioned.

[325] The *Constitution Act*, 1867 allocates general jurisdiction over property rights to provincial governments under their exclusive authority under item 13 of section 92 to make laws in relation to "Property and Civil Rights."

[326] In *The Queen v. Littler*, [1978] C.T.C. 235, 20 N.R. 541, 78 DTC 6179 (FCA) ("*Littler*"), the majority applied the common law meaning of gift even though the transfer of property took place in Quebec and was governed by Quebec law. Chief Justice Jackett reasoned that the relevant provision of the ITA had to be applied consistently across Canada. See also *Gervais v. The Queen*, [1984] C.T.C. 661, 85 DTC 5004 (FCTD).

[260] Third, the fact that a taxpayer is motivated by tax considerations does not in and of itself vitiate the result under the applicable private law. This recognizes the wider principle that tax law is accessory to private law and that, absent a provision of the ITA to the contrary, the tax law is to be applied to the result under private law. In *Will-Kare*, Justice Iacobucci states this principle as follows:

> To apply a "plain meaning" interpretation of the concept of a sale in the case at bar would assume that the Act operates in a vacuum, oblivious to the legal characterization of the broader commercial relationships it affects. It is not a commercial code in addition to a taxation statute. Previous jurisprudence of this Court has assumed that reference must be given to the broader commercial law to give meaning to words that, outside of the Act, are well-defined. See *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298. See also P. W. Hogg, J. E. Magee and T. Cook, *Principles of Canadian Income Tax Law* (3rd ed. 1999), at p. 2, where the authors note:
>
> > The Income Tax Act relies implicitly on the general law, especially the law of contract and property. . . . Whether a person is an employee, independent contractor, partner, agent, beneficiary of a trust or shareholder of a corporation will usually have an effect on tax liability and will turn on concepts contained in the general law, usually provincial law.327

[261] This principle is not commented on in *Friedberg* but is addressed by the Federal Court of Appeal in *Côté v. R.*, 2000 CarswellNat 3211, [2000] F.C.J. No. 1805 (QL), 2000 DTC 6615 (Fr.)("*Côte*"), where the Court affirmed the analysis of the Tax Court judge:

> . . . Relying on the decision of this Court in *The Queen v. Friedberg*, 92 DTC 6031, [the trial Judge] held that even though obtaining a tax advantage was the principal motivation of the respondents in this case, that did not nullify the donors' intent to give. He also was of the view that obtaining a receipt from the charitable organization could not be viewed as consideration that would eliminate the gratuitous and liberal nature of the transaction. . . .
>
> In my view, <u>the judge directed himself properly as to the legal principles that apply to this case</u>. . . .

[Emphasis added.]

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[327] Paragraph 31. Justice Iacobucci also notes at paragraphs 32 and 33 that "[r]eferring to the broader context of private commercial law in ascertaining the meaning to be ascribed to language used in the Act is also consistent with the modern purposive principle of statutory interpretation" and "[t]he technical nature of the Act does not lend itself to broadening the principle of plain meaning to embrace popular meaning. The word sale has an established and accepted legal meaning."

[262] The final principle is that, where subjective intention is an issue under the private law, that intention is to be determined with reference to the objective, documentary evidence and the surrounding facts, including what the parties actually did.

(3) The Private Law relating to Gifts

[263] The Appellants and TGTFC are located in Ontario and the transfer of property to TGTFC took place in Ontario, so it is necessary to consider the legal meaning of gift as it is understood in the common law provinces. The Ontario Court of Appeal addressed the meaning of the word "gift" in *McNamee v. McNamee*, 2011 ONCA 533 ("*McNamee*"):

> [23] Although the term "gift" is not defined in the *Family Law Act*, a gift, generally speaking, is a voluntary transfer of property to another without consideration: *Black's Law Dictionary*, 7th ed. (St. Paul, Minnesota: West Group, 1999), at p. 696; *Birce v. Birce* (2001), 56 O.R. (3d) 226 (C.A.), at para. 17. A transfer of property by contractual agreement involves a mutual exchange of obligations ("consideration"), but a transfer by way of gift involves a gratuitous, unilateral transaction: Mary Jane Mossman and William Flanagan, *Property Law, Cases and Commentary*, 2nd ed. (Toronto: Emond Montgomery, 2004), at p. 439. As McLachlin J. observed in *Peter v. Beblow* [1993] 1 S.C.R. 980, at p. 991-92, "the central element of a gift [is the] intentional giving to another without expectation of remuneration".
>
> [24] The essential ingredients of a legally valid gift are not in dispute. There must be (1) an intention to make a gift on the part of the donor, without consideration or expectation of remuneration, (2) an acceptance of the gift by the donee, and (3) a sufficient act of delivery or transfer of the property to complete the transaction: *Cochrane v. Moore*, (1890), 25 Q.B.D. 57 (C.A.), at p. 72-73; Mossman and Flanagan, *supra*, at p. 441, Bruce Ziff, *Principles of Property Law*, 5th ed. (Toronto: Carswell, 2010), at p. 157.
>
> [25] Some authorities have sought to refine or qualify these elements in various ways, but they remain the substance of a valid gift. Here, the trial judge found two qualifications to be significant. First, he concluded, correctly, that the donor must divest himself or herself of all power and control over the property and transfer such control to the donee. Secondly, he concluded – incorrectly, in our view – that the intention of the donor must be inspired by affection, respect, charity or like impulses and not by commercial purposes.[328]

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[328] Paragraphs 23 to 25. *McNamee* has been cited as authority for the meaning of "gift" in several subsequent decisions of the Ontario Court of Appeal, including, most recently, *Jansen v. Niels Estate*, 2017 ONCA 312. As well, *McNamee* was cited by the British Columbia Court of Appeal for the meaning of "gift" in *V.J.F. v. S.K.W.*, 2016 BCCA 186 at paragraph 49.

[264] Accordingly, for a transfer of property to be a gift, there must be (1) an intention to make a gift on the part of the donor, without consideration or expectation of remuneration, (2) an acceptance of the gift by the donee, and (3) a sufficient act of delivery or transfer of the property to complete the transaction.

[265] The first requirement for a gift embodies the essential objective and subjective character of the transfer. The objective requirement is that the transfer of property must be gratuitous. The subjective requirement is that the transferor must intend the transfer of property to be gratuitous. Professor Hyland describes the common law requirement that the transfer be gratuitous as follows:

> In the common law, as Blackstone noted, gifts are always gratuitous. As an Indian commentator has written, "A gift is essentially a gratuitous transfer." At least on one level, gratuitousness in the common law is easy to define. It involves a transaction without a valid legal consideration. "In fact, if there be a consideration the transaction is no longer a gift, but a contract." This is the unanimous view of the statutes, the case law, and the commentators.[329]

[Citations omitted.]

[266] The Court in *McNamee* focussed on, among other things, whether consideration or remuneration flowed from the transferees to the transferor in exchange for the transfer of property. In the circumstances of that case, the Court concluded that the transferor did not receive consideration or remuneration for the transfer of shares to his children.

[267] In *Maréchaux*, *Kossow* and *Berg* (collectively, the "Trilogy"), the Federal Court of Appeal considered whether the consideration (benefit) had to emanate from the transferee. In *Kossow*, the Court adopted the general approach taken in its decision in *Maréchaux*:

> In *Maréchaux*, this Court dealt with a leveraged charitable donation program that was strikingly similar to the program considered in this case, particularly in so far as a substantial part of the purported gift was funded by an interest-free loan provided by the promoters (who were not the donees) on terms that were part of a series of interconnected contractual arrangements. The Federal Court of Appeal adopted the well-known definition of a gift as set out in *The Queen v. Friedberg*, 92 D.T.C. 6031 (F.C.A.) (*Friedberg*) for the purposes of section 118.1 of the *Income Tax Act* as

[329] Richard Hyland, *Gifts: A Study in Comparative Law* (New York: Oxford University Press, 2009) at section 230, pages 135-136.

> […] a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor (at 6032).
>
> In my view, *Maréchaux* stands for two propositions, as follows:
>
>> (a) a long-term interest-free loan is a significant financial benefit to the recipient; and
>>
>> (b) a benefit received in return for making a gift will vitiate the gift, whether the benefit comes from the donee or another person.[330]

[268] In *Kossow*, the taxpayer argued that, for a gratuitous transfer of property to be precluded from being a gift, *McNamee* required any benefit in issue to flow from the donee rather than a third party. The Court rejected the taxpayer's argument, as follows:

> I agree with the judge that *McNamee* did not purport to change the generally accepted definition of gift as set out in *Friedberg*. In *McNamee*, the Ontario Court of Appeal considered the arrangement between a father and a son and determined whether shares given by the father to a son in an estate freeze situation were as a result of any consideration being given to the father (the donor) from the son (the donee). The Ontario Court of Appeal in *McNamee* did not consider either a leveraged donation program or a situation where, through a series of interconnected transactions, a donor receives a significant benefit from a party other than the donee as part of an interconnected series of transactions that includes the purported gift.
>
> The result is that there is no conflict between the Federal Court of Appeal in *Maréchaux* and the Ontario Court of Appeal in *McNamee*, and there is no basis upon which this Court should depart from *Maréchaux*.[331]

[269] Accordingly, pursuant to the decision in *Kossow*, a transfer of property is not gratuitous if a benefit flows to the transferee as part of an interconnected series of transactions that includes the transfer of property.[332] In my view, the transactions must be interconnected in a legal sense consistent with the Federal Court of Appeal's observation at paragraph 24 of *Kossow* that the transactions in *Maréchaux* were interconnected contractual arrangements.

(a) The Requirement for Donative Intent

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[330] Paragraphs 24 and 25.

[331] Paragraphs 31 and 32.

[332] In *French et al. v. The Queen*, 2016 FCA 64 ("*French*"), a decision addressing a motion to strike under paragraph 53(1)(d) of the *Tax Court of Canada Rules (General Procedure)*, Chief Justice Noël concludes, after reviewing *Friedberg*, *Maréchaux*, *Kossow*, *Berg*, *McNamee* and other cases, that in light of article 1810 of the *Civil Code of Québec* and sections 8.1 and 8.2 of the *Interpretation Act*, R.S.C. 1985, c. I-21, the question of whether the receipt of a benefit in respect of a transfer of property precludes the existence of a gift under section 118.1 in all cases has not necessarily been conclusively resolved.

[270] The Respondent correctly states that for a transfer of property to be a gift, the transferor must have the requisite donative intent. However, in my view, when the Respondent refers to a requirement for "detached and disinterested generosity", the Respondent is misconstruing the role of donative intent and is incorrectly conflating donative intent and motive.

[271] In order for there to be a gift, the transferor must objectively make a gratuitous transfer and must subjectively intend to make a gratuitous transfer.

[272] *Maréchaux* and *Kossow* hold that a transfer of property is not gratuitous if a benefit flows to the transferee as part of an interconnected series of transactions that includes the transfer of property. If the transferor did not make a gratuitous transfer of property then, under the common law, there can be no gift and it is generally not necessary to consider whether the transferor had donative intent.[333]

[273] The dual requirement of a gratuitous transfer of property and of donative intent addresses the fact that a gratuitous transfer may occur in circumstances where the transferor did not intend to permanently enrich the transferee. In *Hu v. Li*, 2016 BCSC 2131, Justice Macintosh observed:

> When one person gratuitously transfers property to another adult person, there is a general presumption that the recipient holds the property in trust for the other. That is because equity presumes bargains, not gifts. The transferor can use this 'resulting trust' to recover his or her property, unless the transferee can show that a gift was intended.[334]

[274] Accordingly, the requirement for donative intent seeks to ensure that a gratuitous transfer was indeed intended by the transferor such that the transferor cannot call for the return of the transferred property.

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[333] One possible exception to this general statement is where on the face of the transaction there is consideration but the circumstances taken as a whole indicate that in fact no consideration or benefit was received by the transferor. For example, in *Gray v. Barton*, 55 N.Y. 68 (NYCA), the creditor Gray agreed to discharge the debtor's trade debt. The debtor insisted on papering the transaction as a compromise in consideration of the payment of $1. The New York Court of Appeals reviewed the circumstances and concluded that the dollar was not payment for the compromise of the debt:

> No compromise of a disputed demand or of an admitted debt, upon payment of less than the amount, was talked of, agreed upon, or at all within the contemplation of the parties. That intention clearly was that the plaintiff should give the entire debt to the defendant, and that he should accept the same as a gift from him. The dollar was given, not in payment, but merely to satisfy defendant of its validity.

[334] At paragraph 36. Similarly, in *Dunnison Estate v. Dunnison*, 2017 SKCA 40, the Saskatchewan Court of Appeal stated at paragraph 21:

> The modern view, which we favour, is that a resulting trust arises because the transferor "lacked donative intent and therefore the title holder has an equitable obligation to hold the property for the benefit of the transferor" (*Oosterhoff* at 594). . . .

[275] The role of donative intent in the common law of gift is exemplified by cases such as *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795 ("*Pecore*"), *Peter v. Beblow*, [1993] 1 S.C.R. 980 ("*Beblow*"), *Thorsteinson Estate v. Olson*, 2016 SKCA 134, *St. Onge Estate v. Breau*, 2009 NBCA 36, *Spooner v. Webb* (1951), 3 WWR (NS) 490 (Sask. C.A.) and *Kinsella v. Pask* (1913), 12 D.L.R 522 (O.S.C. Appellate Division).

[276] In *Pecore*, the Supreme Court of Canada addressed the question of whether a gratuitous transfer of funds from a parent to a child was a gift. Justice Rothstein stated at paragraph 5:

> While the focus in any dispute over a gratuitous transfer is the actual intention of the transferor at the time of the transfer, intention is often difficult to ascertain, especially where the transferor is deceased. . . .

[277] Justice Rothstein goes on to review the presumptions of law that help guide the court in the resolution of the dispute. That analysis establishes that, if there is a gratuitous transfer of property to an unrelated person or an adult child and a dispute arises as to whether a gift was intended, the onus is on the transferee to rebut the presumption of resulting trust on a balance of probabilities.[335] If, on the other hand, there is a gratuitous transfer of property from a parent to minor child or from one spouse to the other, the onus is on the transferor to rebut the presumption of advancement on a balance of probabilities. With respect to the evidence of intent in the latter case, Justice Rothstein states:

> 56 The traditional rule is that evidence adduced to show the intention of the transferor at the time of the transfer "ought to be contemporaneous, or nearly so", to the transaction: see *Clemens v. Clemens Estate*, [1956] S.C.R. 286, at p. 294, citing *Jeans v. Cooke* (1857), 24 Beav. 513, 53 E.R. 456. Whether evidence subsequent to a transfer is admissible has often been a question of whether it complies with the Viscount Simonds' rule in *Shephard v. Cartwright*, [1955] A.C. 431 (H.L.), at p. 445, citing *Snell's Principles of Equity* (24th ed. 1954), at p. 153:
>
>> The acts and declarations of the parties before or at the time of the purchase, [or of the transfer] or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration . . . . But subsequent declarations are admissible as evidence only against the party who made them . . . .

[335] Paragraph 43.

> The reason that subsequent acts and declarations have been viewed with mistrust by courts is because a transferor could have changed his or her mind subsequent to the transfer and because donors are not allowed to retract gifts. . . .
>
> 57 Some courts, however, have departed from the restrictive — and somewhat abstruse — rule in *Shephard v. Cartwright*. In *Neazor v. Hoyle* (1962), 32 D.L.R. (2d) 131 (Alta. S.C., App. Div.), for example, a brother transferred land to his sister eight years before he died and the trial judge considered the conduct of the parties during the years after the transfer to see whether they treated the land as belonging beneficially to the brother or the sister.
>
> 58 The rule has also lost much of its force in England. In *Lavelle v. Lavelle*, [2004] EWCA Civ 223 (BAILII), at para. 19, Lord Phillips, M.R., had this to say about *Shephard v. Cartwright* and certain other authorities relied on by the appellant in that case:
>
>> It seems to me that it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement. Plainly, self-serving statements or conduct of a transferor, who may long after the transaction be regretting earlier generosity, carry little or no weight. [Emphasis added.]
>
> 59 Similarly, I am of the view that the evidence of intention that arises subsequent to a transfer should not automatically be excluded if it does not comply with the *Shephard v. Cartwright* rule. Such evidence, however, must be relevant to the intention of the transferor at the time of the transfer: *Taylor v. Wallbridge* (1879), 2 S.C.R. 616. The trial judge must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention.

[278] It is apparent from these comments that the concern with evidence of donative intent from the transferor is that the transferor may decide after the fact that a gift was not intended. This focus is explained by the simple fact that if there is a gratuitous transfer and the transferor is not challenging the existence of donative intent then there is no dispute as between the transferor and transferee over the nature of the transfer.

[279] In *Beblow*, the Supreme Court of Canada addressed whether a claim for unjust enrichment was established by Catherine Peter, who had gratuitously provided domestic services to her spouse. Justice McLachlin (as she then was) for the majority identified the three requirements for such a claim as follows (at page 987):

> . . . An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment.

[280] The first two elements of unjust enrichment are the hallmarks of any gratuitous transfer from one person to another. Consequently, it was necessary for Justice McLachlin to consider whether there was a juristic reason for the gratuitous transfer. One possible juristic reason was that the transfer was a gift. On this issue, Justice McLachlin stated (at pages 991-92):

> This Court has held that a common law spouse generally owes no duty at common law, in equity or by statute to perform work or services for her partner. As Dickson C.J., speaking for the Court put it in *Sorochan v. Sorochan*, *supra*, at p. 46, the common law wife "was under no obligation, contractual or otherwise, to perform the work and services in the home or on the land". So there is no general duty presumed by the law on a common law spouse to perform work and services for her partner.
>
> Nor, in the case at bar was there any obligation arising from the circumstances of the parties. The trial judge held that the appellant "was under no obligation to perform the work and assist in the home without some reasonable expectation of receiving something in return other than the drunken physical abuse which she received at the hands of the Respondent." This puts an end to the argument that the services in question were performed pursuant to obligation. It also puts an end to the argument that the appellant's services to her partner were a "gift" from her to him. The central element of a gift at law—intentional giving to another without expectation of remuneration—is simply not present.

[Emphasis added.]

[281] Justice McLachlin found that Catherine Peter had established an absence of donative intent, which meant that the gratuitous transfer of services was not a gift from her to her spouse.

[282] In *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, Justice Iacobucci addresses the concern that, if the absence of a juristic reason requirement for a claim of unjust enrichment is open-ended, the transferor is faced with the impossible task of proving a negative. He addresses this by providing discrete categories of juristic reasons: a contract, a disposition of law, a donative intent and other valid common law, equitable or statutory obligations.[336] In so doing, he confirms that in *Beblow* the transferor established that the gratuitous transfer in issue was not accompanied by the intention to make a gratuitous transfer and therefore was not a gift.

(b) The Role of Donative Intent in a Tax Appeal

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[336] At paragraph 44.

[283] The Appellants assert that there was a gratuitous transfer of property to TGTFC and that the gratuitous transfer was intended to be a gift. One might assume, on the basis of the foregoing cases, that if there was a gratuitous transfer of property from the Appellants to TGTFC the question of whether the Appellants had the requisite donative intent does not arise, as neither the Appellants nor TGTFC is challenging the nature of the transfer as a gift.

[284] However, as this is an income tax case, the Minister can and does challenge the nature of the transfer from the Appellants to TGTFC by making assumptions of fact that the transfers were not gratuitous and that the Appellants lacked donative intent. This means that the Appellants must demolish the assumptions made by the Minister by presenting a *prima facie* case to the contrary. According to the Federal Court of Appeal in *House v. The Queen*, 2011 FCA 234 (at paragraph 30):

> . . .
>
> 4. Once the taxpayer has established a *prima facie* case, the burden then shifts to the Minister, who must rebut the taxpayer's *prima facie* case by proving, on a balance of probabilities, his assumptions . . .
>
> 5. If the Minister fails to adduce satisfactory evidence, the taxpayer will succeed.

[285] With respect to donative intent, the Respondent seeks to require the Appellants to present a *prima facie* case to the effect that the Appellants made the transfers by way of benefaction <u>and</u> out of "detached and disinterested generosity", which the Respondent refers to in her argument as "liberal intent" or *animus donandi*.[337] In effect, the Respondent is requiring the Appellants to establish a *prima facie* case regarding their motives for transferring property to TGTFC.

[286] In support of this position, the Respondent cites the comments of the Federal Court of Appeal in *Berg*:

> The Crown is entitled to succeed for a further reason. In my view, it was not open to the judge on this record to conclude that, at the time of the transfer of the timeshare units to Cheder Chabad, Mr. Berg had the requisite donative intent for the purposes of section 118.1 of the Act. In my view, <u>Mr. Berg did not intend to impoverish himself by transferring the timeshare units to Cheder Chabad</u>. On the contrary, he intended to enrich himself by making use of falsely inflated charitable gift receipts to profit from inflated tax credit claims. He consummated the "deal"

[337] Paragraph 309 of the Respondent's Written Submissions.

> solely with that objective, and he acted from beginning to end in a manner intended to achieve that result.[338]
>
> [Emphasis added.]

[287] In my view, the Court is not addressing Mr. Berg's motive for transferring property but is simply observing that Mr. Berg lacked the intention to transfer property gratuitously because he consummated the "deal" in order to acquire falsely inflated tax receipts that he could use to his financial advantage. The lack of donative intent found by the Court follows from the fact that the transfer itself was not gratuitous but rather was for value because of the economic benefit that flowed to Mr. Berg.[339]

[288] A review of the development of the concept of donative intent or *animus donandi* supports the view that donative intent does not require a particular motive for the gratuitous transfer of property.

[289] Under classical Roman law, "donation was a disposition for the benefit of somebody else, for which this other party was not expected to give any recompense".[340] A donation could take many forms but, regardless of the form, a particular transfer was a donation only if the transfer was "intended to confer a gratuitous benefit on the donee—if, as several texts put it, the donor acted animo donandi."[341]

[290] For a period of time, the law did move away from this classical definition. In the 6th century, Emperor Justinian codified a requirement for an altruistic motive.[342] However, according to Professor Zimmermann this requirement had been removed from the legal concept of gift by the 19th century (page 502):

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[338] Paragraph 29.

[339] In *The Queen v.Castro*, 2015 FCA 225 ("*Castro*"), Justice Scott highlights the fact that Mr. Berg received value and intended to receive value from the scheme, as follows (at paragraph 42):

> . . . The pretence documents [in *Berg*] had value since they were used by Mr. Berg to claim greater tax credits than those he was actually entitled to receive. Furthermore, this Court determined that on the facts of that case, it was not open to the judge to conclude that Mr. Berg had the requisite donative intent. Mr. Berg never intended to impoverish himself by transferring the timeshare units to the registered charity; on the contrary he wanted to enrich himself by making use of falsely inflated charitable gift tax receipts. In sum, Mr. Berg did not have the requisite donative intent for the purposes of section 118.1 of the *Act*.

[340] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996) at page 479. Professor Zimmermann discusses the history of gift law at length in chapter 16 starting at page 477.

[341] Ibid. at pages 479 and 480.

[342] Zimmermann, page 496. At page 497, Professor Zimmermann describes the difficulties caused by using human motivations to define legal relationships:

> . . . The great writers of the 19th century had stripped it [donative intent] of any unrealistic implication of magnanimity and unselfishness. The donor, as Savigny had put it, may hope to gain, by way of his donation, some goodwill and affection which will in the long run bring him much greater advantages; he may make his gift out of mere vanity, in order to make others admire his wealth and generosity. In all these cases the transaction is a gift because the donor genuinely intends the other person's enrichment, albeit only in order to achieve certain ulterior purposes.

[291] This view of donative intent was clearly reflected in American law[343] and in the law of other common law countries by the early 20th century. In *Collector of Imposts (Vict.) v. Peers*, [1921] H.C.A. 5; (1921), 29 C.L.R. 115 ("*Peers*"), Australia's highest court explicitly stated that benevolence[344] is not a requirement for a gift:

> The phrase "the gift must be an act of benevolence or something akin to it" is not very precise, but if it means more than this–that the donor must not receive consideration from the donee–we cannot accept it. There may be a good gift although no feeling of benevolence exists between donor and donee, a gift is no less a gift because by its means the donor intends to compass the moral or physical destruction of the donee.[345]

[292] In its recent decision in *McNamee*, the Ontario Court of Appeal addresses donative intent and in so doing expressly rejects the notion that donative intent refers to the motive of the transferor:

> Respectfully, this analysis erroneously conflates intention with underlying motivation or purpose. They are not the same concepts and to treat them as such constitutes error in law. That Mr. McNamee Sr.'s primary purpose or motivation in transferring the shares was to underpin the estate freeze does not mean he did not intend to gift the shares in order to give effect to that purpose. Had the trial judge focussed on Mr. McNamee Sr.'s intention in relation to the transfer of the shares

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> Pure altruism and unselfishness, of course, are much to be admired, but, regrettably, are rare in legal dealings. Human nature being what it is, "it is much more common for altruism to be somewhat impure", and Justinian's infusion of contemporary Christian ethics into the law was to throw up problems; purity of motive is an unhandy criterion for legal distinctions.

[343] See, for example, W. W. Thornton, *A Treatise on the Law Relating to Gifts and Advancements* (Philadelphia: T. & J. W. Johnson & Co, 1893) at pages 2 to 3 and 61 to 67. An excerpt from pages 2 to 3 is quoted in the definition of "gift" in the tenth edition of *Black's Law Dictionary*.

[344] Benevolence is to be distinguished from benefaction. Benevolence is a possible reason for a transfer of property whereas benefaction is the act of transferring property gratuitously.

[345] This statement of the law was subsequently confirmed by the majority and the minority of the High Court of Australia in *Collector of Imposts (Vict.) v. Cuming Campbell Investments Pty Ltd*, [1940] H.C.A. 17, (1940), 63 C.L.R. 619 ("*Cuming Campbell*") at pages 629 and 644 C.L.R. Chief Justice Latham states in his dissent that a gift involves "benefaction" and that this is not the same as "benevolence" (page 634 CLR). Other members of the High Court also describe a gift as involving benefaction. These cases are still cited in Australia for the meaning of gift: *Roman Catholic Church Trust Corporation of the Archdiocese of Hobart v. Commissioner of State Revenue*, [2012] TASSC 43 and *Moffa v. Calabrese*, [1997] SADC 102.

itself, rather than on his ultimate purpose or motivation in putting the estate freeze in place, he would have realized – on the evidence here – that Mr. McNamee Sr. did intend to gift the shares: the documentation to that effect (the Declaration of Gift) is clear; the fact that he did not sell the shares to the boys because they had no money – as noted by the trial judge above – reinforces the notion that the transfer was by way of gift; and there was no "consideration" in law, as we have earlier explained. The intention respecting the transfer of shares was to do so gratuitously. The transfer was part of the corporate structure putting the estate freeze in place. And the estate freeze was the ultimate motivation or purpose.

Had he given effect to these distinctions, the trial judge would have recognized that Mr. McNamee Sr. had the requisite intention as donor to transfer the shares by way of gift.

In his analysis, the trial judge relied upon a Superior Court decision, *Traversy v. Glover* (2006), 30 R.F.L. (6th) 372 which, in turn, at para. 39, cited the following statement as part of the definition of "gift" from *Black's Law Dictionary*, 5th ed. (St. Paul, Minnesota: West Group, 1979):

> In tax law, a payment is a gift if it is made without conditions, from detached and disinterested generosity, out of affection, respect, charity or like impulses, and not from the constraining force of any moral or legal duty or from the incentive of anticipated benefits of an economic nature.

We are not able to find this reference in later editions of *Black's*. In any event, we are not persuaded that "inspired by affection, respect, charity, or like impulses" is the only type of donor intention that may found a valid gift – "the spirit of, say, cufflinks under the Christmas tree", as the trial judge put it. Here, the intention to transfer the shares had a perfectly legitimate legal objective, namely, to underpin the corporate restructuring in the form of an estate freeze. To the extent that *Traversy* and the trial judge here are suggesting that for a gift to be valid the donor's intention may only be motivated by altruism, we respectfully disagree. A transfer of property by way of gift may equally be motivated by commercial purposes provided the transfer is gratuitous, i.e., as McLachlin J. (as she then was) put it in *Peter v. Beblow*, *supra*, provided it involves "[the] intentional giving to another without expectation of remuneration." [346]

[293] In *Leary v. Federal Commissioner of Taxation* (1980), 32 A.L.R. 221 ("*Leary*"), cited by the Federal Court of Appeal in *McBurney*, the Federal Court of Australia does state that a gift "ordinarily 'proceeds from a "detached and disinterested generosity" . . .'", citing *Commissioner v. Duberstein*, (1960), 363

[346] *McNamee*, paragraphs 34 to 37. See also *Lubberts Estate (Re)*, 2014 ABCA 216 at paragraph 32.

U.S. 278 which in turn cites *Commissioner v. LoBue* (1956), 351 US 243 (cited in *Duberstein*) and *Robertson v. United States* (1952), 343 US 711.[347]

[294] In the cases cited in *Leary*, the United States Supreme Court was interpreting a section of the *Internal Revenue Code* (the "IRC") that broadly defined gross income subject to taxation.[348] The section expressly excepted "[t]he value of property acquired by gift, bequest, devise, or inheritance".[349] In *Duberstein*, the Court introduces its analysis of whether the item received is a gift within the meaning of section 22 of the IRC as follows:

> The course of decision here makes it plain that the statute does not use the term "gift" in the common-law sense, but in a more colloquial sense. This Court has indicated that a voluntarily executed transfer of his property by one to another, without any consideration or compensation therefor, though a common-law gift, is not necessarily a "gift" within the meaning of the statute. . . .
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> . . .
>
> The Government says that this "intention" of the transferor cannot mean what the cases on the common-law concept of gift call "donative intent." With that we are in agreement, for our decisions fully support this.[350] . . .

[Emphasis added.]

[295] The United States Supreme Court in *Duberstein* clearly states that the US tax cases have departed from the common-law meaning of gift in favour of a colloquial meaning because the statutory context required that approach. This is contrary to the approach required by section 118.1 as stated in *Friedberg*.[351] In

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[347] Empirically speaking, it is not clear on what basis this statement can be made as the motivation for giving a gift is not something that is ordinarily disclosed. Regardless, *Peers* states that such motivations are not required for a gratuitous transfer to be a gift. Moreover, the Federal Court of Appeal in *McBurney* preferred the simple formulation of "gift" adopted by Owen J. in *Commissioner of Taxation of the Commonwealth v. McPhail* (1967–68), 41 ALJR 346 over what the Court referred to as the "qualification" in *Leary*. In *McPhail*, Owen J. stated at page 347:

> 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.

After reproducing the "qualification" in *Leary* which included the reference to a "detached and disinterested generosity", the Federal Court of Appeal stated:

> Apart from this qualification (which I would not consider material) the approach taken by Owen, J. in the McPhail case has stood through the years and has found favour in the Trial Division of this Court in the *Zandstra* case.

[348] Section 22 of the IRC.

[349] Section 22(b)(3) of the IRC.

[350] At page 285.

[351] In *Friedberg*, the Court states that "the general principles of law with regard to gifts are utilized by the Courts in these cases". This approach is consistent with the approach stipulated by the Supreme Court of Canada in *Backman* and *Will-Kare*.

addition, the Court in *Duberstein* does not reproduce the full context of the statements in *LoBue* and *Robertson*. For example, the Court in *LoBue* does not state that detached and disinterested generosity is a condition for a gift under section 22(b)(3) of the IRC but simply observes that there is no evidence of the "detached and disinterested generosity which might evidence a 'gift' in the statutory sense".[352] This says nothing more than that evidence of an altruistic motive may support donative intent as that term is understood for the purposes of section 22(b)(3) of the IRC.

[296] Given the statutory context and actual content of the comments of the United States Supreme Court in *Duberstein*, *LoBue* and *Robertson*, the reference to "detached and disinterested generosity" in *Leary* is not in my view indicative of the meaning of donative intent for the purposes of section 118.1 of the ITA. Donative intent does not require the transferor to have a particular motive for making the transfer. Rather, donative intent simply requires that the transferor intended to transfer the property gratuitously.

[297] Furthermore, in *Backman*, the Supreme Court of Canada holds that a tax motive does not alter the result under the private law and in *Côté* the Federal Court of Appeal holds that the motive of obtaining the benefit of the tax credit provided by section 118.1 does not disqualify a transfer of property from being a gift.

[298] Finally, although they relate to the requirement that the transfer of property be gratuitous and not to the requirement for donative intent per se, *Friedberg*, *Côté* and other cases hold that the receipt of a tax credit because of a transfer of property to a qualified donee does not disqualify that transfer from being a gift.[353] Similarly, the receipt of a charitable donation tax receipt in respect of a transfer of property does not in and of itself constitute a benefit to the transferor even if the amount of the receipt is inflated.[354]

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[352] At page 246. See also *Robertson v. United States* (1952), 343 US 711 at pages 713 and 714.

[353] The tax credit under section 118.1 is a financial benefit resulting from a gift to a qualified donee. However, disqualifying a gift because of the tax credit resulting from the gift is an absurd result and therefore is presumed not to have been intended by Parliament. To the extent that the private law of gift does disqualify a gratuitous transfer of property as a gift because of the receipt of the tax credit, a result which is far from clear, the meaning of "gift" for the purposes of section 118.1 must be adjusted to implement the intention of Parliament by avoiding the absurdity: *R. v. Monney*, [1999] 1 S.C.R. 652 at paragraph 28. It is also worth noting that, if the tax credit did disqualify the transfer of property as a gift, the result would be circular since denial of the tax credit also removes the reason there is no gift.

[354] *Castro* at paragraphs 43 to 48.

(4) Are the Transfers of Property From the Appellants to TGTFC Gifts Under the Common Law?

(a) Are the Transfers of Property to TGTFC Gratuitous?

[299] The evidence establishes that each of the Appellants transferred to TGTFC the face amount of $10,200 per LP Unit. The transfers were funded as to $10,000 per LP Unit by the TGTFC Loans and as to $200 by the Appellants' own cash. The Appellants did not receive anything directly from TGTFC in exchange for the transfers. TGTFC was required to use all but $200 of the amount transferred per LP Unit to acquire the TGTFC Notes. The Respondent submits that the latter requirement diminished the value of the property transferred to TGTFC because the interest rate on the TGTFC Notes is below the market rate.

[300] The evidence also establishes, either directly or by reasonable inference, that the Appellants transferred $10,200 to TGTFC only because they participated in the Program by purchasing a minimum of 10 LP Units in the 2009 LP[355] and only because 98.04% of the amount transferred to TGTFC was funded by the TGTFC Loans.[356] In addition, I conclude from the totality of the evidence of the Appellants that the primary motive for the transfers of property to TGTFC was the receipt of the tax credit under section 118.1.[357]

[301] In *Maréchaux* and *Kossow*, the Federal Court of Appeal held that in a structured arrangement such as the Program, where the transfer of property to the qualified donee is contractually tied to other arrangements, a benefit that flows to the transferor as a consequence of those other arrangements disqualifies the transfer of property from being a gift even if the person providing the benefit is not the qualified donee. The benefit must of course be an economic benefit such that it can be said that the transferor did not transfer the property gratuitously but rather in expectation of the benefit.

[302] The Respondent submits that the pledge of the Appellants to make a payment to TGTFC and the payment itself were each part of a series of interconnected transactions preconceived to form a structured finance arrangement that was designed to provide the Participants with, among other things, cash-flow

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[355] A Participant had to purchase a minimum of ten LP Units in order to participate in the donation aspect of the Program.

[356] None of the Appellants had made gifts of this magnitude in the past, and none of the Appellants had borrowed to make gifts in the past, other than in a structure similar to the Program.

[357] I accept that at least some of the Appellants may have been gratified by the result for TGTFC but I find as a fact that that was not the primary motive for the transfer.

benefits of "5 to 1 income tax deductions and credits to cash invested".[358] I take this to mean that the cash-flow benefits provided to the Appellants by the tax credit under section 118.1 and the interest deduction under paragraph 20(1)(c), as well as other smaller deductions from income, disqualify the transfers as gifts.

[303] For the reasons already stated, the tax credit provided by section 118.1 cannot be a benefit that disqualifies a transfer of property to a qualified donee from being a gift.

[304] The interest deduction under paragraph 20(1)(c) results from the Appellants borrowing money to invest in the 2009 LP.[359] In *Kossow*, the Federal Court of Appeal observed that the interest-free loan in issue in *Maréchaux* was provided "on terms that were part of a series of interconnected contractual arrangements" and the Court viewed the loan to the taxpayer in *Kossow* in the same light. The loans in issue in those cases were advanced for the sole purpose of funding the transfers of property to the qualified donees and could be used for no other purpose.

[305] Here, the legal arrangements provide that the principal amount of the Unit Loan is to be used to invest in the 2009 LP and the principal amount of the TGTFC Loan is to be used to fund the transfer of property to TGTFC. While it is true that the Appellants were required to participate in the 2009 LP Program in order to participate in the TGTFC Program, the Appellants were not required to participate in the TGTFC Program because of participation in the 2009 LP Program. In fact, one Participant chose not to participate in the TGTFC Program.

[306] In my view, the investments in the 2009 LP and the loans used to fund those investments are sufficiently separate from the transfers of property to TGTFC to make it possible to conclude that any benefit from the former was not a benefit received in respect of the transfers of property to TGTFC. The close connection between the loans and the transfers of property that existed in *Maréchaux* and *Kossow* simply does not exist between the investments in the 2009 LP and the Unit Loans used to fund those investments.

[307] The Respondent also submitted that the transactions taken as a whole were circular and that benefits flowed to the Appellants because their money was, in economic terms, returned to them through the circular structure. In my view, that argument ignores the legal effect of the separate transactions, contrary to *Shell*

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[358] Paragraph 311 of the Respondent's Written Submissions.
[359] I assume for the purpose of this analysis that the interest payable to FT is deductible under paragraph 20(1)(c) of the ITA.

Canada Limited v. Canada, [1999] 3 S.C.R. 622 and *Singleton v. Canada*, 2001 SCC 61, [2001] 2 S.C.R. 1046. Consistent with those cases, the results in *Maréchaux* and *Kossow* derived from the Federal Court of Appeal's view of the contractual arrangements and not from an economic substance over legal form analysis.

[308] This leaves only the possibility that the Appellants received a benefit because of the TGTFC Loans. Under the terms of those loans, the Appellants were required to pay 7.85% per annum, of which 3.75% was funded by the Appellants from their own resources and the balance was funded by further advances from FT.

[309] The expert witnesses are divided on whether the TGTFC Loans resulted in benefits to the Appellants.

[310] Mr. Johnson states that the TGTFC Loans are not commercially reasonable debt instruments and that the interest rate on those loans should be between 10% and 14%. On the other hand, Mr. Rosen and Mr. Davidson state that the interest rate on the TGTFC Loans is within the range of commercial reasonability. In fact, after comparing various possible benchmarks, Mr. Davidson concludes that the 7.85% interest rate is slightly higher than the benchmarks.

[311] I have considered the expert evidence and I am inclined to agree with Mr. Johnson that the TGTFC Loans are not commercially reasonable debt instruments. I find it especially difficult to believe that an arm's length commercial lender in the same circumstances would lend such significant amounts, which accumulate over 9 years to become even larger amounts, at a rate that is only roughly 1% above the rate on a 10-year residential mortgage.[360]

[312] While I understand the Appellants' position that the Appellants are high net worth individuals with substantial incomes and that the risk associated with the TGTFC Loans (and the Unit Loans) must be judged in that light, I would at least expect extremely thorough vetting of each Appellant by FT in order to establish the creditworthiness of the Appellants. Further, since the amount owed to FT increases significantly each year, I would expect FT to require at least annual updates of the financial position of the Participants.

[313] Instead, the evidence of Mr. Gordon is that FT did not perform credit checks at all for the first two closings and did not perform credit checks at the time of the

[360] Mr. Rosen and Mr. Davidson referred to unpublished discounted mortgage rates as well as to published mortgage rates. In my view, in the circumstances the appropriate benchmark is the published rates.

additional advances in 2010 and 2011.[361] Moreover, Mr. Gordon's evidence that FT performed credit checks for the closings after October 31, 2009 is hearsay as Mr. Gordon conceded that he had no personal knowledge of the issue and was not able to provide documentary proof of credit checks.[362] I have no evidence at all from FT regarding the loans as no one with direct knowledge of FT and its activities testified.

[314] In addition, the credit application forms provided FT with ranges of income and assets instead of hard numbers and the Appellants, including Mr. Gordon, took a liberal view of what should and should not be disclosed as liabilities. In my view, a lender in these circumstances would require detailed information to support the creditworthiness of the Appellants, and not ranges, and would require full disclosure of all liabilities, not just those liabilities the borrower chooses to disclose. The explanation by some of the Appellants that EquiGenesis knew their financial situation vis-à-vis other programs is inconsistent with the position of the Appellants that FT is an independent, arm's length lender acting in a commercially reasonable manner.

[315] The Appellants did pledge their LP Units as security for their TGTFC Loans and Unit Loans and the TGTFC Loans did take priority over the Unit Loans. However, the evidence is that there was no market for the LP Units and therefore it would be difficult for FT to realize on the LP Units in the event of a default. In any event, since any payment arising from the LP Units was (save for the unknown value of the Man Notes in 9 years) ultimately dependent on the repayment of the Program Loans, the LP Units did not provide security for the Program Loans that could reasonably be considered a proxy for a mortgage on a home.

[316] In the circumstances, I conclude that a commercially reasonable interest rate on the TGTFC Loans would be no less than the bottom end of Mr. Johnson's range, which is 10%.[363] On the basis of this rate, Mr. Johnson calculated a benefit per LP Unit of $1,475 for the 9-year term of the TGTFC Loans.

[317] Accordingly, the transfer of property by the Appellants to TGTFC was not gratuitous and that transfer cannot be considered a gift under the common law. In reaching this conclusion, I am cognizant of the Federal Court of Appeal's observations in *French* regarding the open question surrounding "split gifts". In

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[361] Lines 2 to 27 of page 324 and lines 4 to 20 of page 405 of the Transcript.
[362] Lines 23 to 27 of page 404, lines 27 to 28 of page 320 and lines 1 to 8 of page 321 of the Transcript.
[363] To be clear, even if I accept Mr. Gordon's hearsay testimony regarding FT's vetting of the creditworthiness of the Participants, I view 10% as the minimum interest rate that would be charged by a commercially prudent lender in the circumstances. Also, I do not accept as relevant more recent evidence of the creditworthiness of the Appellants as that evidence does not address the circumstances in 2009 when the Program Loans were advanced.

my view, the Court is simply observing that there may be circumstances where a transferor transfers property to a qualified donee in a manner that in fact involves two transfers: one for consideration and one made gratuitously.[364]

(b) Did the Appellants have the Requisite Donative Intent?

[318] In light of my conclusion that the transfer of property by the Appellants to TGTFC was not gratuitous, it is not necessary for me to consider whether the Appellants had donative intent (i.e., the intent to transfer the property to TGTFC gratuitously).[365] As the discussion above illustrates, donative intent is generally only relevant where there has been a gratuitous transfer but the transferor's intention to make a gratuitous transfer is called into question.

(c) Are the Transfers of Property Gifts for the Purposes of the ITA Because of Subsection 248(30)?

[319] The amendments to the ITA addressing gifts included in Bill C-48[366] were not in issue in the Trilogy. These amendments were assented to on June 26, 2013 and apply, with limited exceptions, in respect of gifts and monetary contributions made after December 20, 2002.

[320] The Respondent acknowledges that, following the enactment of subsections 248(30) to (41) of the ITA, it is no longer the case that the receipt of a benefit in respect of a transfer of property to a qualified donee automatically precludes the existence of a gift under section 118.1 of the ITA.[367]

[321] Subsections 248(30) to (32) state:

> (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

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[364] It appears that the civil law characterizes a gift as a form of contract, which permits the receipt of partial consideration.

[365] This is not a case like that addressed by the New York Court of Appeals in *Gray v. Barton*, *supra*, where all circumstances, including the clear intention of the transferor to transfer the subject property gratuitously, led to the conclusion that the $1 paid by the transferee for the transfer was not consideration for the transfer.

[366] Bill C-48, *An Act to amend the Income Tax Act, the Excise Tax Act, the Federal-Provincial Fiscal Arrangements Act, the First Nations Goods and Services Tax Act and related legislation*, 1st Sess., 41st Parl., 2013 (assented to June 26, 2013); S.C. 2013, c.34.

[367] This may also be the case where the law of Quebec applies to the transfer of property: see *French* at paragraph 27.

(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.

(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.

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

(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

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

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

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

(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.

[322] Under paragraph 248(30)(a), the existence of an amount of an advantage in respect of a transfer of property to a qualified donee does not disqualify the transfer as a gift, provided the amount of the advantage does not exceed 80% of the fair market value of the transferred property. If the amount of the advantage is greater than the 80% limit then the transferor must establish to the satisfaction of the Minister that the transfer was made with the intention to make a gift.

[323] Subsection 248(31) provides that the amount of a gift or monetary contribution is the fair market value of the property that is the subject of the gift or monetary contribution less the amount of the advantage. Subsection 248(32) determines the amount of the advantage in respect of a gift or monetary contribution by a taxpayer.

[324] It appears that the phrase "monetary contribution" refers to contributions under the *Canada Elections Act*.[368] Since these appeals do not involve monetary contributions, I will limit my analysis to gifts.

[325] There is a degree of circularity in subsections 248(30) and (32). Specifically, to determine whether a transfer of property is "saved" by subsection 248(30), it is necessary to determine the amount of the advantage in respect of the transfer of property. However, subsection 248(32) determines the amount of an advantage in respect of a gift but not in respect of a transfer of property.

[326] A strictly textual interpretation would suggest that a transfer of property that is not a gift because of an associated benefit to the transferor will never have an amount of an advantage for the purposes of subsection 248(30) and will always be saved by that subsection. On the other hand, a transfer of property that is a gift can have an amount or advantage in respect of the transfer but never needs to be saved because it is already a gift. That is an absurd result and is therefore assumed not to have been intended by Parliament.

[327] The context of the provisions strongly suggests that subsections 248(30) to (41) are intended to work together and to function as a cohesive whole. The manifest purpose of these provisions is to limit the tax credit under subsection 118.1 or the deduction under section 110.1 for transfers of property to qualified donees where the economic cost of the transfer to the transferor is directly or indirectly[369] reduced. However, where an amount of an advantage in respect of a transfer of property is also responsible for the transfer not being a gift under the applicable private law,[370] the transfer will remain a gift provided the offset is 80% or less of the fair market value of the transferred property or the Minister is convinced that the transferor intended to make a gift.

[328] Taking these considerations into account, a sensible interpretation of subsections 248(30) and (32) is that one must assume that a transfer of property is a gift under private law for the purpose of determining the amount of the advantage in respect of that gift under subsection 248(32). The amount of the advantage in turn determines whether the 80% threshold in paragraph 248(30)(a) is or is not exceeded.

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[368] Subsection 2(1) of the *Canada Elections Act* and subsections 127(3) and (4.1), 230.1(1) and paragraph (b) of the definition of "gifting arrangement" in subsection 237.1(1) of the ITA.
[369] For example, where the amount of an advantage is received, obtained or enjoyed by a person or partnership that is not dealing at arm's length with the transferor.
[370] The description of "the amount of the advantage" in subsection 248(32) is broad and includes advantages that would not necessarily disqualify a transfer of property from being a gift under private law. An obvious example of such an advantage is a loan that is a "limited-recourse debt".

[329] If the 80% threshold is exceeded and the requirement in paragraph 248(30)(b) is not satisfied, the exception provided by subsection 248(30) does not apply to the transfer of property and only the private law will determine the character of the transfer. If the 80% threshold is not exceeded or the requirement in paragraph 248(30)(b) is satisfied, then a transfer of property that is not a gift under private law because of the existence of an amount of an advantage in respect of the transfer will be considered a gift for the purposes of the ITA.

[330] In either case, if there is a gift for the purposes of the ITA, subsection 248(31) and the other applicable rules will then determine the eligible amount of the gift.

[331] Applying this interpretation, one sees that the TGTFC Loans are related to the transfers of property by the Appellants to TGTFC because the loans were applied for by the Appellants and were advanced to the Appellants solely for the purpose of funding those transfers. Consequently, under paragraph 248(32)(a), the amount of the advantage in respect of the transfers of property by the Appellants to TGTFC would include the value of any benefit resulting from those loans determined at the time of the transfers of property. In addition, if the TGTFC Loans of the Appellants are "limited-recourse debt" under subsection 143.2(6.1), the principal amount of those loans would be included in the amount of the advantage in respect of the transfers of property to TGTFC.

[332] It is not entirely clear which advantages are to be considered when applying the 80% threshold in paragraph 248(30)(a) to a particular transfer of property. Subsection 248(32) describes "the amount of the advantage" broadly and some of the items described (such as "limited-recourse debt" determined under subsection 143.2(6.1)) may not be considered to disqualify the transfer of property as a gift under the private law.

[333] There are two possible interpretations of subsection 248(30). Under the first interpretation, only those advantages that disqualify the transfer of property as a gift under the private law are considered in determining whether the 80% threshold in paragraph 248(30)(a) is exceeded. Under the second interpretation, the total of the items described in subsection 248(32) is included in determining whether the 80% threshold in paragraph 248(30)(a) is exceeded even if some of the items described in subsection 248(32) did not disqualify the transfer of property as a gift under the private law.

[334] In my view, the text of subsection 248(30) supports the first interpretation. Subsection 248(30) provides an exception to the private law in circumstances

where the "existence of an amount of an advantage" would otherwise disqualify a transfer of property as a gift. The exception applies if the amount of the advantage described in the opening words does not exceed 80% of the fair market value of the transferred property. The reference to "the advantage" in paragraph 248(30)(a) is a reference to the advantage described in the introductory words of the subsection – that is, the advantage that disqualified the gift under the private law – not to the broader term in subsection 248(32).

[335] This interpretation is supported by the technical notes which state:

> For the transfer of property to qualify as a gift, it is necessary that the transfer be voluntary and with the intention to make a gift. At common law, where the transferor of the property has received any form of consideration or benefit, it is generally presumed that such an intention is not present. New subsection 248(30) of the Act, which applies in respect of transfers of property after December 20, 2002 to qualified donees (such as registered charities), allows the opportunity to rebut this presumption. New paragraph 248(30)(a) provides that the existence of an amount of an advantage to the transferor will not necessarily disqualify the transfer from being a gift if the amount of the advantage does not exceed 80% of the fair market value of the transferred property.[371]

[336] The first interpretation of subsection 248(30) maintains the purpose of the provision - to allow as gifts transfers of property otherwise disqualified under the common law - without adversely impacting the determination of the eligible amount of such gifts under subsection 248(31).

[337] The amount of the advantage that is responsible for the disqualification of the Appellants' transfers of property to TGTFC as gifts under private law is the benefit received under the TGTFC Loans. That benefit is estimated by Mr. Johnson to be $1,475 per LP Unit. This amount is to be compared to the fair market value of the transferred property, which is in dispute and requires consideration of the expert evidence.

[338] Mr. Johnson opines that the TGTFC Notes have a fair market value in the range of $2,889 to $5,249 per LP Unit.[372] Since the other experts opine that the TGTFC Notes have a higher value and the 80% test is not failed at Mr. Johnson's value, I conclude that the benefit associated with the TGTFC Loans to the

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[371] Explanatory Notes Relating to the *Income Tax Act*, the *Excise Tax Act* and Related Legislation, Part 5 - Other Amendments to the *Income Tax Act* and Related Legislation and Regulations - *Income Tax Act* released on October 24, 2012 as part of the Notice of Ways and Means Motion and Explanatory Notes to Implement Technical Amendments to the *Income Tax Act*, *Excise Tax Act* and Related Legislation.

[372] In addition, the Appellants transferred a further $200 per LP Unit funded from their own resources.

Appellants does not exceed the 80% threshold in paragraph 248(30)(a) of the ITA. Accordingly, the transfers of property by the Appellants to TGTFC are gifts for the purposes of the ITA because they are saved by subsection 248(30).

B. The Eligible Amount of the Gifts Is Nil

[339] The Respondent submits that, even if the transfers of property by the Appellants to TGTFC are gifts because of paragraph 248(30)(a) of the ITA, the eligible amount of the gifts is nil.

[340] The Respondent submits that the Program Loans are "limited-recourse debt" as determined under subsection 143.2(6.1) at the time the gifts were made. Subsections 143.2(6.1), (7), (8) and (12) state:

> (6.1) Limited-recourse debt in respect of a gift or monetary contribution — The limited-recourse debt in respect of a gift or monetary contribution of a taxpayer, at the time the gift or monetary contribution is made, is the total of
>
> > (a) each limited-recourse amount at that time, of the taxpayer and of all other taxpayers not dealing at arm's length with the taxpayer, that can reasonably be considered to relate to the gift or monetary contribution,
> >
> > (b) each limited-recourse amount at that time, determined under this section when this section is applied to each other taxpayer who deals at arm's length with and holds, directly or indirectly, an interest in the taxpayer, that can reasonably be considered to relate to the gift or monetary contribution, and
> >
> > (c) each amount that is the unpaid amount at that time of any other indebtedness, of any taxpayer referred to in paragraph (a) or (b), that can reasonably be considered to relate to the gift or monetary contribution if there is a guarantee, security or similar indemnity or covenant in respect of that or any other indebtedness.
>
> (7) Repayment of indebtedness — For the purpose of this section, the unpaid principal of an indebtedness is deemed to be a limited-recourse amount unless
>
> > (a) *bona fide* arrangements, evidenced in writing, were made, at the time the indebtedness arose, for repayment by the debtor of the indebtedness and all interest on the indebtedness within a reasonable period not exceeding 10 years; and
> >
> > (b) interest is payable at least annually, at a rate equal to or greater than the lesser of

(i) the prescribed rate of interest in effect at the time the indebtedness arose, and

(ii) the prescribed rate of interest applicable from time to time during the term of the indebtedness,

and is paid in respect of the indebtedness by the debtor no later than 60 days after the end of each taxation year of the debtor that ends in the period.

(8) Limited-recourse amount — For the purpose of this section, the unpaid principal of an indebtedness is deemed to be a limited-recourse amount of a taxpayer where the taxpayer is a partnership and recourse against any member of the partnership in respect of the indebtedness is limited, either immediately or in the future and either absolutely or contingently.

. . .

(12) Series of loans or repayments — For the purpose of paragraph (7)(a), a debtor is considered not to have made arrangements to repay an indebtedness within 10 years where the debtor's arrangement to repay can reasonably be considered to be part of a series of loans or other indebtedness and repayments that ends more than 10 years after it begins.

[341] The Respondent submits that the Program Loans can reasonably be considered to relate to the gifts by the Appellants to TGTFC and are deemed to be limited-recourse amounts because:

1. There were no *bona fide* arrangements evidenced in writing for repayment by the debtor of the indebtedness and all interest on the indebtedness within a reasonable period of time not exceeding 10 years: paragraph 143.2(7)(a) of the ITA.

2. In the alternative, the Appellants are deemed not to have made arrangements to repay the loans within 10 years because the Appellants' arrangements to repay are part of a series of loans or other indebtedness and repayments that ends more than 10 years after it begins: subsection 143.2(12) of the ITA.

3. In the further alternative, the annual interest in respect of the loans was not paid by each Appellant no later than 60 days after the end of each taxation year.[373]

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[373] Paragraph 146 of the Respondent's Written Submissions.

[342] The first argument is based on the position that the arrangements for the repayment of the Program Loans were not *bona fide* arrangements as required by paragraph 143.2(7)(a) of the ITA. Paragraph 143.2(7)(a) is part of a series of rules in section 143.2 which place limits on the use of leverage and amounts that are not "at risk" to increase tax expenditures or tax credits.

[343] The *Oxford English Dictionary* (2nd ed.) defines *bona fide* as meaning "In good faith, with sincerity; genuinely". When it is used to qualify a noun, as here, the definition is "Acting or done in good faith; sincere, genuine". Of course, the context of the phrase "*bona fide* arrangements" and the purpose of the provisions in which the phrase is found must also be taken into account in interpreting the phrase.[374]

[344] A straightforward interpretation of the text is that the arrangements to repay the Program Loans must be entered into in good faith and must be genuine. The context and purpose of the text suggest to me that Parliament wanted more than just legally enforceable arrangements when it used the phrase *bona fide* to qualify the nature of the arrangements.

[345] In my view, the phrase *bona fide* speaks to the fundamental character of the arrangements and requires that the arrangements reflect what one would reasonably expect arm's length commercial relations to look like in the circumstances. Simply pointing to pieces of paper as evidence of binding legal obligations to repay the debt – even if the authenticity of the pieces of paper is not in issue – is not sufficient to establish that there are *bona fide* arrangements for the purposes of paragraph 143.2(7)(a) of the ITA.[375]

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[374] In *Canada Trustco Mortgage Co. v. Canada,* 2005 SCC 54, [2005] 2 S.C.R. 601 (*Trustco*), the Supreme Court of Canada stated (at paragraph 10):

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play[s] a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[375] In *Tolhoek v. The Queen*, 2008 FCA 128, the Federal Court of Appeal emphasized that subsection 143.2(7) has to be interpreted in a cohesive manner (at paragraph 50):

> . . . In my view, the requirement of a "*bona fide* arrangement" in paragraph 143.2(7)(a) extends to both the principal and interest payments. It is incongruous to argue that even though paragraph 143.2(7)(a) requires interest to be payable pursuant to a *bona fide* arrangement, interest which is in fact paid in order to satisfy the requirement in paragraph 143.2(7)(b) need not have been paid pursuant to a *bona fide* arrangement.

[346] To determine whether there are *bona fide* arrangements to repay the Program Loans, the borrowing arrangements as a whole must be considered and analyzed. If the borrowing arrangements viewed as a whole are not *bona fide* arrangements in the sense in which that phrase is used in paragraph 143.2(7)(a), then it follows that the arrangements to repay the principal and interest embedded in those borrowing arrangements are also not *bona fide* arrangements.

[347] The evidence establishes that the Program Loans were part of structured arrangements and that the Appellants had to either accept or reject the arrangements as presented. The Appellants did not negotiate any aspect of the arrangements but rather, if they decided to participate in the Program, they simply executed documents provided to them by EquiGenesis. Although some of the Appellants did review the Program with professional advisers, these reviews focussed on the tax consequences of the arrangements and not on the commercial issues and risks normally associated with taking on substantial amounts of debt.[376]

[348] There was no bargaining by the Appellants but merely acquiescence to the terms presented by EquiGenesis. The Appellants did not investigate – and in many cases were not even aware of the identity of – the entity from which they were borrowing large amounts of money. The Appellants relied on the representations of EquiGenesis and, where applicable, past experience with other programs offered by EquiGenesis, even though the lenders in those programs were different. One certainly gets the general sense that, for the most part, the Appellants did not distinguish between EquiGenesis and FT, even though Mr. Gordon testified that EquiGenesis dealt at arm's length with FT and that he had no knowledge of the affairs of FT.[377]

[349] Although the Appellants each stated that they were on the hook for the amounts borrowed from FT and could be liable to repay these amounts from their own resources, some of the Appellants failed to disclose similar liabilities from earlier EquiGenesis programs on their loan applications. For example, in cross-examination, Dr. Platnick stated:

> I viewed it as a personal loan, but I didn't — because there was the corresponding investment that I knew — I was hoping would grow over time, it would cover it off. I didn't include the investment part in my net worth statement. I didn't include the debt showing on the liability side because they would cancel each other out.

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[376] Ms. Cassan did testify that she considered the risk inherent in the leveraged aspect of the Program but also testified that at the time she decided to participate she had a limited understanding of the Program.

[377] See, for example, the testimony of Mrs. Tilatti at lines 27 to 28 of page 1065 and lines 1 to 15 of page 1066 of the Transcript.

[350] Similarly, Mrs. Tilatti stated:

> The reason why we did not include them here is because the loans that we have taken out for the EquiGenesis programs in the past were offset by the investment in the program. So the net impact was a zero as far as we were concerned and that's why they're not listed here.[378]

[351] Even Mr. Gordon, the architect of the Program structure, stated that he was not required to provide any documentation to FT to support his net worth and that he did not disclose liabilities associated with his participation in other programs.[379] I take from this that even Mr. Gordon did not see fit to treat the borrowing arrangements as genuine commercial arrangements requiring full, true and plain disclosure of the financial wherewithal of the borrower.

[352] In my view, a borrower's unilateral determination that a significant liability need not be disclosed on a loan application coupled with the failure of FT to insist on full disclosure is strong evidence of an absence of the sort of good faith and genuineness contemplated by paragraph 143.2(7).

[353] I have already commented on the shortcomings of the ULAA Forms, the generalized information provided to FT by those forms, the failure of FT to require documentation to support the information provided on the forms and the failure of FT to perform thorough credit checks on all the Participants prior to closing and at the time of each additional advance. All of these factors point away from the arrangements regarding the Program Loans being *bona fide* arrangements as contemplated by the use of that phrase in paragraph 143.2(7)(a).[380]

[354] I also draw a negative inference regarding the existence of *bona fide* arrangements from the fact that no one from FT testified regarding the borrowing arrangements with the Participants. If the arrangements are indeed *bona fide* arrangements then I would have expected to hear testimony from a representative of FT regarding the details of the arrangements viewed from the perspective of the lender. After all, a loan is an arrangement between a lender and a borrower, and yet here one party to that arrangement is silent as to the details of the arrangement, even though that party is credited with being the driving force behind the arrangement.[381]

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[378] Lines 22 to 27 of page 1015 of the Transcript. Also, lines 16 to 26 of page 1065 of the Transcript.
[379] Lines 5 to 28 of page 326, page 327 and lines 1 to 17 of page 328 of the Transcript.
[380] See also the observations of Mr. Johnson at section 7.5 of the CVPL Report.
[381] For example, according to Mr. Gordon, counsel for FT drafted the ULAA Form subject only to comments from EquiGenesis' counsel and FT determined at its sole discretion who qualified for a Program Loan and who qualified for additional advances under the Program Loans.

[355] For the foregoing reasons, I conclude that the arrangements respecting the Program Loans are not *bona fide* arrangements in the sense contemplated by paragraph 143.2(7)(a) of the ITA. Accordingly, the arrangements to repay the principal and interest owed under the Program Loans are not *bona fide* arrangements and the principal amount of each of the Program Loans is a limited-recourse amount for the purposes of subsection 143.2(6.1).

[356] The Respondent submits that the Unit Loans and the TGTFC Loans are each limited-recourse debt in respect of the gifts made by the Appellants to TGTFC because they can reasonably be considered to relate to those gifts.

[357] It is clear that the TGTFC Loans relate to the gifts since the loans fund roughly 98% of the gifts. I am not convinced, however, that the Unit Loans can reasonably be considered to relate to the gifts on the facts of this case.

[358] The Program was marketed as two separate arrangements giving rise to two separate sources of tax benefits: an investment substantially funded by a loan and a donation to a qualified donee substantially funded by a loan. A Participant in the LP Program could elect to also participate in the TGTFC Program but was not required to participate in it. No portion of the Unit Loan was used to fund or facilitate the transfer of property by the Appellants to TGTFC.

[359] It is true that the existence of the LP Program may indirectly support the TGTFC Program by ostensibly placing more assets in Leeward than would be the case if only the TGTFC Program existed and by allowing the LP Units to be given as security for the TGTFC Loans. However, in my view, that remote a connection is not sufficient for one to conclude that the Unit Loans can reasonably be considered to relate to the gifts made by the Appellants to TGTFC.

[360] I therefore find that the TGTFC Loan is a limited-recourse debt in respect of the gifts by the Appellants to TGTFC and that the eligible amount of the gifts by the Appellants to TGTFC is reduced by the original principal amount of the their respective TGTFC Loans. This means that the eligible amount of Dr. Platnick's gift to TGTFC is reduced by $650,000 and the eligible amount of each of the other Appellants' gifts to TGTFC is reduced by $100,000.

[361] Paragraphs 248(32)(a) and (b) are worded such that an amount described in paragraph 248(32)(b) is not also included in the amount of an advantage by paragraph 248(32)(a). The amount described in paragraph 248(32)(b) in this case is the unpaid principal of the TGTFC Loans at the time the gifts are made. That

amount is not the same amount as a benefit resulting from a below-market interest rate on the principal amount of the TGTFC Loans.

[362] I have already found that the 7.85% rate of interest on the TGTFC Loans resulted in a benefit to the Appellants of $1,475 per LP Unit under the principles described in the Trilogy. This benefit also clearly falls within the language of paragraph 248(32)(a) of the ITA. In my view, it is not double counting to include in the amount of an advantage the principal amount of the TGTFC Loans and the benefit resulting from the below-market interest rate on those loans. Each is described separately in paragraphs 248(32)(b) and (a) respectively.

[363] Accordingly, the amount of the advantage in respect of the gifts made by the Appellants to TGTFC is greater than the amount of those gifts even assuming the fair market value of the gifts is equal to the face amount of the gifts. As a result, the eligible amount of the gift made by each of the Appellants to TGTFC is nil.

[364] If I am wrong in my conclusion that the TGTFC Loans are limited-recourse amounts under subsection 143.2(7) because there are no *bona fide* arrangements to repay the loans within 10 years, I also find that the arrangements to repay the TGTFC Loans are "part of a series of loans or other indebtedness and repayments that ends more than 10 years after it begins" and therefore, under subsection 143.2(12) of the ITA, the Appellants are considered not to have made arrangements to repay the TGTFC Loans within 10 years.

[365] The evidence indicates that the Program was marketed as a 19-year investment in a limited partnership and an opportunity to donate to a qualified donee, both the investment and the donation being substantially funded by a loan. In order not to run afoul of the 10-year limitation in paragraph 143.2(7)(a) of the ITA, the initial loans used to fund the investment and the donation have terms of less than ten years.[382]

[366] The Appellants testified that no representations were made to them regarding the refinancing or replacement of the Program Loans on maturity and the Program documents emphasize that point. Many of the Appellants also pointed to the inherent risk that the loans would not be refinanced. However, subsection 143.2(12) does not speak to the existence of legal arrangements or obligations or to certainty regarding future events. Rather, subsection 143.2(12) asks whether the arrangements to repay "can reasonably be considered" to be part of a series of

[382] Testimony of Mr. Gordon at lines 25 to 28 of page 81 and line 1 of page 82 of the Transcript.

loans or other indebtedness and repayments that ends more than 10 years after it begins.

[367] The use of the phrase “can reasonably be considered” requires an objective assessment, as at the time the Program Loans were advanced, of all the circumstances in order to determine what was reasonably contemplated would occur upon the maturity of the Program Loans. Subsection 143.2(12) is asking whether at the time the Program Loans were advanced a reasonable person would have contemplated that the loans would be replaced or refinanced on substantially similar terms save for changes mandated by the effluxion of time.

[368] It seems to me obvious that a reasonable person would contemplate that when the Program Loans matured they would be replaced or refinanced with other similar loans and that EquiGenesis would take the lead in ensuring that this occurred. In fact, I cannot imagine an individual participating in the Program unless that individual fully expected the Program Loans to be replaced or refinanced in that manner. The refinancing of the loans associated with earlier similar programs offered by EquiGenesis certainly suggests that such an expectation would be reasonable and may even go so far as to suggest that this eventuality is “baked-in” to the fact that the Program has a 19-year term.

C. The Receipts Issued by TGTFC to the Appellants Do Not Meet the Requirements of Paragraph 118.1(2)(a) of the ITA

[369] Subsection 118.1(2) of the ITA and subsection 3501(1) of the ITR require that the official donation receipt contain certain information including:

> 3501(1)(h) the amount that is
>
> (i) the amount of a cash gift, or
>
> (ii) if the gift is of property other than cash, the amount that is the fair market value of the property at the time that the gift is made;
>
> (h.1) a description of the advantage, if any, in respect of the gift and the amount of that advantage;
>
> (h.2) the eligible amount of the gift.

[370] In *Castro*, the Federal Court of Appeal highlighted the importance of complying with the requirements of subsection 118.1(2) of the ITA:

> Even if the Judge determined that a gift was made, there was no official receipt, in the present case, evidencing the amount that was donated, in violation of subsection 118.1(2) of the *Act*. Consequently, the respondent is denied any tax credit.[383]

[371] In light of my conclusion that the eligible amount of the gifts by the Appellants to TGTFC is nil, I do not need to consider whether the donation receipts issued by TGTFC to the Appellants meet the requirements of subsection 118.1(2) of the ITA. However, it is clear from *Castro* that, if the receipts issued by TGTFC to the Appellants do not comply with the requirements in the ITR, the Appellants are not entitled to any tax credit in respect of the transfers of property by them to TGTFC.

D. The GAAR Applies to Deny the Tax Benefit Obtained by the Appellants Under Section 118.1

[372] In light of my conclusion that the eligible amount of the gifts by the Appellants to TGTFC is nil, I do not need to consider whether the GAAR applies so as to recharacterize the tax consequences that would otherwise arise in respect of the transfer of property by the Appellants to TGTFC.

E. The 2009 LP Has Deemed Interest Income Under Subsection 12(9) of the ITA and Section 7000 of the ITR

[373] Sections 2, 5, 9, 10, 20, 27 and 28 of the Linked Note state:

> 2. The Principal Amount of this Note as at any date shall be equal to the aggregate amount of the Subscription Price paid by the Partnership on or prior to such date in accordance with Section 5 and will be increased on the date hereof and on each of the dates referenced in Section 5 as a date on which an Advance on account of the Subscription Price is payable. Any such increase shall be reflected by an appropriate notation on the grid attached to this Note. The Issuer authorizes the Partnership to record on the grid attached to this Note all advances, repayments, prepayments and the unpaid balance of the Principal Amount from time to time. The Issuer agrees that in the absence of manifest error the record kept by the Partnership on the grid attached to this Note shall be conclusive evidence of the matters recorded thereon, and the Principal Amount outstanding at any time shall be equal to the last entry on the grid in the column headed "Aggregate Principal Amount", provided that the failure of the Partnership to record or correctly record any amount or date shall not affect the obligation of the Issuer to pay the outstanding Principal Amount and the Variable Return Amount on the Maturity Date.

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[383] Paragraph 85.

5. This Note shall be issued for a subscription price (the “Subscription Price”) equal to the sum of the following amounts, payable by the Partnership to the Issuer in instalments as follows (each, an “Advance”):

(a) on Closing, the sum of $6,560,000 representing $32,000 multiplied by the number of Units issued on Closing;

(b) on December 1, 2009, the sum of $205,000, representing $1,000 multiplied by the number of Units issued on Closing;

(c) on March 31, 2010, the sum of $220,375, representing $1,075 multiplied by the number of Units issued on Closing; and

(d) on March 31, 2011, the sum of $102,500, representing $500 multiplied by the number of Units issued on Closing.

9. Beginning in 2018, the Partnership shall have the right to redeem and demand payment of this Note in part in accordance with the following provisions of this Section 9.

. . .

10. The Issuer shall pay to the Partnership on the Maturity Date, without any need for the Partnership to elect or otherwise take any action other than the surrender of this Note, an amount in Canadian dollars equal to the Principal Amount then outstanding plus the Variable Return Amount, if any, calculated as provided in Sections 20 to 23, but subject to Sections 24 to 26 plus the sum of the Variable Return Carryover Amounts, if any (the “Payment at Maturity”).

20. The “Variable Return Amount” is equal to the product of the Principal Amount of this Note and the Total Weighted Reference Portfolio Return. The “Total Weighted Reference Portfolio Return” is that amount, expressed as a percentage which is equal to the greater of (i) the sum of the Weighted Basket Returns of the Baskets in Reference Portfolio A, (ii) the return of Reference Portfolio B, and (iii) zero. The “Weighted Basket Return” of the Baskets in Portfolio A is equal to the product of: (i) the total return of a Basket through to the date of calculation; and (ii) such Basket’s weighting from time to time in Reference Portfolio A, as specified in Section 13.

27. The value (“Note Value”) of this Note will be calculated quarterly as at the last Business Day in each of March, June, September and December (each a “Valuation Date”) by the Issuer or such calculation agent as it may from time to time retain for such purpose. The Issuer will not be responsible for any errors or omissions made in the calculation of the Note Value if made by it or by such calculation agent in good faith. The Note Value on any Valuation Date shall be equal to the aggregate of the Principal Amount outstanding as at the close of business on the immediately preceding Business Day plus the value of the Variable Return Amount calculated as if the Valuation Date were the Maturity Date. The

> Note Value shall be made available to the Partnership on request no later than the 10th Business Day following the applicable Valuation Date.
>
> 28. The Issuer may suspend the determination of the Note Value in any period during which the Issuer determines a Market Disruption Event in respect of one or more Baskets has occurred and is continuing.

[374] The Respondent’s submissions on the application of paragraphs 7000(1)(d) and 7000(2)(d) of the ITR to the Linked Notes are as follows:

> 457. The Parties agree the interest on the Linked Note depended on a contingency that existed after the end of each taxation years [*sic*] in which the Linked Noted [*sic*] was held. The interest payable on maturity on the Linked Note is contingent on the performance of the notional investment portfolios (Portfoli[o] A and Portfolio B). That contingency is, “existing after the year” because the Variable Return Amount is based on the entire yield of Portfolios A or B over a period of 20 years. Accordingly, the Linked Notes meet the definition of a PDO under paragraph 7000(1)(d) of the *Regulations*.
>
> 458. S. 7000(2)(d) provides that the “maximum amount of interest that could be payable in respect of” a year must be included in the computation of income for that year. S. 7000(2)(d) does not require that interest be payable in the year. Paragraph 12(1)(c) already provides that interest that is receivable in the year must be included in income. Nor does the provision require that interest “accrue” in that particular year. Subsection 12(3) already provides that accruing interest must be included annually in the computation of income. S. 7000(2)(d) merely requires that interest “could” be payable in that year.
>
> 459. S. 7000(2)(d) first requires that the rights and obligations of the parties be analysed in order to determine whether interest could become payable to the taxpayer following the occurrence of certain events or circumstances. Once it is established that the legal relationship does admit of certain payment events in that year, it must then be determined what is the maximum amount of interest payable under these scenarios.
>
> 460. As explained above, there are two circumstances where EQ09 LP could be entitled to receive interest prior to maturity:
>
> > a) upon the occurrence of an Event of Default, EQ09 LP may declare all of the obligations of Leeward immediately due and payable, and
> >
> > b) beginning in 2018, EQ09 LP is provided with an option to redeem and demand payment of the Linked Notes of the principal amount of the note plus a Redemption Return Amount.
>
> 461. For the 2009, 2010 and 2011 taxations, the maximum amount of interest which could be payable to EQ09 LP is the Variable Return Amount that would be

> payable on the assumption that an Event of Default, as described in the EQ09 LP GSA, has occurred.
>
> 462. Assuming that an Event of Default occurred at December 31, 2009, all amounts under the Linked Notes would become immediately due and payable. As such, the Partnership would be entitled to receive the principal under the notes plus the Variable Return Amount as of December 31, 2009. If the default were to occur on December 31, 2010, the Partnership would be entitled to receive the principal under the notes plus the Variable Return Amount as of December 31, 2010. Because an Event of Default could occur and would entitle the Partnership to receive interest, s. 7000(2)(d) requires this hypothetical interest to be included as deemed interest.[384]

[375] As indicated by the Respondent, the Appellants do not dispute that the Linked Notes are a debt obligation described in paragraph 7000(1)(d) of the ITR.[385] The Appellants submit, however, that paragraph 7000(2)(d) does not apply because "no amount of interest is or 'could be payable' until the Linked Notes mature or are redeemed."[386]

[376] The Appellants concede that the variable return on the Linked Notes is a "bonus or premium" for the purposes of subsection 7000(3) of the ITR, which deems a bonus or premium payable under a debt obligation to be interest for the purposes of section 7000 of the ITR. The Appellants note, however, that subsection 7000(3) does not deem such interest to accrue for the purposes of paragraph 7000(2)(d)[387] and does not transform the variable return on the Linked Notes into a known amount that could be payable.

[377] The Appellants submit that section 7000 of the ITR does not create interest income but merely identifies where such income otherwise exists as a determinable return under the terms of the debt obligation. The Appellants submit that, under the Respondent's approach, gains attributable to appreciation are taxed on a speculative basis and the taxpayer pays tax on fictitious income.

[378] Paragraph 12(1)(c) and subsections 12(3) and 12(9) of the ITA state:

> (1) There shall be included in computing the income of a taxpayer for a taxation year as income from a business or property such of the following amounts as are applicable:

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[384] Paragraphs 458 to 462 of the Respondent's Written Submissions.
[385] Paragraph 17 of the Appellants' Memorandum of Fact and Law.
[386] Paragraph 18 of the Appellants' Memorandum of Fact and Law.
[387] The Appellants' Memorandum of Fact and Law (paragraph 20) refers to paragraph 7000(1)(d) but I take that to be a typographical error since the application of that provision is conceded.

. . . (c) subject to subsections (3) and (4.1), any amount received or receivable by the taxpayer in the year (depending on the method regularly followed by the taxpayer in computing the taxpayer's income) as, on account of, in lieu of payment of or in satisfaction of, interest to the extent that the interest was not included in computing the taxpayer's income for a preceding taxation year;

. . .

(3) Subject to subsection (4.1), in computing the income for a taxation year of a corporation, partnership, unit trust or any trust of which a corporation or a partnership is a beneficiary, there shall be included any interest on a debt obligation (other than interest in respect of an income bond, an income debenture, a small business bond, a small business development bond, a net income stabilization account or an indexed debt obligation) that accrues to it to the end of the year, or becomes receivable or is received by it before the end of the year, to the extent that the interest was not included in computing its income for a preceding taxation year.

. . .

(9) For the purposes of subsections (3), (4) and (11) and 20(14) and (21), if a taxpayer acquires an interest in, or for civil law a right in, a prescribed debt obligation, an amount determined in prescribed manner is deemed to accrue to the taxpayer as interest on the obligation in each taxation year during which the taxpayer holds the interest or the right in the obligation.

[379] Subsections 7000(1) to (5) of the ITR state:

7000(1) For the purpose of subsection 12(9) of the Act, each of the following debt obligations (other than a debt obligation that is an indexed debt obligation) in respect of which a taxpayer has at any time acquired an interest is a prescribed debt obligation:

(a) a particular debt obligation in respect of which no interest is stipulated to be payable in respect of its principal amount;

(b) a particular debt obligation in respect of which the proportion of the payments of principal to which the taxpayer is entitled is not equal to the proportion of the payments of interest to which he is entitled;

(c) a particular debt obligation, other than one described in paragraph (a) or (b), in respect of which it can be determined, at the time the taxpayer acquired the interest therein, that the maximum amount of interest payable thereon in a year ending after that time is less than the maximum amount of interest payable thereon in a subsequent year; and

(d) a particular debt obligation, other than one described in paragraph (a), (b) or (c), in respect of which the amount of interest to be paid in respect of any taxation year is, under the terms and conditions of the obligation, dependent on a contingency existing after the year,

and, for the purposes of this subsection, a debt obligation includes, for greater certainty, all of the issuer's obligations to pay principal and interest under that obligation.

(2) For the purposes of subsection 12(9) of the Act, the amount determined in prescribed manner that is deemed to accrue to a taxpayer as interest on a prescribed debt obligation in each taxation year during which he holds an interest in the obligation is,

(a) in the case of a prescribed debt obligation described in paragraph (1)(a), the amount of interest that would be determined in respect thereof if interest thereon for that year were computed on a compound interest basis using the maximum of all rates each of which is a rate computed

(i) in respect of each possible circumstance under which an interest of the taxpayer in the obligation could mature or be surrendered or retracted, and

(ii) using assumptions concerning the interest rate and compounding period that will result in a present value, at the date of purchase of the interest, of all the maximum payments thereunder, equal to the cost thereof to the taxpayer;

(b) in the case of a prescribed debt obligation described in paragraph (1)(b), the aggregate of all amounts each of which is the amount of interest that would be determined in respect of his interest in a payment under the obligation if interest thereon for that year were computed on a compound interest basis using the specified cost of his interest therein and the specified interest rate in respect of his total interest in the obligation, and for the purposes of this paragraph,

(i) the "specified cost" of his interest in a payment under the obligation is its present value at the date of purchase computed using the specified interest rate, and

(ii) the "specified interest rate" is the maximum of all rates each of which is a rate computed

(A) in respect of each possible circumstance under which an interest of the taxpayer in the obligation could mature or be surrendered or retracted, and

(B) using assumptions concerning the interest rate and compounding period that will result in a present value, at the date of purchase of the interest, of all the maximum payments to the taxpayer in respect of his total interest in the obligation, equal to the cost of that interest to the taxpayer;

(c) in the case of a prescribed debt obligation described in paragraph (1)(c), other than an obligation in respect of which paragraph (c.1) applies, the greater of

(i) the maximum amount of interest thereon in respect of the year, and

(ii) the maximum amount of interest that would be determined in respect thereof if interest thereon for that year were computed on a compound interest basis using the maximum of all rates each of which is a rate computed

(A) in respect of each possible circumstance under which an interest of the taxpayer in the obligation could mature or be surrendered or retracted, and

(B) using assumptions concerning the interest rate and compounding period that will result in a present value, at the date of issue of the obligation, of all the maximum payments thereunder, equal to its principal amount;

(c.1) in the case of a prescribed debt obligation described in paragraph (1)(c) for which

(i) the rate of interest stipulated to be payable in respect of each period throughout which the obligation is outstanding is fixed at the date of issue of the obligation, and

(ii) the stipulated rate of interest applicable at each time is not less than each stipulated rate of interest applicable before that time,

the amount of interest that would be determined in respect of the year if interest on the obligation for that year were computed on a compound interest basis using the maximum of all rates each of which

is the compound interest rate that, for a particular assumption with respect to when the taxpayer's interest in the obligation will mature or be surrendered or retracted, results in a present value (at the date the taxpayer acquires the interest in the obligation) of all payments under the obligation after the acquisition by the taxpayer of the taxpayer's interest in the obligation equal to the principal amount of the obligation at the date of acquisition; and

(d) in the case of a prescribed debt obligation described in paragraph (1)(d), the maximum amount of interest thereon that could be payable thereunder in respect of that year.

(3) For the purpose of this section, any bonus or premium payable under a debt obligation is considered to be an amount of interest payable under the obligation.

(4) For the purposes of this section, where

(a) a taxpayer has an interest in a debt obligation (in this subsection referred to as the "first interest") under which there is a conversion privilege or an option to extend its term upon maturity, and

(b) at the time the obligation was issued (or, if later, at the time the conversion privilege or option was added or modified), circumstances could reasonably be foreseen under which the holder of the obligation would, by exercising the conversion privilege or option, acquire an interest in a debt obligation with a principal amount less than its fair market value at the time of acquisition,

the subsequent interest in any debt obligation acquired by the taxpayer by exercising the conversion privilege or option shall be considered to be a continuation of the first interest.

(5) For the purposes of making the computations referred to in paragraphs (2)(a), (b), (c) and (c.1), the compounding period shall not exceed one year and any interest rate used shall be constant from the time of acquisition or issue, as the case may be, until the time of maturity, surrender or retraction.

[380] Paragraph 12(1)(c) requires taxpayers to include in income any amount received or receivable in the year (depending on the method regularly followed by the taxpayer in computing income) as, on account of or in lieu of interest. The paragraph applies not only to "interest" but also to amounts received either in lieu of interest or on account of interest. The paragraph makes no reference to the source of the payment. The timing of the recognition of income described in the paragraph is determined by the method regularly followed by the taxpayer in computing income.

[381] The meaning of "interest" was considered by the Federal Court of Appeal in *Canada v. Sherway Centre Ltd.*, [1998] 3 F.C. 36:[388]

> [10] The classic definition of interest is found in the 1947 Supreme Court of Canada case *Reference as to the Validity of Section 6 of the Farm Security Act, 1944 of Saskatchewan* where Rand J. defined interest broadly to include "the return or consideration or compensation for the use or retention by one person of a sum of money, belonging to, in a colloquial sense, or owed to, another". This fairly broad definition has since been limited or more narrowly defined. For instance, in *Attorney-General For Ontario v. Barfried Enterprises Ltd.* Judson J., after considering the definition of interest provided by Rand J. in *Farm Security Act* and *Halsbury's Laws of England* [Vol. 27, 3rd ed., London: Butterowrths & Co. (Publishers) Ltd., 1959], found that one of the essential characteristics of interest is that it accrues daily. He held that in the third edition of Halsbury's the text states: "'Interest accrues *de die in diem* even if payable only at intervals, and is, therefore, apportionable in point of time between persons entitled in succession to the principal.' This day-to-day accrual of interest seems to me to be an essential characteristic." However, as Krishna points out in his text, *The Fundamentals of Canadian Income Tax*, Judson J. incorrectly interpreted the Halsbury's definition:
>
>> But *Halsbury* merely says that where an amount is considered to be 'interest', it is *deemed* to accrue from day to day. Unfortunately, the statement was read to mean that a payment *cannot* be interest *unless* it accrues from day to day even if payable only at intervals. This interpretation of *Halsbury* has caused a good deal of misunderstanding as to the meaning of interest.
>
> [11] Another limiting characteristic placed on Rand J.'s definition of interest in *Farm Security Act* is found in Re *Balaji Apartments Ltd. v. Manufacturers Life Insurance Co.* where the Ontario High Court of Justice held that in order to be interest, the payment must be a percentage of the principal sum. Based on these limiting characteristics to the broad definition of interest contemplated by Rand J. in *Farm Security Act*, the Tax Court Judge held that the payments were not interest because they did not accrue day to day and because they were not based on the principal outstanding at [any time] but on the operating surplus of the shopping centre. I will deal with each of these findings in turn.
>
> [12] On the issue of whether the payments accrue day to day, in my opinion, the appropriate interpretation to be given to daily accrual of interest is that each holder's entitlement to interest must be able to be ascertained on a daily basis. I therefore agree with the respondent that the interpretation of the quotation from Halsbury should not be read as establishing a legal principle that "compensation for the use of money is not interest unless it is expressed on a daily basis." Indeed, I

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[388] For an amount to be deductible under paragraph 20(1)(c) of the ITA, the amount must be "interest". The text of paragraph 20(1)(c) does not include the words "on account of or in lieu of".

> agree with the respondent when he states that "an amount paid as compensation for the use of money for a stipulated period can be said to accrue day-to-day."
>
> [13] While the participating interest in this case was only payable once a year, nonetheless, it was based on a percentage of the operating surplus for the year. It was, therefore, capable of being allocated on a day-to-day basis and therefore meets the test for day-to-day accrual.
>
> [14] The more difficult issue is the requirement set out in *Balaji Apartments* that the interest must be a percentage of the principal sum. *Balaji Apartments* dealt with a mortgage which in addition to the mortgage payments also required the payment of a percentage of gross annual rentals after a bare figure was reached. The Court held that the payments related to the gross income were not interest because they were "not a percentage of, or in any way related to, the principal sum." . . .
>
> [15] In my opinion, the *Balaji Apartments* case should not be read as limiting the deductibility of payments that while not directly related to the principal amount, nonetheless, are clearly related to that amount. Indeed, this case should be limited to facts similar to those on which it was decided – where it is clear that payment in question was in addition to the obligation to pay interest on the loan. . . .

[382] Subsection 12(3) provides an additional rule regarding the timing of the recognition as income of interest[389] on debt obligations.[390] The subsection applies to corporations, partnerships, unit trusts or any other trust of which a partnership or a corporation is a beneficiary. The rule requires such taxpayers to include in income for a taxation year the interest on debt obligations that accrues to the taxpayer to the end of the taxation year or becomes receivable or is received by the taxpayer before the end of that year, to the extent that it has not been included in the income of the taxpayer for a previous taxation year.

[383] Subsection 12(9) applies for the purposes of subsections 12(3), (4)[391] and (11)[392] and subsections 20(14) and (21). Subsection 12(9) provides that, if a taxpayer acquires an interest[393] in a prescribed debt obligation, an amount determined in prescribed manner is deemed to accrue as interest on the obligation in each taxation year that the interest in the obligation is held.

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[389] Unlike paragraph 12(1)(c), subsection 12(3) refers only to "interest" and not to an amount either in lieu of interest or on account of interest. However, the impact of subsection 7000(3) of the ITR is incorporated into the rule through subsection 12(9).

[390] The subsection expressly excepts certain debt obligations. None of the exceptions are relevant to these appeals.

[391] Subsection 12(4) applies to all other taxpayers and requires those taxpayers to include in income the interest that accrues on investment contracts, as defined in subsection 12(11) of the ITA, to each anniversary day of the contract. For investment contracts acquired prior to 1990, subsection 12(4) required the recognition of the interest that accrued on such contracts every three years.

[392] Subsection 12(11) sets out the definitions of "anniversary day" and "investment contract".

[393] Or, for civil law, a right in a debt obligation.

[384] Section 7000 of the ITR describes four categories of debt obligations that are prescribed debt obligations and provides for each such category the prescribed manner for determining the amount deemed to accrue to the taxpayer as interest on the debt obligation.[394]

[385] Needless to say, to interpret subsection 12(9) and section 7000 of the ITR, I will consider the text, context and purpose of those provisions.[395]

[386] The introduction of subsection 12(9) in the early 1980s[396] was accompanied by the following technical note:

> 1982 TN: Subsection 12(9) authorizes special rules to be provided in the *Income Tax Regulations* for determining accrued interest income on prescribed debt obligations. . . . The special rules to be provided in the *Income Tax Regulations* . . . will apply for purposes of subsections 12(3), (4), (8) and (11) and 20(14) to determine the interest to be accrued on prescribed debt obligations.

[387] The technical note simply states that subsection 12(9) authorizes special rules for determining accrued interest income on prescribed debt obligations. Fortunately, a more expansive statement of the purpose of these rules was set out in the November 12, 1981 Department of Finance Budget Papers as follows:

> Under present law individuals have the option of reporting interest income for tax purposes each year as it accrues or when they actually receive the interest payment. Lower- and middle-income individuals with modest amounts of investment income would normally report interest as it accrues in order to make use of the $1,000 annual exemption for such income. However, higher-income individuals who purchase certain term deposits, guaranteed investment certificates or other interest-earning assets may defer tax on their interest income. This deferral amounts to a significant reduction in the effective tax rate on this income.
>
> Recently, moreover, several financial institutions have offered new instruments such as deferred annuities and deposit certificates which allow substantially longer deferral of tax over 20 or 30 years and can be attractive to higher-bracket individuals. To prevent such tax deferral, it is proposed that the taxpayer be required to report accrued investment income on any given instrument every third year from the date he acquires it. This will have little impact on low- and middle-income individuals who normally report interest income each year on an accrual

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[394] The rules in section 7000 of the ITR apply whether the debt obligation was acquired from the debtor or from a third party, as in a secondary market purchase of a strip bond: *Goulet v. The Queen*, 2009 TCC 127 at paragraph 6, affirmed 2011 FCA 164.

[395] See, for example, *Trustco* at paragraph 10.

[396] Subsection 12(9), added by 1980-81-82-83, c. 140, subsection 4(8), was applicable to taxation years commencing after 1981. Part LXX of the ITR was added by P.C. 1983-3529, November 17, 1983, SOR/83-864, effective for taxation years commencing after 1981.

> basis so as to claim the $1,000 investment income exemption. Even if they are not reporting on this basis they may find that the accrued interest when added to their income will not be taxable as a result of the exemption.[397]

[388] Together, these statements make clear that the purpose of subsection 12(9) and the accompanying regulations is to ensure the timely recognition as income of the total return on prescribed debt instruments. Importantly, the technical note and budget papers say nothing about recognizing as income amounts that cannot be ascertained for the taxation year to which subsection 12(9) applies.

[389] Four categories of prescribed debt obligation are described in paragraphs 7000(1)(a) through (d) of the ITR. The prescribed manner for determining the interest income deemed to accrue on each such obligation is set out in paragraphs 7000(2)(a) through (d) of the ITR.

[390] Paragraph 7000(1)(a) of the ITR describes debt obligations on which no interest is stipulated to be payable. Paragraph 7000(2)(a) of the ITR provides that the amount deemed to accrue to the taxpayer as interest for a taxation year is the amount of interest that would be determined in respect of the debt obligation for that year if the interest on the obligation were computed on a compound interest basis using the maximum of all the interest rates computed in accordance with subparagraphs 7000(2)(a)(i) and (ii) of the ITR.

[391] Subparagraph 7000(2)(a)(i) of the ITR requires interest to be computed on the debt obligation in respect of each possible circumstance under which an interest of the taxpayer in the debt obligation could mature or be surrendered or retracted. The subparagraph describes the sorts of transactions or events that would occur between the holder of the interest in the debt obligation and the issuer of the debt obligation (i.e., the maturity of the debt obligation, the surrender of the debt obligation or the retraction of the debt obligation). Indeed, there is an underlying assumption that the circumstances in which these transactions or events may occur can be identified, presumably by reference to the terms and conditions of the debt obligation. This assumption is highlighted by the fact that the subparagraph does not describe transactions or events that would typically not be governed by the terms and conditions of a debt obligation, such as a sale of the debt obligation.

[392] For each of the possible circumstances described in subparagraph 7000(2)(a)(i) of the ITR, subparagraph 7000(2)(a)(ii) of the ITR requires the computation of an interest rate and the determination of a compounding period that

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[397] Budget Papers, tabled in the House of Commons by the Honourable Allan J. MacEachen, Deputy Prime Minister and Minister of Finance, November 12, 1981 at page 24.

result in a present value, at the date of purchase of the interest in the debt obligation, of all the maximum payments under the obligations equal to the taxpayer's cost of the interest in the debt obligation.

[393] In a nutshell, paragraph 7000(2)(a) measures the maximum possible return to the taxpayer on the taxpayer's interest in the prescribed debt obligation, based on the terms and conditions of the obligation, and then requires the taxpayer to accrue that return as interest. The only uncertainty in the quantification of the income inclusion results from the use of the maximum possible interest rate determined under subparagraphs 7000(2)(a)(i) and (ii) of the ITR.

[394] Paragraph 7000(1)(b) describes debt obligations that pay to the holder different proportions of principal than of interest. Paragraph 7000(2)(b) provides that the amount deemed to accrue to the taxpayer as interest for a taxation year is the total of all amounts each of which is the interest that would be determined in respect of the taxpayer's interest in a payment under the obligation if interest thereon for that year were computed on a compound basis using the "specified cost" of the interest and the "specified interest rate". These terms are defined in subparagraphs 7000(2)(b)(i) and (ii) of the ITR respectively.

[395] The "specified interest rate" is the maximum interest rate computed in respect of the taxpayer's total interest in the debt obligation using essentially the same methodology as found in subparagraphs 7000(2)(a)(i) and (ii) of the ITR. The "specified cost" of the taxpayer's interest in a payment is the present value of the payment at the date of purchase of that interest, computed using the specified interest rate.

[396] Paragraph 7000(1)(c) describes debt obligations not otherwise described in paragraphs (a) or (b) in respect of which it can be determined that the interest payable will be greater in a future year than in a given previous year.

[397] Where paragraph 7000(2)(c.1) does not apply, subparagraphs 7000(2)(c)(i) and (ii) provide that the amount deemed to accrue to the taxpayer as interest for a taxation year is the greater of the maximum amount of interest on the debt obligation in respect of the year and the maximum amount of interest that would be determined if the maximum interest rate were computed using essentially the same methodology as found in subparagraphs 7000(2)(a)(i) and (ii) of the ITR, except that the present value is calculated at the date of issue of the obligation rather than

the date of purchase of the interest, and the principal amount[398] of the obligation is used rather than the taxpayer's cost.

[398] Paragraph 7000(2)(c.1) of the ITR applies instead of paragraph 7000(2)(c) of the ITR if the interest rate on the debt obligation for each period that the obligation is outstanding is fixed at the date of issue and the interest rate applicable for each time is not less than the rate applicable for all previous times. The paragraph uses a somewhat different methodology than paragraphs 7000(2)(a), (b) and (c) of the ITR to determine the amount deemed to accrue to the taxpayer as interest for a taxation year, but the computation of the interest rate is still based on known inputs, including the sum of all payments under the obligation after its acquisition by the taxpayer, and on assumptions about when the taxpayer's interest in the obligation will mature, be surrendered or be retracted.

[399] Paragraph 7000(1)(d) of the ITR describes debt instruments in respect of which the amount of interest to be paid in respect of any taxation year is, under the terms and conditions of the debt obligation, dependent on a contingency existing after the end of the year.

[400] The text of paragraph 7000(1)(d) of the ITR raises two questions, each of which must be answered in the affirmative in order for the debt obligation to be one described in that paragraph:

1. Has the taxpayer acquired an interest in a debt obligation that is not described in paragraphs 7000(1)(a) to (c) of the ITR?

2. Under the terms and conditions of that debt obligation, is the amount of interest to be paid in respect of any taxation year dependent on a contingency existing after the end of that taxation year?

[401] The second question raised by the provision focusses on whether, under the terms and conditions of the debt obligation, the amount of interest paid in respect of any taxation year is subject to a contingency that will not arise until after the end of the year. The text suggests that the mischief being addressed is the deferral of the recognition as income of interest on the debt obligation because of the contingency. The text also suggests that the elimination of the contingency resolves the issue of how much interest is to be paid under the terms and conditions of the debt obligation in respect of the taxation years of the taxpayer to which the contingency applies.

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[398] The phrase "principal amount" is defined in subsection 248(1), but this definition is not expressly referenced in Part LXX of the ITR.

[402] Subparagraph 7000(2)(d) of the ITR provides that the amount deemed to accrue to the taxpayer as interest for a taxation year is the maximum amount of interest on the prescribed debt obligation that could be payable in respect of that taxation year. When read together with paragraph 7000(1)(d) of the ITR, the text of paragraph 7000(2)(d) requires a determination, for each taxation year to which the contingency applies, of the maximum amount of interest that could be paid in respect of that year under the terms and conditions of the debt obligation if the contingency did not exist. The assumption underlying paragraph 7000(2)(d) is that such an amount is capable of determination, which is consistent with the approach taken in paragraphs 7000(2)(a) through (c.1) of the ITR.

[403] The approach taken in each of paragraphs 7000(2)(a) through (d) is consistent with the general proposition that an amount is not recognized as income under the ITA unless the amount can be ascertained with some reasonable degree of certainty.[399] While a statutory provision enacted by Parliament may of course require the recognition of an amount that cannot otherwise be determined (i.e., phantom income), the language to bring about such a result would have to be clear. In this case, neither the text of subsection 12(9) of the ITA and section 7000 of the ITR read in context nor the purpose of these provisions as described at the time of their introduction supports such a result.

[404] The Respondent says that I should assume a crystallizing event and then calculate what the 2009 LP would be entitled to on that event by reference to the notional value of the Linked Notes at that time. The difficulty I have with this approach is that the amount so calculated has no correlation to what the 2009 LP may actually be entitled to under the terms of the Linked Notes on an actual crystallizing event.

[405] The Linked Notes do no more than provide the 2009 LP with the possibility of a return to be determined upon a crystallizing event such as the maturity of the Linked Notes. Both the existence of the return and the amount of the return on the Linked Notes are dependent on the occurrence of a crystallizing event. In the absence of an actual crystallizing event there is simply no way of knowing the actual amount that the 2009 LP is entitled to be paid under the terms of the Linked Notes and therefore there is no amount to reallocate to avoid a deferral of income. This is not an inappropriate result because in fact there is no deferral of the return

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[399] *M.N.R. v. Benaby Realties Ltd.*, [1968] S.C.R. 12 at page 16, *Ikea Ltd. v. Canada*, [1998] 1 S.C.R. 196 at paragraph 34, *West Kootenay Power and Light Co.v. Canada*, [1992] 1 F.C. 732 (FCA), *Maritime Telegraph and Telephone Co. v. Canada*, [1992] 1 F.C. 753 (FCA) and *Stevenson & Hunt Insurance Brokers Limited v. The Queen*, 62 F.T.R. 81, 93 DTC 5125 (FCTD), affirmed 98 DTC 6383, 1997 CarswellNat 2817 (FCA).

on the Linked Notes because until an actual crystallizing event there is no return to defer. The result simply follows the uncertainty attached to such debt obligations.

[406] Assuming the existence of a crystallizing event does not fix this issue because the assumed event only establishes a notional entitlement and amount for the relevant period. This is in stark contrast to paragraphs 7000(2)(a) through (c.1), which use assumed events such as maturity and retraction to determine the portion of the actual return on the debt obligation that would be earned by the taxpayer in the taxation year if that return was apportioned in a manner that did not defer the recognition of the return as income.

[407] The periodic calculation of the notional value of the Linked Notes required by section 27 of the Linked Notes is not equivalent to the return that may be earned by the 2009 LP following a crystallizing event. The 2009 LP has no claim to that value and, in the absence of an actual crystallizing event, the value of the Linked Note at a particular point in time is not indicative of the amount that the 2009 LP may be entitled to by way of a return for the period on the occurrence of an actual crystallizing event in the future.

[408] In summary, the Respondent's approach ignores the fact that an assumed crystallizing event does not allow for the calculation of a portion of the amount that the 2009 LP is actually entitled to under the Linked Notes and results in the allocation of phantom income that may never be earned by the 2009 LP. The text, context and purpose of the provisions provide no basis on which to conclude that Parliament intended the approach taken in paragraph 7000(2)(d) to depart so markedly from the approach taken in paragraphs 7000(2)(a) through (c.1) of the ITR.

[409] I also note that, while this is by no means determinative, the CRA has consistently applied paragraph 7000(2)(d) on the basis that the return on the debt obligation must be known in order for a maximum amount to be determined under that paragraph.[400]

[410] For the foregoing reasons, I find that subsection 12(9) of the ITA and section 7000 of the ITR do not require the 2009 LP to accrue an amount as interest on the Linked Notes.

F. The Interest Payable on the Unit Loans Is Not Deductible Under Paragraph 20(1)(c)

[400] See, for example, Ruling 2007-0237351R3, Ruling 9719753, ATR-61 and Memo 9633886.

[411] The Respondent submits that if no interest is deemed by subsection 12(9) of the ITA and paragraph 7000(2)(d) of the ITR to accrue to the 2009 LP on the Linked Notes then the deduction from income claimed by the Appellants for interest payable on the Unit Loans should be denied because the Unit Loans are not borrowed money used for the purpose of earning income from a business or property but are borrowed money used for the purpose of realizing capital gains. The Respondent does not dispute that the other three requirements of subparagraph 20(1)(c)(i) have been met.[401]

[412] The Appellants submit that even if their purpose in using the Unit Loans to purchase LP Units was to realize a capital gain, the interest is deductible under subparagraph 20(1)(c)(i) of the ITA. I will address this position first.

[413] In *Stewart v. Canada*, 2002 SCC 46, [2002] 2 S.C.R. 645 ("*Stewart*"), the Supreme Court of Canada stated at paragraph 68:

> With respect to whether or not an anticipated capital gain should be included in assessing whether the taxpayer has a reasonable expectation of profit, we reiterate that the expected profitability of a venture is but one factor to consider in assessing whether the taxpayer's activity evidences a sufficient level of commerciality to be considered either a business or a property source of income. Having said this, in our view, the motivation of capital gains accords with the ordinary business person's understanding of "pursuit of profit", and may be taken into account in determining whether the taxpayer's activity is commercial in

[401] The Supreme Court of Canada summarized the four requirements of subparagraph 20(1)(c)(i) at paragraph 28 of *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622 ("*Shell Canada*"):

> . . . The provision has four elements: (1) the amount must be paid in the year or be payable in the year in which it is sought to be deducted; (2) the amount must be paid pursuant to a legal obligation to pay interest on borrowed money; (3) the borrowed money must be used for the purpose of earning non-exempt income from a business or property; and (4) the amount must be reasonable, as assessed by reference to the first three requirements.

The Respondent says the third requirement has not been met.

> nature. Of course the mere acquisition of property in anticipation of an eventual gain does not provide a source of income for the purposes of s. 9; however, an anticipated gain may be a factor in assessing the commerciality of the taxpayer's overall course of conduct.
>
> [Emphasis added.]

[414] Subsection 9(1) of the ITA states that "a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year". In *Stewart*, the Court states that a capital gain is not income from a source described in section 9 of the ITA, which can only mean that a capital gain is not income from a business or property.[402] While this proposition is self-evident and can be further justified by a detailed review of the relevant provisions of the ITA and the history of the taxation of capital gains under the ITA, in my view this brief analysis is sufficient to reject the Appellants' position that, for the purposes of paragraph 20(1)(c), a reasonable expectation of income includes a reasonable expectation of capital gains.

[415] The Appellants used the Unit Loans to acquire LP Units. The Program gave the Appellants three possible ways of realizing on their LP Units: on the maturity of the Program on December 31, 2028; by requesting the redemption of the LP Units after the ninth year of the Program;[403] or by selling the LP Units to a third party approved by the 2009 LP and FT. Mr. Gordon testified that exit on maturity was the "expected route".[404] The other Appellants either explicitly testified that they expected to hold the LP Units until the maturity of the Program or appeared to assume that that was what would occur under the Program.[405]

[416] The term sheets for the Program described two possible scenarios regarding the LP Units: Scenario A and Scenario B. Mr. Gordon described these two scenarios as follows:

> Scenario A was intended to provide an analysis as to the financial repercussions on maturity if a unit holder held the units to maturity. Scenario B was designed to indicate the financial repercussions or results for somebody who was able to sell their units prior to maturity.

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[402] See, also, *Mohammad v. Canada*, [1998] 1 F.C. 165 (FCA) at paragraph 13 where the Court notes that paragraph 20(1)(c) says nothing about capital gains. Subsection 9(3) states that "[i]n this Act, 'income from a property' does not include any capital gain from the disposition of that property".

[403] The redemption route was available to the Appellants once annually after the ninth year of the Program.

[404] Line 23 of page 222 of the Transcript.

[405] For example, Mrs. Tilatti testified that she would hold her LP Units until maturity while Dr. Chu and Dr. Sang expressed no understanding of scenario A or B but appeared to assume that they would be holding their LP Units until maturity because that was how the Program worked.

> In that case, it was assumed that the units themselves were treated as capital property. As a result, the disposition of the sale of those units to a third party would trigger a capital gain income inclusion as opposed to a full income inclusion.[406]

[417] Of the five other Appellants, those who appeared to have some understanding of the two scenarios testified that Scenario A yielded income and was the likely scenario because there was no market or buyer for the LP Units. Two Appellants testified that they had no understanding of the two scenarios.[407] Dr. Platnick stated in cross-examination that he hoped for scenario B.

[418] The 2009 LP's sole source of income is the Linked Notes. The Linked Notes provide a return to the 2009 LP, determined on maturity, equal to the greater of two amounts, each computed by reference to a notional portfolio (Portfolio A and Portfolio B).[408] Regardless of the amount Leeward owes to the 2009 LP on the maturity of the Linked Notes, the amount that will be paid by Leeward to the 2009 LP in satisfaction of the Linked Notes cannot be greater than the assets of Leeward at the time less the amount payable by Leeward to TGTFC under the TGTFC Notes. The assets of Leeward are comprised of the Man Notes and the loans to DT.

[419] Notwithstanding this practical limitation, the 2009 LP will be required to include in income under paragraph 12(1)(c) the full amount of the return on the Linked Notes. If Leeward does not pay the full amount of the return owing to the 2009 LP on the maturity of the Linked Notes, the 2009 LP is expected to claim a deduction from income under paragraph 20(1)(p) equal to the shortfall.[409]

[420] In *Ludco*, the Supreme Court of Canada stated:

> . . . In the result, the requisite test to determine the purpose for interest deductibility under s. 20(1)(c)(i) is whether, considering all the circumstances, the taxpayer had a reasonable expectation of income at the time the investment was made.
>
> Reasonable expectation accords with the language of purpose in the section and provides an objective standard, apart from the taxpayer's subjective intention, which by itself is relevant but not conclusive. It also avoids many of the pitfalls of the other tests advanced and furthers the policy objective of the interest

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[406] Lines 27 to 28 of page 226 and lines 1 to 9 of page 227 of the Transcript.
[407] Dr. Sang and Dr. Chu.
[408] The Linked Notes also provide for a determination of the return on other crystallizing events such as a redemption of the Linked Notes: section 9 of the Linked Notes.
[409] Lines 10 to 16 of page 213 of the Transcript.

deductibility provision aimed at capital accumulation and investment, as discussed in the next section of these reasons.[410]

[421] The Respondent does not dispute that the LP Units are a potential source of income to the Appellants. Rather, the Respondent submits that the Appellants did not acquire their LP Units for the purpose of earning the income that may be allocated to them by the 2009 LP on the maturity of the Linked Notes but for the purpose of realizing a capital gain on the disposition of the LP Units. The Respondent provides the following submissions in support of this position:

> 490. In light of the evidence and all of the circumstances, there is no reasonable basis to conclude that EquiGenesis or the participants expected the linked notes to mature, thus realising income, in particular:
>
> a) Equigenesis is in the business of promoting tax-assisted investments and its objective is to maximize the tax benefits for his *(sic)* clients. Looking at the term sheet, the single greatest tax benefit described on it is scenario B, which has the investors realizing a capital gain in year 20.
>
> b) Equigenesis is constantly trying to enhance the structures to maximise the return of the investors, and in particular the tax benefits. Amongst the enhancements for the 2010 taxation year is the new exit strategy, which results in a taxable capital gain of nil to the participants.
>
> c) The participants chose to participate in the EQ09 Program primarily for its tax benefits.
>
> d) There is no evidence of any factors that would prevent EquiGenesis from facilitating the disposition of units or assets of the Partnership in year 2028, such that the participants would realize capital gains, instead of partnership income.
>
> e) Investors preferred the Option B and viewed option A as a worst case scenario.
>
> 491. As a result, this Court should conclude that the appellants did not have a reasonable expectation that they would realize gross income from their investments in EQ09 LP.[411]

[422] I am unable to accept the Respondent's position. The oral and documentary evidence clearly establishes that there was no market for the LP Units and that

[410] Paragraphs 54 and 55. The Court goes on to state that "income" in this context refers to gross income: paragraph 63.

[411] Paragraphs 490 and 491 of the Respondent's Written Submissions.

there was no identifiable buyer for the LP Units. The oral and documentary evidence also clearly establishes that no written representations were made to the Appellants that their LP Units would be purchased prior to the maturity of the Program. As for oral representations, I accept the evidence of the Appellants that no oral representations were made to them regarding the purchase of their LP Units prior to the maturity of the Program.

[423] Mr. Gordon did describe four situations in which participants in earlier programs sold partnership units on their own to relatives or a friend and two situations in which EquiGenesis was able to find purchasers for limited partnership units.[412] However, Mr. Gordon's evidence does not support the conclusion that there is a market for the LP Units or that there is a buyer for the LP Units. It only establishes that it may be possible to sell the LP Units.

[424] The points raised by the Respondent in paragraphs 490 a) through e) of her submissions do not support the position that the LP Units were acquired by the Appellants solely for the purpose of realizing a capital gain.

[425] The points raised in paragraphs a) and b) support only a possible inference that the Appellants' purpose in using the Unit Loans to acquire LP Units was to realize a capital gain. The evidence of the Appellants and the objective evidence of the elements of the Program found in the documents implementing the Program rebut any such inference.[413]

[426] The point raised in paragraph c) is a description of the Appellants' tax motives. The Appellants' motives are not the same as the Appellants' purpose in using the Unit Loans to purchase LP Units.[414]

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[412] Line 28 of page 227, page 228 and lines 1 to 12 of page 229 of the Transcript.

[413] In *Swirsky v. The Queen*, 2014 FCA 36, the Federal Court of Appeal summarizes at paragraphs 8 and 9 the correct approach to assessing the intention of a taxpayer by reference to all the circumstances:

> In *Ludco Entreprises Ltd. v. Canada*, 2001 SCC 62, [2001] 2 S.C.R. 1082 at paragraphs 54 and 55 the Supreme Court determined that where the purpose or intention behind an action is to be ascertained, a court should objectively determine the purpose, guided by both objective and subjective manifestations of purpose. The appellant asserts that the Judge erred in law by relying inordinately upon the wife's subjective intention and not enough upon objective manifestations of purpose.

[414] The distinction between motive and intention or purpose is described by the Supreme Court of Canada at paragraph 22 of *Backman*. In *Walls*, the Supreme Court of Canada stated at paragraph 22:

> Although the respondents in this case were clearly motivated by tax considerations when they purchased their interests in the Partnership, this does not detract from the commercial nature of the storage park operation or its characterization as a source of income for the purposes of s. 9 of the Act. It is a well-established proposition that a tax motivation does not affect the validity of transactions for tax purposes . . . .

[427] The point raised in paragraph d) is a roundabout way of saying that a sale of the LP Units is possible. However, the fact that a sale of the LP Units is possible says nothing about whether the Appellants' purpose in using the Unit Loans to acquire LP Units was to realize a capital gain or earn income. It simply establishes that the Appellants could sell their LP Units. This possibility must be viewed in the context of the oral and documentary evidence that there was no market for the LP Units and no written or oral representations to the Appellants that their LP Units would be purchased. In the circumstances, a sale of the LP Units is merely a possibility and not a purpose of acquiring the LP Units.[415]

[428] The point raised in paragraph e) is not supported by the evidence. At best, the Appellants who understood the two scenarios recognized that Scenario B provided a better tax result and hoped that scenario B would transpire. In fact, the strongest statement on this point was Dr. Platnick's concession in cross-examination that he hoped for scenario B. Given how the ITA differentiates between capital gains and income, it is certainly not surprising that the Appellants would prefer to realize a capital gain rather than earn ordinary income in the same amount. However, evidence of wishful thinking in hoping for a result that the objective evidence establishes to be unlikely is not persuasive evidence that the Appellants' purpose in using the Unit Loans to purchase LP Units was to realize capital gains and not income.

[429] I also note that, even though the Respondent did not concede that the LP Units are a potential source of income to the Appellants, for the reasons that follow I would draw the conclusion, based on the evidence, that the LP Units are a potential source of income and that the Appellants' expectation at the time of the investment of earning gross income from the LP Units was reasonable.

[430] The structure of the Program is such that the Appellants' only legally enforceable sources of return on the LP Units are the right to redeem the LP Units after nine years but before the maturity of the Program and the right to a share of the income of the 2009 LP realized on the maturity of the Linked Notes on December 31, 2028.

[431] Mr. Gordon stated in his testimony that redemption of the LP Units prior to the maturity of the Program would trigger full inclusion in income for the

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[415] I note that in *Ludco* the Supreme Court stated, at paragraph 50, that the purpose of earning income did not have to be the only purpose or even the predominant purpose:

> . . . . nothing in the text of the provision [subparagraph 20(1)(c)(i)] indicates that the requisite purpose must be the exclusive, primary or dominant purpose, or that multiple purposes are to be somehow ranked in importance in order to determine the taxpayer's "real" purpose. . . .

redeeming Participant. As well, the redeeming Participant would be responsible for any shortfall between the amount paid to the Participant by the 2009 LP and the balance owing on the Participant's Unit Loan and TGTFC Loan.[416] The Respondent has not suggested a different result on the redemption of LP Units prior to the maturity of the Program.

[432] Similarly, the evidence establishes that the maturity of the Program is expected to result in income to the Appellants although the quantum of that income is not known. The potential for income results from the maturity of the Linked Notes and the allocation by the 2009 LP of any resulting income to the holders of the LP Units. The term sheets for the Program describe the tax consequences to Participants of this allocation as scenario A.

[433] The existence of the legal right to payment by the 2009 LP on the maturity of the Program is an essential aspect of the Program since it provides the means by which the Participants can repay their outstanding debts to FT without using their own resources. For them to do that the amount received from the 2009 LP on the maturity of the Program must at least be equal to the principal amount of the loans to the Participants outstanding on December 31, 2028,[417] which amount will be significantly greater than the original investment in the 2009 LP.[418]

[434] The Appellants' legal right to payment by the 2009 LP on the maturity of the Program is not mere window dressing.[419] This right is indirectly backed up by the assets of Leeward, which are comprised of the Man Notes and the accumulating amounts owed to Leeward by DT less Leeward's much smaller obligation to TGTFC under the TGTFC Notes. The assets of DT are the accumulating amounts owed to DT by FT and the assets of FT are the accumulating amounts owed to FT by the Participants.[420]

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[416] Lines 13 to 28 of page 223 and lines 1 to 21 of page 224 of the Transcript.
[417] That is, the loans that replace the Unit Loans and the TGTFC Loans at the halfway mark.
[418] The original investment in the 2009 LP is $36,140 per LP Unit. The original aggregate principal amount of the TGTFC Loan and the Unit Loan is $42,000 per LP Unit. The latter number will increase considerably over the term of the Program as a result of the annual advances by FT to pay interest.
[419] I note that this determination regarding "window dressing" has no bearing on my earlier analysis under subsection 143.2(7) (or vice versa) as that analysis was based on the interpretation and application of specific anti-avoidance provisions in the ITA. Moreover, in *Ludco*, Justice Iacobucci expressly rejected a *bona fide* purpose test for paragraph 20(1)(c) (paragraphs 47 to 52).
[420] It is apparent from this description that the 2009 LP Program is essentially a series of legally enforceable transactions designed to achieve an interest deduction. However, the structured and tax-driven nature of the transactions is not in and of itself a reason for denying the interest deduction where the transactions comply with the requirements of the ITA for the sought-after deduction. As stated in *Shell Canada* at paragraphs 39 and 40: ". . . absent a specific provision of the Act to the contrary or a finding that they are a sham, the taxpayer's legal relationships must be respected in tax cases" and ". . . a searching inquiry for either the "economic realities" of a

[435] The fact that there is a practical limit to the amount that may be paid by Leeward to the 2009 LP under the terms of the Linked Notes and that the 2009 LP may claim a deduction from income under paragraph 20(1)(p) does not detract from the real possibility that the Appellants will earn income from their LP Units because, even if the practical limit is reached, the 2009 LP will still have substantial gross income that must be allocated to the holders of LP Units. Accordingly, this possibility does not turn an objectively reasonable expectation of gross income into an unreasonable expectation.

[436] Finally, the fact that the reasonably expected gross income is expected to be realized on December 31, 2028 is not a consideration raised by paragraph 20(1)(c) of the ITA. The paragraph dictates the timing of the deduction of the interest expense and does not require that the deduction be matched to the income from the business or property. This point is reinforced by the fact that the matchable expenditure rules in section 18.1 do not apply to deductions provided for under section 20.

[437] On the basis of the foregoing, I conclude that the interest payable by the Appellants on their respective Unit Loans is deductible under subparagraph 20(1)(c)(i) of the ITA as provided for in that subparagraph. As well, since the analysis is essentially the same, the Fees incurred by the Appellants are also deductible in accordance with the applicable provisions of the ITA.

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particular transaction or the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the Act to a taxpayer's transaction". See, also, *Stewart* at paragraph 65 and *Ludco* at paragraph 64.

IV. Conclusion

[438] The appeals are allowed and the reassessments of the Appellants are referred back to the Minister for reconsideration and reassessment in accordance with the foregoing conclusions.

Signed at Ottawa, Canada, this 8th day of September 2017.

"J.R. Owen"

Owen J.

APPENDIX A

2013-355(IT)G; 2013-3488(IT)G (Cassan); 2014-384(IT)G (Gordon); 2014-806(IT)G (Tilatti); 2014-804(IT)G (Platnick); 2014-802(IT)G (Chu); 2014-803(IT)G (Sang)

TAX COURT OF CANADA

BETWEEN:

LYNN CASSAN ET AL

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

PARTIAL STATEMENT OF AGREED FACTS

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Respondent

PARTIAL STATEMENT OF AGREED FACTS

The parties to these proceedings admit, for the purposes of these proceedings only, the truth of the facts and set out in this Statement of Agreed Facts ("Agreed Statement").

The facts in this Agreed Statement are organized under the following headings:

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A. The Program

1. The EquiGenesis 2009-II Preferred Investment Limited Partnership and Donation Program ("EQ 2009 Program") is a program promoted by EquiGenesis Corporation ("EquiGenesis").

2. The EQ 2009 Program has two components: an investment in a limited partnership (the "Investment Program") and a payment of $10,200 per limited partnership unit purchased to a registered charity (the "Donation Program").

3. Participants in the EQ 2009 Program had the option of participating in either the Investment Program, or in both the Investment and Donation Program.

4. In 2009, fifty-nine Canadian resident taxpayers participated in the EQ 2009 Program, fifty-eight of which participated in both components of the EQ 2009 Program (each a "Participant", collectively, the "Participants").

5. One taxpayer participated in the Investment Program only.

B. The Parties

6. EquiGenesis is a privately-held, federally-incorporated company with its registered head office in Toronto, Ontario.

7. Ken Gordon is the sole shareholder of EquiGenesis.

8. EquiGenesis 2009-II Preferred Investment LP (the "Partnership") is an Ontario limited partnership that is registered as a tax shelter (TS075390) for purposes of the *Income Tax Act* (the "Act").

9. The general partner of the Partnership is EquiGenesis 2009-II Preferred Investment GP Corp. (the "General Partner").

10. The sole shareholder of the General Partner is ultimately the 2009 Gordon Family Trust.

11. EquiGenesis and the General Partner are promoters of the EQ 2009 Program.

C. The Charity

12. Established in 2005 and located in Ottawa, Canada, the Ottawa College of Jewish Studies was a registered charitable organisation for purposes of the Act.

13. The Ottawa College of Jewish Studies' stated purpose was promoting the study of Judaism by developing and offering educational courses.

14. Effective September 24, 2009, following a special resolution by its directors, the Ottawa College of Jewish Studies changed its name to The Giving Tree Foundation of Canada (the "Charity").

15. Effective September 24, 2009, the mandate of the Charity was, among other things, to "receive and maintain a fund or funds and to apply all or part of the principal and income therefrom, from time to time, to charitable organizations that are registered charities under the [Act]."

16. On December 2, 2009, the Charity entered into a memorandum of understanding with EquiGenesis that, among other things, outlined the terms of its participation in the EQ 2009 Program.

D. The Investment Program

17. To participate in the investment component of the EQ 2009 Program, each Participant:

    (a) was required to subscribe for a minimum of 10 units in the Partnership (the "Units"); and

    (b) completed a Subscription and Power of Attorney (the "Unit Power of Attorney") naming the General Partner as attorney and agent of the Participant.

18. The Units were offered to Participants under private placement prospectus exemptions for purposes of the *Securities Act* (Ontario) and to similarly qualified Participants in all other provinces excluding Newfoundland and Quebec.

19. Each Participant who subscribed to the Partnership executed (i) a Unit Loan Application and Assignment Form and (ii) a Promissory Note.

20. Between August 12, 2009 and December 30, 2009, fifty-nine Participants in the EQ 2009 Program acquired a total of 1,113.75 Units in the Partnership, which were represented by Unit Certificates (the "LP Unit Certificates").

(i) <u>Finance Trust</u>

21. To finance their acquisition of the Units, Participants borrowed funds from aIncome 2009 Finance Trust ("Finance Trust").

22. The corporate trustee of Finance Trust was aIncome 2009 Finance Corp.

(ii) <u>The Investment Loan</u>

23. Of the $36,140 used to purchase one Unit, each Participant paid $4,140 in cash and borrowed $32,000 from Finance Trust (the "Investment Loan").

24. The funds advanced by Finance Trust to the Participants for the purposes of the Investment Loan were borrowed by Finance Trust (the "Loan Facility").

25. As security for the Investment Loan, each Participant assigned his or her Units to Finance Trust.

26. The Investment Loan bore interest at the rate of 7.85% per annum.

27. The interest on the Investment Loan is due on or before February 28 of each year and the principal repayment is due on February 15, 2019.

28. Beginning on February 1, 2011 an annual fee of $30 per Unit was paid by Participants to Finance Trust as a loan maintenance fee ("Loan Maintenance Fee") in respect of the prior year's loan balance on the Investment Loan.

29. Beginning on February 1, 2011, an annual fee of $95 per Unit was paid by Participants to the General Partner as an administration fee (the "Administration Fee").

30. Under the Unit Loan Application and Assignment Form, if a Participant's interest is not paid by February 28 of a given year, the Participant is deemed to have requested a further cash advance from Finance Trust to pay the outstanding interest. The decision to grant such an advance is subject to the discretion of Finance Trust.

31. Participants appointed the General Partner to receive the initial loan proceeds.

(iii) Use Of Funds Obtained By the Partnership and Debt Obligation to Leeward

32. Of the $36,265 that Participants paid per Unit:

    (i) $36,140 was paid as the subscription price for each Unit and invested in the Partnership; and

    (ii) a one-time fee of $125 per Unit was paid as a loan arrangement fee ("Loan Arrangement Fee") to Finance Trust.

33. The Partnership invested $34,575 per Unit in a debt obligation with Leeward (defined and described below).

34. Each Participant paid the $4,140 difference between the subscription price of $36,140 and the Investment Loan of $32,000, plus the one time Loan Arrangement Fee ($125), the annual Loan Maintenance Fee ($30), and the annual Administration Fee ($95) in cash from his or her own resources.

(iv) Leeward

35. Of the $36,140 invested by Participants per Unit in the Partnership:

(i) $1,565 was paid by the General Partner to cover issue costs for the Units; and

(ii) $34,575 was paid by the Partnership to Leeward (defined below) in exchange for linked notes that mature in nineteen years (the "Linked Notes").

36. Leeward Alternative Financial Asset 2009 Corporation ("Leeward") is a corporation formed under the laws of the British Virgin Islands.

37. Under a General Security Agreement dated August 12, 2009, Leeward granted to the Partnership a blanket security coverage over all of its assets and rights.

38. The Linked Notes were issued for a total price of $38,507,906.25.

39. In summary, the Partnership acquired from Participants the following amounts, and with these amounts, purchased the Linked Notes as follows:

	Per Unit	**1,113.75 Units**
Cash paid by Participants	$4,265	$4,750,143.75

	Per Unit	1,113.75 Units
Borrowed from Finance Trust (7.85% per annum)	$32,000	$35,640,000
Total	**$36,265**	**$40,390,143.75**
Paid to Finance Trust as Loan Fee	$125	$139,218.75
Paid to General Partner	$1,565	$1,743,018.75
Balance Used to Purchase the Linked Notes	$34,575	**$38,507,906.25**

40. The Linked Notes are subordinate to the Charity Notes (as defined below).

(v) <u>The Linked Notes</u>

41. On July 30, 2009, Leeward and the Partnership executed the Note Issuance and Performance Fee Agreement.

42. On December 31, 2028, the return on the Linked Notes will be determined by reference to notional portfolios of securities.

43. Under the Linked Notes, on December 31, 2028, Leeward must unconditionally pay the Partnership $34,575 per Unit (the "principal amount") plus a variable return amount equal to the greater of the return from Portfolio A and the return from Portfolio B.

44. Portfolio A is a basket of securities and debt instruments notionally purchased with the principal amount of the Linked Notes, comprised of:

(i) selected Canadian dividend mutual funds managed by Canadian chartered banks (50%);

(ii) selected Canadian bond mutual funds managed by Canadian chartered banks (35%); and

(iii) Notes issued by AHL Investment Strategies SPC (15%).

45. Portfolio B is a notional investment portfolio consisting of the investments included in the Dow Jones Canada Select Dividend index with the return computed at 200% of the return of the index.

46. Beginning in 2018, the Partnership may begin to redeem the principal amount portions of the Linked Notes together with a calculated return amount, subject to a redemption notice being provided to Leeward.

(vi) <u>The Safekeeping Agreement</u>

47. On August 12, 2009, Finance Trust, the General Partner, Leeward and the law firm Gowling Lafleur Henderson LLP ("Gowlings") entered into a Safekeeping Agreement.

48. The Safekeeping Agreement appointed Gowlings as the custodian, on behalf of Finance Trust, of the Participants' Promissory Notes (mentioned in paragraph 19 above), LP Unit Certificates, and the Unit Powers of Attorney, which Gowlings is to hold until the requirements set out in the Safekeeping Agreement are satisfied.

(vii) <u>The Priority Agreement</u>

49. On August 12, 2009, Finance Trust, the Partnership and the General Partner entered into a Priority Agreement.

50. Pursuant to the Priority Agreement, the security interest granted by Participants to the General Partner in respect of the annual administration fees payable by the Participants to the General Partner is wholly subordinated to the security interest granted by Participants to Finance Trust.

(viii) **Use Of Funds Obtained By Leeward**

51. Of the $34,575 per Unit obtained by Leeward, $2,575 was invested in Class D Notes issued by AHL Investment Strategies SPC, a Cayman Islands company managed by Man Investments Limited.

52. Man Investments was established in 1983 as part of the Man Group plc. Man Group plc is a publicly traded investment management company that offers alternative investment products and solutions to private investors and institutions worldwide.

53. Of the total $38,507,906.25 obtained by Leeward, it paid $2,867,906.25 for the Class D Notes.

54. Of the $34,575 per Unit obtained by Leeward, $32,000 was loaned to aIncome 2009 Deposit Trust ("Deposit Trust") for 19 years at 7.85% per annum (the "Deposit Trust Investment Loan").

55. Deposit Trust is an affiliate of Finance Trust.

56. The loan from Leeward to Deposit Trust is repayable in full on December 31, 2028.

57. Under a General Security Agreement dated August 12, 2009, Deposit Trust granted to Leeward a security interest over its right, title, and interest in all of its existing and future property.

58. Upon receipt of the loan from Leeward, Deposit Trust loaned the same amount to Finance Trust at 7.85% per annum (the "Finance Trust Investment Loan").

59. The Finance Trust Investment Loan is repayable in full on December 31, 2028.

60. Under a General Security Agreement dated August 12, 2009, Finance Trust granted to Deposit Trust a security interest in its right, title and interest in the loans it made in 2009, and all security taken as security for those loans, which included the Units.

E. **The Donation Program**

61. By investing in the Partnership, each Participant had the option to participate in the Donation Program in the EQ 2009 Program.

62. To participate in the Donation Program, each Participant completed a Donation Loan Application and Assignment Form as well as a Pledge and Direction Form.

63. Each person who participated in the Donation Program paid to the Charity $10,200 per Unit purchased under the Investment Program.

64. Of the $10,200 per Unit paid to the Charity, the Participants financed $10,000 per Unit by borrowing from Finance Trust for approximately 9 years and 2 months at 7.85% per annum (the "Donation Loan").

65. The funds advanced by Finance Trust to the Participants for the purposes of the Donation Loan were borrowed by Finance Trust under the Loan Facility.

66. The Participants in the Donation Program were required to assign their Partnership Units as security for the Donation Loan.

67. The Participants appointed EquiGenesis to receive the Donation Loan proceeds from Finance Trust.

68. Of the $10,200 per Unit paid to the Charity, Participants paid $200 of that amount from their own cash savings and borrowed $10,000 from Finance Trust.

69. For every $10,000 borrowed from Finance Trust, Participants paid a Loan Arrangement Fee to Finance Trust of $35.

70. Fifty-eight of the fifty-nine Participants who participated in the Investment Program participated in the Donation Program.

71. As of December 30, 2009, the Participants in the Donation Program disbursed a total of the following amounts:

Cash @ $200	$220,750
Donation Loan @ $10,000	$11,037,500
Charity Total	**$11,258,250**
Loan Arrangement Fee @ $35	$38,631.25

72. The interest owing to Finance Trust on the Donation Loan of each of the Participants is due on or before February 28 of each year and the principal repayment is due on February 15, 2019.

73. If a Participant's annual Donation Loan interest is not paid by February 28 of a given year, the Participant is deemed to have requested a further cash advance from Finance Trust to pay the outstanding interest. The decision to grant such an advance is subject to the discretion of Finance Trust.

(i) <u>Direction of Funds Paid To The Charity</u>

74. Participants, by way of the Pledge and Direction Form, directed and instructed the Charity:

    (i) to invest 98.04% of every $10,200 paid to the Charity in a first-priority debt obligation of Leeward;

    (ii) that the debt obligation would yield 4.75% interest per annum with a payment of 1.75% in December 2010 and subsequent annual payments to the Charity of 3.75% beginning in 2011; and

    (iii) that the investment was to be held for a period of not less than 19 years.

75. Under the terms of an agreement titled "The Giving Tree Foundation of Canada Direction" between Participants and the Charity (the "Direction"):

(i) Participants directed the Charity to distribute 90% of the initial $200 per Unit received by the Charity to specific charities; and

(ii) Participants directed the Charity to distribute 90% of the funds it receives from the Charity Notes (as defined below) to specific charities.

76. The following charities have received the agreed upon amounts under the Direction:

Charity	2009	2010	2011
Giving Tree Foundation of Canada	$22,075.00	$19,315.63	$41,390.63
Holland Bloorview Kids Foundation	$44,307.45	$38,769.02	$83,076.47
Geneva Centre for Autism Foundation	$21,579.84	$18,882.36	$40,462.20
Leave out Violence	$35,017.02	$30,639.89	$65,656.91
JACS Toronto	$21,096.00	$18,459.00	$39,555.00
Make-A-Wish Canada	$34,806.69	$30,455.85	$65,262.54
Canuck Place Children's Hospice Foundation	$8,604.00	$7,528.50	$16,132.50
Alberta Children's Hospital Foundation	$24,480.00	$21,420.00	$45,900.00
IWK Health Centre Foundation	$2,790.00	$2,441.25	$5,231.25

Children's Hospital Foundation of Manitoba	$5,994.00	$5,244.75	$11,238.75
Total	**$220,750.00**	**$193,156.25**	**$413,906.25**

(ii) **The Giving Tree Foundation Notes**

77. On December 15, 2009 and December 30, 2009, the Charity received two promissory notes from Leeward acknowledging the debt obligations of Leeward, totaling $11,037,500, each with a maturity date of December 31, 2028 (the "Charity Notes").

78. The aggregate principal amount of the Charity Notes was based on an amount equal to 1,103.75 (representing the number of Units purchased by the Participants who participated in the Donation Program) multiplied by $10,000, as follows:

Purchase Date	Charity Note	LP Units	Amount per Unit	Charity Note Amount
Dec 15, 2009	Series 1 Note	722.75	$10,000	$7,227,500
Dec 30, 2009	Series 2 Note	381.00	$10,000	$3,810,000
Total		**1,103.75**		**$11,037,500**

79. The Charity was entitled to receive interest payments, calculated with reference to the principal amount of each of the Charity Notes at a rate of 1.75% on December 31, 2010, and 3.75% annually thereafter beginning on December 31, 2011 until maturity.

80. An additional compounding amount of 1% is due to the Charity on maturity such that the aggregate compound interest rate received by the Charity by maturity would equal 4.75% payable on the initial principal amount for the term of the Charity Note.

81. The Charity retained 10% of the interest paid by Leeward and disbursed 90% to the charities listed in paragraph 76 above.

82. Under a General Security Agreement dated December 15, 2009, Leeward granted the Charity a general security interest over all of Leeward's assets and rights.

83. On December 15, 2009, Leeward, the Charity, the Partnership, Deposit Trust and EquiGenesis entered into a Safekeeping Agreement, which requires that all property, assets and entitlements of Leeward remain in Canada.

84. On December 15, 2009, Leeward, the Charity, the Partnership and Deposit Trust entered into an Intercreditor Agreement pursuant to which:

    (i) the Charity security over all of Leeward's assets and rights, referenced in paragraph 82 above, is given first priority over the Partnership security, referenced in paragraph 37 above;

    (ii) Leeward was required to deliver to the Charity the certificates representing the Class D Notes.

(iii) <u>Flows of Funds in the Donation Program</u>

85. Leeward loaned $11,037,500 to Deposit Trust, pursuant to the terms of a loan agreement dated December 15, 2009, for a period of up to 19 years and 2 weeks at 7.85% per annum ("the Deposit Trust Donation Loan").

86. Deposit Trust loaned $11,037,500 to Finance Trust, pursuant to the terms of a loan agreement dated December 15, 2009, for a period of up to 19 years and 2 weeks at 7.85% per annum (the "Finance Trust Donation Loan").

87. Beginning on February 28, 2011:

    (i) Participants paid interest out of their own cash savings to Finance Trust under the Donation Loan in the amount of $375 per Unit, in respect of the prior year's accrued amount;

(ii) Finance Trust paid interest to Deposit Trust under the revolving loan facility in the amount of $375 per Partnership Unit;

(iii) Deposit Trust paid interest to Leeward under the revolving loan facility, in the amount of $375;

(iv) Leeward paid interest to the Charity under the Charity Notes in the amount of $375 per Unit; and

(v) Participants were deemed to have requested an additional cash advance from Finance Trust in an amount sufficient to pay the balance of the interest payable under the Donation Loan. The decision to grant such an advance is subject to the discretion of Finance Trust.

88. By December 31, 2028, the maturity date of the Charity Notes, Leeward is required to have paid the Charity the following amounts:

Principal Repayment Amount Owing at Maturity	$11,037,500.00
Interest Paid on December 31, 2010 @ 1.75%	$ 193,156.25
Interest Paid Annually over Term @ 3.75%	$ 7,450,312.50
Accrued Interest of approx. 1% Owing at Maturity	$ 3,796,900.00
Aggregate Total of Amounts Paid to the Charity	**$22,477,868.75**

F. The Appellants

(i) Lynn Cassan

89. In 2009, Lynn Cassan participated in the EQ 2009 Program.

90. On December 30, 2009, Cassan subscribed for 10 Units at a price of $36,140 per Unit for a total subscription of $361,400.

91. Cassan funded the acquisition of the Units with cash from her own pocket in the amount of $41,400 and financed the balance with a loan from Finance Trust (that is, the Investment Loan) in the amount of $320,000.

92. Cassan also incurred other expenses with respect to the Investment Loan and the administration of the Partnership, including, (i) a Loan Arrangement Fee of $1,250 paid to Finance Trust on closing in the 2009 Taxation Year; (ii) a Loan Maintenance Fee of $300; and (iii) an Administration Fee of $950, each paid in respect of the 2010 Taxation Year and 2011 Taxation Year.

93. The Investment Loan was for a term of approximately 9 years and 7 weeks (from December 30, 2009 to February 15, 2019).

94. The interest payable by Cassan on the Investment Loan was $68.82 in the 2009 Taxation Year, $25,125.40 in the 2010 Taxation Year and $27,097.75 in the 2011 Taxation Year.

95. During the 2009, 2010 and 2011 Taxation Years, the Partnership reported business losses, of which Cassan was allocated a pro-rata share of $1,444.55 for the 2009 Taxation Year; $3,309.24 for the 2010 Taxation Year; and $3,309.24 for the 2011 Taxation Year.

96. Cassan paid $102,000 to the Charity, and the Charity issued a charitable donation tax receipt to Cassan for this amount.

97. Cassan executed a Pledge and Direction Form directing and instructing the Charity to invest 98.04% of the $102,000 she paid to the Charity in a first-priority debt obligation of Leeward.

98. Cassan funded the $100,000 paid to the Charity with a loan from Finance Trust. The Donation Loan was for a term of approximately 9 years and 7 weeks (from December 30, 2009 to February 15, 2019).

99. She funded the remainder with cash from her own pocket.

100. In summary, in computing her income under the Act for the 2009, 2010 and 2011 Taxation Years, Cassan claimed the following deductions in relation to her participation in the EQ 2009 Program:

Item	2009	2010	2011
Interest Expenses	$68.82	$25,125.40	$27,097.75
Loan Arrangement Fee	$250	$250	$250
Loan Maintenance Fee		$300	$300
Administration Fee		$950	$950
Partnership Loss	$1,444.55	$3,309.24	$3,309.24
Donation Tax Credit	$29,580.00		

101. The Minister reassessed Cassan for the 2009, 2010 and 2011 Taxation Years. For the 2010 Taxation Year, the Minister included partnership income of $37,884. For the 2011 Taxation Year, the Minister initially included income of $145,400, and later reassessed Cassan to remove that inclusion and reduce it to $0.

102. The Minister also denied the deductions for interest and expenses (for the 2009, 2010 and 2011 Taxation Years), and the charitable donation tax credit (for the 2009 Taxation Year).

103. Cassan objected to the reassessments by way of notices of objection filed on May 30, 2012 and June 18, 2013.

(ii) Ken Gordon

104. In 2009, Ken Gordon participated in the EQ 2009 Program.

105. On October 6, 2009, Gordon subscribed for 10 Units at a price of $36,140 per Unit for a total subscription of $361,400.

106. Gordon funded the acquisition of the Units with cash from his own pocket in the amount of $41,400 and financed the balance with a loan from Finance Trust (that is, the Investment Loan) in the amount of $320,000.

107. Gordon also incurred other expenses with respect to the Investment Loan and the administration of the Partnership. These expenses included; (i) a Loan Arrangement Fee of $1,250 paid to Finance Trust on closing in the 2009 Taxation Year; (ii) a Loan Maintenance Fee of $300; and (iii) an Administration Fee of $950, each paid in respect of the 2010 Taxation Year.

108. The Investment Loan was for a term of approximately 9 years and 19 weeks (from October 6, 2009 to February 15, 2019).

109. The interest payable by Gordon on the Investment Loan was $5,918.68 in the 2009 Taxation Year and $25,584.62 in the 2010 Taxation Year.

110. During the 2009 and 2010 Taxation Years, the Partnership reported business losses, of which Gordon was allocated a pro-rata share of $1,444.55 for the 2009 Taxation Year and $3,309.24 for the 2010 Taxation Year.

111. Gordon paid $102,000 to the Charity, and the Charity issued a charitable donation tax receipt to Gordon for this amount.

112. Gordon executed a Pledge and Direction Form directing and instructing the Charity to invest 98.04% of the $102,000 he paid to the Charity in a first-priority debt obligation of Leeward.

113. Gordon transferred the charitable donation credit to his spouse who claimed a portion in computing her income for the 2009 Taxation Year.

114. Gordon funded $100,000 of the $102,000 paid to the Charity with a loan from Finance Trust. The Donation Loan was for a term of approximately 9 years and 9 weeks (from December 15, 2009 to February 15, 2019).

115. Gordon funded the remainder with cash from his own pocket.

116. In summary, in computing his income under the Act for the 2009 and 2010 Taxation Years, Gordon claimed the following deductions in relation to his participation in the EQ 2009 Program:

Item	2009	2010
Interest Expenses	$5,919	$25,585
Loan Arrangement Fee	$250	$250
Loan Maintenance Fee		$300
Administration Fee		$950
Partnership Loss	$1,444.55	$3,309.24
Donation Tax Credit[1]	$Nil	

117. The Minister reassessed Gordon for the 2009 and 2010 Taxation Years to include partnership income of $28,243 and $60,006. The Minister also denied the deductions for interest, expenses and losses.

118. Gordon objected to the reassessments by way of notices of objection filed on June 11, 2013.

119. Gordon was previously involved in other arrangements similar to the EQ 2009 Program, namely:

[1] As noted above, Gordon transferred the credit to his spouse who claimed a portion in computing her income for the 2009 Taxation Year.

Program	Promoter	Years	Charity
EquiGenesis 2004 Preferred Investment LP & Charitable Donation Program	EquiGenesis 2004 Preferred Investment GP Corp.	2004 to 2023	Canadian Lacrosse Association Little League Baseball Henvey Inlet First Nations Community Football Canada H B Arts Foundation
EquiGenesis 2005 Preferred Investment LP & Charitable Donation Program	EquiGenesis 2005 Preferred Investment GP Corp.	2005 to 2024	KRG Children's Charities
EquiGenesis 2006 Preferred Investment LP & Charitable Donation Program	EquiGenesis 2006 Preferred Investment GP Corp.	2006 to 2025	KRG Children's Charities
EquiGenesis 2004-II Preferred Investment LP	EquiGenesis 2004 Preferred Investment GP Corp.	2010 to 2024	N/A

(iii) Howard Platnick

120. In 2009, Howard Platnick participated in the EQ 2009 Program.

121. On August 12, 2009, Platnick subscribed for 65 Units at a price of $36,140 per Unit for a total subscription of $2,349,100.

122. Platnick funded the acquisition of the Units with cash from his own pocket in the amount of $269,100 and financed the balance with a loan from Finance Trust (that is, the Investment Loan) in the amount of $2,080,000.

123. Platnick also incurred other expenses with respect to the Investment Loan and the administration of the Partnership. These expenses included: (i) a Loan Arrangement Fee of $8,125 paid to Finance Trust on closing in the 2009 Taxation Year; (ii) a Loan

Maintenance Fee of $1,950; and (iii) an Administration Fee of $6,175, each paid in respect of the 2010 Taxation Year.

124. The Investment Loan was for a term of approximately 9 years and 27 weeks (from August 12, 2009 to February 15, 2019).

125. The interest payable by Platnick on the Investment Loan was $63,075.28 in the 2009 Taxation Year and $168,231.41 in the 2010 Taxation Year.

126. During the 2009 and 2010 Taxation Years, the Limited Partnership reported business losses of which Platnick was allocated a pro-rata share of $9,389.55 for the 2009 Taxation Year and $21,510.08 for the 2010 Taxation Year.

127. Platnick paid $663,000 to the Charity, and the Charity issued a charitable donation tax receipt to Platnick for this amount .

128. Platnick executed a Pledge and Direction Form directing and instructing the Charity to invest 98.04% of the $663,000 he paid to the Charity in a first-priority debt obligation of Leeward.

129. Platnick funded $650,000 of the $663,000 paid to the Charity with a loan from Finance Trust. The Donation Loan was for a term of approximately 9 years and 9 weeks (from December 15, 2009 to February 15, 2019).

130. He funded the remainder with cash from his pocket.

131. In summary, in computing his income under the Act for the 2009 and 2010 Taxation Years, Platnick claimed the following deductions in relation to his participation in the EQ 2009 Program:

Item	2009	2010
Interest Expenses	$63,075	$168,231
Loan Arrangement Fee	$1,625	$1,625
Loan Maintenance Fee		$1,950
Administration Fee		$6,175
Partnership Loss	$9,393	$21,515
Donation Tax Credit	$ 192,270	

132. The Minister reassessed Platnick for the 2009 and 2010 Taxation Years to include partnership income of $397,711 and $568,539, respectively. The Minister also denied the deductions for interest, expenses and charitable donation tax credit.

133. Platnick objected to the reassessments by way of notices of objection filed on August 13, 2013.

134. Platnick was previously involved in other arrangements similar to the EQ 2009 Program, namely:

Program	Promoter	Years	Charity
EquiGenesis 2004 Preferred Investment LP & Charitable Donation Program	EquiGenesis 2004 Preferred Investment GP Corp. & EquiGenesis Corporation	2004 to 2023	Canadian Lacrosse Association Little League Baseball Henvey Inlet First Nations Community Football Canada H B Arts Foundation
EquiGenesis 2005 Preferred Investment LP & Charitable Donation Program	EquiGenesis 2005 Preferred Investment GP Corp. &	2005 to 2024	KRG Children's Charities

Program	Promoter	Years	Charity
	EquiGenesis Corporation		
EquiGenesis 2006 Preferred Investment LP & Charitable Donation Program	EquiGenesis 2006 Preferred Investment GP Corp. & EquiGenesis Corporation	2006 to 2025	KRG Children's Charities
EquiGenesis 2004-II Preferred Investment LP	EquiGenesis 2004 Preferred Investment GP Corp.	2010 to 2024	N/A

(iv) Dana Tilatti

135. In 2009, Dana Tilatti participated in the EQ 2009 Program.

136. On December 30, 2009, Tilatti subscribed for 10 Units at a price of $36,140 per Unit for a total subscription of $361,400.

137. Tilatti funded the acquisition of the Units with cash from her own pocket in the amount of $41,400 and financed the balance with a loan from Finance Trust (that is, the Investment Loan) in the amount of $320,000.

138. Tilatti also incurred other expenses with respect to the Investment Loan and the administration of the Partnership. These expenses included: (i) a Loan Arrangement Fee of $1,250 paid to Finance Trust on closing in the 2009 Taxation Year; (ii) a Loan Maintenance Fee of $300; and (iii) an Administration Fee of $950, each paid in respect of the 2010 Taxation Year.

139. The Investment Loan was for a term of approximately 9 years and 7 weeks (from December 30, 2009 to February 15, 2019).

140. The interest payable by Tilatti on the Investment Loan was $25,125.40 in the 2010 Taxation Year.

141. During the 2009 and 2010 Taxation Years, the Partnership reported business losses , of which Tilatti was allocated a pro-rata share of $1,444.55 for the 2009 Taxation Year and $3,309.24 for the 2010 Taxation Year.

142. Tilatti paid $102,000 to the Charity, and the Charity issued a charitable donation tax receipt to Tilatti for this amount.

143. Tilatti executed a Pledge and Direction Form directing and instructing the Charity to invest 98.04% of the $102,000 she paid to the Charity in a first-priority debt obligation of Leeward.

144. Tilatti funded $100,000 of the $102,000 paid to the Charity with a loan from Finance Trust. The Donation Loan was for a term of approximately 9 years and 7 weeks (from December 30, 2009 to February 15, 2019).

145. Tilatti funded the remainder with cash from her own pocket.

146. In summary, in computing her income under the Act for the 2009 and 2010 Taxation Years, Tilatti claimed the following deductions in relation to her participation in the EQ 2009 Program:

Item	2009	2010
Interest Expenses	$68.82	$25,125.40
Loan Arrangement Fee	$250	$250
Loan Maintenance Fee		$300
Administration Fee		$950
Partnership Loss	$1,444.55	$3,309.24
Donation Tax Credit	$8,601	$7,027

147. The Minister reassessed Tilatti for the 2009 and 2010 Taxation Years to include partnership income of $28,240 and $60,006. The Minister also denied the deductions for interest, expenses and charitable donation tax credit.

148. Tilatti objected to the reassessments by way of notices of objection filed on August 13, 2013.

149. Tilatti participated in other arrangements similar to the EQ 2009 Program, namely:

Program	**Promoter**	**Years**	**Charity**
EquiGenesis 2006 Preferred Investment LP & Charitable Donation Program	EquiGenesis 2006 Preferred Investment GP Corp. & EquiGenesis Corporation	2006 to 2025	KRG Children's Charities
EquiGenesis 2011 Preferred Investment LP & Charitable Donation Program	EquiGenesis 2011 Preferred Investment GP Corp. & EquiGenesis Corporation	2011 to 2021	The Giving Tree Foundation of Canada

(v) **Stephen Chu**

150. In 2009, Stephen Chu participated in the EQ 2009 Program.

151. On August 12, 2009, Chu subscribed for 10 Units at a price of $36,140 per Unit for a total subscription of $361,400.

152. Chu funded the acquisition of the Units with cash from his own pocket in the amount of $41,400 and financed the balance with a loan from Finance Trust (that is, the Investment Loan) in the amount of $320,000.

153. Chu also incurred other expenses with respect to the Investment Loan and the administration of the Partnership. These expenses included: (i) a Loan Arrangement Fee of $1,250 paid to Finance Trust on closing in the 2009 Taxation Year; (ii) a Loan Maintenance

Fee of $300; and (iii) an Administration Fee of $950, each paid in respect of the 2010 Taxation Year.

154. The Investment Loan was for a term of approximately 9 years and 27 weeks (from August 12, 2009 to February 15, 2019).

155. The interest payable by Chu on the Investment Loan was $9,703.89 in the 2009 Taxation Year and $25,881.76 in the 2010 Taxation Year.

156. During the 2009 and 2010 Taxation Years, the Partnership reported business losses , of which Chu was allocated a pro-rata share of $1,444.55 for the 2009 Taxation Year and $3,309.24 for the 2010 Taxation Year.

157. Chu paid $102,000 to the Charity, and the Charity issued a charitable donation tax receipt to Chu for this amount.

158. Chu executed a Pledge and Direction Form directing and instructing the Charity to invest 98.04% of the $102,000 he paid to the Charity in a first-priority debt obligation of Leeward.

159. Chu funded $100,000 of the $102,000 paid to the Charity with a loan from Finance Trust. The Donation Loan was for a term of approximately 9 years and 9 weeks (from December 15, 2009 to February 15, 2019).

160. He funded the remainder with cash from his own pocket.

161. In summary, in computing his income under the Act for the 2009 and 2010 Taxation Years, Chu claimed the following deductions in relation to his participation in the EQ 2009 Program:

Item	2009	2010
Interest Expenses	$9,703.89	$25,881.76
Loan Arrangement Fee	$250	$250
Loan Maintenance Fee		$300
Administration Fee		$950
Partnership Loss	$1,444.55	$3,309.24
Donation Tax Credit	$29,581.00	

162. The Minister reassessed Chu for the 2009 and 2010 Taxation Years to include partnership income of $61,186 and $87,468. The Minister also denied the deductions for interest, expenses and charitable donation tax credit.

163. Chu objected to the reassessments by way of notices of objection filed on June 17, 2013.

164. Chu participated in other arrangements similar to the EQ 2009 Program, namely:

Program	Promoter	Years	Charity
EquiGenesis 2004 Preferred Investment LP & Charitable Donation Program	EquiGenesis 2004 Preferred Investment GP Corp. & EquiGenesis Corporation	2004 to 2023	Canadian Lacrosse Association Little League Baseball Henvey Inlet First Nations Community Football Canada H B Arts Foundation
EquiGenesis 2005 Preferred Investment LP & Charitable Donation Program	EquiGenesis 2005 Preferred Investment GP Corp. & EquiGenesis Corporation	2005 to 2024	KRG Children's Charities
EquiGenesis 2006 Preferred Investment LP & Charitable Donation Program	EquiGenesis 2006 Preferred Investment GP Corp. & EquiGenesis Corporation	2006 to 2025	KRG Children's Charities
EquiGenesis 2004-II Preferred Investment LP	EquiGenesis 2004 Preferred Investment GP Corp.	2010 to 2024	N/A

(vi) Katherine Lee Sang

165. In 2009, Katherine Lee Sang participated in the EQ 2009 Program.

166. On October 6, 2009, Lee Sang subscribed for 10 Units at a price of $36,140 per Unit for a total subscription of $361,400.

167. Lee Sang funded the acquisition of the Units with cash from her own pocket in the amount of $41,400 and financed the balance with a loan from Finance Trust (that is, the Investment Loan) in the amount of $320,000.

168. Lee Sang also incurred other expenses with respect to the Investment Loan and the administration of the Partnership. These expenses included: (i) a Loan Arrangement Fee of $1,250 paid to Finance Trust on closing in the 2009 Taxation Year; (ii) a Loan Maintenance Fee of $300; and (iii) an Administration Fee of $950, each paid in respect of the 2010 Taxation Year.

169. The Investment Loan was for a term of approximately 9 years and 19 weeks (from October 6, 2009 to February 15, 2019).

170. The interest payable by Lee Sang on the Investment Loan was of $5,918.68 in the 2009 Taxation Year and $25,584.62 in the 2010 Taxation Year.

171. During the 2009 and 2010 Taxation Years, the Partnership reported business losses , of which Lee Sang was allocated a pro-rata share of $1,444.55 for the 2009 Taxation Year and $3,309.24 for the 2010 Taxation Year.

172. Lee Sang paid $102,000 to the Charity, and the Charity issued a charitable donation tax receipt to Lee Sang for this amount.

173. Lee Sang executed a Pledge and Direction Form directing and instructing the Charity to invest 98.04% of the $102,000 she paid to the Charity in a first-priority debt obligation of Leeward.

174. Lee Sang funded $100,000 of the $102,000 paid to the Charity with a loan from Finance Trust. The Donation Loan was for a term of approximately 9 years and 7 weeks (from December 30, 2009 to February 15, 2019).

175. She funded the remainder with cash from her own pocket.

176. In summary, in computing her income under the Act for the 2009 and 2010 Taxation Years, Lee Sang claimed the following deductions in relation to her participation in the EQ 2009 Program:

Item	2009	2010
Interest Expenses	$5,919	$25,585
Loan Arrangement Fee	$250	$250
Loan Maintenance Fee		$300
Administration Fee		$950
Partnership Loss	$1,444.55	$3,309.24
Donation Tax Credit	$29,554	

177. The Minister reassessed Lee Sang for the 2009 and 2010 Taxation Years to include partnership income of $28,240 and $60,006. The Minister also denied the deductions for interest, expenses and charitable donation tax credit.

178. Lee Sang objected to the reassessments by way of notices of objection filed on August 15, 2013.

179. Lee Sang participated in another arrangement similar to the EQ 2009 Program, namely:

Arrangement	Promoter	Years	Charity
EquiGenesis 2011 Preferred Investment LP & Charitable Donation Program	EquiGenesis 2011 Preferred Investment GP Corp. & EquiGenesis Corporation	2011 to 2021	The Giving Tree Foundation of Canada

The parties hereto agree that this Agreed Statement does not preclude either party from calling evidence to supplement the facts agreed to herein, it being accepted that such evidence may not contradict the facts agreed.

DATED at the City of Toronto, in the Province of Ontario, this day of December, 2015.

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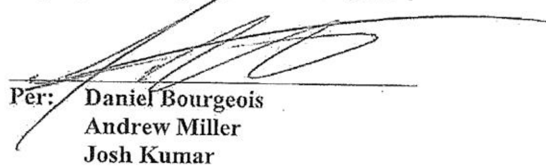
DATED at the City of Ottawa, in the Province of Ontario, this 30th day of November, 2015.

Deputy Attorney General of Canada



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2014-384(IT)G (Gordon);
2014-806(IT)G (Tilatti); 2014-804(IT)G (Platnick);
2014-802(IT)G (Chu); 2014-803(IT)G (Sang)

TAX COURT OF CANADA

BETWEEN:

LYNN CASSAN ET AL

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

PARTIAL STATEMENT OF AGREED FACTS

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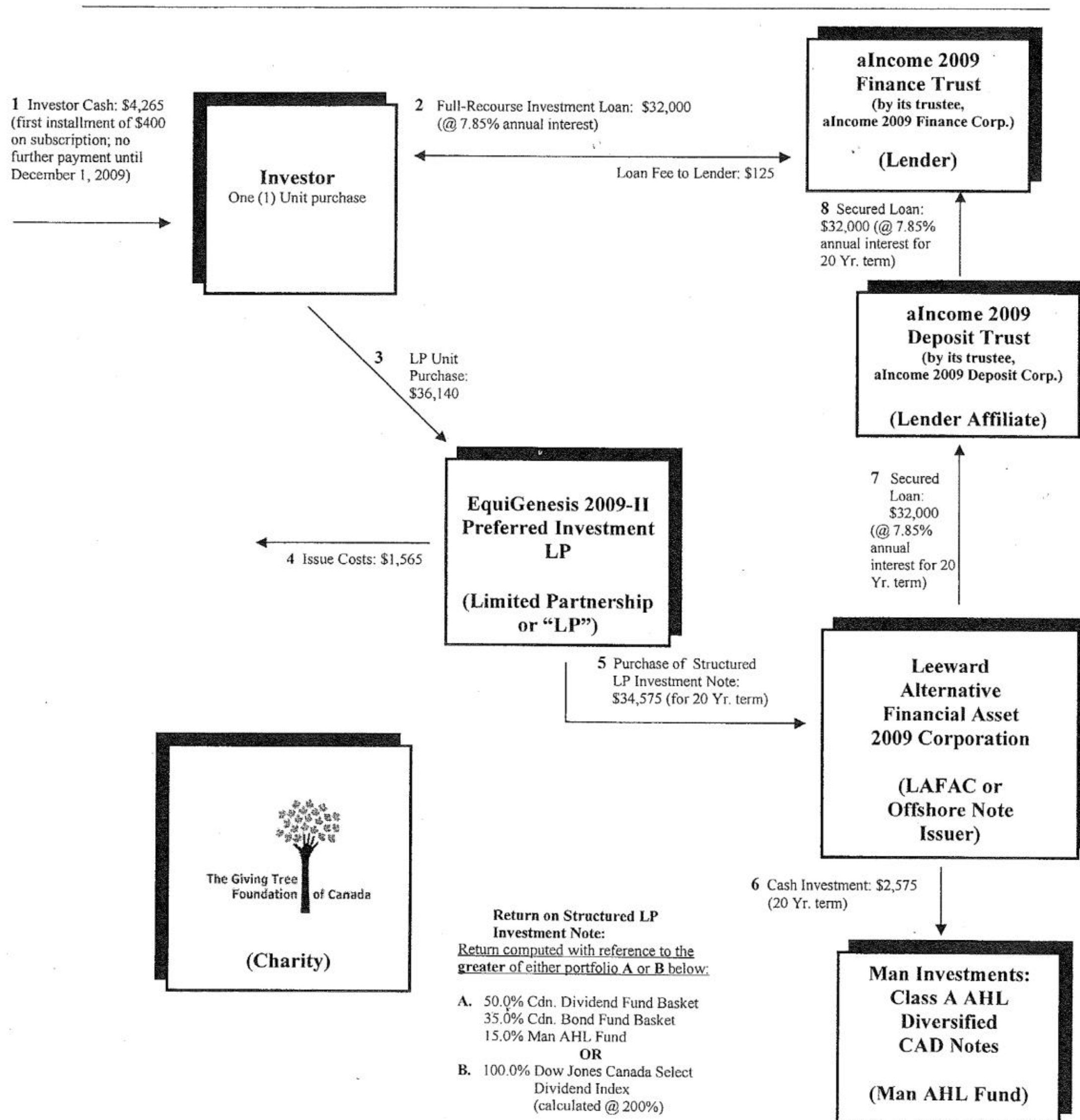
APPENDIX B



CITATION:	2017 TCC 174
COURT FILE NOS.:	2013-355(IT)G, 2013-3488(IT)G, 2014-384(IT)G,2014-802(IT)G, 2014-803(IT)G, 2014-804(IT)G and 2014-806(IT)G
STYLES OF CAUSE:	LYNN CASSAN; KENNETH GORDON; STEPHEN CHU; KATHERINE LEE SANG; HOWARD PLATNICK; AND DANA TILATTI v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	February 8 to 12, 2016, February 15 to 19, 2016, February 22 to 25, 2016 and June 29 and 30, 2016
REASONS FOR JUDGMENT BY:	The Honourable Justice John R. Owen
DATE OF JUDGMENT:	September 8, 2017
APPEARANCES:	
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Counsel for the Respondent:	Daniel Bourgeois, Andrew Miller and Josh Kumar
COUNSEL OF RECORD:	
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