Docket: 2006-2757(IT)I

BETWEEN:

ELIZABETH M. RUSSELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
2007-3231(IT)I, 2007-3232(IT)I, 2007-3234(IT)I,
2007-3235(IT)I, 2007-3236(IT)I, 2007-3309(IT)I, 2007-3589(IT)I,
2007-3597(IT)I, 2007-3599(IT)I, 2007-3619(IT)I, 2007-4298(IT)I,
on September 21, 22, 23, 24, 25, 29 and 30, 2009,
at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Izaak de Rijcke
Counsel for the Respondent:	Perry Derksen

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2000 and 2001 taxation years are dismissed.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Campbell J. Miller"

C. Miller J.

Docket: 2007-3231(IT)I

BETWEEN:

WILLIAM E. RUSSELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
2006-2757(IT)I, 2007-3232(IT)I, 2007-3234(IT)I,
2007-3235(IT)I, 2007-3236(IT)I, 2007-3309(IT)I, 2007-3589(IT)I,
2007-3597(IT)I, 2007-3599(IT)I, 2007-3619(IT)I, 2007-4298(IT)I,
on September 21, 22, 23, 24, 25, 29 and 30, 2009,
at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Izaak de Rijcke
Counsel for the Respondent:	Perry Derksen

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2001, 2002, and 2003 taxation years are dismissed.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Campbell J. Miller"

C. Miller J.

Docket: 2007-3232(IT)I

BETWEEN:

VIVIAN M. RUSSELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
2006-2757(IT)I, 2007-3231(IT)I, 2007-3234(IT)I,
2007-3235(IT)I, 2007-3236(IT)I, 2007-3309(IT)I, 2007-3589(IT)I,
2007-3597(IT)I, 2007-3599(IT)I, 2007-3619(IT)I, 2007-4298(IT)I,
on September 21, 22, 23, 24, 25, 29 and 30, 2009,
at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Izaak de Rijcke
Counsel for the Respondent:	Perry Derksen

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2001, 2002, and 2004 taxation years are dismissed.

The appeal from the reassessment made under the *Income Tax Act* for the 2003 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that there is no net taxable gain.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Campbell J. Miller"

C. Miller J.

Docket: 2007-3234(IT)I

BETWEEN:

BRUCE RUSSELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
2006-2757(IT)I, 2007-3231(IT)I, 2007-3232(IT)I,
2007-3235(IT)I, 2007-3236(IT)I, 2007-3309(IT)I, 2007-3589(IT)I,
2007-3597(IT)I, 2007-3599(IT)I, 2007-3619(IT)I, 2007-4298(IT)I,
on September 21, 22, 23, 24, 25, 29 and 30, 2009,
at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Izaak de Rijcke
Counsel for the Respondent:	Perry Derksen

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2000 taxation year is dismissed.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Campbell J. Miller"

C. Miller J.

Docket: 2007-3235(IT)I

BETWEEN:

ADRIENNE RUSSELL-O'LEARY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
2006-2757(IT)I, 2007-3231(IT)I, 2007-3232(IT)I, 2007-3234(IT)I,
2007-3236(IT)I, 2007-3309(IT)I, 2007-3589(IT)I,
2007-3597(IT)I, 2007-3599(IT)I, 2007-3619(IT)I, 2007-4298(IT)I,
on September 21, 22, 23, 24, 25, 29 and 30, 2009,
at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Izaak de Rijcke
Counsel for the Respondent:	Perry Derksen

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2000 taxation year is allowed and the reassessment is referred back to the

Minister of National Revenue for reconsideration and reassessment on the basis that there is no net taxable gain.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Campbell J. Miller"

C. Miller J.

Docket: 2007-3236(IT)I

BETWEEN:

SARAH RUSSELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
2006-2757(IT)I, 2007-3231(IT)I, 2007-3232(IT)I, 2007-3234(IT)I,
2007-3235(IT)I, 2007-3309(IT)I, 2007-3589(IT)I,
2007-3597(IT)I, 2007-3599(IT)I, 2007-3619(IT)I, 2007-4298(IT)I,
on September 21, 22, 23, 24, 25, 29 and 30, 2009,
at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Izaak de Rijcke
Counsel for the Respondent:	Perry Derksen

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2000 taxation year is allowed and the reassessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that there is no net taxable gain.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Campbell J. Miller"

C. Miller J.

Docket: 2007-3309(IT)I

BETWEEN:

JOHN MAZGOLA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
2006-2757(IT)I, 2007-3231(IT)I, 2007-3232(IT)I, 2007-3234(IT)I,
2007-3235(IT)I, 2007-3236(IT)I, 2007-3589(IT)I,
2007-3597(IT)I, 2007-3599(IT)I, 2007-3619(IT)I, 2007-4298(IT)I,
on September 21, 22, 23, 24, 25, 29 and 30, 2009,
at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Izaak de Rijcke
Counsel for the Respondent:	Perry Derksen

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 1999, 2002, and 2003 taxation years are dismissed.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Campbell J. Miller"

C. Miller J.

Docket: 2007-3589(IT)I

BETWEEN:

PEGGY MURRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
2006-2757(IT)I, 2007-3231(IT)I, 2007-3232(IT)I, 2007-3234(IT)I,
2007-3235(IT)I, 2007-3236(IT)I, 2007-3309(IT)I,
2007-3597(IT)I, 2007-3599(IT)I, 2007-3619(IT)I, 2007-4298(IT)I,
on September 21, 22, 23, 24, 25, 29 and 30, 2009,
at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Izaak de Rijcke
Counsel for the Respondent:	Perry Derksen

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2000, 2001, 2002, and 2003 taxation years are allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that there is no net taxable gain.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Campbell J. Miller"

C. Miller J.

Docket: 2007-3597(IT)I

BETWEEN:

DANIEL DESPRES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
2006-2757(IT)I, 2007-3231(IT)I, 2007-3232(IT)I, 2007-3234(IT)I, 2007-3235(IT)I, 2007-3236(IT)I, 2007-3309(IT)I, 2007-3589(IT)I, 2007-3599(IT)I, 2007-3619(IT)I, 2007-4298(IT)I,
on September 21, 22, 23, 24, 25, 29 and 30, 2009,
at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Izaak de Rijcke
Counsel for the Respondent:	Perry Derksen

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2001, 2002, and 2003 taxation years are dismissed.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Campbell J. Miller"

C. Miller J.

Docket: 2007-3599(IT)I

BETWEEN:

KAREN DESPRES,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
2006-2757(IT)I, 2007-3231(IT)I, 2007-3232(IT)I, 2007-3234(IT)I, 2007-3235(IT)I, 2007-3236(IT)I, 2007-3309(IT)I, 2007-3589(IT)I, 2007-3597(IT)I, 2007-3619(IT)I, 2007-4298(IT)I,
on September 21, 22, 23, 24, 25, 29 and 30, 2009,
at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Izaak de Rijcke
Counsel for the Respondent:	Perry Derksen

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2001, 2002, and 2003 taxation years are allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that there is no net taxable gain.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Campbell J. Miller"

C. Miller J.

Docket: 2007-3619(IT)I

BETWEEN:

JOHN BILODEAU,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
2006-2757(IT)I, 2007-3231(IT)I, 2007-3232 (IT)I, 2007-3234(IT)I, 2007-3235(IT)I, 2007-3236(IT)I, 2007-3309(IT)I, 2007-3589(IT)I, 2007-3597(IT)I, 2007-3599(IT)I, 2007-4298(IT)I,
on September 21, 22, 23, 24, 25, 29 and 30, 2009,
at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Izaak de Rijcke
Counsel for the Respondent:	Perry Derksen

JUDGMENT

The appeals from the reassessments made under the *Income Tax Act* for the 2001, 2002, and 2003 taxation years are dismissed.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Campbell J. Miller"

C. Miller J.

Docket: 2007-4298(IT)I

BETWEEN:

ANGELO EPIFANI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on common evidence with the appeals of
2006-2757(IT)I, 2007-3231(IT)I, 2007-3232(IT)I, 2007-3234(IT)I, 2007-3235(IT)I, 2007-3236(IT)I, 2007-3309(IT)I, 2007-3589(IT)I, 2007-3597(IT)I, 2007-3599(IT)I, 2007-3619(IT)I
on September 21, 22, 23, 24, 25, 29 and 30, 2009,
at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant:	Izaak de Rijcke
Counsel for the Respondent:	Perry Derksen

JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2002 taxation year is dismissed.

The appeals from the reassessments made under the *Income Tax Act* for the 2000 and 2001 taxation years are allowed and the reassessments are referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that there is no net taxable gain.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Campbell J. Miller"

C. Miller J.

Citation:2009 TCC 548
Date:20091026
Dockets: 2006-2757(IT)I, 2007-3231(IT)I,
2007-3232(IT)I, 2007-3234(IT)I,
2007-3235(IT)I, 2007-3236(IT)I,
2007-3309(IT)I, 2007-3589(IT)I,
2007-3597(IT)I, 2007-3599(IT)I,
2007-3619(IT)I, 2007-4298(IT)I

BETWEEN:

ELIZABETH M. RUSSELL, WILLIAM E. RUSSELL,
VIVIAN M. RUSSELL, BRUCE RUSSELL,
ADRIENNE RUSSELL-O'LEARY, SARAH RUSSELL,
JOHN MAZGOLA, PEGGY MURRE,
DANIEL DESPRES, KAREN DESPRES,
JOHN BILODEAU and ANGELO EPIFANI,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Miller J.

De gustibus non est disputandum

[1] This is an art donation case. The Courts have decided this matter against taxpayers in previous similar decisions (see *Nash v. R*[1], *Klotz v. R*[2], and *Nguyen et al v. The Queen*[3]). The Appellants are of the view that the Courts have not yet fully considered the proper identification of the market, in reaching a conclusion on fair market value ("FVM") of the donated property. Having now heard such an argument, I have not been convinced that the Appellants can rely on anything greater than what they paid for the art as the FMV for the purposes of setting a value for their charitable donations.

Facts

[2] Mr. William Russell, one of the Appellants, was the tax return preparer for the other Appellants. They are representative of a further 70 or so taxpayers who, as clients of Mr. Russell's, bought into the Canadian Art Advisory Services Inc. ("CAAS") art donation program, a program marketed by Mr. Barnet Goldberg, the principal of CAAS. The art donation program is an arrangement whereby the taxpayer buys art at a certain amount and on the same day donates it to a registered charity, obtaining a charitable receipt for an amount equal to three to five times greater than what the taxpayer paid, relying on appraisers' certificates of value.

[3] I heard evidence from Mr. and Mrs. Russell and several of the buyers/donors. From the latter, there were consistent recurring themes:

- they relied completely on Mr. Russell, though they may have seen some promotional materials from CAAS;

- they felt no need to see the art;

- they intended to donate the art for the purpose of obtaining close to a 40% return on their investment, by the lowering of taxes, without fully understanding how it all worked;

- they signed a Purchase Agreement, Retainer Agreement, and a Deed of Gift and received a receipt from a charity they knew nothing about;

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1 2005 FCA 386.

2 2005 FCA 158 and 2004 TCC 147.

3 2008 TCC 401.

- they neither chose the art nor the charity but left that to the promoter;

- they received a free work of art from Mr. Russell each year they invested in the program;

- they did little or no research into the art, artists, or value of the art;

- they did not recall exactly when they signed documents, though they signed everything the same day, including the acquisition and disposition documents;

- they acknowledged that the purchase agreement stipulated that part of the price went to promoter's commission;

- they admitted that the spouse with the lower income would claim any taxable capital gain arising; and

- they were investing.

[4] The parties helpfully provided a schedule that set out for each of the Appellants, for each of the years in issue, the price paid by them, the amount claimed as a donation (split between the husband and wife), the amount of the capital gain reported and the amount of the gain assessed. This is reproduced as Appendix A to these reasons.

[5] Mr. Russell clearly had an excellent understanding of the program, and it is primarily from his testimony I will set out what happened. Where there was any discrepancy between Mr. Russell's testimony and that of his clients, I accept Mr. Russell's version, as he was much more intimately involved in the program and was highly credible.

[6] There were three phases of the art donation program. Phase one was prior to 2000; phase two was 2000 to 2002; and phase three was 2003. The basics of the program were the same, however, in all three phases: the phases simply reflect changes in the *Income Tax Act* (the "*Act*") that may impact on the ultimate tax result, but are not relevant to my determination of FMV.

[7] The art donation program was promoted by Mr. Barnet Goldberg, through CAAS. Mr. Russell first came into contact with Mr. Goldberg in 1999 and had many meetings with him thereafter. Mr. Goldberg was able to secure art work and charities

to which the art could be donated. He also had access to several art appraisers, including Mr. McCanse (the primary appraiser according to Mr. Russell).

[8] The program was simple. Mr. Goldberg, through CAAS, arranged to acquire art from artists at anywhere from $20.00 to $100.00 per original work of art. Notwithstanding Mr. Goldberg's claim of dealing with the artists with respect, it was clear he strove hard to pay as little as possible for the art, which he was buying in bulk from various artists. He acknowledged being astounded at what he could get the art for, but suggested it was not dissimilar from what galleries would pay. With respect to valuing art, Mr. Goldberg looked primarily to Mr. Varley, a well-respected name in the art business. Mr. Goldberg indicated that if Mr. Varley believed a work of art was worth $1,000.00, this would be of significant influence on the appraisers, such as Mr. McCanse, who actually signed certificates of value. Mr. McCanse maintained he not only considered Mr. Varley's opinion but checked invoices provided to him by Mr. Goldberg of sales of similar art by the artist whose work Mr. McCanse was appraising. He also considered the artists *curriculum vitae*, history, qualifications, decorative merit, sales and galleries who represented the artist. Mr. McCanse appraised several thousand works of art in this manner. At trial, only a handful of the sort of invoices Mr. McCanse said he relied upon were tendered as evidence. There was no direct evidence from any gallery confirming such sales.

[9] I should note at this point that I did not accept Mr. McCanse as an expert on the valuation of contemporary art, but did allow him to testify as to the role he played and, in fact, what he did in providing the appraisals. I accepted him as an expert with respect to the overall distribution of art from artists, through agent, to gallery and onto the public. In this regard, it was helpful to hear that dealers take proprietary interest in artists they show, often on an exclusive basis. According to Mr. McCanse, artists produce more than they can ever sell and are often uncomfortable with the business side of selling their art. It was common for the gallery to sell to the public at twice the amount for which they acquire the art directly from the artist. If an agent is involved between the artist and the gallery, the artist would receive even less than 50% of the final sale price to the public. He described the market between artist and agent or gallery as the wholesale market and between gallery and the public as the retail market. He confirmed it was rare for bulk purchases of art in the retail market.

[10] Mr. Goldberg was able to locate charities prepared to accept the art on the basis they would provide a receipt for the appraised value. The charities also agreed not to market the art for a period of 10 years, to ensure the art did not come back into the market too soon and interfere with the current gallery business.

[11] Mr. Goldberg marketed the art donation program through a flyer entitled "Doing Well by Doing Good". Some excerpts are informative:

> Canadian Art Advisory Services Inc. (CAAS) is an art dealer specializing in the sale and subsequent donation of hand drawn original and merit worthy works of art from well renowned, important and respected Canadian artists. In the event that you choose to donate some or all of the artwork purchased from us, we will direct and aid you throughout the entire donation process; from sourcing the charity to whom you desire the donation to be made to, all the way through to obtaining your tax receipt from the charity.
>
> We have the necessary expertise and resources to aid you in maximizing the generous tax benefits available to you under the *Income Tax Act* when such donations are made.
>
> In the event that you choose to donate all or some of the works of art purchased from CAAS, the tax benefits available as a result of the donation will in most circumstances vastly exceed the cost of the artwork to you.
>
> If your cost for the art is only 20 percent of the appraised value of the art of $10,000 then your donation, event after all capital gains are accounted for, will result in a tax free benefit to you of $3,923. In terms of a return on money actually paid out, it translates into a return of 39.23 percent.
>
> In most circumstances, there may be an advantageous relationship between the cost of the art to you as a buyer/donor and the benefits available under the *Income Tax Act* and we invite you to explore this exciting opportunity with us.

[12] Mr. Russell made his clients aware of this investment possibility, after having done some of his own investigating into the qualifications of the appraisers. Mr. Russell certainly appreciated the arrangement hinged on the appraisals, and he also understood the appraised value was that which the art would obtain in the gallery retail market; that is, from gallery to the ultimate art consumer. Mr. Russell even went out to Serpent River, where most of the 1999 and 2000 art was donated and saw art by two of the artists on display for prices of $1,000.00 each.

[13] Mr. Russell verified that when his clients signed the several documents (Purchase Agreement, Retainer Agreement, Deed of Gift) that the portfolio list listing all the works of art would not be attached to the Purchase Agreement at that point. CAAS would provide this later on the basis of the amount of investment the buyer/donor was making. On the day the clients signed, they did not know what art they were acquiring and donating. They simply signed: (i) a Purchase Agreement agreeing to buy art listed on the Portfolio list (not attached), (ii) a Retainer

Agreement retaining CAAS as consultant regarding the donation and (iii) a Deed of Gift donating the work of art on the Portfolio list (again a list attached subsequent to their signing).

[14] There is evidence that Mr. Russell did not charge relatives a fee for services. There is also evidence that, after the change in the tax shelter rules, Mr. Russell set up Strategic Donations Inc., a company that registered for tax shelter purposes.

[15] Finally, I heard the evidence of the Canada Revenue Agency officer, Mr. Plas. The Appellants' objected to the presentation of Mr. Plas' documents, obtained from CAAS, as well as Mr. Plas' Excel worksheet, which estimated the volume of the CAAS art donation program. I ruled against the Appellants and permitted the entering of the documents. Based on Mr. Plas' review of purchase agreements, he reached a cumulative purchase price by the buyers/donors of approximately $3,766,000.00 over the years in question. The financial statements of CAAS showed sales of almost twice that amount over the same time period.

[16] The Minister assessed the taxpayers on the basis that the FMV of the art donated was equal to the amount the taxpayers paid for the art. For some taxation years, however, the Minister reassessed on the basis that the Appellants triggered a taxable net gain, based on amounts that the taxpayers themselves reported. This is all set out in Appendix A.

Issue

[17] For the purpose of computing tax payable for the years in question, are the Appellants entitled to the deduction for charitable gifts pursuant to subsection 118.1(3) of the *Act*, based on the FMV of the works of art indicated in the receipts obtained from the various charities? If they are entitled to the deduction, how does this impact on the calculation of their capital gain? Given that the definition of charitable gift in subsection 118.1(1) of the *Act* refers to the FMV of the gift, the question becomes whether the charitable receipts accurately reflect the FMV of the gift, being the works of art.

[18] This is not the first time this type of matter has come before the Courts. The Federal Court of Appeal have addressed similar arrangements (see *Nash* and *Klotz*) and in both cases have found against the taxpayer on the basis that what the taxpayer paid for the art is the best indicator of the FMV of the art. Further, this very art donation program promoted by CAAS has been before this court (*Nguyen*) and Justice Diane Campbell concluded:

> I have not been persuaded that the analysis used in *Nash* and *Klotz* should not prevail here. Without evidence of comparable sales or a market that permits a direct comparison, the only value that I can reasonably attribute to the donated artwork is the amount that someone was actually willing to pay for it around the time it was donated. …

[19] These are difficult precedents for the Appellants to overcome. Their argument, in a nutshell, is that the Courts have not correctly applied the definition of FMV, universally accepted as accurately stated in *Henderson v. Minister of National Revenue*[4]:

> The statute does not define the expression "FMV", but the expression has been defined in many different ways depending generally on the subject matter which the person seeking to define it had in mind. I do not think it necessary to attempt an exact definition of the expression as used in the statute other than to say that the words must be construed in accordance with the common understanding of them. That common understanding I take to mean the highest price an asset might reasonably be expected to bring if sold by the owner in the normal method applicable to the asset in question in the ordinary course of business in a market not exposed to any undue stresses and composed of willing buyers and sellers dealing at arm's length and under no compulsion to buy or sell. I would add that the foregoing understanding as I have expressed it in a general way includes what I conceive to be the essential element which is an open and unrestricted market in which the price is hammered out between willing and informed buyers and sellers on the anvil of supply and demand.

[20] The Appellants argue that the highest price the art might reasonably be expected to receive would be in the retail market, which is where such art would be sold in the ordinary course of business. The Appellants suggest the transaction at the donor level to the charity is as close to the retail market as possible. The Appellants then go on to argue that the FMV in the retail market is the value Mr. McCanse and the other appraisers certified at the time of the donation.

[21] The Appellants distinguish the *Nash* and *Klotz* cases on the basis that there were no direct market comparisons, while here, relying on invoices (see Exhibits A-8 and A-9) showing sales of individual works of art in 1999 and 2000 in the $1,100.00 to $1,400.00 range, and on Mr. McCanse and Mr. Goldberg's testimony that appraisals were based on such invoices, there is an appropriate direct market comparison. Further, here we are dealing with individual works of art which are sold

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4 73 DTC 5471 (Fed. T.D.).

commercially as individual works of art on a piece-by-piece basis, not groups of prints sold as a group. In such a case, there is no floundering on the shoals of common sense, as former Chief Justice Bowman so colourfully put it in *Klotz*, and to which the Federal Court of Appeal agreed in *Nash*. The Appellants argue the values are well within the bounds of commercial common sense and value at the retail level can be, and in the art industry is, significantly greater than the price at which an artist disposes of the art. Though I agree with the Appellants that common sense should not be the determinative factor, I have not been persuaded that the retail market is the appropriate market in which the *Henderson* definition of FMV should be applied.

[22] I follow the approach of the Federal Court of Appeal in *Nash* in that the first step in applying the definition of FMV is to identify the asset whose FMV is to be ascertained. There are a couple of issues that arise at this stage of the inquiry. First, does one look to the asset the buyers/donors were buying, or the asset they were donating? Clearly, the donation receipt is based on the gift of the art, yet is the art the asset bought by the buyers/donors? I raised this point with counsel suggesting that the "property" being bought by the buyers/donors was not the art but was an investment, the primary element of which was the charitable receipt. This was a train of thought neither side wished to pursue, but I intend to come back to it when discussing market.

[23] The second issue that arises at this stage of identifying the asset is whether the asset is the group of art of several painters that make up the buyers/donors portfolio list, or does the asset consist of each particular work of art on an individual basis? In *Nash*, the Federal Court of Appeal addressed this as follows:

> The evidence before the judge was that CVI only sold groups of prints, that it arranged for the donation of the groups of prints and that the taxpayers did, in fact, acquire and donate the groups of prints. There was no evidence of individual prints being acquired or donated. Because the prints were only acquired and donated in groups, the relevant asset was the group of prints, not the individual prints in the group.
>
> …
>
> If the evidence is that the groups are not sold in the same market as individual items, the fair market value of the groups will not be the aggregate of the fair market value of the individual items. For example, if items are sold in large volumes in a wholesale market, the fair market value of the volumes sold in that market will be less than the aggregate of the values of the items considered individually that make up those volumes. If that were not the case, there would be no wholesale market. The wholesalers would sell their large quantities in the retail market to obtain the aggregate of the retail prices for the individual items for the large quantities they

> sold. But that does not occur because consumers will not purchase the large quantities the wholesalers are selling. There are other differences between a wholesale and retail market such as convenience and other services to the consumer provided by retailers but not by wholesalers. That is why there is a difference between prices in the retail and wholesale markets.

[24] It is clear the Federal Court of Appeal has addressed the issue of purchases in bulk, concluding bulk purchases take place in the wholesale market, while individual art purchases take place in the retail market. I see no distinction between the circumstances in *Nash* and the circumstances before me that would cause me to conclude the purchase of several paintings of several artists sold together by CAAS should be treated differently than how the Federal Court of Appeal treated the prints in *Nash*. CAAS sold groups of paintings together into the market in which it dealt. There was no evidence CAAS was in the business of selling this artwork on an individual piece-by-piece basis. The confusion lies in the fact that this art would not be sold in bulk when it is put into the retail market. But that has more to do with the determination of the appropriate market, which I now turn to.

[25] The Appellants suggest that the correct reading of the *Henderson* definition of FMV is to ask what value would the buyers/donors obtain for their art if they placed it in the market where such art is sold in the ordinary course of commerce for the highest amount, which the Appellants say is the retail market. The flaw in this approach is that it ignores the reality that the buyers/donors have no access to that retail market, other than through a gallery. There was no evidence, expert or otherwise, to suggest there was any market for an individual to dispose of large quantities of individual pieces of art. That is what galleries do, not what individuals do. In effect, there is no market for individuals to dispose of art in bulk. I can speculate that the buyers/donors might go knocking on the galleries' doors to sell in bulk, but this would not yield the retail price the gallery would sell the art for, only the wholesale price the gallery would buy the art for.

[26] The conundrum in identifying the proper market in which to assess FMV is that the market in which the promoter and buyers/donors were operating was not an art market, but it was a charitable receipt market. CAAS' promotional material, the Appellants' own testimony and certainly the Retainer Agreement make it crystal clear that the buyers/donors were acquiring an investment, which would yield a charitable receipt that would result in an approximate 40% return on their money. This was an investment market, not an art market. The Courts have struggled with pigeonholing the art in the appropriate market, presuming that buyers/donors were engaged in the art market, when in reality, they were not.

[27] What is left is the same conclusion the Federal Court of Appeal reached in *Nash*, that there is no market that permits a direct comparison for the purchase and sale of groups of original contemporary art. It is not the retail market, nor is it the art donation program market, which as I have concluded, is an investment market, nor is there any market in which the buyers/donors can sell to the public. There simply is no market within which to apply the *Henderson* FMV definition. The Appellants would suggest that the fallback position must be the open retail market, as that is closer to where the buyers/donors transacted their purchase than the wholesale market. I disagree. Mr. McCanse described the art industry as one in which the artist sells numerous paintings to a gallery either directly, or indirectly through an agent, and the gallery then sells individual pieces onto the public. The purchase by the buyers/donors is far more closely in line with the artist to gallery market, than the gallery to public market.

[28] No, I conclude, in line with the Federal Court of Appeal's conclusion, that the best evidence of value, where there is no market (the fallback position, if you will) is to look at what the buyers/donors paid.

[29] I wish to be clear that I reached this decision not on the basis of common sense dictating property could not triple in value from one instant to the next. Depending on the market in which one is dealing, a two or three time increase in value can make eminent commercial sense. The poor struggling artist sells to a hard nosed wheeler-dealer who turns around and negotiates a great deal with a gallery, which then puts as high a price as possible on the art to the public. This appears to be how this industry works and it should be no surprise that there is a manyfold increase from the step one sale by the artist to the end step sale to the consumer. An interesting question would arise if an art gallery itself donated art to a charity. Would the government assess on the basis of the amount paid by the gallery or the amount the gallery receives for such art? I would suggest a strong argument could be made for the latter, if comparable retail sales can be proven. The Federal Court of Appeal in *Nash* suggested there was no credible explanation for a threefold increase between the time of acquisition and the time of disposition. This is based, correctly, on the assumption buyer and seller are the same. As soon as you look at different players (artist, promoter, gallery, consumer) and consequently different markets, different values naturally emerge.

[30] Finally, though not necessary, I wish to address the Appellants' argument that, if the retail market is the appropriate market in which to determine FMV, then they have successfully proven the charitable receipts accurately reflect the FMV. I have

several concerns with respect to the appraiser's certificate of value, upon which the charities based their receipt.

i) Mr. McCanse testified he relied upon Mr. Varley's assessment along with reviewing sales invoices of similar works of art. Notwithstanding several thousand appraisal certificates, only four such invoices were produced for two artists in 1999 and 2000. With no witnesses from the galleries who were purported to have sold these paintings, and no testimony from Mr. Varley, and with only four invoices, I am not prepared to place much reliance on these invoices as conclusive proof of a market for these paintings in the $1,000.00 to $1,500.00 range for the years in question.

ii) Mr. McCanse's area of speciality was not contemporary art.

iii) Mr. McCanse provided no supportive documentation for his appraisals.

iv) The value for the art in the years of the personal use property rules hovered conveniently around the $1,000.00 mark.

v) There was no indication the appraisers, relied upon by CAAS, paid any heed to the impact of thousands of paintings flooding the market 10 years hence.

vi) There was no evidence of any sale of any of the art donated (presumably as the 10-year period has not run), though Mr. Russell took a picture of a couple of works of art at Serpent River he claimed to be donated art. His video showed a listed price of $1,000.00, but again no evidence of a sale.

[31] While I might conclude the donated art could be listed at the retail level for greater than what the buyers/donors paid for it, simply based on the explanations of how the art industry works, the evidence provided by the Appellants has fallen short of convincing me that value is accurately reflected in the charitable receipts. At best, I would describe that figure as an optimistic wishful hope, certainly not a value I would accept for purposes of the entitlement to the subsection 118.1(3) deduction.

[32] The appeals are dismissed, except with respect to those taxation years in which a net gain was assessed. As noted earlier, the Government assessed net taxable gains

against some of the Appellants or their spouses. Given my decision that there was no gain upon donation, there should be no assessment of any net taxable gain, and assessments for such taxation years are allowed to reflect that adjustment for those Appellants to whom it applies. I also want to be clear that there are no penalties assessed. The Respondent's counsel assured me that was the case, notwithstanding the schedule provided indicated some penalties were assessed. Finally, the parties asked that I not make any order as to costs until they had an opportunity to review my decision. The parties shall therefore provide written submissions with respect to costs to the Court and to each other on or before the 13th day of November, 2009. The parties shall provide any written responses to those submissions to the Court and to each other on or before 27th day of November, 2009.

Signed at Ottawa, Canada, this 26th day of October 2009.

"Campbell J. Miller"

C. Miller J.

Appendix A

R-1

William Russell et al v. H.M.Q.

Appellant/Spouse	Year	Purchase Price	Receipt	Charity	Amount Claimed	Amount Allowed by MNR	Net Gain Reported	Net Gain Per Reassessment	Penalty Assessed
Bilodeau, John	2000	$10,000	$50,300	Serpent R.	NBC[1]	NBC	NBC	NBC	NBC
Bilodeau, Frances[2]									
	2001	$10,000	$50,200	Nat. Child's.	$31,160	$6,207	No	No	No
					$19,040	$3,793	$40,200	$40,200	No
	2002	$10,000	$50,000	In Kind Can.	$30,369	$6,074	No	No	No
					$19,631	$3,926	$40,000	$40,000	No
	2003	$10,000	$51,550	Senior Assist	$33,717	$6,541	No	No	No
					$17,833	$3,459	$41,550	$41,550	No
Despres, Daniel	**2001**	$8,000	$40,650	Shedden	$28,000	$5,520	No	No	No
Despres, Karen					$12,650	$2,480	$32,650	$32,650	No
	2002	$8,000	$41,300	In Kind Can.	$23,905	$4,640	No	No	No
					$17,395	$3,360	$33,300	$33,300	No
	2003	$7,000	$36,400	Senior Assist	$18,750	$3,606	No	No	No
					$17,650	$3,394	$29,400	$29,400	No
Epifani, Angelo	**2000**	$6,000	$31,100	Serpent R.	$31,100	$6,000	$25,100	$25,100	Yes
	2001	$4,000	$20,200	Silent V.	$20,200	$4,000	$16,200	$16,200	Yes
	2002	$5,000	$25,200	In Kind Can.	$25,200	$5,000	$20,200	Nil – deleted	Yes

[1] NBC = Not Before Court
[2] Not part of 12 test cases but the transactions are relevant to spouse's appeal.

Appellant/Spouse	Year	Purchase Price	Receipt	Charity	Amount Claimed	Amount Allowed by MNR	Net Gain Reported	Net Gain Per Reassessment	Penalty Assessed
Mazgola, John	**1999**	$7,500	$22,000	Nat. Child's.	$22,000	$7,500	No	No	Yes
Mazgola, Yvonne[3]					Nil	N/A	N/A	N/A	N/A
	2000	$13,500	$80,650	Serpent R.	NBC	NBC	NBC	NBC	NBC
	2001	$8,000	$40,550	Cheder Chab.	NBC	NBC	NBC	NBC	NBC
	2002	$5,000	$25,500	In Kind Can.	$16,855	$3,305	No	No	Yes
					$8,645	$1,695	$20,500	Nil – deleted	Yes
	2003	$5,000	$25,450	Senior Assist	$15,340	$3,014	No	No	No
					$10,110	$1,986	$20,450	$20,450	Yes
Murre, Peggy	**2000**	$6,800	$40,250	Serpent R.	$8,266	$1,530	$33,450	$33,450	Yes
Murre, Randall[4]					$28,480	$5,270	No	No	Yes
	2001	$6,000	$30,600	Silent V.	$7,450[5]	$774	$24,600	$24,600	Yes
					$26,654	$5,226	No	No	Yes
	2002	$6,000	$30,300	In Kind. Can.	$7,476	$1,500	$24,300	$24,300	No
					$22,824	$4,500	No	No	No
	2003	$6,000	$31,500	Senior Assist	$8,690	$1,680	$25,500	$25,500	No
					$22,810	$4,320	No	No	Yes
Russell, Elizabeth	**2000**	$3,400[6]	$20,100	Serpent R.	$14,410	$2,285	$16,700	Nil – deleted	No
	2001	Carry-forward			$5,690	$902	No	No	No

[3] Not part of 12 test cases but the transactions are relevant to spouse's appeal.
[4] Not part of 12 test cases but the transactions are relevant to spouse's appeal.
[5] Comprised of $3946.00 with respect to purchase of art in 2001 and carry-forward claimed in the amount of $3504.00 with respect to purchase of art in the 2000 taxation year.
[6] 16 works were purchased but only 15 were donated.

Appellant/Spouse	Year	Purchase Price	Receipt	Charity	Amount Claimed	Amount Allowed by MNR	Net Gain Reported	Net Gain Per Reassessment	Penalty Assessed
Russell, William	**2001**	$1,170[7]	12,500	Serpent R.	$8,925[8]	$1,170	No	No	No
Russell, Vivian	**2001**	$1,800	$13,900	Cheder Chab.	$11,591[9]	$1,800	$12,100	Nil – deleted	No
Russell, William	**2002**	Carry-forward			$3,575[10]	$0.00	No	No	N/A
	2002	Carry-forward			$2,309[11]	$0.00	No	No	N/A
Russell, William	**2002**	$2,550	$16,950	In Kind Can.	$5,178	$0.00	No	No	No
Russell, Vivian					$11,772	$2,550	$14,400	Nil – deleted	No
	2003	$3,000	$25,950	Senior Assist	$10,445	$0.00	No	No	No
					$11,708[12]	$3,000	$22,950	$22,950	No
Russell, Vivian	**2004**	Carry-forward			$3,797	$0.00	No	No	N/A
Russell, Bruce	**2000**	$2,901	$20,400	Serpent R.	$13,765	$1,957	No	No	No
Russell, Sarah					$6,635	$944	$17,499	$17,499	No
Russell-O'Leary, A.	**2000**	$5,000	$33,800	Serpent R.	$33,800	$5,000	$28,800	$28,800	Yes

[7] Purchased and donated in 2000 but first claimed in 2001.
[8] The balance of $3,575 was carried forward to 2002.
[9] The balance of $2,309 was carried forward and claimed by the spouse, William Russell, in 2002.
[10] Carry-forward from purchase in 2000 and previous 2001 claim.
[11] Carry-forward from spouse, Vivian Russell, in 2001.
[12] The balance of $3,797 was carried forward and claimed by Vivian Russell in 2004.

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STYLE OF CAUSE:	ELIZABETH M. RUSSELL, WILLIAM E. RUSSELL, VIVIAN M. RUSSELL, BRUCE RUSSELL, ADRIENNE RUSSELL-O'LEARY, SARAH RUSSELL, JOHN MAZGOLA, PEGGY MURRE, DANIEL DESPRES, KAREN DESPRES, JOHN BILODEAU, AND ANGELO EPIFANI, AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 21, 22, 23, 24, 25, 29 and 30, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Campbell J. Miller
DATE OF JUDGMENT:	October 26, 2009
APPEARANCES:	
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Counsel for the Respondent:	Perry Derksen

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