Docket: 2016-3838(IT)G

BETWEEN:

YELLOW POINT LODGE LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on June 28, 2018, at London, Ontario
By: The Honourable Justice Henry A. Visser

Appearances:

Counsel for the Appellant:	Keith M. Trussler
Counsel for the Respondent:	Selena Sit

JUDGMENT

The Appeal from the assessment made under the *Income Tax Act* for the Appellant's taxation year ending December 31, 2014 is dismissed.

Signed at Charlottetown, Prince Edward Island this 28th day of August 2019.

"Henry A. Visser"

Visser J.

Citation: 2019 TCC 178
Date: 20190827
Docket: 2016-3838(IT)G

BETWEEN:

YELLOW POINT LODGE LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Visser J.

[1] Yellow Point Lodge Ltd. ("Yellow Point") is a corporation incorporated pursuant to the laws of British Columbia, and is the registered owner of certain lands located on Yellow Point on Vancouver Island more particularly known municipally as 3700 Yellow Point Road, Ladysmith, British Columbia (the "Lands"). The Lands are for the most part undeveloped and in their natural state, but for a lodge and cabin resort named Yellow Point Lodge which is owned and operated by Yellow Point on a portion of the Lands.

[2] On June 6, 2008, Yellow Point granted a covenant and other specified legal interests with respect to a 27.35 hectare parcel of ecologically sensitive land located on the easterly portion of the Lands (collectively referred to as the "Covenant"), 50% of which was granted to TLC The Land Conservancy of British Columbia ("TLC") and 50% of which was granted to the Nanaimo & Area Land Trust Society ("NALT"). At that time the Covenant had a fair market value of $5,810,000.

[3] In filing its income tax return for its taxation year ended December 31, 2008, Yellow Point did not initially claim a deduction in respect of its gift of the Covenant to TLC and NALT pursuant to paragraph 110.1(1)(d) of the *Income Tax*

Act[1] (the "*Act*") because it had not at that time obtained the following documents with respect to its gift of the Covenant:

(a) A "Statement of Fair Market Value of an Ecological Gift Pursuant to the Income Tax Act of Canada";

(b) A "Certificate of Ecologically Sensitive Land, Receipt Identification, and Registered Charity Approval Pursuant to the *Income Tax Act* of Canada"; and

(c) Donation tax receipts from TLC and NALT.

[4] Yellow Point's 2008 income tax return, as initially filed, was assessed by the Minister of National Revenue (the "Minister") pursuant to the *Act* on July 16, 2009. Yellow Point's 2008 taxation year is not under appeal herein.

[5] The federal Minister of the Environment subsequently issued the following two certificates to Yellow Point with respect its gift of the Covenant to TLC and NALT (collectively, the "Certificates"):

(a) A "Statement of Fair Market Value of an Ecological Gift Pursuant to the Income Tax Act of Canada" dated December 21, 2009, valuing the Covenant at $5,810,000; and

(b) A "Certificate of Ecologically Sensitive Land, Receipt Identification, and Registered Charity Approval Pursuant to the *Income Tax Act* of Canada" dated December 22, 2009.

[6] TLC then issued a tax receipt to Yellow Point on February 18, 2010, in the amount of $2,905,000, representing 50% of the value of the gift of the Covenant. NALT in turn issued a tax receipt to Yellow Point on February 26, 2010, in the amount of $2,905,000, representing the remaining 50% of the value of the gift of the Covenant.

[7] By letter dated May 19, 2010, from its accountant, Parkes Moysey, Chartered Accountants, Yellow Point requested that the Minister reassess its taxation year ended December 31, 2008, to allow it to claim a deduction from income of $382,779 with respect to its gift of the Covenant made in 2008. The

1 R.S.C., 1985, c. 1 (5th Supp.), as amended.

effect of the deduction was, *inter alia*, to reduce Yellow Point's 2008 taxable income to nil. In this respect, on July 27, 2010, the Appellant's taxation year ended December 31, 2008, was reassessed by the Minister to allow a deduction from income of $382,779 with respect to the gift of the Covenant pursuant to paragraph 110.1(1)(d) of the *Act*. Subsequent to the reassessment dated July 27, 2010, the Appellant did not make a request to the Minister to reassess its taxation year ended December 31, 2008, to remove the deduction from income of $382,779 with respect to the gift of the Covenant.

[8] In subsequent taxation years, Yellow Point also claimed the following deductions from income with respect to its gift of the Covenant pursuant to paragraph 110.1(1)(d) of the *Act*:

(a) December 31, 2009 - $474,673;

(b) December 31, 2010 - $495,339;

(c) December 31, 2011 - $496,252;

(d) December 31, 2012 - $519,720; and

(e) December 31, 2013 - $468,055.

[9] In aggregate, Yellow Point claimed $2,836,818 in respect of its gift of the Covenant in its 2008 through 2013 taxation years pursuant to paragraph 110.1(1)(d) of the *Act*. As a result, the amount of its gift of the Covenant which remained unclaimed after its 2013 taxation year was $2,973,182.

[10] In filing its income tax return for its taxation year ended December 31, 2014, Yellow Point claimed a further deduction from income of $1,553,374 with respect to its gift of the Covenant pursuant to paragraph 110.1(1)(d) of the *Act*. On July 28, 2015, the Minister assessed the Appellant's taxation year ended December 31, 2014, and accordingly issued a notice on that date (the "Assessment") to deny the deduction claimed by Yellow Point in respect of its gift of the Covenant on the basis that the gift of the Covenant was made in 2008 and therefore Yellow Point was not permitted to claim a deduction in its 2014 taxation year as it was outside of the five year carryforward provided in paragraph 110.1(1)(d) of the *Act* (as applicable to gifts made in 2008).

[11] On October 26, 2015, the Appellant served on the Minister a Notice of Objection to the Assessment. The Minister confirmed the Assessment by notice dated June 22, 2016.The Appellant has appealed the Assessment to this Court on the basis that the 2008 deduction in respect of the gift of the Covenant was not valid and the five year carryforward permitted pursuant to paragraph 110.1(1)(d) of the *Act* did not start until 2009 when the Certificates were issued, as a result of which the five year carryforward permitted under paragraph 110.1(1)(d) of the *Act* ended with Yellow Point's 2014 taxation year.

I. ISSUES

[12] The facts in this Appeal are not in dispute and have been summarized above. The parties submitted a Statement of Agreed Facts which is set out at Appendix "A".[2] The parties also submitted a Joint Book of Documents[3] which includes, *inter alia*, copies of the relevant documents establishing Yellow Point's gift of the Covenant to TLC and NALT. The parties did not call any witnesses at the hearing of this Appeal.

[13] This Appeal involves a technical interpretation of the carryforward rules for certain gifts (often referred to as ecological gifts) set out in paragraph 110.1(1)(d) of the *Act*. In this respect, the sole issue in this Appeal is whether Yellow Point is entitled to claim a deduction of $1,553,374 in computing its income for its taxation year ended December 31, 2014, with respect to the carryforward of its gift of the Covenant pursuant to paragraph 110.1(1)(d) and subsection 110.1(2) of the *Act*. For the reasons that follow, it is my view that it could not as the five year carryforward of the gift of the Covenant allowed under paragraph 110.1(1)(d) ended in Yellow Point's 2013 taxation year.

II. LAW AND ANALYSIS

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2 See Exhibit A-1, Statement of Agreed Facts.

3 See Exhibit A-2, Joint Book of Documents.

[14] For gifts made in 2008 and 2009, paragraph 110.1(1)(d) of the *Act* read as follows:[4]

> 110.1(1) Deduction for [charitable] gifts [by corporation] — For the purpose of computing the taxable income of a corporation for a taxation year, there may be deducted such of the following amounts as the corporation claims:
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> …
>
> (d) ecological gifts - the total of all amounts each of which is the eligible amount of a gift of land (including a covenant or an easement to which land is subject or, in the case of land in the Province of Quebec, a real servitude) if
>
> (i) the fair market value of the gift is certified by the Minister of the Environment,
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> (ii) the land is certified by that Minister, or by a person designated by that Minister, to be ecologically sensitive land, the conservation and protection of which is, in the opinion of that Minister or the designated person, important to the preservation of Canada's environmental heritage, and
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> (iii) the gift was made by the corporation in the year or in any of the five preceding taxation years to
>
> …
>
> (D) a registered charity one of the main purposes of which is, in the opinion of that Minister, the conservation and protection of Canada's environmental heritage, and that is approved by that Minister or the designated person in respect of the gift.
>
> [emphasis added]

[15] For gifts made in 2008 and 2009, subsection 110.1(2) of the *Act* read as follows:

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[4] Paragraph 110.1(1)(d) has subsequently been amended a number of times, including by 2014, c.20, s.5, which extended the carryforward period set out in subparagraph 110.1(1)(d)(iii) from five years to ten years for gifts made after February 10, 2014. Those amendments are not applicable in the circumstances of this Appeal.

> 110.1(2) Proof of gift — An eligible amount of a gift shall not be included for the purpose of determining a deduction under subsection (1) unless the making of the gift is evidenced by filing with the Minister
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> (a) a receipt for the gift that contains prescribed information;
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> […]
>
> (c) in the case of a gift described in paragraph (1)(d), both certificates referred to in that paragraph.

[16] In this case, the parties disagree on the interpretation of subparagraph 110.1(1)(d)(iii) (as set out above), pursuant to which Yellow Point could claim a deduction in a taxation year in respect of its gift of the Covenant if, *inter alia*, "the gift was made by the corporation in the year or in any of the five preceding taxation years".[5] In essence, they disagree on when the gift of the Covenant was "made" for the purposes of subparagraph 110.1(1)(d)(iii). In this respect, the Respondent argues that the gift of the Covenant was "made" in 2008 when it was legally granted by Yellow Point to TLC and NALT, whereas the Appellant argues that it was "made" in 2009 when all of the preconditions to making an ecological gift were completed (i.e., when the Minister of the Environment issued the Certificates in December 2009). Having considered the submissions provided by each of the parties in all of the circumstances of this Appeal, I agree with the Respondent for the reasons that follow.

[17] In this case, it is clear that Yellow Point legally granted the Covenant on June 6, 2008.[6] As such, the Respondent argues that Yellow Point "made" the gift of the Covenant in 2008 and therefore could only claim a deduction in respect of the gift of the Covenant pursuant to paragraph 110.1(1)(d) of the *Act* in the Appellant's 2008 to 2013 taxation years, which the Appellant did and the Minister allowed. In this respect, the Respondent argues that the words of paragraph 110.1(1)(d) of the *Act* are clear and that this Court should not, as the Appellant argues, read into the provision words and qualifiers that are not expressed.

[18] The Appellant, however, argues that a textual analysis of paragraph 110.1(1)(d) of the *Act* does not accord with its purpose, and encourages this Court to undertake a textual, contextual and purposive analysis of paragraph 110.1(1)(d). In this respect, the Appellant argues that:

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5 See subparagraph 110.1(1)(d)(iii) of the *Act*.

6 See Exhibit A-1, Statement of Agreed Facts, paragraph 6, and Exhibit A-2, tab 1.

(a) "Ecological gifts" were intended to be a distinct category of gift. The purpose of the ecological gifts program is to provide a tax incentive to individuals to donate ecologically sensitive lands to ensure that the land's bio diversity and environmental heritage are conserved in perpetuity.

(b) The concept of an "ecological gift" does not exist at common law, but is entirely a creation of the *Act*. Therefore, the use of the word "gift" in paragraph 110.1(1)(d) does not refer to when an ordinary gift is made, but refers to when an "ecological gift" is "completed".

(c) Pursuant to paragraph 110.1(1)(d), a transfer or conveyance of lands is not an "ecological gift" unless it possesses all of the characteristics set out in paragraph 110.1(1)(d) (including in particular that the Minister of the Environment provides the two certificates set out therein).

(d) A gift under paragraph 110.1(1)(d) is not "made" until all of the conditions precedent set out therein have been "completed", and the five year carryforward therefore does not commence until that time.

(e) An "ecological gift" is only "completed" when the land or covenant has been gifted and both certificates prescribed by paragraph 110.1(1)(d) have been provided by the Minister of the Environment to the donor corporation.

(f) The concept of "ecological gifts" should be the same for individuals (as set out in section 118.1 of the *Act*) and for corporations (as set out in paragraph 110.1(1)(d) of the *Act*).

(g) In this case, Yellow Point's gift of the Covenant was "completed" and therefore "made" when the Certificates were issued by the Minister of the Environment in December 2009.

(h) Yellow Point's 2008 deduction under paragraph 110.1(1)(d) was not valid because Yellow Point's gift of the Covenant was not "made" until 2009 when the required Certificates were issued by

the Minister of the Environment. In addition, paragraph 110.1(d) does not permit a carry back.

(i) The five year carryforward period for the gift of the Covenant extends until Yellow Point's 2014 taxation year because the gift of the Covenant was "made" in 2009.

(j) The Minister's interpretation of paragraph 110.1(1)(d) leads to an entirely unfair and harsh result that is contrary to the purpose of paragraph 110.1(1)(d) because a taxpayer losses the ability to claim a deduction in respect of an ecological gift for the taxation years before which the Minister of the Environment issues the required certificates required by paragraph 110.1(1)(d). In this case, the Appellant will lose one year in which a deduction can be claimed.

(k) The Appellant is prepared to consent to a reassessment of its 2008 taxation year in order to cancel the deduction permitted by the Minister on account of the completion of the ecological gift in 2009.

[19] As noted above, the Appellant has argued that a textual, contextual and purposive analysis of paragraph 110.1(1)(d) of the *Act* supports its conclusion that its gift of the Covenant to TLC and NALT was not "made" for the purpose of paragraph 110.1(1)(d) until 2009. In my view, the Appellant's position in this Appeal (and its interpretation of paragraph 110.1(1)(d)) is without merit. In my view, the wording of paragraph 110.1(1)(d) is very clear and functions as Parliament intended. It is also my view that the position proffered by the Appellant in this case, if adopted by this Court, would create a great deal of uncertainty with respect to the application of paragraph 110.1(1)(d) and therefore potentially frustrate the purposes and policies intended by Parliament in enacting paragraph 110.1(1)(d) of the *Act*.

[20] In *Canada Trustco Mortgage Co. v. R*, 2005 SCC 54, at paragraph 10-13, the Supreme Court of Canada noted the following with respect to the principles of interpretation applicable to the *Act*:

> 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. R.*, [1999] 3 S.C.R. 804 (S.C.C.), 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 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.

11 As a result of the Duke of Westminster principle (*Inland Revenue Commissioners v. Duke of Westminster* (1935), [1936] A.C. 1 (U.K. H.L.)) that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable, Canadian tax legislation received a strict interpretation in an era of more literal statutory interpretation than the present. There is no doubt today that all statutes, including the Act, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.

12 The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently. As stated at para. 45 of *Shell Canada Ltd. v. R.*, [1999] 3 S.C.R. 622 (S.C.C.):

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

See also *65302 British Columbia*, at para. 51, *per* Iacobucci J. citing P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (2nd ed. 1997), at pp. 475-76:

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

> 13 The *Income Tax Act* remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation. Onto this compendium of detailed stipulations, Parliament has engrafted quite a different sort of provision, the GAAR. This is a broadly drafted provision, intended to negate arrangements that would be permissible under a literal interpretation of other provisions of the *Income Tax Act*, on the basis that they amount to abusive tax avoidance. To the extent that the GAAR constitutes a "provision to the contrary" as discussed in *Shell* (at para. 45), the Duke of Westminster principle and the emphasis on textual interpretation may be attenuated. Ultimately, as affirmed in *Shell*, "[t]he courts' role is to interpret and apply the Act as it was adopted by Parliament" (para. 45). The court must to the extent possible contemporaneously give effect to both the GAAR and the other provisions of the *Income Tax Act* relevant to a particular transaction.
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> [emphasis added]

[21] Paragraph 110.1(1)(d) as set out above, which was applicable to gifts made in 2008 and 2009, allows a corporation to claim a deduction in computing its taxable income in a taxation year if it meets the following criteria:

(a) It must be in respect of a gift of land, including a covenant or easement to which the land is subject or, in the case of land in Quebec, a real servitude;

(b) The fair market value of the gift must be certified by the federal Minister of the Environment;

(c) The land must be certified by the federal Minister of the Environment (or by a designate) to be ecologically sensitive land;

(d) The gift must have been made in the year or in any of the five preceding taxation years to a specified done set out in paragraph 110.1(1)(d); and

(e) Pursuant to subsection 110.1(2), a corporation claiming a gift under paragraph 110.1(1)(d) must evidence the gift by filing with the Minister a receipt for the gift containing prescribed information and the two certificates provided by the Minister of the environment.

[22] I agree with the Respondent that each of these criteria must be considered separately based on the wording of the *Act*. Therefore, it is first necessary to determine if a gift has been made. While the *Act* does not include a definition of the word "gift", its meaning has been established by case law. For example, the

Federal Court of Appeal, in *The Queen v. Berg*, 2014 FCA 25, at paragraph 23, noted the following:

> 23 The Act does not define the term "gift." The meaning of the term is determined under the applicable law, which in this case is the common law. The authoritative definition for this purpose is stated as follows in *Friedberg v. R.* (1991), 92 D.T.C. 6031 (Fed. C.A.) (*Friedberg*):
>
> > [...] a gift is a voluntary transfer of property owned by a donor to a done in return for which no benefit or consideration flows to the donor (at 6032).

[23] In this case, as previously noted, it is clear that Yellow Point legally granted the Covenant to TLC and NALT on June 6, 2008. Yellow Point does not dispute this. In my view, it is therefore clear that Yellow Point made a gift of the Covenant to TLC and NALT on that date.

[24] I note that the Appellant initially took that same position. In this respect, I note that the Appellant, in a letter to the Canada Revenue Agency from its accountant dated May 19, 2020, requested that the Minister adjust its 2008 taxable income to allow it to claim an amount in respect of the gift. The opening paragraph of that letter reads as follows:

> During 2008, the above company made a donation of ecologically sensitive land valued at $5,810,000. It was not reported on its 2008 corporate income tax return because the supporting documentation concerning the value of the gift and its eligibility as ecologically sensitive land was not issued by Environment Canada until December of 2009. In support of this donation we are enclosing copies of the following documents: …

[25] The Appellant now argues, however, that it was wrong in claiming an amount in its 2008 taxation year and the Minister was wrong in granting its request to claim a deduction in its 2008 taxation year because the gift was not made until 2009 when all of the criteria discussed above were met. In my view, however, the Appellant's interpretation cannot be accepted. I agree with the Respondent that each of the criteria set out in paragraph 110.1(1)(d) are separate, and in particular that they are not part of the determination of when a gift has been made, which in my view occurs when a donor legally effects a voluntary transfer of property to a donee (within the meaning established by *Friedberg*).

[26] I also note that this interpretation is supported by both the text of paragraph 110.1(1)(d) and the context of the *Act* read as a whole. Paragraph 110.1(1)(d)

specifically references a "gift of land". It also references both the "fair market value of the gift" and the taxation year in which "the gift was made by the corporation". It also does not make the "making of the gift" conditional on the corporation obtaining the two specified certificates from the Minister of the Environment. They are separate events, and a corporation making a gift bears the risk of obtaining the necessary certificates from the Minister of the Environment if it wishes to claim a deduction under paragraph 110.1(1)(d) of the *Act*. In this respect, I note that a gift of ecologically sensitive land would be a valid gift, as a matter of law generally, even if the corporate donor never obtained the necessary certificates from the Minister of the Environment. In that case, however, the donor would be prevented from claiming a deduction under paragraph 110.1(1)(d). It is clear, in my view, that the certificates are necessary to claim a deduction under paragraph 110.1(1)(d) of the *Act*, but not to determine if a gift of land has been "made" for the purpose of paragraph 110.1(1)(d).

[27] Subsection 110.1(2) also addresses a "gift" claimed under paragraph 110.1(1)(d), and specifically provides that "the making of the gift" must be evidenced by "a receipt for the gift" and, "in the case of a gift described in paragraph (1)(d), both certificates referred to in that paragraph." The wording of subsection 110.1(2) in my view supports the Respondent's position that the making of the gift is separate from the receipt and certificates that must be provided to the Minister in order to claim a deduction for the gift under paragraph 110.1(1)(d). In this respect, I note that the donation receipts obtained by Yellow Point from TLC and NALT both reference the gift at issue in this Appeal as having been made on June 6, 2008.[7]

[28] Subsection 110.1(5) also applies to a gift made under paragraph 110.1(1)(d), and provides as follows:

> 110.1(5) Ecological gifts — For the purposes of applying subparagraph 69(1)(b)(ii), this section and section 207.31 in respect of a gift described in paragraph (1)(d) that is made by a taxpayer, the amount that is the fair market value (or, for the purpose of subsection (3), the fair market value otherwise determined) of the gift at the time the gift was made and, subject to subsection (3), the taxpayer's proceeds of disposition of the gift, is deemed to be the amount determined by the Minister of the Environment to be
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> (a) where the gift is land, the fair market value of the gift; or

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7 See Exhibit A-2, tab 3 at page 40.

> (b) where the gift is a covenant or an easement to which land is subject or, in the case of land in the Province of Quebec, a real or personal servitude, the greater of
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> (i) the fair market value otherwise determined of the gift, and
>
> (ii) the amount by which the fair market value of the land is reduced as a result of the making of the gift.

[29] Subsection 110.1(5) provides that the fair market value "of the gift at the time the gift was made" and "the taxpayer's proceeds of disposition of the gift" is deemed to be the amount determined by the Minister of the Environment. In my view, subsection 110.1(5) thus also contemplates that the making of the gift is separate from the process for obtaining the necessary certificates from the Minister of the Environment.

[30] Subsections 118.1(10.2) – (12) of the *Act* outline the process for obtaining the necessary certificates from the Minister of the Environment for the purpose of paragraph 110.1(1)(d), as well as a taxpayers appeal rights in respect of determinations made by that Minister. They provide as follows:

> 118.1(10.2) Request for determination by the Minister of the Environment — Where a person disposes or proposes to dispose of a property that would, if the disposition were made and the certificates described in paragraph 110.1(1)(d) or in the definition "total ecological gifts" in subsection (1) were issued by the Minister of the Environment, be a gift described in those provisions, the person may request, by notice in writing to that Minister, a determination of the fair market value of the property.
>
> (10.3) Duty of Minister of the Environment — In response to a request made under subsection (10.2), the Minister of the Environment shall with all due dispatch make a determination in accordance with subsection (12) or 110.1(5), as the case may be, of the fair market value of the property referred to in that request and give notice of the determination in writing to the person who has disposed of, or who proposes to dispose of, the property, except that no such determination shall be made if the request is received by that Minister after three years after the end of the person's taxation year in which the disposition occurred.
>
> (10.4) Ecological gifts — redetermination — Where the Minister of the Environment has, under subsection (10.3), notified a person of the amount determined by that Minister to be the fair market value of a property in respect of its disposition or proposed disposition,
>
> (a) that Minister shall, on receipt of a written request made by the person on or before the day that is 90 days after the day that the

person was so notified of the first such determination, with all due dispatch confirm or redetermine the fair market value;

(b) that Minister may, on that Minister's own initiative, at any time redetermine the fair market value;

(c) that Minister shall in either case notify the person in writing of that Minister's confirmation or redetermination; and

(d) any such redetermination is deemed to replace all preceding determinations and redeterminations of the fair market value of that property from the time at which the first such determination was made.

(10.5) Certificate of fair market value — Where the Minister of the Environment determines under subsection (10.3) the fair market value of a property, or redetermines that value under subsection (10.4), and the property has been disposed of to a qualified donee described in paragraph 110.1(1)(d) or in the definition "total ecological gifts" in subsection (1), that Minister shall issue to the person who made the disposition a certificate that states the fair market value of the property so determined or redetermined and, where more than one certificate has been so issued, the last certificate is deemed to replace all preceding certificates from the time at which the first certificate was issued.

(11) Assessments — Notwithstanding subsections 152(4) to (5), such assessments or reassessments of a taxpayer's tax, interest or penalties payable under this Act for any taxation year shall be made as are necessary to give effect

(a) to a certificate issued under subsection 33(1) of the Cultural Property Export and Import Act or to a decision of a court resulting from an appeal made pursuant to section 33.1 of that Act; or

(b) to a certificate issued under subsection (10.5) or to a decision of a court resulting from an appeal made pursuant to subsection 169(1.1).

(12) Ecological gifts [fair market value] — For the purposes of applying subparagraph 69(1)(b)(ii), subsection 70(5), this section and section 207.31 in respect of a gift described in the definition "total ecological gifts" in subsection (1) that is made by an individual, the amount that is the fair market value (or, for the purpose of subsection (6), the fair market value otherwise determined) of the gift at the time the gift was made and, subject to subsection (6), the individual's proceeds of disposition of the gift, is deemed to be the amount determined by the Minister of the Environment to be

(a) where the gift is land, the fair market value of the gift; or

> (b) where the gift is a servitude, covenant or easement to which land is subject, the greater of
>
> > (i) the fair market value otherwise determined of the gift, and
> >
> > (ii) the amount by which the fair market value of the land is reduced as a result of the making of the gift.

[31] Subsection 118.1(10.2) provides that a taxpayer who disposes or proposes to dispose of a property described in paragraph 110.1(1)(d) may request a determination of the fair market value of the property from the Minister of the Environment. It thus contemplates a gift being made, as a matter of law generally, without the donor obtaining any certificates from the Minister of the Environment if the donor chooses not to. If a donor chooses to, it contemplates this request being made either before or after the gift has been legally effected, and is therefore separate from the making of the gift itself.

[32] Subsection 118.1(10.3) provides that the Minister of the Environment "shall with all due dispatch make a determination in accordance with subsection (12) or 110.1(5) … of the fair market value of the property referred to in that request and give notice of the determination in writing to the person …". Subsection 118.1(10.3) thus mandates that the Minister of the Environment make a fair market value determination of the gift and provide notice thereof to the person.

[33] Subsection 118.1(10.4) provides for a redetermination of the fair market value of the gifted property (including a proposed gift) by the Minister of the Environment at the request of the requesting person or at the initiative of the Minister of the Environment.

[34] After the Minister of the Environment has made a determination or redetermination of the fair market value of property pursuant to subsections 118.1(10.3) or (10.4), and the property has been disposed of to a qualified done described in paragraph 110.1(1)(d), subsection 118.1(10.5) provides that the Minister of the Environment shall issue to the person who made the disposition of the property a certificate that states the fair market value of the property. Subsection 118.1(10.5) thus also contemplates that the issuance of the certificate by the Minister of the Environment is separate from, and is subsequent to, the making of the gift and the resulting disposition of the gifted property.

[35] Subsection 169(1.1) of the *Act* in turn allows a taxpayer to appeal any determination made by the Minister of Environment after that Minister has issued a certificate of fair market value pursuant to subsection 118.1(10.5). Subsection 169(1.1) provides as follows:

> 169(1.1) Ecological gifts — Where at any particular time a taxpayer has disposed of a property, the fair market value of which has been confirmed or redetermined by the Minister of the Environment under subsection 118.1(10.4), the taxpayer may, within 90 days after the day on which that Minister has issued a certificate under subsection 118.1(10.5), appeal the confirmation or redetermination to the Tax Court of Canada.

[36] Subsection 169(1.1) thus also contemplates that a donors appeal rights with respect to the determination, or redetermination, of the fair market value of gifted property are separate from, and are subsequent to, the making of the gift and the disposition of the gifted property.

[37] Subsection 118.1(11) provides that the Minister shall make any assessments or reassessments for any taxation year to give effect to a certificate issued by the Minister of the Environment pursuant to subsection 118.1(10.5). Thus, contrary to the arguments made by the Appellant in this case, subsection 118.1(11) mandates that the Minister make any assessments to give effect to the final determination of the fair market value of gifted property, whether made by the Minister of the Environment or a court upon appeal. The stipulated process thus ensures that a taxpayer can claim a deduction in the taxation year a gift is made and the subsequent five taxation years in accordance with paragraph 110.1(1)(d), even if there are delays in the final determination of the fair market value of the gifted property.

[38] Subsection 118.1(12) applies to individual donors and is equivalent to subsection 110.1(5), as discussed above.

[39] As noted above, the Supreme Court of Canada in *Canada Trustco* noted at paragraph 10 that:

> "… 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 a dominant role in the interpretive process. …

[40] In *Canada Trustco*, the Supreme Court of Canada also noted at paragraphs 11 and 12 that:

> 11 … However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.
>
> 12 The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently. …

[41] In this case, it is my view that paragraph 110.1(1)(d), and the other provisions discussed above that apply to a gift to which paragraph 110.1(1)(d) applies, are precise and unequivocal. In my view, they clearly separate the making of the gift of property, and the timing thereof, from the determination of the fair market value of the property and the obtaining of the necessary certificates from the Minister of the Environment. It is also my view that they contemplate that a gift of ecologically sensitive land will be "made" when it is legally effected, which in this case was June 6, 2008. In my view this interpretation leads to a result which achieves consistency, predictability and fairness, and is consistent with a textual, contextual and purposive analysis to find a meaning that is harmonious with the *Act* as a whole.

[42] Under the interpretation favoured by the Appellant, the date upon which a gift is made is not able to be determined until the Minister of the Environment issues the certificates. This would create much uncertainty in my view. It would also potentially prejudice a corporate taxpayer which had sufficient income in the year in which a gift of land was legally effected but contemplated that it would have little or no income in future years (e.g., because it was winding up its operations). In that case, if the Minister of the Environment issued the certificates in a later year, the corporate taxpayer would effectively lose the ability to the claim a deduction under paragraph 110.1(1)(d). It might also prejudice corporate taxpayers which subsequently were subject to short taxation years under the *Act*.

[43] In contrast, the interpretation favoured by the Respondent, which I agree with, creates certainty, and allows taxpayers to plan and manage their affairs intelligently, as mandated by the Supreme Court of Canada in *Canada Trustco*. Under that interpretation, the date a gift is "made" for the purposes of paragraph 110.1(1)(d) is the date it is legally effected. This also accords with the

interpretation set out in *Berg* and *Friedberg*, as discussed above, and in my view accords with a textual, contextual and purposive analysis of paragraph 110.1(1)(d) and the *Act* read as a whole.

[44] Overall, it is my view that paragraph 110.1(1)(d) of the *Act* (as set out above) is clear and only permits the Appellant to deduct amounts in respect of its gift of the Covenant in its 2008 through 2013 taxation years in all of the circumstances of this Appeal. The inability of the Appellant to deduct the full value of its gift of the Covenant against its taxable income during those taxation years is determined by the amount of taxable income it otherwise earned in those taxation years and policy choices made by Parliament in enacting paragraph 110.1(1)(d) of the *Act* as applicable to gifts of ecologically sensitive land made in 2008.

[45] It is Parliament's responsibility, not this Court's, to address any issues which taxpayers may have with respect to the policy regime Parliament implemented for corporate gifts of ecologically sensitive land. As noted above, paragraph 110.1(1)(d) of the *Act* was amended by Parliament in 2014 to extend the carryforward period for gifts of ecologically sensitive land from five to ten years for gifts made after February 10, 2014, which arguably addresses the issue, at least in part, raised by the Appellant in this case with respect to the carryforward period. As Parliament, however, chose not to make the amendments retroactive, they are of no assistance to the Appellant in the circumstances of this Appeal.

CONCLUSION

[46] Based on all of the foregoing, Yellow Point's appeal is dismissed.

COSTS

[47] Costs are awarded to the Respondent. The parties shall have 30 days from the date hereof to reach an agreement on costs, failing which the Respondent shall have a further 30 days to file written submissions on costs and the Appellant shall have yet a further 30 days to file a written response. Any such submissions shall not exceed 10 pages in length. If the parties do not advise the Court that they have reached an agreement and no submissions are received, costs shall be awarded to the Respondent as set out in the Tariff.

Signed at Charlottetown, Prince Edward Island, this 28th day of August 2019.

"Henry A. Visser"

Visser J.

Appendix "A"

Statement of Agreed Facts

2016-3838(IT)G

TAX COURT OF CANADA

BETWEEN:

YELLOW POINT LODGE LTD.

Appellant

and

HER MAJESTY THE QUEEN,

Respondent

STATEMENT OF AGREED FACTS

By their respective solicitors, the parties, for the purposes of this proceeding only, admit and agree upon the following facts. The parties will not adduce evidence that is inconsistent with this Statement of Agreed Facts, but may adduce evidence that is not inconsistent with this Statement of Agreed Facts.

1. The Appellant, Yellow Point Lodge Ltd. ("Yellow Point Lodge"), is a company incorporated pursuant to the laws of the Province of British Columbia.

2. Yellow Point Lodge has a taxation year end of December 31.

3. The President of Yellow Point Lodge is Richard Hill.

4. Yellow Point Lodge is the registered owner of lands located on Yellow Point on Vancouver Island, which are known municipally as 3700 Yellow Point Road, RR3, Ladysmith, British Columbia, and legally described as:

PID: 004-344-502	**THAT PART OF LOT 14, OYSTER DISTRICT, LYING EASTERLY OF THE EAST BOUNDARY OF LOT 13 OF SAID DISTRICT AND OF THE SAID BOUNDARY PRODUCED NORTHERLY TO HIGH WATER MARK ON STUART CHANNEL AND SAID TO CONTAIN 92.5 ACRES MORE OR LESS EXCEPT THOSE PARTS IN PLANS 4145 AND 27697**

(hereinafter referred to the "Lands")

5. The Lands for the most part are undeveloped and in its natural state, but for a lodge and cabin resort owned and operated by Yellow Point Lodge on a portion of the Lands.

6. On June 6, 2008, an Instrument was registered on the title of the Lands granting the following interests to *TLC* The Land Conservancy of British Columbia and Nanaimo & Area Land Trust:

   a) A Covenant pursuant to section 219 of the British Columbia *Land Titles Act,*

   b) A Statutory Right of Way pursuant to section 218 of the British Columbia *Land Titles Act,*

   c) A Rent Charge pursuant to section 219 of the British Columbia *Land Titles Act* and as a fee simple rent charge at Common Law.

   (hereinafter collectively referred to as the "Covenant").

   A true copy of the Instrument, registered on June 6, 2008 as Instrument Number FB179687 is at TAB 1 of the Joint Book of Documents.

7. *TLC* The Land Conservancy of British Columbia has been designated by the then Minister of the Environment, Lands and Parks of British Columbia, as a person authorized to accept covenants under section 219 of the *Land Title Act* and as a person authorized to accept statutory rights of way pursuant to section 218 of *the Land Title Act.*

8. Nanaimo & Area Land Trust has been designated by the then Minister of Environment, Lands and Parks of British Columbia, as a person authorized to accept covenants under section 219 of the *Land Title Act* and as a person authorized to accept statutory rights of way pursuant to section 218 of the Lane/ *Title Act.*

9. The area of the Lands covered by the Covenant is an approximately 27.35 hectare area of the easterly portion of the Lands.

10. On December 21, 2009, the Federal Minister of the Environment issued a Statement of Fair Market Value of an Ecological Gift Pursuant to *the Income Tax Act* of Canada, valuing the Covenant at a fair market value of $5,810,000.00.

    A true copy of the Statement of Fair Market Value of an Ecological Gift Pursuant to the Income Tax Act of Canada, issued December 21, 2009 is at TAB 3, pages 38 to 39 of the Joint Book of Documents.

11. On December 22, 2009, the Federal Minister of the Environment issued a Certificate of Ecologically Sensitive Land, Recipient Identification and Registered Charity Approval Pursuant to the *Income Tax Act* of Canada with respect to the Covenant.

    A true copy of the Certificate of Ecologically Sensitive Land, Recipient Identification and Registered Charity Approval Pursuant to the *Income Tax Act* of Canada, issued December 22, 2009 is at TAB 3, pages 36 to 37 of the Joint Book of Documents.

12. On February 18, 2010, *TLC* The Land Conservancy of British Columbia issued a Tax Receipt to Yellow Point Lodge, in the amount of $2,905,000.00, representing 50% of the certified fair market value of the Covenant by the Federal Minister of the Environment on December 21, 2009.

A true copy of Tax Receipt 19730, issued by *TLC* The Land Conservancy of British Columbia to Yellow Point Lodge on February 18, 2010 is at TAB 3, page 40 of the Joint Book of Documents.

13. On February 26, 2010, the Nanaimo & Area Land Trust Society (NALT) issued a Tax Receipt to Yellow Point Lodge, in the amount of $2,905,000.00, representing 50% of the certified fair market value of the Covenant by the Federal Minister of the Environment on December 21, 2009.

A true copy of Tax Receipt 4642, issued by Nanaimo & Area Land Trust Society (NALT) to Yellow Point Lodge on February 26, 2010 is at TAB 3, page 40 of the Joint Book of Documents.

14. Yellow Point Lodge's income tax return for the taxation year ended December 31, 2008 was initially assessed on July 16, 2009.

15. In filing its income tax return for the taxation year ended December 31, 2008, Yellow Point Lodge could not claim a deduction with respect to the Covenant under subparagraph 110.1(1)(d) of the *Income Tax Act,* because the following documents had yet to be issued and/or delivered to Yellow Point Lodge:

    a) Statement of Fair Market Value of an Ecological Gift Pursuant to the *Income Tax Act* of Canada;

b) Certificate of Ecologically Sensitive Land, Recipient Identification and Registered Charity Approval Pursuant to the *Income Tax Act* of Canada; or

c) Tax Receipts from *TLC* The Land Conservancy of British Columbia and the Nanaimo & Area Land Trust Society (NALT).

16. By letter dated May 19, 2010 from its accountant, Parkes Moysey, Chartered Accountants, Yellow Point Lodge requested that the Minister of National Revenue (the "Minister") reassess Yellow Point Lodge's taxation year ended December 31, 2008, to allow it to claim a deduction with respect to the Covenant under subparagraph 110.l(l)(d) of the *Income Tax Act* in the amount of $382,779.

A true copy of correspondence from T.R. Parkes to the Canada Revenue Agency, dated May 19, 2010, is at TAB 3 of the Joint Book of Documents

17. On July 27, 2010, Yellow Point Lodge's request was granted and Yellow Point Lodge's taxation year ended December 31, 2008 was reassessed to permit a deduction with respect to the Covenant under subparagraph 110.1(l)(d) of the Income *Tax Act* in the amount of $382,779.

18. Yellow Point Lodge subsequently claimed the following deductions with respect to the Covenant under subparagraph 110.1 (l)(d) of the *Income Tax Act*

a) for the taxation year ended December 31, 2009, the amount of $474,673;

b) for the taxation year ended December 31, 2010, the amount of $495,339;

c) for the taxation year ended December 31, 2011, the amount of $496,252;

d) for the taxation year ended December 31, 2012, the amount of $519,720; and

e) for the taxation year ended December 31, 2013, the amount of $468,055.

19. In filing its income tax return for the taxation year ended December 31, 2014, Yellow Point Lodge claimed a deduction with respect to the Covenant under subparagraph 110.1 (l)(d) of the *Income Tax Act* in the amount of $1,553,374.

20. In the Corporation Notice of Assessment and Summary of Assessment, dated July 28, 2015, the Minister disallowed Yellow Point Lodge's deduction claim made with respect to the Covenant, and assessed Yellow Point Lodge the sum total of $554,450.81, in Federal and Provincial Taxes and arrears interest, for the taxation year ended December 31, 2014,

A true copy of the Corporation Notice of Assessment and Summary of Assessment of Yellow Point Lodge for the taxation year ended December 31, 2014, is at TAB 6 of the Joint Book of Documents.

21. The reason given in the Summary of Assessment for disallowing Yellow Point Lodge's deduction claim under subparagraph 110.1(l)(d) of the *Income Tax Act* was that the "original claim exceeds the total available amount of carryforward and current-year donations."

22. Subsequent to the reassessment dated July 27, 2010, Yellow Point Lodge did not make a request to the Minister to reassess its taxation year ended December 31, 2008 to remove the deduction from income of $382,779 with respect to the Covenant.

[Signature Page Immediately Next]

DATED at the City of London, the Province of Ontario, this 25th day of June, 2018.

Keith M. Trussler
Sean Flaherty
McKenzie Lake Lawyers LLP
140 Fullarton Street Suite 1800

London, Ontario N5A 5P 2

Keith M. Trussler
Solicitor/counsel for the Appellant

DATED at the City of Vancouver, the Province of British Columbia, this _____ day of June, 2018

ATTORNEY GENERAL OF CANADA
Department of Justice Canada British Columbia
Regional Office 900-840 Howe Street
Vancouver, British Columbia V6Z 2S9

Per: Selena **Sit**
Solicitor/counsel for the Respondent

CITATION:	2019 TCC 178
COURT FILE NO.:	2016-3838(IT)G
STYLE OF CAUSE:	YELLOW POINT LODGE LTD. AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	London, Ontario
DATE OF HEARING:	June 28, 2018
REASONS FOR JUDGMENT BY:	The Honourable Justice Henry A. Visser
DATE OF JUDGMENT:	August 27, 2019

APPEARANCES:

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Counsel for the Respondent:	Selena Sit

COUNSEL OF RECORD:

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