Docket: 2009-3506(IT)G

BETWEEN:

JUANITA MARIANO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of *Douglas Moshurchak* (2009-3516(IT)G) on April 7, 8, 9, 10, 13, 14, 2015, at Toronto, Ontario, May 8 and 9, 2015 at Halifax, Nova Scotia, May 25, 26, 27, 28, 29, June 15, 16, 17, 22, 23, 24, 25, September 14, 15, 16, 17, and 18, 2015 at Vancouver, British Columbia

By: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Howard W. Winkler Rahul Shastri
Counsel for the Respondent:	Gordon Bourgard Matthew Turnell Zachary Froese

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JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* for the 2005 taxation year is dismissed, with costs to the Respondent. The parties shall have 30 days from the date of this Judgment to make submissions as to costs if they are not satisfied with the above order as to costs.

Signed at Ottawa, Canada, this 19th day of October 2015.

"F.J. Pizzitelli"

Pizzitelli J.

Docket: 2009-3516(IT)G

BETWEEN:

DOUGLAS MOSHURCHAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on common evidence with the appeal of *Juanita Mariano* (2009-3506(IT)G) Appeals heard on April 7, 8, 9, 10, 13, 14, 2015, at Toronto, Ontario, May 8 and 9, 2015 at Halifax, Nova Scotia, May 25, 26, 27, 28, 29, June 15, 16, 17, 22, 23, 24, 25, September 14, 15, 16, 17, and 18, 2015 at Vancouver, British Columbia

By: The Honourable Justice F.J. Pizzitelli

Appearances:

Counsel for the Appellant:	Howard W. Winkler Rahul Shastri
Counsel for the Respondent:	Gordon Bourgard Matthew Turnell Zachary Froese

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JUDGMENT

The appeal from the reassessments made under the *Income Tax Act* for the 2004 and 2005 taxation years is dismissed, with costs to the Respondent. The parties shall have 30 days from the date of this Judgment to make submissions as to costs if they are not satisfied with the above order as to costs.

Signed at Ottawa, Canada, this 19th day of October 2015.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2015 TCC 244
Date: 20151019
Docket: 2009-3506(IT)G

BETWEEN:

JUANITA MARIANO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2009-3516(IT)G

AND BETWEEN:

DOUGLAS MOSHURCHAK,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Pizzitelli J.

[1] These cases were heard at the same time and on common evidence.

[2] The Appellants appeal reassessments from the Minister of National Revenue (the "Minister") denying them charitable tax credits pursuant to section 118.1 of the *Income Tax Act* (the "*Act*"). Specifically, the Appellant, Douglas Moshurchak, was denied recognition of charitable gifts claimed for 2004 totalling $57,004, and for 2005 totalling $928,052. The said Appellant claimed a cash donation of $14,250 and an in-kind donation of $42,754 for 2004, and a cash donation of $116,000 and an in-kind donation of $812,051 for 2005. For 2006, the said Appellant carried over unused deductions, after transferring some to his spouse, which were also denied. The Appellant, Juanita Mariano, was denied recognition of charitable gifts totalling $45,044 for 2005, consisting of a cash donation of $7500 and an in-kind donation of $37,544.

I. The Legal Issues

[3] The Respondent has identified the 5 legal issues related to determining the issue of whether the Appellants were properly denied their charitable contributions, namely;

1. Did the Appellants make any 'gifts' to Millenium and CCA [the charities later defined] within the meaning of section 118.1? The Respondent says this involves determining whether the Appellants had the "donative intent" to do so, as well as whether a gift was actually made having regard to the other requisite elements of a gift.

2. Is the Global Learning Trust (2004) a valid trust at law? The Respondent challenges the validity of the Trust due to to its failure to have "certainties" present or due to the non-exercise of unassignable duties by its Trustee.

3. Is the GLGI Program and all the transactional steps involved in it a "sham"?

4. If 1 and 2 are answered in the affirmative and 3 in the negative, then was the fair market value of the licenses donated what the Appellants claimed?; and if so,

5. Do subsections 248(30) to (32) apply so as to reduce the eligible amounts of the gifts to Nil?

[4] The Appellants take the position that the only real issue in dispute is the fair market value of the gift in kind of licences which, they argue, their expert witness report confirms is higher than the value of the tax receipts claimed by all the Appellants; save and except that it concedes that the value for the Appellant, Douglas Moshurchak, for its 2005 year was only $423,057 and not the $812,051 claimed by him for the year, while asks that the value of the licences be valued at $52,724 for 2004, instead of the lower amount of $42,754 claimed. For Mariano, the value sought is $42,682 instead of the lower amount of $37,544 actually claimed. Let me just say, bluntly, that I will not allow any increase in the charitable donation over the amount of the charitable tax receipt in any event as it is trite law that a claim must be based on the issued charitable receipt.

[5] I intend to review and analyse the above issues in dispute after a brief review of the relevant facts and description of the donation program involved.

II. Background facts and Description of Donation Program

[6] The donation program known as the Global Learning Gift Initiative (the "Program") involved an offshore entity, Phoenix Learning Corporation ("Phoenix"), which was a Bahamian corporation, acquiring software licenses consisting of 6 different courseware titles, at nominal value, ranging from 13.3 cents per licence to 26.7 cents per licence, from a Florida corporation, Infosource Inc. ("Infosource"), and in turn, gifting most of such licenses to a Canadian trust, Global Learning Trust 2004 (the "Trust"), and directly or indirectly selling the balance to such Trust in order to fund its purchase of licences from Phoenix. The Trust was settled by a Mr. Morris, a Bahamian resident and expat Canadian under the laws of Ontario and of which Global Learning Trust Services Inc., an Ontario corporation, was the appointed trustee ("Trustee"). The Trust then distributed them to the participants, like the Appellants, who, after submitting a predetermined set of documents described later, were accepted as capital beneficiaries of the Trust; who in turn donated them to a select charity, Canadian Charities Association ("CCA"), and received a donation receipt having a purported value that exceeded the donation receipt received for their cash outlay to another charity, Millenium Charitable Foundation ("Millenium"), by a factor of 3 or more times.

[7] The Program was promoted by Global Learning Group Inc. (the "Promoter") a Canadian corporation owned by Robert Lewis, whose name was linked to earlier donation programs such as Global Learning Systems, which entered into letter agreements with both charities for a fee. The Agreements indicate that the Promoter was to receive about 20% of the cash donations made to Millenium, net of its expenses in relation to the Program, and 20% of the amount of both the cash and in-kind donations made to CCA. Millenium redonated 80% of the cash donations it received to CCA so, in the end, retained only a small portion of the cash donations it received from which it had to pay its operating expenses, including fees paid to other entities like JDS Corporation ("JDS"), of which one Mr. Denis Jobin was the sole officer, director, shareholder and worker, for administration services such as maintaining a database and preparing and/or issuing tax donation receipts on its behalf.

[8] The other parties involved in the Program, aside from the lawyers for the Promoter who appeared to have acted for almost everyone involved at some time or another, other than for Infosource Inc., were the administrators of the program. IDI Strategies Inc. ("IDI"), a corporation owned or controlled by James Penturn and Richard Glatt that had been involved with earlier donation programs,

contracted with the Promoter to effectively administer the program for an annual fee that consisted of a lump sum of cash and a percentage of the cash donations made by donors under the Program, payable on the date of each such donation and which the Promoter directed Millenium to pay out of funds payable to it within the terms of the Promoter's letter agreement with Millenium above discussed. The services IDI provided included general administrative and record keeping, developing and maintaining an electronic database for recording the details of the donors' identification and contact information and their donations of cash and other properties, handling all verbal inquiries and preparing all required documentation in relation to the Program. JDS above mentioned was also contracted by the Promoter to perform computer consulting work, evidenced by numerous invoices issued to and paid by the Promoter in 2005, was contracted by the Trust to develop, maintain and host a database and register and record complete records of all capital beneficiaries and the property received and distributed by the Trust; all for essentially a lump sum set-up fee and monthly fee of $3000; performed contract work for IDI as evidenced by payments made to it, and even kept databases and prepared tax donation receipts for Millenium and CCA, even though it had no contract with CCA but because, as Denis Jobin of JDS testified, they were all part of the same program from which he received instructions from Jack Keslassy of IDI, with whom he shared a small office. It should be noted JDS prepared the Assignment of Licences and related documents, including the Trust resolution approving the acceptance of participants as capital beneficiaries and the allocation of a specific number of licences.

[9] Another relevant party involved in the Program was Escrowagent Inc. (the "Escrow Agent"), a corporation controlled by Allan Beach, one of the solicitors for the Promoter, and others, who purportedly received documents from each applicant, including the Appellants, consisting of a Deed of Gift to Millenium for a cash outlay, a Cheque to Millenium for such outlay, a Deed of Gift of the In-kind property (i.e the courseware licences) to CCA, a cheque of $10.70 to the Escrow Agent for its fees, an Application for Consideration as a Capital Beneficiary to the Trust, and two directions to the Escrow agent authorizing it to deliver the gifts and accompanying Deed of Gift to the requisite charities, to date such cheques or documents to reflect the date of actual delivery and arrange for delivery of charitable receipts back to the donor- all if the donor did not revoke such gifts within 72 hours for the cash gift and 48 hours for the licences gift after being notified by email of being approved as a capital beneficiary and given a distribution of property from the Trust; and, in some cases, the donor would execute a Waiver of the time periods purportedly allowed for them to change their minds, referenced in the Deeds of Gift above, as in the case of Mariano (all such

documents or items hereinafter together referred to as the "Transaction Documents"). All of the Escrow Agent's services were clearly effectively undertaken by IDI and JDS from the evidence which includes correspondence from the Escrow Agent to the CRA confirming it, in fact, only played a small role and that the contemplated deliveries were made by IDI, JDS or others.

[10] Infosource, earlier mentioned, was the developer and proprietary owner of the 6 instructional courseware titles that formed the subject matter of the licenses in issue (the "Licenses") described as:

1. Office 2000 Seminar on a Disk, which involved training for various Microsoft Office applications at beginner, intermediate and advanced levels;

2. How to Master Office XP, which was similar to Office 2000 Seminar on a Disk updated for Office XP;

3. How to Master Office 2003, which related to Microsoft's further update of its Office products;

4. IC3, which was an internet and computing course certification to enable the user to obtain the competency;

5. A+ 2003, which dealt with an application that could be used for individuals training to become computer hardware technicians to handle the use of PCs; and

6. MCSE 2000, or the "Microsoft Certified Systems Engineer for 2000", which was a more advanced application related to deploying Windows 2000 to multiple PCs.

[11] Infosource sold Licenses to its courseware, substantially all in the U.S. market with less than 5% in the Canadian market, which were packaged for one to multiple titles, were perpetual or time limited, and were for single or multiple users. At the relevant time, the products were delivered online or in CD Rom formats. The online delivery for multiple users involved the setup of an access site with a password. This option provided clients with administrative access and the ability to track the activities of their users through the so-called learning management system (the "LMS").

[12] Infosource entered into various Licence agreements with Phoenix from 2004 to 2007, however the two most relevant are the two initial agreements reflected by an agreement dated October 20,2004 and a Schedule "B" amending the initial agreement dated September 14, 2005 pursuant to which Infosource transferred 250,000 licenses for each of the courseware titles to Phoenix on both dates, for a fee of $400,000 and $200,000 U.S. respectively; thereby transferring 3 million Licenses, consisting of 500,000 licences per courseware title, for a total fee of $600,000 within that one year period (hereinafter referred to as the "Master License Agreements"). The Master License Agreements permitted assignment of such licenses to third parties on subsequent notification to Infosource and allowed the holder, at its expense and from an authorized party, to convert the licenses to CD Rom format only, on a basis of one courseware title per CD. By the end of 2006, more than 5,000,000 of these Licences had been transferred to Phoenix, pursuant to all the respective License agreements between them. It is these Licences that were purportedly transferred through a "pipeline"; from Phoenix to the Trust to the Appellants to CCA.

III. Position of Parties

[13] The Appellants argue that the Court should focus on the need to see the transactions through the lens of the Appellants' appeals. In short, the Appellants' position is that they met the four conditions of making the cash donation: i.e., 1. they made the donation; 2. the donation was made to Millenium, a registered charity; 3. they obtained a valid donation receipt; and 4. they claimed the deduction in the appropriate year. They argue the cash gift was voluntary and made the donation to benefit the charity, and achieved a tax savings. With respect to the donation in kind of Licences the Appellants say they have also met all the conditions; namely, 1. they received and owned the Licenses; 2. they donated the Licenses to CCA or its successor; 3. CCA was a registered charity; 4. they obtained a valid receipt; and 5. they claimed the deduction in the appropriate year.

[14] The Appellants argue that the circumstances behind them obtaining the Licenses, i.e, the chain of title for the Licenses from Infosource to Phoenix, then to the Trust, then to the Appellants and then finally to CCA are irrelevant, as is the fact the charities were subsequently deregistered. Qua Appellants, they argue, all the conditions were met at the time of the gifts and the gifts were separate, unconditional and did not result in any other benefit to them other than their desire to make a gift and obtain their entitled tax advantage therefrom. They point out that the Minister, in fact, assumed all the aforesaid conditions, including that they executed the appropriate deed of gifts, the charities were registered, they received

receipts and they executed all the necessary documentation. In short, "we dotted the i's and crossed the t's" as evidenced by the Transaction Documents not in dispute and so qualify for the tax credits claimed.

[15] The Respondent takes a different approach than the Appellants. The Respondent alleges that the Appellants participated in the Program, a variation of an earlier scheme known as the Global Learning Systems, that was marketed so as to indicate the result of participating was that a participant would obtain a net or total cash advantage after the refunds from charitable tax credits in relation to the purported gifts that exceeded the participant's cash outlay, which the Respondent described as essentially a "participation fee". The Respondent described this scheme as being one where the Appellants executed a predetermined set of documents at the same time, the Transaction Documents; all of which were part of a donation scheme whereby the tax donation receipt for the gift of Licences exceeded the donation receipt for the cash gift by a multiple of three of more, resulting in a net profit. In fact, the ratio of value of the tax receipt for the gift in kind to cash for the Appellant Moshurchak was, in fact, 3:1 in 2004 and about 8:1 in 2005, while being 5:1 for Mariano in 2005.

IV. Analyses of Issues

A. Was There a Gift by the Appellants to the Charities?

[16] There is no dispute that the ITA does not define what a "gift" is. The definition of gift is found in established case law; namely, from the Federal Court of Appeal decision of Linden J.A. in *The Queen v Friedberg*, 92 DTC 6031, at page 6032, (affirmed by the Supreme Court of Canada):

> Thus, a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor … The tax advantage which is received from gifts is not normally considered a "benefit" within this definition, for to do so would render the charitable donations deductions unavailable to many donors.

[17] The three requisite elements of a gift thus are that: 1. there must be a voluntary transfer of property; 2. the property transferred must be owned by the donor; and 3. there must be no benefit or consideration to the donor, which element has, in later jurisprudence, been taken to mean that the donor must have had 'donative intent'.

[18] In *The Queen v Burns*, 88 DTC 6101, a decision of Pinard J. of the Federal Court affirmed by the Federal Court of Appeal ([1990] FCJ No. 174) discussed the concept of donative intent at p. 6105:

> I would like to emphasize that one essential element of a gift is an intentional element that the Roman law identified as *animus donandi* or liberal intent … The donor must be aware that he will not receive any compensation other than pure moral benefit; he must be willing to grow poorer for the benefit of the *donee* without receiving any such compensation. …

[19] The Respondent has argued that the principle of donative intent then has an essential element that the donor must intend to impoverish himself or "grow poorer" from the gift. I agree that this is accepted law. In *The Queen v Berg*, 2014 FCA 25, 2014 DTC 5028, Near J.A., in finding the taxpayer "did not have the requisite donative intent for the purposes of section 118.1 of the *Act*" stated:

> [29] … In my view, Mr. Berg did not intend to impoverish himself by transferring the time share units to Cheder Chabad. On the contrary, he intended to enrich himself by making use of falsely inflated charitable gift receipts to profit from inflated tax credit claims. …

[20] It is clear that the element of "impoverishment" is the crucial element to be found in determining donative intent, and that it is often couched in the language of "impoverishment", or "not enriching one's self" or "profiting from the gift" as indicated in *Berg*, but also in many cases before this Court, including *Bandi v The Queen*, 2013 TCC 230, 2013 DTC 1192, and *Glover v The Queen*, 2015 TCC 199, [2015] TCJ No. 160.

[21] It is also clear from the above that the expectation of receiving or actual receipt of a tax receipt itself from a charity does not *per se* vitiate any gift. The tax advantage resulting from claimed donation receipts is, after all, not the "benefit" contemplated by *Friedberg* and other case law above mentioned. This does not mean, however, that the expectation of an "inflated" tax receipt exceeding the value of the property transferred or the receipt of any other benefit does not vitiate a gift; all of which will depend on whether, in the circumstances, the taxpayer intended to impoverish himself.

[22] I note at this time that the Appellants' counsel argued that the Appellants deprived themselves of both the cash and licences and hence impoverished themselves. The concept of deprivation in the context of transferring the property to the donee, itself a separate requirement of a gift as above alluded to, does not, in

my opinion, equate with the concept of impoverishment, otherwise every transfer of property would automatically qualify as impoverishment. The concept of impoverishment means more than depriving oneself of property; it clearly means depriving oneself of property in such a manner as to not benefit from such deprivation. The manner in which the Appellants frame the issue is simply incorrect in my opinion.

[23] The Appellants also rely on the decision of Justice Woods of this Court in *David v The Queen*, 2014 TCC 117, 2014 DTC 1111, who in turn relied on the Federal Court of Appeal decision in *The Queen v Doubinin*, 2005 FCA 298, 2005 DTC 5624, for the proposition that the receipt of an inflated tax receipt should not usually be considered a benefit that negates a gift. *Doubinin*, at paragraphs 14 and 15, makes it clear that the taxpayers in that case could not have relied on the inflated tax credits because the charity in question could not have issued a tax receipt to the taxpayers due to the fact the contributions were made by a third party and so, on the specific facts of that case, Sexton J.A. found that "… it cannot be said that the Respondent received any actual benefit from the "inflated tax receipt"."; thus, the expectation of the inflated tax receipt was irrelevant. In *David*, a case involving the purchase of inflated tax receipts, Justice Woods decided it would not be fair to decide the appeals on the basis of a donative intent argument raised by the Respondent at trial since it had not pleaded such assumption and granted the taxpayers a deduction for the cash actually expended. *David* was appealed by the Respondent, has been heard and a decision is pending by the Federal Court of Appeal. Accordingly, I am not swayed by the Appellants' argument in this case, as the issue of donative intent has been specifically pleaded. Moreover, the language of the Federal Court of Appeal in *Berg*, above referred to, suggests otherwise at par 24:

> [24] The underlying facts are not in dispute. The series of interconnected and pre-arranged transactions set out earlier in this judgment have been determined and are not in question, nor is the intention of Mr. Berg in dispute. It was accepted by the judge and it is evident from the record that Mr. Berg understood from the outset that the series of interconnected and pre-arranged transactions (or the "deal" as Mr. Berg himself described them as referred to at paragraph 27 of the judge's reasons) were designed to mislead tax officials as to the FMV of the property transferred to Cheder Chabad. <u>This was done solely for the purpose of receiving inflated tax receipts and claiming inflated tax credits.</u> Nor can there be any doubt that Mr. Berg's participation in the scheme was conditional upon him receiving the pretence documents to support his inflated claims.
>
> [Emphasis added]

[24] It seems at least clear to me that where a taxpayer is aware he is receiving inflated tax receipts in the circumstances that the expectation of inflated tax receipts is a benefit that vitiates the gift, as Near J.A. found in *Berg* and I would suggest for the very reason that such finding of fact would automatically lead to the conclusion the taxpayer did not intend to impoverish himself, as Near J.A. also found as a second reason for allowing the Minister's appeal, but which it seems logical to conclude also flows from the first.

[25] The fundamental disagreement between the parties in this matter lies in their framing of the issue. The Appellants argue that the gift of cash is separate and unconnected to the gift in kind and hence, since the Appellants only expected to receive a tax receipt equal in amount to the fair market value of those unconnected gifts of property, there is, in fact, no expectation of anything other than those expected fair market value receipts and hence no benefit received. In other words, they only expected to receive a tax receipt for the fair market value of the gifts, not an inflated value. In fact, each of the Appellants testified that they expected to benefit charities by gifts of cash and in kind with no strings attached and receive the tax receipts to which they were legally entitled for so doing. The Appellants argue that their position is evident from both the intention of the parties, evidenced from their testimony, as well as the Transaction Documents themselves.

[26] The Respondent's position is that the Appellants expected, for making their cash gift to Millenium, to be accepted as capital beneficiaries of the Trust and receive a distribution of Licences as a result, which had a fair market value about equal to the value of Licences requested by them in their application to be accepted as a capital beneficiary and as identified in the valuation of the EMC Partners communicated to them by the Promoter; in essence, the two gifts are part of the same transaction and connected. The benefits the Appellants expected to receive are, in fact, numerous, a "chain of benefits" as described by the Respondent in argument; namely, the expectation to be accepted as a capital beneficiary, the expectation to be distributed Licences and the expectation that they would receive a tax receipt for the donation of such Licences at an inflated value, in the ratios above discussed, so that, in the end, they had an expectation they would profit from the cash donation.

[27] The Appellants suggest that their separate gifts were motivated by their desire to help others in need. Mr. Moshurchak specifically testified that, as a teacher, he saw the value in his students being taught how to use computers and software and saw the Program as a way to extend that valuable skill to adults who

could not afford to buy such software or be taught by teachers like him. Mrs. Mariano testified that she was motivated by her desire to help others as well.

[28] While I appreciate the subjective intention of the appellants must always be considered, such stated intention is not determinative but must be based in some objective reality. The Supreme Court of Canada in *Symes v Canada*, [1993] 4 SCR 695 described the analysis of intention to be undertaken, at page 736, as follows:

> As in other areas of law where purpose or intention behind actions is to be ascertained, it must not be supposed that in responding to this question, courts will be guided only by a taxpayer's statements, *ex post facto* or otherwise, as to the subjective purpose of a particular expenditure. Courts will, instead, look for objective manifestations of purpose, and purpose is ultimately a question of fact to be decided with due regard for all of the circumstances. …
>
> [Emphasis added]

[29] Unfortunately, not only is the Appellants' own evidence more consistent with a stated intention of receiving a benefit other than the moral gift of giving, the evidence from their testimony and documentary evidence and other relevant circumstances strongly suggests the Appellants did not have an intention to impoverish themselves but, rather, to profit from their participation in the program.

[30] In brief, Mrs. Mariano, a registered nurse, testified she attended a seminar with a friend and an advisor and viewed a presentation the same or similar to a slide show put into evidence by the Respondent, after which she decided to participate in the Program which she also thought involved the transfer of computers by some entity and not software. She was not even aware of the type of property she purportedly was gifting let alone which of the charities involved was making the computers available to those in need. She admitted she signed all the transaction documents without reading them through and allowed her financial advisor, one Ms. "A", to complete the documents on her behalf. Moreover, she bluntly admitted that she would not have donated cash without receiving the benefit of the tax credits for the gift in kind. All she knew is that she donated $7500 in cash and was going to get a net tax advantage "… more than that." Her subjective intention to receive a benefit is crystal clear from her own admissions.

[31] Mr. Moshurchak, a retired teacher, on the other hand, insisted his intention was solely philanthropic, a desire to help the needy with no expectation to benefit other than the tax advantage that he did not consider a benefit, but an entitlement. He testified he attended a few of the seminars in Saskatoon before making his

mind up to participate and identified a slide show presentation put to him by the Respondent as similar or the same as that he viewed at such presentations. He testified that he understood that he did not have to donate any Licences received as a capital beneficiary to CCA and could, for a small fee, have the licences converted to CD Rom format and keep them for himself or donate them to another charity. However, after making inquiries, he decided there was no charity in Saskatchewan that could use them so left them with the default charity identified in the Direction forming part of the Transaction Documents, namely, CCA. There was no evidence tendered as to the details of any such inquiry, neither to locate another more local charity to donate them to, nor, for that matter, to substantiate where and at what cost he could have had them converted to CD Rom format. There is nothing in the promotional materials, be it the slide show run by the Promoter at the hotels, nor any other evidence in any online site or otherwise, that dealt with such conversion procedure in any detail or disclosed the cost thereof. Moreover, aside from testifying he went online to ensure CCA was a registered charity and phoned it to make sure they were in operation, he does not appear to have made any effort to investigate their use of the Licences, whether and how they converted them to CD Rom or how they distributed them. For someone that evidence showed had no history of making any large donations, or any donations beyond the $50 to $100 range in any prior years, who suddenly donates $14,250 in one year and a purported $116,000 in another for the stated purpose of benefitting needy adults to learn how to operate computer software, without taking steps to ensure such largesse was properly converted and distributed and thereafter following up to see if he got his money's worth, seems incredible. He seems not even to question the fact that two of the courseware products, the MCSE and A+ were highly technical software designed for advanced users for certification of computer hardware systems and multiple users, as earlier described, a far cry from the How to use Microsoft basic programs the other products referred to.

[32] Moreover, Mr. Moshurchak also testified he decided to not revoke his cash gift to Millenium because, from his inquiries, he was satisfied it was a "United Way like charity." There is no evidence given as to why Mr. Moshurchak came to that conclusion and the only evidence of a description of Millenium put out by itself was from a single-page web site Millenium had in the years in question, as confirmed by a Mr. Kroger who testified as the executive director of Millenium, that described it as accepting donations and making donations to other registered charities and specifically only mentioning its support of CCA but no other charities. The only evidence of a description of Millenium found in the promotional materials of the Promoter is that it is a "foundation's foundation" and "the expert's source for charities to turn to for support", yet absolutely no charities,

other than CCA, are mentioned in the same promotional material. This is hardly the foundation upon which to base a conclusion that Millenium was a United Way-like charity, the latter of which openly advertises the large number of charitable recipients it contributes to.

[33] Mr. Moshurchak, who testified he had experience in identifying and choosing software for his school board and teaching its use to his students, seems to have put very little thought or energy into investigating the charities or the conversion of the software onto CD Rom nor its ultimate distribution, including even whether and to whom it was actually distributed, something that is totally inconsistent with his stated philanthropic intention that sprang from his experience, knowledge and professed interest in the subject matter. I simply do not find his testimony credible.

[34] Mr. Moshurchak also admitted that it would have mattered to him if he had not been accepted as a capital beneficiary, that he understood the program would generate a total cash advantage and agreed that same would be in the range of 76% based on the Promoter's presentation using a 3:1 ratio. He also testified that had he not participated in this Program, he definitely would have made a large contribution to another charity, a statement I do not find credible given his history of small donations, but could not say for certain to whom or for what amount but probably not as much, suggesting at the very least the size of his cash donation was related to the benefit he received. Mr. Moshurchak also admitted that he and his spouse had commuted their teacher's pension and that he was aware the program was marketed as a means to offset the tax cost of cashing in registered pension plans, as referred to in the promotional material he admitted reviewing and which was a factor he considered in deciding whether to participate in the program. All of these facts suggest his subjective intention was to profit, not impoverish himself, from his participation in the Program.

[35] Finally, as far as valuing his stated intention of philanthropic motivation, the evidence is clear that, in respect of his large 2005 donation, Mr. Moshurchak and his advisor, one Mr. "S", negotiated for a larger ratio of licences for cash, 8:1 based on the actual cash sent by Mr. Moshurchak directly, on the basis that, as a repeat contributor and having regard to the large size of the cash donation, he would be able to obtain a larger number of Licenses. He also negotiated a kick-back of part of the commission his advisor, Mr. S, received for what I will bluntly call the sale of the program to Mr. Moshurchak, and Mr. S. sent a cheque to Millenium for an additional $10,000 for the benefit of Mr. Moshurchak. Not only is the kick-back ample evidence of a vitiating benefit received by Mr. Moshurchak,

but the fact he was negotiating both the kick-back and the value of Licences he would receive confirms that the cash and Licences were clearly connected donations in his mind. Moreover, Mr. Moshurchak's testimony was expressed in the manner of "dealing" and "negotiating" the level of his contributions and benefits, more consistent with making a financial investment than making an unconditional gift. I should also note that it is quite clear from *Marchevaux* that the court will "not disregard a benefit simply because it was provided by a third party." In my opinion, as far as Mr. Moshurchak's appeal goes, he would be considered to have received a benefit from his gift just as a result of this kick-back he negotiated.

[36] The Appellants also argue that the transaction documents support their stated intention to support their donative intent and the non-connection of the two donations by arguing that they had the ability in the two respective Directions they executed in favour of the Escrow Agent to revoke their decision to deliver the cash or gift of licences within 72 and 48 hours respectively of being advised of their acceptance as capital beneficiaries. Consequently, they argue that they could have made a gift of cash only, or a gift of licences only, or both or none. On its face, such options seem to suggest there was no requirement of a cash payment and hence it could not be seen to be a fee for participating in any scheme.

[37] Frankly, the evidence of Mr. Jobin, of JDS, was that no cheques were cashed before any participant was notified of his or her acceptance as a capital beneficiary by the Trust via an email sent by Mr. Jobin as part of his duties. Mr. Moshurchak testified he was aware his cheque would not be cashed until the expiration of such 72 hour period as "that's … the security" of the program. The Directions themselves clearly tie a participant's acceptance as a capital beneficiary to the cash gift. The practice of the program administrators clearly shows no cheques were cashed until after the email signalling such acceptance had been sent out; a practice consistent with the "security" evidence of Mr. Moshurchak and understood by him.

[38] It is clear to me that any participants in the program knew that their cheques for the cash contribution would not be cashed until they were notified they were accepted as capital beneficiaries and, thus, would be receiving the further benefit of Licence distributions for further gifting. There is no evidence anyone, let alone the Appellants, ever revoked their Licences donations or elected to keep the Licences for themselves.

[39] With respect to keeping the Licences, it is clear the from the details contained in the Assignment of Licences that each of the Appellants would have received a large number of the 6 types of Licences; begging the question of what

they would do with such a large duplication of each if they were retained for their own use. Aside from the fact Mrs. Mariano was not even expecting to receive Licences, it begs the question what she would have done with multiple copies of them, 195 in all, or what Mr. Moshurchak would have done with over 4,500 Licences purportedly distributed to him consisting of over 700 of each of the 6 types of Licences in 2005 alone. Considering there is no evidence, as earlier mentioned, that any participant was notified what the actual cost of converting the Licences to CD Rom format for his own use would be in any of the promotional material or Transaction Documents pertaining to the Program, and given the testimony of Mr. Jobin, who issued donation receipts on behalf of CCA, that no one ever elected to keep them throughout the entire program, I am satisfied such option was window dressing at best; designed to give CRA the impression there was an actual choice or that the donations were unconnected.

[40] I also note that the purported target of these philanthropically issued Licences was the charitable recipient, not those that could afford to buy them, as the Appellants have taken great pains to point out in their arguments on the philanthropic intent of Infosource selling the Licenses to Phoenix in the first place, and so on down the chain, including the gifting of them by the Trust to the participants and ultimately to CCA, the preferred entity expressly conveyed by the Trust in the Direction itself. Keeping the Licences as an option seems inconsistent with the alleged philanthropic purpose of the program itself and I do not find such option was realistic or intended by anyone. The option was simply window dressing.

[41] Counsel for the Appellants points to the fact that Mr. Wall, the purported educational director of CCA based in Halifax and the party charged with reconciling such charity's inventory of converted Licences at its Toronto warehouse, also received Licences he donated to CCA, as confirming evidence there was no obligation to make a cash donation to Millenium as part of the program in order to be accepted as a capital beneficiary and receive a distribution of Licences. Counsel for the Appellants argues that this shows anyone could qualify as a capital beneficiary without a separate cash donation and hence there was no requirement of a cash donation and hence the two donations are not connected. This begs the question as to how any member of the public, other than a person like Mr. Wall directly involved in the Program, who did not attend a presentation of the Program or view the Program on-line or was not solicited by one of the commissioned sales persons or advisors, would even know of such option. A cash donation was always mentioned and integrated into any calculations of net cash advantage or total contributions. Such position is just not credible.

[42] In any event, it is the donative intent of the Appellants, as arm's length participants in the Program that is at issue here, not that of Mr. Wall, an obvious insider, who has also been denied the deduction and will no doubt be affected by the decision rendered in this case, making his testimony somewhat unreliable. I found Mr. Wall to be a totally uncredible witness, as I will discuss later on, and am inclined to conclude any distribution of Licences to him was a benefit of his employment or contract with the Promoter.

[43] I must also add that I have a serious problem with the form of the Direction No.2 executed by the Appellants in favour of the Escrow Agent, under which the Appellants represent and warrant that they are the beneficial owners of the Licences, free and clear of any liens. The Licences are described as being in a Schedule "A", which was not attached to the Direction at the time of signing or at any time thereafter and which, based on the evidence of Mr. Jobin, was prepared by him and communicated to the Appellants by email at a later date, instructing them they had been approved as a capital beneficiary and to go online for the details. It is he who date-stamped the direction after such events. It is clear the Appellants were not the owners of any Licences at the time of executing their Direction and thus did not own anything at the time. They clearly had no knowledge of what number of each of the respective Licences they purported to own and could not have as that fact was established later on. Mr. Moshurchak testified the execution of the Direction on the same date as the other documentation was simply a matter of convenience to avoid him coming back to sign afterwards, notwithstanding that he testified he had attended his advisor's office on numerous occasions beforehand and that he was only a 10 minute drive away. However, it also begs the question of how a donor can gift a property that has not yet been identified or own what he can't identify. One can argue that the direction, at best, amounts only to a gift of value, not specific property, especially since the makeup of the number of Licences was not yet known. It defies logic and common sense to suggest someone can have the donative intent to give something he cannot even identify yet. In any event, this document and the explanation of Mr. Moshurchak suggest to me that he was fully expecting to receive the distribution of Licences in any event in return for his cash outlay.

[44] I note in the Promotional materials that the participants are told:

> THE FOLLOWING 3 CRITERIA COMPLETE THE PROCESS
>
> 1. YOU make a cash donation to a charity.

2. YOU become a beneficiary of a trust.

3. YOU have the option of donating a Gift in Kind to another charity.

all of which clearly emphasizes the fact that acceptance as a beneficiary and the implied distribution of property from the Trust is automatic. Moreover, in reviewing the presentation slides and other promotional material, it is quite evident little is mentioned of the charities or their charitable works, other than the names of both Millenium and CCA or its successor, ICAN, which figure prominently everywhere and are the only two charities ever mentioned by name, as the emphasis is clearly on the net cash flow advantage, underlying calculations to demonstrate such advantage and salesmanship-like comments on how "No one will dispute that writing a cheque for $10,000 and receiving a tax credit of $18,564 IS A BAD THING." or "WHAT IF There was a way for you to redeem your RRSP's in a tax efficient manner", not to mention many other dangled carrots.

[45] It is clear that neither the Promoter nor any of the administrators involved, either hired and paid for by the Promoter, the Charities or the Escrow Agent, such as IDI and JDS, could be paid under the program if there was no cash donation. It is clear the Promoter received its compensation only in cash, pursuant to agreements with Millenium and CCA, both at the stage they were made by the participants to Millenium, and again at the stage Millenium redonated 80% of such cash received to CCA who paid the Promoter, from its cash received, a further amount equal to 20% of both the value of such cash redonated as well as the value of Licences donated by the participants to CCA based on the EMC valuation. IDI was paid in cash via the direction of the Promoter to Millenium, to pay from amounts owing to it, funds to IDI based also on a percentage of cash donations. If there was no cash, there was no method of payment to the Promoter and those down the chain and so there was no business to be carried on by the Promoter or others. Common sense and the business model clearly identified for the Program support the need for a cash contribution to make the program work. The fact the program was used to compensate insiders like Mr. Wall only demonstrates that the Promoter was willing to ignore its own materials and Transaction Documents when convenient and what little value the Promoter ascribed to the licences. Mr. Wall is the only person in evidence who appears not to have made a cash donation in any event and no doubt there may be a few others like him, but the evidence is that there are huge numbers of participants identified in all the donation receipt records as having made cash donations.

[46] The Appellants have argued that unlike the fact situation in *Bandi* and *Glover*, which were similar schemes where the appellants therein also applied to be considered capital beneficiaries, were accepted and had software distributed to them which they donated to another charity together with a cash donation required by the charity as a condition of accepting the software donation in order to pay off liens attaching to the software, the Program here had no requirement of cash to pay off a lien or to be applied for any other purpose. I do not see what difference it makes whether the cash donations were tied to the donation in kind in that manner or not. Such a requirement was certainly treated as evidence of the interconnection of the two donations in those cases, but the decisions in those cases do not hinge only on that fact. Hogan J, in *Bandi*, focused primarily on the manner in which the scheme was marketed to the taxpayer therein as evidence of the taxpayers' intention to profit from their participation therein. At paragraph 15 thereof, Hogan J. stated:

> [15] The marketing material presented to the appellant shows that the Charitable Technology Gifting Program was promoted on the basis that the appellant would acquire software licences having a fair market value in excess of the amount of the appellant's alleged cash donation. The material also indicates that the appellant could keep the software for his own use or, as expected, he could gift it to the Foundation in return for promised enhanced tax credits. The tax credits were shown to exceed the appellant's alleged cash donation so that he was expected to earn a positive after-tax cash benefit. While the appellant did not reap that benefit because of the promoter's failure to properly implement the Program, I conclude that the appellant's expectation in that regard is sufficient to nullify his alleged donative intent.

[47] The Program here was marketed in similar fashion to its participants, save that the cash donation was made to a different charity, Millenium, than the donation of the Licences (to CCA). The evidence is that Millenium donated substantially all the cash it received from participants of the Program, net of the Promoter's fees, to CCA. The fact the cash travelled through an intermediary or was not linked to paying off any lien or other encumbrance affecting the Licences, the subject matter of the second gift, does not affect my conclusion that the two donations were connected as part of the same program nor does it matter whether the participants had no actual knowledge of the manner in which the cash flowed. The participants knew enough, as the Respondent has suggested, in that they knew how the Program involving the two donations worked and the consequences to them of participation therein. They were even aware their financial advisors were acting as commissioned sales agents that entitled them to a substantial commission, between 24% and 30% as Mr. Moshurchak testified, and so they had evidence of

the business nature of the arrangement. As Hogan J. decided in *Bandi* at paragraph 16, adopting the Federal Court of Appeal's decision in *Marechaux v the Queen*, 2010 FCA 287, "it is inappropriate to separate transactions forming part of an integral arrangement into their cash and non-cash parts.

[48] There is no dispute that the Appellants voluntarily chose to participate in the program and did not do so under any duress to do so. The fact that one voluntarily chooses to donate cash to a charity does not mean such person automatically has the donative intent to make a gift. In answering the crucial question as to whether the Appellants intended to impoverish themselves, it is clear they participated in a leveraged donation scheme that was interconnected and all part of the same transaction or series of transactions, the same program if you will, that was clearly marketed to them for the purpose of offering to them and from which they expected to receive, in return for their cash donation, a number of Licences having an expected value of 3 to 8 times the cash donation to donate to another charity, all together resulting in a final benefit in the form of tax receipts entitling them to claim tax credits that would have, if allowed, given them a profit on their original cash donation, marketed to range from 56% to 89%, depending on the province of residence of the participant and based on a 3:1 ratio only. The higher the ratio of gift in kind to cash donation, the higher the profit percentages. Mrs. Mariano was honest enough to admit it. Mr. Moshurchak hid under the veil of an honest and philanthropic citizen until his own evidence and the documentary evidence of the Transactional Documents showed otherwise; in fact, showing he was negotiating a deal for even greater benefits than his fellow participants. In fact, based on the Appellants' province of residence and the anticipated profit above, the Respondent has calculated that Mrs. Mariano would have a net tax cash advantage, after deduction of her cash donation, of $8,863 for 2005 and that Mr. Moshurchak's net tax advantage for 2004 would have been $4,527 and for 2005, the huge amount of $241,268. When put in numerical context, the extent of the benefit is staggering, yet the law is clear that any benefit or consideration will do to find there was no donative intent.

[49] In the end, I cannot see how any person participating in such a scheme, regardless of whether such person had an honest belief in the value of the Licences he expected to receive or not, can argue, based on the manner in which the scheme was marketed and in the makeup and integration of the Transactional Documents that deliver it, that he or she expected none other than to profit from, be enriched or not be impoverished by, such participation, and thus not have the requisite donative intent.

[50] The Appellants did not have the donative intent to make the gifts of cash or Licences. This is enough to dismiss the appeals of the Appellants, however I wish to address the other aspects of whether there was a valid gift as well for failure to meet the other necessary elements of a gift; namely whether the donor owned or transferred the property.

B. Ownership and Transfer of Gift

[51] As mentioned above, the Appellants could not have identified the number and type of Licences they owned, either at the time they executed the Deed of Gift nor at the time they were purportedly accepted as beneficiaries, as the number and allocation of the types of Licences, from the 6 available Licences having different assigned values, were only formulated after those events in time, as per Mr. Jobin's testimony; namely, his computer program used an algorithm to choose and allocate the number and type of Licences to be distributed to program participants to closely match the requested value filled in by or on behalf of the Appellants in the Direction. At best, at the time of executing the Deed of Gift, the Appellants, or any participants in the program, would only be aware of the expected value of the Licences they expected to receive and would not have been able to identify the specific property they purported to own. This is *prima facie* evidence the Appellants could not have owned the Licences they say they voluntary gifted and no evidence supports otherwise at that time. It simply defies common sense to suggest someone can voluntarily give a property he does not yet know of or otherwise has any way of specifically identifying.

[52] The Respondent has also pleaded in its assumptions that the Trust itself fails at law and that, even if it did not, the Trustee did not exercise its discretion to accept capital beneficiaries or distribute capital property to them and accordingly, under both arguments, there could be no validly approved capital beneficiaries of the Trust nor any legal distribution of licences from the Trust to any capital beneficiaries, and hence the Appellants or any other participants in the Program for that matter, could not give what they did not have. A brief review of the Trust is necessary before addressing those issues.

(1) <u>The Trust</u>

[53] As referred to above, the Trust was settled by Michael Morris, a resident of Bahamas, pursuant to a Deed of Settlement dated November 19, 2004 (the "Trust Deed") made with Global Learning Trust Services Inc., the corporate Trustee of which Ron Knechtel was the owner, officer and director. The Trust was settled by

five (5) $20 U.S. bills but, pursuant to paragraph 2.1(a) of the Trust Deed, the Trustee had the right to receive and accept further property; in this case, including the Licenses donated to it from Phoenix from time to time, which include the 2,400,000 Licences donated by Phoenix to the Trust during 2004 and 2005, pursuant to Deeds of Gift dated November 19, 2004 and December 22, 2005 respectively and more in subsequent years; which Phoenix had originally purchased from Infosource as earlier described.

[54] While CCA was the only Income Beneficiary of the Trust entitled to receive such part of the Trust's annual income as the Trustee wished to distribute until its Ultimate Distribution Date, the Trust also had the discretion to distribute any capital of the Trust to any Capital Beneficiaries of the Trust as defined in Schedule "B" of the Trust. Paragraph 3.1(b) of the Trust Deed empowers the Trustee to make distributions to "Capital Beneficiaries" and reads as follows:

> Until the Distribution Date, the Trustee shall have the right at any time to pay or transfer such amount or amounts out of the capital of the Trust Fund to or for the benefit of any one or more of the Capital Beneficiaries from time to time and to the exclusion of any one or more of them as the Trustee in the exercise of an absolute discretion determines.

[55] Schedule B of the Trust Deed defines "Capital Beneficiary" as follows:

> "Capital Beneficiary" at any time means any sui juris individual, other than the Settlor and any individual who has at any time contributed any property to the Trust Fund, and who
>
> (i) made one or more charitable donations to one or more Registered Charities in the calendar year in which the individual made an application for consideration for inclusion as a Capital Beneficiary or in the immediately preceding calendar year,
>
> (ii) received from each of those Registered Charities a receipt in the form prescribed by the Income Tax Act issued in the name of that individual or their spouse,
>
> (iii) made written application to the Trustee for consideration for inclusion as a Capital Beneficiary; and
>
> (iv) whose application for consideration was approved by the Trustee, in the exercise of an absolute discretion prior to that time.

[56] What is clear from the above provisions is that the Trustee had to exercise its absolute discretion to both determine the amount or amounts to be distributed out of the capital of the Trust to Capital Beneficiaries as well as to approve an individual's application for consideration as a Capital Beneficiary having regard to the requirements set out in the definition above.

(2) Failure to exercise Trustee discretion

[57] I am in agreement with the Respondent's position that both the Trust Deed and the common and statutory law require a trustee to exercise its discretion and do not permit a trustee to delegate such powers.

[58] Article 21 of the Trust Deed provides that the "Deed is established under the laws of Ontario" and "shall be interpreted according to the laws of Ontario". The Ontario *Public Guardian and Trustee Act*, RS0 1990, c. P.51 while permitting a Trustee to delegate its function of investment of trust property to the same extent that a prudent investor would pursuant to subsection 27.1 thereof, contains no provision that permits a Trustee to delegate any of its powers of appointment or distributive powers.

[59] It is also clear that well-established case law in Ontario and other provinces support the Respondents position on this matter. In *Partanen Estate (Re)*, [1944] 2 DLR 473 at 473 (HCJ) (QL), the Ontario High Court of Justice refused to sanction a request by the Trustees to approve their plan to turn over funds to a University to establish a scholarship fund for students of mining or agriculture when the will left the gift to two trustees who were charged therein to use their "uncontrolled discretion" to set up a scholarship fund for students of mining or agriculture. At paragraph 5 thereof, the Court stated:

> … [T]he trustees are under the will to establish such scholarship and/or other funds as they in their discretion shall decide. What they propose is not properly to be called the establishment of scholarship and/or other funds, but, rather, the turning over to somebody else of the discretion as to what scholarship and/or other funds are to be set up. … What the Court is asked to do, I repeat, is to sanction a delegation by the trustees of the discretion which the testator gave to them …
> [Emphasis added]

[60] The Ontario Court of Appeal upheld the Ontario Court of Justice decision above in *RE Partanen*, [1944] 2 DLR 473 at 476 (Ont. CA) (QL) specifically on the grounds that the trustees could not delegate their discretionary decisions:

> … We desire to say this, however, that in dismissing the appeal we base our conclusion upon the second ground specifically stated by the learned Chief Justice of the High Court, that is, that the trustees are not really doing what cl. 3(f) of the will authorizes them to do, but are delegating or seeking to delegate to someone else the duty that they themselves should perform.
>
> [Emphasis added]

[61] This same sentiment was expressed in *Bellai v IWA - Forest Industry Pension Plan (Trustees of)*, 2003 BCSC 1077, [2003] BCJ No. 1613 (QL), where the British Columbia Supreme Court refused to permit the Trustees of a Pension Plan to ratify the decision of a subcommittee composed of both trustees and non-trustees without effective consideration. At paragraph 60, the Court stated:

> I have concluded that the evidence does not support the suggestion that the trustees have in fact exercised their discretion, as they are required to do under the plan. They were not entitled to simply endorse the decision of the audit committee which membership consists of people other than trustees, without actually considering the merits of Mr. Bellai's claim. The plan does not specifically authorize a delegation of such responsibility, and makes it the sole responsibility of the Board of Trustees. …

[62] In the case at hand, there is no wording in the Trust Deed that authorizes the Trustee to delegate any power to appoint capital beneficiaries or the power to determine the amount of distribution of property to any such validly determined capital beneficiary, and it is clear that Ontario Law does not specifically permit it. The Appellants have not argued otherwise on the state of this law, but instead argue that the onus is on the Respondent to establish such fact since this is not information within the knowledge of the Appellants and they have not since there is no evidence the Trustee did not exercise such absolute discretion.

[63] Regardless of whether the Appellants have the onus of demolishing this assumption made by the Minister or not, it is clear to me that the Respondent has, in any event, clearly made a *prima facie* case that the Trustee did not give any consideration to reviewing any application for consideration of approving the Appellants as capital beneficiaries, nor to determining the amount of property to be distributed to them, and there was no evidence to the contrary during this trial.

[64] The evidence, earlier alluded to, was that Mr. Jobin, of JDS, developed and utilized software that allocated the number of Licences to be distributed to each Appellant, and any participant for that matter, at weekly closings, based on an algorithm that matched the appropriate number of different Licences with

established values to approximate the value of Licences requested by each participant in their Direction and completed both the Assignment of Licences for signature by the Trustee, which, in 2004, involved the use of pre-signed Assignments given to him and which, in 2005, involved his authorized use of the electronic signature of Ron Knechtel as officer of the corporate Trustee. The Trustee could simply not have exercised any discretion to determine the amount or amounts of the Licences or property to be distributed since this was done using Mr. Jobin's algorithm, and it was he who notified the Appellants by e-mail that they had been accepted and with what amounts automatically. He did not send drafts to the Trustee for its consideration or even deal with the Trustee at any time directly and it is clear he had no reason or instructions to do so since he was provided pre-signed documents or given authority to apply the trustee's signature on the Assignment documents. Since the Trustee could not have exercised this part of his discretion, it seems to me *prima facie* proof as well that he did not exercise the part to approve the Appellants as capital beneficiaries either. Why would he do one and not the other?

[65] The evidence is that Mr. Keslassy of IDI, with whom Mr. Jobin shared a small office, reviewed the package of Transaction Documents and instructed Mr. Jobin to proceed with the weekly closing procedures. Mr. Keslassy did not testify, and the Appellants argue therefore that the Respondent has no proof of what discussions or procedure occurred between IDI and the Trustee before Mr. Jobin was given instructions by Mr. Keslassy to proceed with each closing. While Mr. Jobin conceded, in cross examination, that he could not say what discussions were held between Mr. Keslassy and the Trustee, it is clear that, as stated above, there could have been no discussions, at least concerning the determination of those specific Licences to be distributed, as their makeup was not yet known. Mr. Jobin testified that Mr. Keslassy was the only person who determined the completeness of the document package and as long as the documents were filled out properly, an individual would be accepted, and if not, the documents would not be processed until rectified. In my opinion, the process of appointing capital beneficiaries and distributing Trust property was nothing more than an automatic step, "an automated assembly line" as described by the Respondent in argument, that the Trustee had no involvement in, other than providing presigned documents or authority to use his electronic signature, the latter of which was given to Mr. Kepes, the attorney for the Trust and the Promoter, from the Trustee and passed on. I agree with the Respondent that the process was such that the Trustee had no involvement, not even rubber-stamping the decision to allocate property in the manner done.

[66] This position is supported by the documents admitted into evidence through the Joint Book of Documents, which contains a letter by Ron Knechtel to the Promoter, dated July 20,2005, pursuant to which Mr. Knechtel objected to the Promoter's website material, identifying him personally as the Trustee and demanded such misleading references be removed and wherein he effectively stated that the Trustee in effect had no role in choosing capital beneficiaries and distributing property from the following excerpt:

> It is stated in part that: "Ronald C. Knechtel administers the Trust." That statement is not correct. I do not administer the Trust. The trustee of the Trust is "Global Learning Trust Services Inc." (hereinafter referred to as the "Trustee"). I am a director and an officer of this Corporation. The Trustee of the Trust had entered into a contract with "JDS Corporation", (hereinafter referred to as the "Corporation") to provide all administrative services to the Trust related to the charitable gifting initiative. The Trustee deals only with entering into service contracts, paying for services provided by the Corporation to the Trust and filing income tax returns for the Trust."
>
> [Emphasis added"]

[67] While the Appellants object to this letter as being hearsay, such letter was admitted into evidence as part of the Joint Book of Documents, both as to its authenticity and relevance. While I appreciate Mr. Knechtel had passed away before this trial and could not be called to testify, his letter is then the best evidence we have from the Trustee itself and was dated at the beginning of the program, not after the audit had commenced, and so seems more credible as a result. Moreover, this evidence is consistent with the evidence of Mr. Jobin above.

[68] There is also evidence, by way of a few letters Mr. Knechtel wrote to the CRA in 2006 and 2007, contained in the Joint Book of Documents as well, supporting the Respondent's position that the Trustee played no role in approving capital beneficiaries nor in the allocation of the Licences to them; particularly, his letter of October 25, 2006 which states:

> The process of approving and confirming beneficiaries of the Trust and the distribution of licences to beneficiaries is handled by JDS on behalf of the Corporation [the Trustee] following established policies.

[69] As mentioned above, the contract between JDS and the Trust makes no reference to such role to be undertaken on behalf of the Trust and there is no written contract between the Trustee and JDS at all. Even if there was, it is clear

from statutory law and common law above discussed that such Trustee duties could not have been delegated to JDS.

[70] Furthermore, the evidence shows JDS had a contract with the Trust to design, develop, host and maintain a database management program and keep records of all capital beneficiaries and the receipt, acquisition and distribution of Trust property, but did not have a contract with the Trustee regarding the carrying out of any distributive powers. When asked why he would use his software to calculate allocated Licences and prepare the Assignment of Licences and related e-mails notifying the Appellants they had been accepted as capital beneficiaries and to give them their password to access the Program website to view the distribution details, he testified such duties were part of the closing procedure he was paid to service, lending credence to the assembly-line description suggested by the Respondent. The evidence is clear that Mr. Jobin, through JDS, was exercising discretionary power of a trustee, with its tacit approval, without even any legal obligation to do so, but something both Mr. Knechtel, the representative of the Corporate Trustee, and Mr. Jobin of JDS, confirm was the in essence part of the latter's administrative duty; all exercised without any consideration, input or involvement by the Trustee.

[71] In the circumstances, I do not find the Trustee exercised its obligation to determine the amount of property to be distributed to any capital beneficiary, let alone to determine who the capital beneficiaries were, in violation of its duties under the Trust Deed, as well as statutory and common law. While the Appellants may not have been directly involved in matters pertaining to the creation and administration of the Trust, they are nonetheless affected thereby. The law is also clear and has long been established that the failure of the required exercise of discretion of a trustee renders the decisions ineffective. In *Re Wilson*, [1937] OR 769 (Ont CA) (QL), a case involving the delegation by a corporate trustee of discretion to its general manager, rather than consideration of it by its board of directors, the Ontario Court of Appeal held, at paragraph 31:

> By the will of this testator the discretion to delay realization of assets is given to the company itself, and consequently is to be exercised by the board of directors as the agent of the company. In such a case the maxim *delegata potestas non potest delegari* applies, and the attempted exercise of the discretion by any authority other than the board of directors is ineffective.
>
> [Emphasis added.]

[72] I should also add that the Appellants were at least aware of or had the ability to be aware of the importance of the Trust and the exercise of Trustees' discretion as being an integral part affecting the validity of the Program and do not appear to have made any effort to obtain legal advice on same. Mr. Moshurchak, in particular, admitted that he reviewed the legal opinion of Cassels, Brock found on the Promoter's website, wherein such law firm assumed the exercise of the Trustee's discretion was a material fact in rendering its opinion that "the distribution of Licenses by the Trust to the Donors should constitute a distribution of capital by a personal trust", found in paragraph 47 of that opinion, and that "these assumptions [as listed in Part I] are critically important to the opinions expressed herein." While I am not suggesting the Appellants or any other non-lawyer participants in the program should be assumed to know the intricacies of Trust law, it seems unconvincing to me that someone investing so much of his money in a program like this would not bother to obtain legal advice on the legal risks of doing so, particularly in at least confirming that the distribution of Licences by the Trust would be valid. When one also considers that the Direction to the Escrow Agent executed by each participant identifies that 3% of the donated funds, up to a maximum of $750,000, would be set aside as a legal defence fund which the applicant could access on condition he used the Promoter's counsel, that provision should have set off some alarm bells for even the most unsophisticated participant, who no doubt will not likely ever see his cash outlay returned.

[73] Accordingly, neither the Appellants, nor any other applicants so characterized, were properly approved capital beneficiaries, nor was there a proper distribution to them of any capital property of the Trust. Accordingly, they could not own or transfer property to CCA and thus fail to comply with these requirements of a gift as well.

(3) Validity of a Trust

[74] There is no dispute between the parties that in order for a trust to be valid, it must have the "three certainties"; namely:

1. Certainty of intention - meaning the settlor must intend to create a trust relationship;

2. Certainty of property - meaning the trust must hold legal title to a certain amount of property; and

3. Certainty of objects - meaning the property must be distributed to certain beneficiaries.

[75] The main dispute between the parties pertains to the third certainty, the certainty of objects. The Respondent's written argument, at page 305, quotes Eileen E. Gillese, author of *The Law of Trusts*, 3d ed., (Toronto: Irwin Law, 2014) at pages 44-45, to describe the necessity of this certainty for all parties:

> The requirement for certainty is necessary for all parties; it is needed by the settlor to ensure her intentions will be achieved; it is required by the beneficiaries to ensure that all who are entitled, and none who are not, receive a share of the property; it is critical for the trustee to know among whom the property is being distributed; and it is necessary for the court if it is to step into the role of the trustee.

[76] The test for certainty of objects of a discretionary trust, referenced by Gillese at page 45, who cites the well-known UK decision of *McPhail v Doulton*, [1971] 1 AC 424 at 456, is that "it must be possible to say with certainty whether 'any given individual is or is not a member of the class.'"

[77] In addition, *McPhail* went on to say, at page 457, that a discretionary trust will also fail and the gift revert back to the settlor, "where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form "anything like a class" so that the trust is administratively unworkable.

[78] Frankly, notwithstanding the Appellants' argument that the wording of the definition of Capital Beneficiaries is clear and unambiguous, common sense would dictate that the Trustee here would not have been able to know who was in or out of the class of capital beneficiaries at any time since at no time would the Trustee have had access to confidential tax information on Canadian taxpayers, let alone any foreign taxpayers, who complied with the requirement found in Schedule B of the Deed that requires a member of the class be one who has made a donation to one or more Registered Charities in the calendar year, or the preceding calendar year, for which they received a donation receipt in the form prescribed by the *Income Tax Act*. The fact that applicants provided this information to the Trust, at the same time as executing the Transaction Documents, means the Trustee would only know those members of the class of potential beneficiaries that actually applied. It would have no way of knowing all the potential capital beneficiaries who could but had not applied. In addition, the class was subject to change from year to year, depending on whether those that qualified in one year also qualified in another. I agree with the Respondent that the open-ended nature of the class of

capital beneficiaries and the rolling or changing makeup of the class from year to year is incompatible with the certainty of objects.

[79] I must also agree that the class of beneficiaries is so hopelessly wide as to not form anything like a class. If "all the residents of London" were too wide a group to form anything like a class, as found in *McPhail* above, then I must agree that all Canadians who made a charitable donation and anyone else in the world who made a charitable donation entitling them to a prescribed tax receipt from Canadian registered charities is even wider. I accept the Respondent's argument that I could take judicial notice of the fact that 84% of Canadians made such a potential donation in 2004, based on Statistics Canada, Media Release/Communique 89-652-X: *"Volunteering and charitable giving in Canada*", (March 13,2015), found on its website.

[80] The impossibility of how the members of the so-called class of capital beneficiaries would be able to identify each other to ensure no one received a benefit they were not entitled to or how a Court could do so if it had to assume that role highlights the problem even more, let alone for the Trustee, especially when one considers that paragraph 3.1(c) of the Trust Deed requires the Trustee to pay and transfer the capital of the Trust Fund remaining on the final Distribution Date of the Trust to any one or more of the Capital Beneficiaries who shall then be living, or paragraph 1(l), which defines the "Time of Division" as a date prior to the Ultimate Distribution Date as determined by the Trustee in writing and delivered in counterparts to every adult beneficiary, which term includes capital beneficiaries, living at the time of signing same. It would be an administratively impossible task to identify, let alone serve, such potential capital beneficiaries at any of those times, and such task became more difficult with each year the program continued.

[81] I conclude that the Trust must also fail for lack of certainty of objects, given the impossibility of defining and administering the class of potential capital beneficiaries as defined.

[82] The Respondent also makes several alternative arguments pertaining to the legality of the Trust, both in the context of failure to meet the certainty of intention and the illusory nature of the Trust, designed to hide its true object of circumventing the provisions of subsection 248(35), the recent amendments to the *Act* that effectively limit the fair market value of donated property to be the donor's cost, which in this case would equate to the cost of the Licences to Phoenix from Infosource at 13 to 26 cents per Licence had it not been for the

wording of subsections 69(1)(*c*) and 107(2) of the *Act* which bumps the cost up to the fair market value as argued; all, frankly, connected to its sham argument as well. I need not address any of those arguments here, as the failure of the Trust itself on the above grounds alone renders the Program ineffective.

(4) Alternate Arguments

[83] As mentioned, the Respondent also takes the position that if the Court finds the Appellants had donative intent and met the other requirements of making a gift and if the Trust did not fail for failure of the Trustee to exercise its discretion and for lack of certainty of objects and intention, then the Program is a sham or in the further alternative, the value of the Licences was between 13 to 26 cents per Licence and not the exponentially larger value as per the Appellants' appraisals. I will address the sham argument as well as the valuation issue briefly.

C. Sham

[84] In light of my conclusions on the first two issues to be decided, it is not necessary for me to examine the sham argument in large detail, notwithstanding that I may be swayed by many of the arguments of the Respondent in that regard, but shall address a few of such arguments.

[85] It is clear that the Promoter, either directly or through its subcontractors or agents, undertook the duties of both the Trustee and the Escrow Agent, above discussed, so that any participant in the Program was deceived into thinking these parties were active and independent when they were not.

[86] It is also clear to me that the Transaction Documents, particularly the Directions to the Escrow Agent, were also a sham since the Escrow Agent conducted no activity. Since the evidence shows that Alan Beach, the solicitor who prepared the precedents for the Transaction Documents, was also the principal of the Escrow Agent, whom he acknowledged played no active role in correspondence with the CRA, then it is clear that even solicitors for the Promoter were aware of the deceit intended to be perpetrated upon any applicants and the public at large. When one considers the Promoter obtained and published on its website a legal opinion on the Program, which focused on the necessity of the validity of the Trust and the exercise by the Trustee of its discretionary powers, which the Promoter knew was nothing more than window dressing, not reality, then it is self-evident that the Promoter went to great lengths to perpetrate this sham, aided by its advisors and subcontractors.

[87] As the Respondent has ably set out in its argument, there are numerous other examples of deceit of the Promoter or its agents and subcontractors, including other attempts to legitimize the Program by publishing unsupportable valuations of the Licences, not disclosing that over 90% of the total cash donated did not stay with any charities and thus masking the true business of the Promoter, and even proffering fraudulent customs invoices to substantiate conversions of Licences into CDs, let alone creating an inventory of CDs *ex post facto* the accuracy and existence of which is truly unsupportable. There appears to be no length the Promoter or its accomplices were not prepared to go to further their deceit but it is just not necessary to detail such actions any further in this decision.

[88] While the Appellants, or most applicants for that matter, who participated in the Program did not create the Program, so could not be said to have directly perpetrated the sham of the Program, there is no doubt they signed Directions and Deeds of Gift of Licences that refers to a Schedule ”A“ describing the software that was not prepared or attached at that time and thus would have known they were gifting something that was not identified even to them until some later date in time and so can be said to have agreed to be wilfully blind, if not complicit, in perpetrating this sham. The Appellant, Mrs. Mariano, signed the documents and left it to her agent to complete while the Appellant, Mr. Moshurchak, even negotiated a kickback of commissions from his financial agent selling the Program, and both understood the nuances of the Program; namely, that for making a cash donation they expected to receive some asset for re-donation to another Charity that would result in a net cash advantage to them. They also understood that their cash cheques would not be cashed, as part of the “security” of the Program Mr. Moshurchak referred to, until they were accepted as capital beneficiaries or received a distribution of assets from the Trust, Licences generally, while Mr. Mariano thought they involved computers. They were also aware of the legal defence fund identified in the Direction to the Escrow Agent, which should have set off alarm bells but did nothing to obtain legal advice notwithstanding. When otherwise good people turn a blind eye to the obvious reality surrounding them, they cannot lay blame on others for the consequences that follow from the fraud or sham of others. They certainly should not expect the Canadian public to fund their losses.

[89] In any event, the law is clear that the deceit, as a necessary element of a sham, is trite law confirmed in *2529-1915 Quebec Inc. v The Queen*, 2008 FCA 398, 2009 DTC 5023, at paragraph 59, and numerous other appellate decisions, need not be perpetrated by the Appellants in order to find a sham, as their participation in the sham is sufficient to invalidate their purported gifts of cash and

property to the charities as was the case in *Bonavia v The Queen*, 2010 FCA 129, 2010 DTC 5114.

D. Valuation of Licences

[90] About half the trial dealt with the valuation of the Licences. There was no dispute between the parties that the onus was on the Appellants to demolish the assumption made by the Minister that the value of each Licence was 35 cents. Each of the parties had an expert witness, with clear disagreement between them as to the value and method of valuation. In general, the Appellants' expert witness, one Mr. Dobner of PricewaterhouseCoopers ("PWC"), valued the Licenses using the Market Approach, effectively using the sale of CD Roms and On-line sales, in final form, by Infosource to its educational market clients over the period of 2004 and 2005, based on a 2003 Price List and calculating a range of relevant discounts based on those transactions for each of the 6 courseware items and applying such discounted prices to the selected Licenses distributed to each of the Appellants as at the date of such distribution. Mr. Dobner did not use the transaction between Infosource and Phoenix reflected in the Master Licence Agreements earlier described, the original transactions that produced the licences that were assigned eventually via the Trust to the Appellants for donation to CCA on the grounds he assumed those two parties were not at arm's length based on that information provided by one Mr. Williams, a former employee of Infosource and on the grounds the Master Licence Agreements had a philanthropic purpose and not a commercial one. Likewise, he assumed the transactions of sale of some of the Licences by Phoenix to the Trust were also not appropriate to consider as, in paragraph 108 of his opinion, he considered them "to be conducted in the spirit of philanthropy and with no expectation of compensation".

[91] In general, the Respondent's expert witness, one Mr. Mizrahi of FTI, valued the Licenses using a purported Cost Approach, effectively taking the position that the cost to Phoenix of the Licences was as the Minister assumed because it was an arm's length business transaction and reflected the only comparable asset transaction available to consider, the sale of a courseware licence, which contained the right to convert it into CD Rom format at the holder's expense and not the converted product as valued by Dobner.

[92] As mentioned, there was great disagreement between the experts on many levels, including the asset to be valued, the market for such asset to be utilized, what methodology best reflects the highest and best price, on the underlying

assumptions presumed by each of the expert witnesses and even the credibility of the factual foundations for such assumptions.

[93] There is, however, no dispute between them that the fundamental goal of a valuation was to determine the "Fair Market Value" of an asset or as to the law applicable to same.

[94] Mr. Dobner defined Fair Market Value in paragraph 6 of his Expert Report, dated December 9, 2014:

> …. we have used the concept of fair market value ("FMV"), which is defined as "the highest price available in an open and unrestricted market between informed, prudent parties acting at arm's length and under no compulsion to act, expressed in terms of money or money's worth."

which was almost identical to the definition used by Mr. Mizrahi in his report.

[95] There is no dispute such definition is founded on well-established case law. The well-accepted definition of Fair Market Value is found in the decision of Cattanach J. in *Henderson Estate and Bank of New York v M.N.R.*, 73 DTC 5471, as referenced in the Federal Court of Appeal's decision in *Canada v Nash*, 2005 FCA 386, at paragraph 8 thereof:

> The statute does not define the expression "fair market value", 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.

[96] The premise for determining the FMV of the donated Licences was expressed by Mr. Dobner in paragraph 9 of his report:

> Our premise for determining the FMV of the Donated Licences at the respective Valuation Dates reflects a notional transaction between an education customer

> (i.e. a non profit organization that provides or oversees the provision of education services, such as district school boards) and a supplier of such Donated Licences (e.g. Infosource). Such transaction is assumed to have been consummated at the relevant price list at the relevant time, less a discount which is consistent with the common method under which such licences were sold in the ordinary course of business during the relevant time.

[97] In my opinion, the Appellants have failed to demolish the assumptions of the Minister on the fair market value for a number of reasons, the most significant of which I will address in the context of why I consider the Expert Report of Mr. Dobner to not be reliable.

1. Mr. Dobner valued the wrong asset

[98] The Appellants also relied on the Federal Court of Appeal's decision in *Nash* above for the proposition that the first step in applying the fair market value definition is to accurately identify the asset. Rothstein J.A. as he was then, stated at paragraph 17:

> In applying the Henderson definition of fair market value, the first step is to accurately identify the asset whose fair market value is to be ascertained. It is only once the asset is identified that the market in which the asset is normally sold in the ordinary course can be determined.

[99] While the Dobner report specifically purports to value the 233 and 4,321 courseware Licences issued to Mr. Moshurchak in 2004 and 2005 and the Licences issued to Mrs. Mariano in 2005, it is clear that the comparable transactions reviewed by Mr. Dobner were the Infosource transactions of Courseware that were delivered on CD Rom format or On-line format. In fact, the notional transaction he based his transaction choices on were between an educational customer and a vendor of Donated Licences such as Infosource, but only reviewed transactions where Infosource sold the converted licences; ones that had been already transferred onto usable format, either in CD Rom or On-line form. He, in fact, assumed such Donated Licences had been converted and that there was a market for them.

[100] I agree with Mr. Mizrahi's comments in his opinion that the Licences, i.e, the courseware with an option to convert to CD Rom format as provided for in the Master Licence Agreements, could not have the same value as the converted products sold by Infosource. Mr. Dobner's valuation did not reduce the values of

the comparable asset transactions of Infosource, either by the cost of their conversion to CD Rom format, or by the cost an arm's length party would incur in marketing, selling and distributing such products, let alone taking the risk of doing same in the market. It is clear from the Financial Statements of Infosource entered into evidence that Infosource had expenditures for rents, salaries, commissions and other business expenses, all of which play a role in marketing, selling and distributing their finished products. The fact it lost money in its 2004 taxation year suggests there is risk in doing so. Mr. Dobner simply did not address any such adjustment to the value of the formatted Licences used in the transactions he compares, rendering his valuation suspect and unreliable.

[101] I should also like to comment on the Appellants' assertion in argument that in fact Mr. Mizrahi valued the wrong assets by only valuing the underlying intellectual property of the Licence and not the corresponding right a holder had to convert it to CD Rom or other usable format. In my opinion, there is simply no foundation for such a position. Mr. Mizrahi defined the Licences (actually using the term Sublicenses) separately from Products, the latter of which was effectively defined as the converted licence. In his description of the Licences he makes reference to the fact it carried the ability to convert. Moreover, the comparable assets he used for his valuation were the Licences transferred pursuant to the Master License Agreements between Infosource and Phoenix, which contain the right to convert, so it is clear that if he valued such Licences, then he valued the right asset. The facts are clear on this, notwithstanding the Appellants' attempt to frame them as otherwise based on inconsistent terminology. I must also agree with the Respondent that in no way was there a transfer of any underlying intellectual property by anyone here. The transfer was only a license to use the underlying property together with a right to convert it.

[102] The Appellants also suggest that only Mr. Dobner valued the actual gifts made by the Appellants and one other person who did not proceed to this trial, namely the specific number of courseware Licences donated only by them, while Mr. Mizrahi valued all the Licences, the 3 million licences in total, created by the Master Licence Agreements. I would agree he did, but I do not agree this makes Mr. Dobner's valuation more preferred and will deal with this issue in more detail shortly.

2. Mr. Dobner considered the wrong market

[103] Mr. Dobner relied on a notional transaction between an educational customer (i.e., a non-profit organization that provides or oversees the provision of

education services, such as district school boards) and a supplier of Donated Licences (e.g. Infosource). No real explanation was given as to why an educational market was used. It is clear from the evidence and the transactions Mr. Dobner relied upon, that the buyers in those transactions were school boards and similar entities that clearly paid and were able to pay for the products purchased. The Licences distributed by both the Appellants to CCA and by CCA to end users, were all charitable transactions, in which no payment was received nor expected.

[104] The only arm's length market transaction in evidence of which the element of philanthropic gifting is potentially present is the transaction between Infosource and Phoenix pursuant to the Master Licence Agreements, which Mr. Dobner did not use, partially on account of its purported philanthropic element.

[105] What is clear to me is that the market most relevant to valuing the donations would not be a retail market but rather the charitable donation market, a market created by the Program, which produced millions of licences over a few years for distribution to charitable recipients and a market recognized by the Appellants' own witness, Mr. Williams, a former employee of Infosource who testified that one of the reasons Infosource was willing to sell the Licences to Phoenix at the low price was because they recognized the Licences would be ultimately distributed in Canada to persons who would otherwise be unable to purchase same and thus would not impact their own market; effectively, would not compete with their business.

[106] Mr. Dobner himself referenced this charitable market in paragraph 38 of his report where he made reference to ICAN, defined as CCA in this decision, as receiving "… donations-in-kind of food, household goods and other items including educational materials and licenses for the use of educational software programs for use directly in the charitable activities it carried on and for distribution to other organizations for use in their charitable activities. …".

[107] In determining what market would be relevant to this situation, this Court in *Lockie v the Queen*, 2010 TCC 142, 2010 DTC 1121, a case involving a buy-low, sell-high donation scheme of school supplies, considered what market would be relevant to the charity that had received the donations. Webb J., as he was then, stated at paragraph 41 that:

> …. it seems to me that the relevant market would be the market which In Kind Canada would have acquired products if the products would not have been donated by the donors to In Kind Canada [if it had to acquire the assets had they

> not been donated]. … It seems to me that the identification of the market in which In Kind Canada would have purchased such products is critical to the determination of the fair market value of the products donated … However, the critical question is whether the retail market is the correct market in this case.

[108] Webb J. found that the retail market was not the appropriate market to use and determined the more appropriate market would have been the "wholesale" market, wherein the charity would have bought from the initial suppliers who would have been indifferent as to whether to sell to the middle man or the charity directly. At paragraph 55 and 56, Webb J. stated:

> [55] It seems to me that the retail market is not the appropriate market to use in determining the fair market value of the products donated to In Kind Canada. The donors were a conduit in the pipeline for the products that flowed from the manufacturer to CEI (or a related company) to the donors to In Kind Canada. John Groscki described the role of the donors as:
>
> > So at the end of the day we were basically making donors into wholesale distributors or distributors of products, one way or the other to charities.
>
> [56] It seems to me that if In Kind Canada were to acquire the products from someone other than the Appellant, that it would acquire these products directly from CEI (or a company related to CEI). …

[109] It seems to me that, in this matter, we also have a conduit or pipeline where the same Licences transferred by Infosource to Phoenix found themselves travelling down to the Trust, the Appellants and other participants in the program and ultimately to CCA, making CCA or even the Appellants and other donors the effective distributors or wholesalers of the Licences at best.

[110] Moreover, in the case at hand, Infosource was in the business of selling Licensed Products in final format or selling Licences where the purchaser would pay the cost of conversion. There is no evidence before me to suggest Infosource would not have been willing to sell directly to CCA and I find there is evidence Infosource and Phoenix were at arm's length and had a business relationship first and foremost so that there appears to be no reason why it would have made any difference to it whether it sold to CCA directly or through the conduit of Phoenix down the pipe eventually to CCA.

[111] Accordingly, the price paid by Phoenix to Infosource would appear to be the best price, consistent with the Court's finding in *Lockie*, at paragraph 59, that the

price paid by the appellant to CEI was the fair market value as "[i]n effect, the Appellant was acquiring these products on behalf of and for the benefit of In Kind Canada." Phoenix, likewise, acquired these products ultimately on behalf of CCA, passing them through the pipeline and I would think its price would be the relevant transaction to value.

[112] Earlier decisions of this Court also recognized that the magnitude of donation programs can, in effect, create their own market for an asset, either in the context of looking at the totality of the donations in play, as did Bowman ACJ, as he was then, in *Klotz v The Queen*, 2004 TCC 147, 2004 DTC 2236, at paragraph 40(b), or in the more general sense of recognizing the sheer volume of assets in play affect the market through supply and demand considerations on fair market value which I will deal with shortly.

[113] As the Respondent has also pointed out, Mr. Dobner's report assumes that the Appellants had access to the retail market that Infosource conducted its business in. The Appellants, or any participant in the program, unless they were also in the business of selling software, did not have the ability to access or play in that market. In *Russell v The Queen*, 2009 TCC 548, 2009 DTC 1371, which involved an art donation program where the appellant therein argued that in accordance with the *Henderson* definition of fair market value, the Court should consider the retail market, in that case the sale of art by a gallery, as being the market in which the appellant could obtain the highest and best price, C. Miller J. stated, at paragraph 25:

> … 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. …

[114] By the same token, there is no evidence, from Mr. Dobner or otherwise, to suggest there is a retail market available for the Appellants to access and sell their Licences, let alone any evidence they had the structure, asset base and access to clients to do so in the manner Infosource did.

3. Dobner failed to consider effect of supply of Licences in the market

[115] Dobner's report values only the specific Licences received by the Appellants and one other, LB, totalling 5,451 Licences. The evidence is clear that on the dates

each of the Appellants received Licences pursuant to the respective Assignment of Licences documents, that there were hundreds of other accepted capital beneficiaries that received thousands of Licences that were donated to CCA. The evidence is that closings occurred every week during the relevant period, resulting in thousands of Licences flowing to CCA. Moreover, the Master Licence Agreements provided for 3 million Licences that were available for distribution and travelling down the pipeline in the Program by the end of 2005 and over 5 million by 2007.

[116] Notwithstanding the sheer number of Licences actually donated to CCA at the same time as the Appellants donated theirs, and throughout the period of 2004 and 2005 from which Dobner drew his comparables from Infosource sales to educational customers, Dobner did not consider the impact of such large supply and potential supply in the market place other than to incredibly suggest it was irrelevant due to the potential infinitesimal number of Licences Infosource could have issued.

[117] The obvious fact is that there were thousands, if not millions, of Licences that were in play and no effort was made by Mr. Dobner to consider their impact on the fair market value of the donated Licences he valued for the Appellants.

[118] It is well accepted law, evident from the definition of fair market value in *Henderson Estate*, that supply and demand is a factor. I repeat the dicta of that Court:

> … 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.

[119] In cases such as *Malette v Canada*, 2004 FCA 187, 2004 FCJ No. 867, the Federal Court of Appeal confirmed the need to consider the volume of art works of an artist to determine a bulk discount and, at paragraph 16, stated:

> The need to apply such a discount is a function of supply and demand. When, for any reason, a large number of personal property items come on the market at the same time, a depressive effect on the value of the individual items can occur due to the fact that the number of items offered for sale exceeds the number of willing buyers. …

[120] And, at paragraph 22, Noel J.A., as he was then (now CJA), stated:

> Rather, the respondent's argument appears to be that in enacting section 118.1, Parliament contemplated a "fair market value" that differs from that notion as it is commonly understood by directing, in effect, that the fair market value of gifted cultural property be determined without regard to the depressive effect of volume on the relevant market.

[121] The learned, now Chief Justice, concluded that a block discount is not precluded by the *Act* and that the Tax Court judge erred in holding otherwise, contrary to the accepted meaning of fair market value.

[122] Similar approaches were adopted by the Federal Court of Appeal in *Nash* and by this Court in *Klotz* and *Nguyen v The Queen*, 2008 TCC 401, 2008 DTC 4390, as well, where, in the latter, Campbell J. stated at paragraph 27:

> … The same analysis as applied in the cases of *Nash* and *Klotz* is the correct yardstick to be used in these appeals. … Without evidence to the contrary, the best evidence of FMV will be the purchase price of the group of assets.

[123] In my opinion, Mr. Dobner failed to consider the effect of such a vast supply of Licences already available in the market, from the thousands of already donated Licences to CCA, in valuing the Licences. Moreover, he made no mention of the impact possible competitors to Infosource would have had on his valuation. His approach was contrary to the definition of fair market value, where buyers and sellers would be informed and supply and demand would be an essential element, an omission fatal to his valuation in my opinion.

4. <u>His valuation is "devoid of common sense"</u>

[124] As former Chief Justice Bowman stated in *Klotz*, at paragraph 46, relied upon by *Nguyen*, dealing with an appellant who purchased 250 art prints from an art dealer at $300 per print, who had acquired them for between $5 to $50 each, and donated them to charity for $1000:

> … The problem with the claim here, whereby property is acquired for $5 to $50, sold to the appellant for $300 and claimed to have a fmv two days later of $1,000, is that it is devoid of common sense and out of touch with ordinary commercial reality.

[125] In the case at hand, Licences were purchased by Phoenix for between 13 and 26 cents each during the relevant period of the Appellants' donations, the same Licences that the Appellants would have had to donate which they received through the pipeline, and somehow their value increased exponentially in a very

short period of time. Mr. Moshurchak for example, donated 4,321 Licences in 2005, for which Phoenix would have paid Infosource a maximum of $1,123.46, based on the highest price paid of 26 cents per licence, yet Mr. Dobner values them at $423,057, while that Appellant had received an actual donation receipt for $812,051, based on the valuation of EMC partners, on whose values the Program was based.

5. His assumption that Infosource and Phoenix were not dealing at arm's length is unfounded

[126] As set out in the Supreme Court of Canada's decision in *The Queen v J.L.J* , 2000 SCC 51, [2000] SCJ No. 52, at paragraph 59:

> Before any weight at all can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist. …

[127] Mr. Dobner assumed such fact solely on the basis of information he received from Mr. Williams, a former employee of Infosource. There is no evidence Mr. Dobner attempted to contact the owners of Infosource to determine its shareholdings or other facts relevant to determining the issue. Since Mr. Williams was not a shareholder of Infosource and admitted he had little knowledge of its financial statements, being the development manager for the resale division, his testimony is, at best, hearsay. Moreover, the general testimony of Mr. Williams was just inconsistent and generally not credible, to put it kindly, for a number of reasons , including:

1. Mr. Williams testified in chief so as to suggest he did not know Mr. Lewis well, the owner of the Promoter, yet in cross examination disclosed he had worked for Mr. Lewis, as vice president of Canadian International Technology Training Inc. ("CITTI"), a corporation Mr. Williams testified was owned by Mr. Lewis involved in the previous GLS program.

2. Mr. Williams denied he had received or reviewed Mr. Dobner's report, suggesting he had no involvement in its production, yet the evidence of Mr. Dobner is that he was the main point of contact for Infosource and, on cross-examination, Mr. Williams admitted he was forwarded correspondence relating to the matter that asked for his opinion on whether it passed the "smell test" from Mr. Dobner's

colleague and he admitted reviewing the report on cross-examination after being confronted with a letter he wrote to PWC.

3. Mr. Williams had, in fact, suggested to PWC that they consider looking at Infosource's 2002 sales of the Microsoft-related courseware because they were at higher prices; evidencing he was attempting to influence a higher price. In fact, I found the tenor of his evidence to be one of advocating for the Promoter, who Mr. Dobner agreed was the party paying for his report, rather than of an objective and impartial witness.

4. Mr. Williams denied attending a promotional conference for the Program in 2011 while the Respondent presented evidence he was listed on the program as a presenter; something he continued to deny notwithstanding the documentary evidence showing otherwise.

5. Mr. Williams received substantial commissions for the sale of Licences by Infosource to Phoenix as the salesperson of record as well as continued to be involved with the Program after leaving Infosource through his corporation, Summit Knowledge Systems LLC, and earned substantial commissions in both 2014 and 2015, evidencing he had a long and continuing financial interest in working with Mr. Lewis or entities with which he was involved and hence had a personal stake in the outcome of this matter.

6. Mr. Williams testified Infosource had little or no reseller presence in Canada but later evidence showed it accounted for 3 to 5% of Infosource's sales revenue.

[128] The only other evidence of whether the two were at arm's length is the report of Mr. Mizrahi which assumed they were at arm's length because he investigated same with the owner of Infosource, who provided correspondence in writing that not only was Mr. Williams not authorized to speak on behalf of Infosource, but that Infosource was not related to Phoenix and had conducted its transactions with Phoenix on an arm's length basis as a business deal. While I appreciate Mr. Warner, an owner of Infosource, was not called to testify, the Appellants were aware of Mr. Mizrahi's assumptions and did not call him to rebut them either. Moreover, if it were a matter of weighing only hearsay evidence, I found Mr. Mizrahi's evidence and the written correspondence from Infosource to be far more credible than the testimony of Mr. Williams on the matter, and Mr.

Mizrahi at least made independent inquiry of the owners of Infosource, something I cannot understand why Mr. Dobner failed to do.

[129] Frankly, even Mr. Williams' testimony would lead me to conclude the two were operating at arm's length, regardless of any ownership tests. Mr. Williams testified in such a manner as to suggest the transfer of 1.5 million Licences in 2004, pursuant to the Master Licence Agreement, was a good deal for Infosource in that Infosource did not have to duplicate CDs, Infosource knew the Licences were to end up in the hands of charitable recipients in Canada that could not otherwise afford to buy them and hence posed no competition to its predominantly U.S. market and the distribution of such Licences in Canada would give Infosource more exposure in the Canadian market. These are all business justifications for making the deal with Phoenix, regardless of the philanthropic language used in the Master Licence Agreement suggesting otherwise. Mr. Williams' testimony suggests the fee paid to Infosource was very profitable. I give no weight to the arguments that the transfer was to effect a sole philanthropic purpose as the evidence is clear that Infosource's standard agreement was used, save that the philanthropic language was inserted at the request of Cassel's Brock, the Canadian lawyers who, oddly enough, appear to be advising a Bahamian Corporation on entering into a U.S. contract.

[130] I also note that even though the $400,000 fee in the first Master Licence Agreement was expressed to be a fee to help Infosource defer expenses, there was, in fact, a substantial fee each time Infosource transferred Licences to Phoenix, namely an additional $200,000 in the 2005 Schedule "B", an additional $550,000 fee pursuant to a further agreement dated April 19, 2006 and an additional $200,000 pursuant to an amendment of same dated November 7, 2006. Each time there was a transfer of any Licences by Infosource to Phoenix, there were substantial sums involved which, as Mr. Williams earlier alluded to, did not require Infosource to bear any cost of replication and which evidence shows constituted a significant portion of Infosource's sales revenue. On sales of $3,500,000 in 2004, the $400,000 fee would represent 11% of its sales, and logically, a larger contributor to the bottom line if, as Mr. Williams suggested, there were very little costs related to it. Common sense suggests this was a good business deal for Infosource, consistent with the information obtained by Mr. Mizrahi from the owners of Infosource on the relationship with Phoenix.

7. Mr. Dobner assumed the Licences were received and used without foundation

[131] There is no dispute that Mr. Dobner assumed, in paragraph 38 of his report, that the Licences were received and used directly in the charitable activities of CCA and distributed to other organizations for use in their charitable activities. Mr. Dobner testified that he relied on the information received from Mr. Wall that "practically all the CD's were distributed to charities" as the basis for his assumption. He admitted in cross-examination that if the Licences were not, in fact, converted and used then they would have no value.

[132] No independent steps were otherwise taken by Mr. Dobner to verify his assumptions. There is no evidence that he contacted even one recipient to determine if even one, single CD, of the thousands he assumed were distributed as a result of the Appellants' donation, was received and was usable.

[133] Again, as set out in the Supreme Court of Canada's decision in *J.L.J*, above, at paragraph 59:

> Before any weight at all can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist. …

[134] The evidence of Mr. Wall, as reflected in his report to M.L., the Executive Director of CCA, is that during the period between 2003 and 2007, CCA received 6,256,905 Licences, distributed 1,710,815 and had an ending inventory, as at Dec 31, 2007, of 4,546,088 Licences, which ending inventory consisted of 3,250,363 of actual Licenses in stock, 500,000 unused portal or on-line applications in stock and 795,726 which were stored with Infosource, to be totally unreliable and cannot support the factual basis for Mr. Dobner's assumptions, for many reasons including:

(a) Mr. Wall was employed by Mr. Lewis through the Promoter as a contractor both during his time with and after leaving CCA after its charitable registration was revoked in 2008 right up to 2014 and participated in the Program himself in the years 2005 to 2013, without making any cash donations, but claiming receipts for donations in kind ranging from $20,000 to $60,000 during those years, averaging about $31,000 which transactions are also under review by the CRA; thus he has a clear, vested, financial interest in the Program and the outcome of these appeals.

(b) Mr. Wall was based in Halifax and although he testified he travelled to the CCA warehouse in Toronto a few times a month, he had no role in the financial reporting or inventory controls of CCA and had no accounting

background on which to assume he was even competent to undertake such roles. Yet, without an accounting background, Mr. Wall is remarkably called upon to prepare an inventory report for CCA with a view to satisfying the CRA that CCA made appropriate charitable distributions and thus should not have its charitable registration revoked.

(c) Mr. Wall admitted that CCA had no system for tracking the receipt and distribution of Licences, a fact confirmed by the testimony of M.L., the executive director of CCA at the time, and that his task was to create an *ex post facto* inventory report in March of 2008, for the period ending December 31, 2007, to track inventory received and distributed from 2003 to the end of 2007, based on the most complete available information, which he admitted was not solely based on facts, but required him to make many assumptions, which have no factual foundation, including:

i) Mr. Wall assumed that the Licences received were based solely on the donation receipts issued by CCA, without having any actual knowledge of receipt;

ii) Mr. Wall calculated the Licences distributed throughout the period were in both CD and On-line portal format, without any explanation or proof of CCA having the right to convert Licences to On-line format, contrary to the express wording in the Master Licence Agreements that called for only CD Rom format. Moreover, Mr. Wall assumed that each on-line customer had access to 100 Licences so that the 5,000 on-line charitable recipients he recorded actually got 500,000 Licences, notwithstanding the Master Licence Agreement limiting conversion to one Licence per CD;

iii) There is no evidence of Infosource storing another 795,726 Licences for them. The evidence is that Infosource would issue a master Licence disc for duplication by its approved replicators, not store any Licences for anyone;

iv) With respect to the hard inventory counts, the report showed 3,250,363 licences in the warehouse, as per Mr. Wall's count sheets, which Mr. Wall indicated was confirmed by WIS, an independent inventory contractor, who did not testify. The evidence is that a few of the skids of CDs contained only

product from the previous GLS program, only one could have contained GLGI courseware and the others could have been either GLS or GLGI, with no actual proof of either, and that Mr. Wall assumed there were multiple licenses per CD disc, up to 65, resulting in grossly overinflated Licence counts;

v) There is doubt as to whether there was even any CD Rom disc inventory during the relevant period and a suggestion the pallets of disc boxes were brought into the warehouse only after the audit started. M.L, the executive director of CCA, testified she walked through the plant every day to get to her office and only noticed the skids one day after which Mr. Wall appeared to take inventory. While she admitted, on cross-examination, that such skids could have been elsewhere in the plant without her knowing, I am inclined to believe her since if the skids of discs were already in the plant, then CCA would have been able to provide CRA with the discs on earlier occasions after CRA had demanded proof of same on several prior occasions, according to the CRA auditor who was investigating that charity;

vi) Mr. Wall calculated the number of Licences distributed according to the courier or shipping invoices he found, effectively on the basis of a multiple number of Licences per disc as well as assuming there was so many sets of discs and so many discs per pound of weight where disc numbers were not present, without any factual foundation for same and multiplying those by a factor as well, ranging from 1 in 2004, 10 in 2005 and 2006 and 28 in 2007. In one example, Mr. Wall calculated there were 10,200 Licences shipped, when documentary evidence showed the recipient received 50 Licences, and all pertaining to the previous GLS program to boot. In another, Mr. Wall equated the weight of a shipment to represent 900 Licenses when the customer e-mail confirmed 40 were received;

vii) Mr. Wall relied on customs invoices for shipments received from English Lake, the approved replicator for Infosource, to establish the conversion of Licences into CD's, yet there was much confusion as to whether the customs invoices referred to

CD's or Licence numbers and Mr. Wall admitted he did not know which on cross-examination. Moreover, there was evidence Mr. Wall relied on two fabricated customs invoices after the Respondent put into evidence the actual invoices containing the customs bond barcode designated for CCA that would have been on all customs invoices and that was not on those relied upon by Mr. Wall. The difference between the two was significant, resulting in about 50% of the Licences claimed. The evidence also established that the product referred to in the 2004 customs invoice related only to the previous GLS program product;

viii) Mr. Wall testified that Licences were distributed on a first-in, first-out basis. The evidence shows that at the beginning of 2004, there were more than 287,000 undistributed GLS program Licences, having a value of over $93,000,000 and that a total of 333,000 Licences were distributed throughout all of 2004 and 2005. As the Program did not start until October 2004, it would appear that any such distributions of Licences would have likely been from the GLS program only, having regard to the first-in, first–out approach and, as above mentioned, there was evidence many of the recipients from the shipping invoices were found to have received GLS product; and

(ix) Even if Mr. Wall's figures that CCA received 6,256,905 Licences and distributed 1,710,815 during that period are correct, this would demonstrate that only 27% of the received Licences were ultimately distributed, a far cry from the substantially all assumed by Mr. Dobner.

[135] Considering all the concerns related to the inventory report, I cannot possibly find that it was in any way accurate or credible regarding whether GLGI discs were converted, received by CCA or distributed to anyone during the period, if at all. I note that the accountants for CCA were of the same view, as they expressly inserted notes to the financial statements of CCA advising the reader that they were not able to verify the inventory figures therein recorded.

8. <u>The Dobner report is not impartial</u>

[136] Mr. Kiki Anadu, a PWC employee from Mr. Dobner's office, sent an e-mail dated May 2, 2012 to Mr. Williams, copied to Mr. Dobner, which e-mail letter reads in part:

> Hello Richard,
>
> As discussed, here is a summary of our very preliminary results for a "smell test".
>
> …
>
> Please let us know if you think this looks reasonable/not reasonable, and if you have any comments that you think might be helpful to tweak our analyses as needed.
>
> We have not shared these results with any other parties as we are still fine tuning our analysis and will ask you to keep confidential until we have done so.
>
> Once we have the draft report ready, we will send you the complete draft report for your review, which will have detailed explanations of how we arrived at these results.

[137] This e-mail confirms that Mr. Williams was actively advocating for higher prices and had a large role in the preparation of the expert report, in fact, as the point man for the Promoter who commissioned the report, and would have received it, contrary to his initial testimony. More importantly, this e-mail casts doubt on the credibility of the expert report; suggesting the expert was tailoring his report to meet the needs of his client and not being an impartial report, contrary to the obligation of expert witnesses to this Court. Absolutely no attempt was made by the Appellants to otherwise explain this e-mail and I am satisfied it speaks clearly for itself.

9. Other Deficiencies

[138] There were a multitude of other potential deficiencies in Mr. Dobner's report which were at issue in the trial; all of which cast some doubt on the reliability of Mr. Dobner's report; ranging from evidence he considered some transactions that were clearly corporate and not educational customers, to considering mostly transactions for products that were delivered to customers via On-line format products instead of CD format, to ignoring that many of the educational customers were multi users who paid a flat fee and not a fee from the 2003 Price List relied upon; which, frankly, I need not address in further detail.

[139] It should also be mentioned that Mr. Mizrahi's report was not without doubt on many levels as well, particularly with respect to his reliance on certain tests of reasonableness to support his Cost-approach results; namely his total reliance on Cost of developing the Courseware from the analyses of a Mr. Scott, who was not qualified as an expert witness, or his reliance on the limited financial statements of Infosource to suggest the developments costs of Infosource were low and hence the costs of developing the courseware would be low for an informed buyer. I agree these arguments were neither determinative nor persuasive to support his arguments.

[140] However, I must find his conclusions as to the fair market value of the Licences to be more persuasive for one very basic reason, evident from the definition of Cost Approach, not in dispute, and found in both expert reports. The Appellant described the Cost Approach in paragraph 17 of Appendix "D" of its expert report as follows:

> The Cost Approach uses the concept of replacement cost as an indicator of Fair Market Value. The premise of the Cost Approach is that a prudent investor would pay no more for an asset than the amount for which the asset could be replaced with a new one. Replacement cost new refers to the cost incurred to replace the asset in like utility using current material and labour rates. To the extent that the asset will provide less utility than a new one, the value of that asset is less than the replacement cost new.

[141] It is clear that the concept of replacement cost is the key element. The definition does not, *per se*, require that the person replacing it must be the person who undertakes to manufacture or create it himself from scratch. That would be illogical and commercially unfeasible, having regard to well-known practices of large manufacturers, like automobile manufacturers for instance, of purchasing element parts for the vehicle they ultimately produce from parts manufacturers that are independent from them. To such automobile manufacturer, the cost of such part is the price it pays to acquire it on the open market.

[142] In similar fashion, Mr. Mizrahi has equated the Cost of replacing the Licence to the cost it can acquire it on the open market, using the arm's length transaction between Infosource and Phoenix as evidence of the cost one could acquire it at. I appreciate this is also consistent with the Market Approach, defined generally by both experts, as "using one or more methods that compare the subject asset to similar assets that have been sold", as expressed in paragraph 20 of Mr. Dobner's report - Appendix "D" above, which, as expressed in paragraph 21 thereof, includes the Precedent Transaction Method under which "… valuation

ratios are derived from open-market transactions of assets which are considered to be the same or similar as the subject asset".

[143] The point being, that although Mr. Dobner criticized the use of the Cost Approach of Mr. Mizrahi as being the actual use of the Market Approach, the definitions of both approaches in these circumstances would frankly seem to apply and overlap. The transaction between Infosource and Phoenix was both the comparable open-market comparable transaction for the Licences that should have been used by Mr. Dobner, as well as the basis for replacement cost in Mr. Mizrahi's Cost Approach. I might also add that in this comparable transaction, there was no price differential between the various courseware as a matter of fact. Each of the 6 courseware products were treated the same and I see no basis on which to distinguish them, regardless of the fact that as a finished product, they might attract a higher price on the open market if sold individually, but not necessarily when valued as a large group of assets due to the depressive effect of a large supply in the market.

10. Conclusion as to FMV

[144] In any event, the expert witnesses are there for the benefit of the Court; to inform, advise and help the Court reach a conclusion. Based on my analyses of both reports and the testimony of the expert witnesses, I am satisfied that the conclusions of Mr. Mizrahi are valid, that the Licences have a value of between 13 cents and 26 cents each. I appreciate Mr. Mizrahi's argument that once an additional 1.5 million Licences became available in 2005 for $200,000, pursuant to the Schedule "B" amendment to the initial Master Licence Agreement dated September 16, 2005, that any Licences issued and not distributed pursuant to the initial agreement of October 20, 2004 lost value down to such 13 cents, all in U.S. dollars. Accordingly, any participant who assigned Licences to CCA prior to September 16, 2005 could reasonably claim a fair market value of 26 cents, and any afterward of 13 cents. In the case at hand, each of the Appellants purportedly donated their Licences prior to September 16, 2005 and so would be accorded a value of 26 cents per Licence had they otherwise been found to make a valid gift; however, as the Minister assumed a value of 35 cents in its assumptions, such value would have to be applied to these Appellants.

[145] Having found that, at best, the value of each Licence would range from 13 cents to 26 cents, next-to-nothing compared to the valuations utilized by the Promoter during its program and the value attributed by Mr. Dobner of PWC, I do not see it necessary to determine the last legal issue on the table: whether the

workings of subsections 248(30) to (32) apply so as to reduce the eligible amounts of the gifts to Nil.

V. Conclusion

[146] Having regard to all the foregoing, I find that the Appellants did not have the donative intent to make any of their gifts, did not own or transfer the property that is the subject matter of the gift in kind, i.e. the Licences, and that the Program was a sham; however even if I am wrong on those issues, I find the value of each Licence donated by the Appellants would actually only be 26 cents per Licence but for purposes of these appeals would have to be set at 35 cents per License based on the Minister's assumptions in its Reply of that amount.

[147] Accordingly, the appeals are dismissed, with costs to the Respondent. The parties shall have 30 days to make submissions as to costs if they are not satisfied with the above order as to costs.

Signed at Ottawa, Canada, this 19th day of October 2015.

"F.J. Pizzitelli"

Pizzitelli J.

CITATION:	2015 TCC 244
COURT FILE NOs.:	2009-3506(IT)G 2009-3516(IT)G
STYLES OF CAUSE:	JUANITA MARIANO and HER MAJESTY THE QUEEN DOUGLAS MOSHURCHAK and HER MAJESTY THE QUEEN
PLACES OF HEARING:	Toronto, Ontario; Halifax, Nova Scotia; Vancouver, British Columbia
DATES OF HEARING:	April 7, 8, 9, 10, 13, 14, 2015, at Toronto, Ontario, May 8 and 9, 2015 at Halifax, Nova Scotia, May 25, 26, 27, 28, 29, June 15, 16, 17, 22, 23, 24, 25, September 14, 15, 16, 17, and 18, 2015 at Vancouver, British Columbia
REASONS FOR JUDGMENT BY:	The Honourable Justice F.J. Pizzitelli
DATE OF JUDGMENT:	October 19, 2015

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