Court File No. 08-CV-349792

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KATHRYN ROBINSON and RICK ROBINSON

Plaintiffs

and

ROCHESTER FINANCIAL LIMITED, PROMITTERE CAPITAL GROUP INC., PROMITTERE ASSET MANAGEMENT LTD., BANYAN TREE FOUNDATION and FRASER MILNER CASGRAIN LLP

Defendants

Proceeding under the *Class Proceedings Act, 1992*

SUPPLEMENTARY MOTION RECORD

RE: CERTIFICATION AND RESPONDING MOTION RECORD

RE: STAY MOTION OF THE GIFT PROGRAM DEFENDANTS

March 11, 2009

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Court File No. 08-CV-349792

ONTARIO
SUPERIOR COURT OF JUSTICE

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I N D E X

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BETWEEN:

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and

ROCHESTER FINANCIAL LIMITED, PROMITTERE CAPITAL GROUP INC., PROMITTERE ASSET MANAGEMENT LTD., BANYAN TREE FOUNDATION and FRASER MILNER CASGRAIN LLP

Defendants

AFFIDAVIT OF VERN KRISHNA

I, Vern Krishna, of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY:

1. I am of counsel with Borden Ladner Gervais LLP in Ottawa.

2. I have been engaged by Scarfone Hawkins LLP counsel for the plaintiffs in this matter to assist them on certain tax matters in connection with this case and as such have knowledge of the matters hereinafter deposed.

3. A copy of my *curriculum vitae* is attached as Exhibit "A".

4. A copy of my report dated March 4, 2009, prepared in this matter at the request of counsel for the plaintiffs is attached as Exhibit "B".

5. I make this affidavit for no improper purposes.

SWORN BEFORE ME at the City of Ottawa, Province of Ontario this 9th day of March, 2009.

Kate Rover

Commissioner for Taking Affidavits (or as may be)

VERN KRISHNA

This is Exhibit "A" referred to in the Affidavit of Vern Krishna sworn March 9th..., 2009

Kate Lorer

Commissioner for Taking Affidavits (or as may be)

VERN KRISHNA, CM, QC, FRSC, FCGA, MCIArb.

B. Comm., M.B.A., LL.B., DCL (Cambridge), LL.M. (Harvard)

Barrister

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Citizenship: Canadian

Year of Birth: 1943

Educational Background:

Universities Attended	Years	Degree	Major
Manchester (U.K.)	1960 - 63	B.Comm.	Economics
Alberta (Canada)	1968 - 69	M.B.A.	Finance
Alberta (Canada)	1971 - 74	LL.B.	
Harvard (U.S.)	1974 - 75	LL.M.	Tax & Corporate
Cambridge (U.K.)	1985 - 86	Dip. Law	Corporate law

Professional Qualifications:

Barrister & Solicitor	Ontario	1983
	Called Alberta	1981
	Called Nova Scotia	1977

Honors:

Order of Canada	2004
Doctor of Laws (LSUC)	2004
South Asian Bar Association Distinguished Career Award	2008
Indo-Canadian Chamber of Commerce Professional Man of the Year	2002
Governor General's 125th Canada Medal	1993
Fellow of Royal Society of Canada	1992
Queen's Counsel (Canada)	1989
Fellow of the Certified General Accountants of Canada	1989
CGA Ontario Ivy Thomas Award (for public and community service)	2005
CGA Canada John Leslie Award	2006
CGA Canada (Top 100 CGAs)	2008
Lexpert's Directory of Best Lawyers in Trusts & Estates	2006
Lexpert's Directory of Best Lawyers in Tax Law	2006

Professional and Administrative Experience:

University of Ottawa 1981 - present	Professor of Law

Borden Ladner Gervais, LLP Barristers & Solicitors Ottawa 2002- present	Counsel
Lawyers Professional Indemnity Co. LAWPRO 1999 - 2001 2003 - 2006	Director
Harvard Law School Cambridge, Mass. 1997-1998	Visiting Scholar International Tax
Koskie Minsky Barristers & Solicitors Toronto 1987-2002	Counsel
Tax Research Centre University of Ottawa 1991 - present	Executive Director
Ontario Securities Commission 1994 - 1997	Commissioner
Boards of Inquiry Ontario Human Rights	Adjudicator
Federation of Law Societies of Canada National Committee on Accreditation 1983- present	Executive Director
McCarthy Tetrault Barristers and Solicitors Toronto 1986-1989	Consultant
MBA-LL.B. Program University of Ottawa 1981-86.	Director of Program
Department of Finance (Ottawa) 1979-80	Chief, Tax Policy & Legislation

Faculty of Law Dalhousie University 1975-78	Associate Professor of Law
Attorney General's Office (1978) Province of Nova Scotia	Crown Prosecutor
University of Alberta Faculty of Business 1969-74	Lecturer in Accounting
Arthur Anderson & Co. 1964-67	Staff Accountant
Ford Motor Co. Ltd. England 1963-64	Financial Analyst

Professional Activities:

Treasurer (President) of the Law Society of Upper Canada	2001 - 03
Elected Bencher, Law Society of Upper Canada,	1991 - 03
Ex Officio Bencher, Law Society of Upper Canada	2003 -
President, Certified General Accountants Association (Ontario)	1995 - 96
Governor, Certified General Accountants Association (Ontario)	1985 - 97
Member of Minister of Revenue's Appeals Advisory Committee	1997 - 99
Managing Editor, *Canadian Corporate Law Reporter,* Butterworths, Toronto.	1987 - 91
Managing Editor, *Canadian Current Tax,* Butterworths, Toronto.	1983 -
Managing Editor, *Canada's Tax Treaties*, Butterworths, Toronto	1996 -
Editor, *Ontario Law Reports*, Butterworths of Canada	1991 -

Executive Director, National Committee on Accreditation, Federation of Law Societies of Canada	1983 -
Canadian Bar Association Committee on Goods & Services Tax	1988

Books Published:

1. *Canadian Taxation*, Richard De Boo Limited, Toronto:
   - 1st Ed. 1979
   - 2nd 1981

2. *The Taxation of Capital Gains*, Butterworths, 1983.

3. *The Fundamentals of Canadian Income Tax,* Carswell Legal Publishers, Toronto:
   - 1st Ed. 1985
   - 2nd 1986
   - 3rd 1989
   - 4th 1993
   - 5th 1995
   - 6th 2000
   - 7th 2002
   - 8th 2004
   - 9th 2006

4. *Tax Avoidance: The General Anti Avoidance Rule,* Carswell Legal Publishers,Toronto, 1989

5. *Canadian International Taxation*, Carswell Legal Publishers, Toronto: 1995 (Looseleaf)

6. *Canada's Tax Treaties*, Butterworths, 1996

7. *The Essentials of Income Tax Law*, Irwin Law, 1997

8. *The Canada - US Tax Treaty,* Lexis Nexis, Canada, 2005

9. *The Canada – UK Tax Treaty,* Lexis Nexis, Canada, 2006

10. *The Canada – India Tax Treaty,* Lexis Nexis, Canada, 2007

11. Halsburys Laws of Canada, General Taxation, LexisNexis, 2008

12. Halsburys Laws of Canada, Corporate Taxation, LexisNexis, 2008

Monthly Contributor of Legal, Finance and Tax Columns to:

Legal Post (National Post)
Lawyers Weekly (Lexis Nexis)
Law Times (Canada Law Book)
Bottom Line (Lexis Nexis)
Canadian Current Tax (Lexis Nexis)
CGA Magazine (CGA Canada)

This is Exhibit "B" referred to in the Affidavit of Vern Krishna sworn March ....9...., 2009

Kate glover

Commissioner for Taking Affidavits (or as may be)

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BORDEN
LADNER
GERVAIS

By Courier

March 4, 2009

Mr. David Thompson
Scarfone Hawkins LLP
One James Street South, 14th Floor
Hamilton ON L8P 4R5

Dear David

Robinson *v.* Rochester Financial Limited
Our File: 332998-000001

Context

I have reviewed the Motion Record in respect of the subject proceedings and the documents filed with the record. Specifically, I reviewed the following:

1. Motion Record in Support of Certification;
2. Motion Record of Gift Program Defendants seeking a Stay of the Action;
3. FMC Opinion Letter dated October 23, 2002; and
4. FMC Opinion Letter dated September 5, 2003.

The following are my preliminary views on the matters that arise under the proposed class action proceeding and the tax dispute between the Plaintiffs (and others) and the Canada Revenue Agency (CRA).

For present purposes, I confine my review and comments to the validity of the "gifts" and the legal opinion thereon. I have not addressed the "limited recourse loan" issue at this time as it is essentially a factual issue. We can do so later if it is necessary.

A. Background Facts

Various versions of the "facts" are outlined in the Motion Record, including the Affidavit of Robert Thiessen [Tab 2], the Fraser Milner Casgrain LLP opinion [Tab 2(D)], and the Statement of Claim [Tab 2(A)]. For present purposes, we summarize the salient facts below:

1. The Plaintiffs (Kathryn Robinson and Rick Robinson – residents of Ontario – and other similarly situated members of the Class) participated in a charitable donation arrangement.

2. The Plaintiffs donated monies, which they claimed as "gifts", and obtained or claimed a tax credit for federal and provincial income tax purposes.

3. The Plaintiffs made the donations pursuant to a Gift Program promoted by three entitles, Promittere Capital Group Inc., Promittere Asset Management Ltd., and Banyan Tree Foundation.

4. The donors made their donations to the Banyan Tree Foundation.

5. Banyan Tree Foundation was a registered charity for purposes of the *Income Tax Act* as defined in s.248(1) of the *Act*. [Canadian Revenue Agency (CRA) revoked the charitable status of the Banyan Tree Foundation in 2008 (see report in the Toronto Star, Friday, December 5, 2008 at page A27)].

6. The Gift Program allowed participants to borrow money for the purpose of making their charitable donations in order to receive a receipt and claim the income tax credit thereon.

   The Gift Program was highly leveraged. The participants paid approximately 13.5% in cash and borrowed approximately 86.5% of the total contribution.

7. The participants of the Program also made a "security deposit".

8. To pre-arrange loans, the donors borrowed money from Rochester, a corporation whose sole purpose was to provide the loans and manage the security deposits.

9. Promittere Asset acted as an agent for Rochester and as an administrative agent for both Rochester and Banyan Tree.

10. In the case of Kathryn in 2003, the leveraged loan and donation worked as follows. Kathryn executed a loan application and Power of Attorney agreeing to pledge a total of $40,000 to Banyan Tree. She paid $5,520 to Rochester on account of the required security deposit. She also paid an additional cash donation of $5,400. Kathryn borrowed $34,600 from Rochester and executed a promissory note in favour of Rochester for that amount. The cash contribution amounted to 13.5% of the charitable donation tax receipt of $40,000 for the 2003 tax year.

11. Kathryn and other participants made similar donations in respect of the 2004 and 2005 taxation years, in each case borrowing a substantial amount of the donation claimed. The loans were secured by promissory notes.

12. The loans were either limited-recourse or full-recourse loans. In the case of the limited-recourse loans, the liability of the participant was stated to be limited to the amount of the security deposit that he or she paid. With the full-recourse loans, the liability of the participant was stated to be off-set by the security deposit and its growth as well as an insurance policy that the Defendants secured.

13. The money borrowed was to be repayable in 10 years (or earlier at the option of the donor) bearing interest at a rate equal to the greater of 4.5% per year and the prescribed rate of interest for the purposes of s.143.2(7) of the Income Tax Act in effect on the date that the lender accepted the donor's loan application.

14. The lender would acquire an insurance policy that would insure the risk that the security deposit (net of interest payment on the loan) would not be sufficient to repay the loan.

15. The essence of the insurance policy was that it would ensure that the growth of the security deposit would produce an annual rate of return sufficient to cover annual interest, income taxes and principal due at the end of the loan.

16. The participants of the Gift Program signed a pledge document under which they pledged the borrowed money (plus a portion of the cash that the participant paid in) to Banyan Tree as a charitable donation. The participants directed that Rochester forward the proceeds of the loan to Banyan Tree.

17. Rochester held the security deposits that the participants paid and invested the amounts for the benefit of the participants pursuant to the agreement.

18. Rochester retained an investment manager to manage most of the security deposits. Promittere Capital managed the remainder.

19. Promittere Asset Management Ltd. obtained a tax opinion from Fraser Milner Casgrain (FMC) on October 23, 2002. The opinion described the income tax consequences for individuals who participated in the Gift Program.

20. The FMC tax opinion is Exhibit "D" in the Affidavit of Robert Thiessen (sworn on October 21, 2008).

21. The FMC opinion *assumes* certain key facts. Some of the underlying assumptions assume the question that needs to be addressed in order to establish the validity of the donations to the registered charity.

    For example, assumption number 3 says that the Foundation will not impose any obligation or restriction on "gifts" made to the Charity. This assumes that the donation is a valid "gift", which is one of the essential issues that the CRA disputes in their assessment.

22. Assumption number 6 says that no donor...will receive "any benefit of any kind" except as described. The issue of whether the Donor receives "any benefit" is also fundamental to the validity of the gifts in question, which are the subject of the CRA assessment.

23. Assumption number 7 states that "the Promoter will deal at arm's length with the Lender". The determination of an "arm's length" relationship is also at the heart of the donation scheme and is a mixed question of fact and law.

24. The FMC Opinion concludes that the cash donations would constitute a "gift" to a registered charity for purposes of the *Income Tax Act* and would entitle the Donor

to a tax credit in respect of the cash donations under s.118.1 of the *Income Tax Act* (Canada).

25. The Opinion is based on certain assumptions outlined on pages 3-4 in 11 numbered paragraphs.

B. Legal, Jurisdictional and Logistical Issues

The intended class action litigation raises three distinct issues:

1. Resolution of the CRA assessment as a matter of tax law;

2. The substance of the FMC tax opinion(s) on which the Plaintiffs presumably relied – in whole or in part – in deciding to make their donations under the arrangement outlined above; and

3. Jurisdiction and the timeline for the resolution of the tax assessments.

Clearly, Items 1 and 2 above are closely related. The appropriateness of the FMC Opinion depends upon an analysis of the facts and law pertaining to charitable donations.

Analysis

1. Resolution of the CRA Assessment as a Matter of Tax Law

The CRA issued several potential pre-assessment letters to the Plaintiffs in respect of the taxation years under review. The letters are essentially similar.

The February 21, 2007 letter to Richard Robinson in respect of the 2003 taxation year in Exhibit E" of Robert Thiessen's Affidavit (October 21, 2008) is representative of the CRA's position.

The CRA challenges the validity of the Gift Program and the 2003 claim for charitable donations credit on three grounds:

1. "There was not a valid 'gift' pursuant to s.118.1 of the *Income Tax Act.*" The CRA challenges the validity of the gifts under several headings. The department says that the donations were not a gift because the loans were not *bona* fide loans. They assert that the gifts were shams and that the donors received benefits by virtue of the loans entered into with respect to the donations.

2. "The Program is a tax shelter pursuant to s.237.1 of the *Act* and the loan obtained is a limited-recourse amount pursuant to s.143.2 of the *Act*"; or

3. "The General Anti-Avoidance Rule contained in s.254(2) of the *Act* applies since there has been a misuse of s.118.1 of the *Act* and an abuse of the object and spirit of the Act read as a whole".

The letter states that the CRA will disallow the *entire* amount of the donation claim.

(a) What Constitutes a Gift?

There are two substantive legal criteria for determining the deductibility of a charitable donation:

1. Does the contribution constitute a gift?; and

2. Was the gift to a registered charity or other public service organization?

The validity of the Gift Program initially depends upon the answers to these two questions.

The *Income Tax Act* does not define "gift". At common law, a gift is a voluntary transfer of property for no consideration or material advantage. A transfer of property is a gift where it is made:

- By way of benefaction;
- Without exchange for material reward or advantage; and
- Without contractual obligation.

The essence of a gift is that it is a transfer without *quid pro quo* – a contribution motivated by detached and disinterest generosity.

The meaning of "gift" for Canadian tax purposes is well established. The Tax Court of Canada ("T.C.C.") generally relies on the definition of "gift" espoused in *Friedberg v. R*, – 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".[1]

Based on the *Friedberg* definition, the T.C.C. identifies the following as elements of a "gift" for tax purposes:[2]

1. The gifted property must be owned by the donor.

2. The transfer to charity must be voluntary.

3. No consideration can flow to the donor in return for the gift.

4. The subject of the gift must be property, as distinguished from providing services.[3]

Overlying these elements is the "general notion that a taxpayer must have a donative intent in regards to the transfer of property to the charity".[4]

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1 *Friedberg v. R* (1991), 92 D.T.C. 6031 (F.C.A.); aff'd [1993] 4 S.C.R. 285 [*Friedberg*].

2 *Coombs, supra.*, note 4 at para. 15.

3 The T.C.C. recently confirmed that a gift for income tax purposes must involve the transfer of "something known to law as property"; that is, something within the usual meaning of the term. "Property" does not include the supply of services without compensation. See *Slobodrian v. Canada (Minister of National Revenue)*, [2003] F.C.A. 350 at paras. 11-15. See also *Slobodrian v. Canada*, [2005] F.C.A. 336, in which the Federal Court of Appeal came to the same conclusion regarding the same facts. Leave to appeal the latter decision was dismissed, [2005] S.C.C.A. No. 552. See also *Rapistan Canada Limited v. Minister of National Revenue* (1974), 74 D.T.C. 6426 (F.C.A.), aff'd (1976), 65 D.L.R. (3d) 383, [1976] S.C.J. No. 128 (S.C.C.); *Manrell v. Canada*, [2003] F.C.A. 128. Note also that "property" is defined in the ITA at subsection 248(1).

4 *Coombs, supra.*, note 4 at para. 15.

The meaning of donative intent and consideration is unsettled. The law pertaining to these issues has been in flux for some time and needs clarification.[5] The primary area of concern is whether or not a donor can have any expectation of benefit without vitiating the gift. This issue is addressed in a separate section below.

It is worth noting that on the issue of gifts generally that the T.C.C. recently confirmed that a donor's hopes that a gift will be used in a particular way does not, at common law, negate the legal characterization of the transfer as a gift. In *Benquesus v. Canada*,[6] Mr. Benquesus transferred a significant sum of money to the Sephardic Educational Foundation ("SEF"). With the donation, Mr. Benquesus submitted a letter indicating that the funds were a loan to SEF on behalf of Mr. Benquesus' children. If the children required the funds for their own use, Mr. Benquesus instructed SEF to pay them accordingly. Otherwise, SEF was entitled to consider it a donation if the children forgave the loan.

Mr. Benquesus' children forgave some, but not all, of the loan. In 1999, the Foundation issued charitable receipts to the children for the donations. The children claimed tax credits. The Minister disallowed the credits. The children appealed on the grounds that their father (or father-in-law) had gifted them the money in question, which the taxpayers then donated. The issue turned on whether or not Mr. Benquesus had gifted the money to his children or had donated the money to SEF personally.

The T.C.C. allowed the taxpayers' appeal. The three requirements for an *inter vivos* gift are: (1) an intention to donate; (2) acceptance by the donee; and (3) a sufficient act of delivery. With respect to the first requirement, Mr. Benquesus had a history of transferring money to his children and explicitly stated, by letter, that the money was to be transferred from SEF to the children at the children's request. This was sufficient to establish an intent to gift monies to his children. Secondly, the children accepted the gift. They were aware of the transfer to SEF and its terms. his awareness, combined with their instructions to SEF to retain some of the funds while taking some themselves, established acceptance. According to the T.C.C., the bar for finding acceptance is low. Finally, with respect to delivery, the T.C.C. applied the following tests: Has the donor retained the means of control or, has all that can be done been done to divest title in favour of the donee? On the evidence, the children effectively took control of the money by instructing the SEF to retain some money as a donation and to pay them the remainder. This was a sufficient act of delivery to perfect Mr. Benquesus' gift to his children. Mr. Benquesus' hope that his children would forgive the loan did not negate either intent or delivery. In the result, the children were entitled to the claimed tax credit.

"The essence of a gift is that it is a transfer without *quid pro quo*, a contribution motivated by detached and disinterested generosity".[7] In other words, the donor of a gift, in the legal sense of "gift", must intend to benefit the recipient charity and cannot expect any benefit in return. According to the T.C.C.,

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5 See, for instance, *R. v. Bromley*, [2004] B.C.P.C. 48; [2004] 3 C.T.C. 58 at paras. 115 and 121 [*Bromley*].

6 [2006] T.C.C. 193, [2006] T.C.J. No. 149 (QL) [*Benquesus* cited to T.C.J.].

7 *Tite v. M.N.R.*,, [1986] 2 C.T.C. 2343, 86 D.T.C. 1788 (T.C.C.).

> There is an element of impoverishment which must be present for a transaction to be characterized as a gift. Whether this is expressed as an *animus donandi*, a charitable intent or an absence of consideration the core element remains the same.[8]

Recent Canadian case law discloses continued reliance on traditional definitions and principles regarding gifts. However, the following developments are of note:

1. A donor's hope that a gift will be used in a particular way does not alter the gift's legal characterization as such.

2. The common law regarding donative intent and consideration in the context of gifts is unsettled. It is well established that, in order to constitute a gift, a donor must have donative intent. There is some uncertainty as to the requisite extent of that intent and its link to partial consideration that a donor receives in return for a donation.

3. Donative intent is a key issue in cases dealing with charitable donation tax shelter schemes. Recent cases demonstrate that a lack of donative intent is a consistent downfall for participants in charitable donation tax shelter schemes. While the presence or absence of donative intent is ultimately a factual inquiry, the cases confirm the "common sense" and "trite" points of law that "the anticipation and receipt of a cash *kickback* equal to 75% of [a] donation vitiates the gift"[9] and that donations made with the *sole* intent to receive a tax receipt do not trigger the tax credit provisions of the *Income Tax Act* ("*ITA*").[10]

4. Amendments to the *ITA*[11], first tabled in 2002, which have not yet received Royal Assent, may clarify the law regarding donative intent, at least in the tax context. The amendments modify the *ITA*'s gift scheme by establishing a split-receipting regime. The extent to which this legislative change will alter the common law definition of "gift" in the tax realm, if at all, is speculative and will be open for assessment after the amendments come into force and are judicially considered. They are not directly relevant to the present litigation.

5. Case law to date indicates that the split-receipting regime will apply, even if the donor in question legitimately intends to give the full amount of a donation to a charity.

In England, the current meaning of "gift" is accurately summarized in the 2004 Reissue of *Halsbury's Laws of England* ("*Halsbury's*") as: "the transfer of any property from one person to another gratuitously". With respect to donative intent and consideration, the English courts recently confirmed that gifts must be voluntary, purely gratuitous and made with an intent that the gift shall not be returned. Further, while donors must, in theory, own the property being

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8 *McPherson, supra.*, note 3 at para. 20.

9 *McPherson,* [2006] T.C.C. 648, [2006] T.C.J. No. 519 at para. 22 [*McPherson*].

10 See *Coombs v. Canada*, [2008] T.C.C. 289 [*Coombs*].

11 Bill C-10, *An Act to amend the Income Tax Act, including amendments in relation to foreign investment entities and non-resident trusts, and to provide for the bijural expression of the provisions of that Act*, 2nd Sess., 39th Parliament, 2007 (as passed by the House of Commons 29 October 2007).

transferred, the concept of "ownership" may be flexible and may evolve to accommodate statutory modifications.

(b) Donative Intent

The law of donative intent and consideration is somewhat unsettled In *R. v. Bromley,* Bruce Prov. J. observed, "it is apparent that a definition of gift that includes the notion of a voluntary transfer without conditions or expectation of return has not been consistently applied by the Courts in taxation cases".[12] Further, Bruce Prov. J. noted, "There is a live issue in the civil tax jurisdiction as to whether and to what extent a donor may reap a benefit from the donee in consideration for a donation and still qualify for a tax credit".[13]

Despite the uncertainty, some common law issues have been fairly well accepted. First, the tax credit triggered by a charitable donation is not a "benefit" that vitiates a gift. According to the Federal Court of Appeal in *Friedberg*,

> 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.[14]

The issue of whether or not a donor receives a disqualifying benefit is often considered in terms of donative intent. If a taxpayer donates money to a charity and receives a tax receipt in return, the donation constitutes a gift as long as the donor intends, at least in part, to benefit the charity.[15] However, if the taxpayer donates money with the sole intent of receiving a tax credit, the requisite donative intent is absent and the taxpayer is ineligible for a tax credit.

Two recent cases from the T.C.C. illustrate the distinction. First, in *Cote v. Canada,*[16] the taxpayer had the requisite donative intent when donating art and jewellery to a charity, even though the taxpayer's primary motivation was to receive a tax advantage. The tax advantage was not a disqualifying benefit and the taxpayer was found to have intended, at least in part, to benefit the charity in question. In contrast, in *Coombs v. Canada* ("*Coombs*"),[17] the taxpayer appellants gave money to a registered charity through a donation program created by an accountant, Harold Coombs ("Accountant"). The taxpayers received receipts from the charity.

The evidence revealed that each "donation" involved no transfer of property to the charity or a transfer of money into the charity's bank account followed by a transfer out, on or around the same day, to the donors, to parties identified by the donors or to parties closely connected to the Accountant. Upon deciding whether or not charitable donations had been made, only donative intent was at issue. Although the mechanics of the donation program remained a mystery, the T.C.C. concluded, "the scheme involved the issuance of false donation receipts in circumstances

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12 *Bromley, supra.*, note 12 at para. 115.

13 *Bromley, supra.*, note 12 at para. 121.

14 *Friedberg, supra.*, note 2.

15 See, for instance, *Cote v. Canada*, [1998] T.C.J. No. 1046 (T.C.C.); aff'd [2000] F.C.J. No. 1805 (F.C.A.) [*Cote*] and *Paradis v. Canada*, [1996] T.C.J. No. 1638 (T.C.C.). Note that both of these cases were subject to the *Civil Code of Quebec.*

16 *Cote, ibid.*

17 *Coombs, supra.*, note 4.

where there was never any intent to benefit the charity".[18] None of the taxpayers intended to contribute to the charity. Rather, their sole intent in writing cheques to the charity was to achieve a tax savings.[19] As a result, no gift was made at any time and the tax credit was properly disallowed.

A set of cases arising out of donations to the Association for the Betterment of Literacy and Education (ABLE) offers further insight into the courts' interpretation of donative intent.[20] While the workings of the ABLE donation program varied over time and by investor, one variant of the scheme involved donors transferring funds to ABLE, receiving a receipt for the full amount of the transfer, and then receiving a payment (dubbed an "educational gift") worth 75% of the original donation from ABLE or a third party. In each case, the taxpayer claimed a tax credit for the full donation amount on his or her tax return. In each case, the Minister disallowed the tax credit on the grounds that the educational gift was a kickback which vitiated the gift.

On appeal to the T.C.C., the issue was whether or not the taxpayers in question had donative intent when giving money to ABLE. In each case, the Court concluded that the taxpayer had no donative intent, at least not with respect to the full amount claimed. Rather, the taxpayers donated money to ABLE in order to receive a tax credit and a substantial refund of the amount "donated".[21] As a result, the taxpayers were ineligible for the tax credit. Documentation, signed by the taxpayers at the time of donation, stating that the donations were made without any material expectation of receiving a gift in return did not rebut the Court's conclusions. The documentation was merely "window-dressing or self-serving statements".[22]

When a donor hopes for or is aware of a potential future benefit from the donation, the donor's genuine donative intent is not fully vitiated. In *Doubinin v. Canada,*[23] another case arising out of the ABLE donation program, the taxpayer followed the advice of his financial planner and donated $6,887 to ABLE. The taxpayer had received confirmation from CRA that ABLE was a registered charity. The taxpayer believed that if he donated $6,887, he would be eligible to receive a charitable donation receipt for $27,548 if a non-resident trust, the Publishers Philanthropic Fund of Bermuda ("PPFB"), a private philanthropic entity, made a charitable donation triple that of the taxpayer's, to ABLE on the taxpayer's behalf. The taxpayer was aware that PPFB was not obliged to make a donation and he neither expected nor knew that PPFB would donate. After the taxpayer made his donation, he received a tax receipt for $27,548. ABLE told the taxpayer that PPFB made the hoped for donation. As a result, the taxpayer claimed the full amount as a tax credit.

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18 *Coombs, supra.*, note 4 at para. 20.

19 See also: *Abouantoun v. Canada*, [2001] T.C.J. No. 653 (T.C.C.) and *Dutil v. Her Majesty the Queen* (1991), 95 D.T.C. 281, in which the T.C.C. concluded that taxpayers who make donations in order to receive a tax benefit are not eligible for a tax credit.

20 *Norton v. Canada*, [2008] TCC 91 [*Norton*]; *McPherson, supra.*, note 8; *Webb, supra.*, note 8; *Doubinin supra.*, note 8.

21 *Norton, ibid.; Webb, supra.*, note 8.

22 *Norton, ibid.* at para. 14.

23 *Doubinin, supra.*, note 8.

The Minister disallowed the credit on the basis that the expected benefit was an inflated tax receipt. Upon learning, from the Minister, that PPFB had not made a donation, the taxpayer reduced his claim for a tax credit to the amount of his personal cash donation – $6,887.

The T.C.C. held that ABLE's promoter might be part of a fraudulent scheme but that the taxpayer was not part of any tax evasion scheme. The T.C.C. accepted that the taxpayer had the donative intent necessary to establish that his donation of $6,887 was a charitable donation to a registered charity. The taxpayer did not expect anything in return for his donation.

On appeal to the Federal Court of Appeal ("F.C.A."), the Minister argued, *inter alia*, that the taxpayer's hope to be entitled to a tax credit of $27,548 disentitled the taxpayer to a tax credit for any amount. In other words, reliance on the inflated tax receipt was a benefit that vitiated the entire gift. The F.C.A. rejected this argument, holding that the T.C.C. did not err in finding that the taxpayer had no expectation of a benefit. There was no evidence that the taxpayer knew of any wrongdoing.

Finally, it is of note that the fact that a donation program's creator sought an opinion regarding the program's legality may be insufficient to support the conclusion that the program's participants gave gifts, in the legally relevant sense. In *Norton v. Canada,*[24] the T.C.C. noted that Mr. Norton, the program's promoter, had obtained a positive legal opinion regarding ABLE's donation program prior to soliciting donations. Despite the opinion, the T.C.C. concluded that no true gifts had been made. The T.C.C. stressed that the legal opinion made no mention of the fact that the "educational gift" back to donors would amount to 75% of the donation or that all donors would receive the gift. Further, the opinion explicitly assumed that all donations made were "voluntary, unconditional and gratuitous transfer[s] of property", made without the expectation of receiving a benefit. The opinion warned that if donors expected a benefit in return for their donation, they would not be entitled to a tax credit.

(c) Other Legal Challenges

In addition to challenging the validity of the Plaintiff's gifts to the Foundation, the CRA also challenges the tax credits on several other grounds.

The most complex of these challenges will be under the GAAR, a complex anti-avoidance provision. The Supreme Court of Canada rendered its split 4:3 decision in *Lipson* in January 2009. There were two separate dissents.

For present purposes, I will not review the complex law relating to each of the heads of the potential assessment that the CRA threatens to issue the Plaintiffs. Suffice it to say that they are all complicated questions of fact and law. As noted above, the law in respect of GAAR is particularly difficult because it is relatively new and the courts are developing their jurisprudence.

Given the broad scope of the CRA assessment, the Tax Court of Canada could decide the validity of the Gift Program on any of the assessed grounds.

2. The FMC Opinion

As noted above (see Background Facts), the FMC opinion *assumes* certain important facts that are central to the issue under consideration.

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24 *Norton, supra.*, note 24.

The FMC Opinion circumvents some of the complex issues pertaining to gifts because it *assumes* that the donations are "gifts" made to a charity. That, of course, is the very essence of the issue that CRA is reviewing and assessing.

Based on its assumptions of fact and law, the FMC concludes that the Cash Donation constitutes a gift to a registered charity for the purposes of the *Income Tax Act* that will entitle the Donor to a tax credit in respect of his or her Cash Donation under s.118.1 of the *Act*.

Similarly, the FMC opinion assumes that the Donor will not receive any benefit of any kind in return for his or her Cash Donation. The CRA seriously challenges that assumption (see Exhibit "E" at page 6).

Thus, the Opinion assumes several of its key conclusions. The CRA refutes the conclusions.

FMC should have been aware that participants in the Gift Program and Donors would rely on the Opinion – in detail or in summary – to determine that the program was acceptable for tax purposes and the charitable donation credit. Thus, FMC should have anticipated that their Opinion would likely be part of the marketing documents of the Gift Program to potential Donors. Such tax opinions are usually used to market tax programs.

Assuming the essential element of its Opinion – that the donation was a valid and proper gift for tax purposes – was not reasonable in the particular circumstances.

Investors relying on the FMC Opinion would derive unwarranted confidence from the Opinion. (The Thiessan Affidavit notes at paragraph14 that the Opinion was available to participants.)

The FMC Opinion quite properly, and conservatively, advised that the promoters of the Gift Program should apply for tax shelter identification numbers.

3. Jurisdiction and Timeline for Resolving the Tax Dispute

(a) General Comments

The income tax system operates on the basis that a taxpayer initially assesses their own tax liability in respect of a taxation year. The tax return is then examined by the Minister, who may assess, or reassess, the taxpayer in respect of the taxpayer's self-assessed liability. A taxpayer who is assessed by the Minister may appeal the assessment.

Once issued, the Minister's assessment may be challenged only through an appeal. It cannot be challenged by a writ of *certiorari*.[25]

(b) Notice of Objection

The first formal legal step in the appeal process is the filing of a Notice of Objection.[26] Although a taxpayer may negotiate with the Agency prior to filing a Notice of Objection, *all* of the taxpayer's statutory legal rights in respect of an appeal hinge upon the timely filing of the objection — that is, within the 90-day period from the *date of mailing* of the notice of assessment

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25 *Federal Court Act*, R.S.C. 1985, c. F-7; see *The Queen v. Parsons*, [1984] C.T.C. 352, 84 D.T.C. 6345 (F.C.A.) (Minister's assessments not to be reviewed, restrained or set aside by court in exercise of its discretion under ss. 18 and 28 of *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.)).

26 S. 165; IC 98-1R, "Collection Policies" (Sept. 15, 2000).

or within one year of the "filing due date". The 90-day time limit is strictly enforced, and is extended only in exceptional circumstances.[27]

(c) Administrative Appeals

An "administrative appeal" involves discussion with, and representations to, the CRA to determine whether the matters raised in the Notice of Objection can be resolved on an informal basis. At this stage of the dispute, the taxpayer (or the taxpayer's representative) may be asked to supply further information by way of explanation or supplementary documentation.

Failing resolution of disputed items, the next step for the taxpayer is to proceed to the more formal administrative process before the Appeals Branch of the CRA. The Appeals Branch is theoretically "independent" of the auditing and assessing sections of the Agency. It is supposed to take a fresh and independent view of the facts and the law and render a decision on an objective basis.

It is, however, important to bear in mind that the staff of the Appeals Branch are recruited from the audit and assessing sections of the Agency and they return to their assessing responsibilities upon completion of their tour of duty with the Appeals Branch. Therefore, their approach to appeals may be influenced both by their past association with the assessing and audit divisions and the knowledge that they will return to their peers in those divisions upon completion of their assignment in Appeals.

(d) Appeal to Tax Court

Where a taxpayer fails to resolve a dispute with the Agency at an administrative level, he or she may launch an appeal to the Tax Court. An appeal lies to the Tax Court where the Minister has confirmed the assessment or 90 days have elapsed from the date of service of the Notice of Objection.[28]

(i) General Comment

The Tax Court of Canada has the sole and exclusive jurisdiction to hear appeals under the *Income Tax Act*. The Court has two different tracks: informal and general.

The Tax Court of Canada has the exclusive jurisdiction to hear and determine references and appeals on matters arising under the *Income Tax Act* (Canada).[29]

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27 Ss. 166.1, 166.2; see, e.g., *Morasutti v. M.N.R.*, [1984] C.T.C. 2401, 84 D.T.C. 1374 (T.C.C.) (leave refused where taxpayer's solicitor became aware of necessity to file within two weeks of expiry of 90-day period); *Wright v. M.N.R.*, [1983] C.T.C. 2493, 83 D.T.C. 447 (T.R.B.) (leave refused where taxpayer missed limitation period because he would not pay his lawyer's retainer); *Horton v. M.N.R.* (1969), 69 D.T.C. 821 (T.A.B.) (taxpayer served notice of objection 92 days after date of assessment after learning only on last day that he had to file such notice; board rejected argument and dismissed appeal); see also *Gregg v. M.N.R.*, [1969] Tax A.B.C. 782, 69 D.T.C. 559; *Brady-Browne v. M.N.R.* (1969), 69 D.T.C. 797 (T.A.B.); *Grenier v. M.N.R.* (1970), 70 D.T.C. 1299 (T.A.B.); *Vineland Quarries & Crushed Stone Ltd. v. M.N.R.*, [1971] C.T.C. 501, 71 D.T.C. 5269 (F.C.T.D.); varied as to costs [1971] C.T.C. 635, 71 D.T.C. 5372 (F.C.T.D.); *Paletta v. M.N.R.*, [1977] C.T.C. 2285, 77 D.T.C. 203 (T.R.B.).

28 Ss. 169(1).

29 Section 12, *Tax Court of Canada Act.*

The jurisdiction of the Tax Court is confined to that which the Parliament of Canada, either expressly or by necessary implication, has conferred upon it.[30] The Tax Court does not have jurisdiction for judicial review of unfair and arbitrary exercise of discretionary powers conferred by statute. The latter jurisdiction rests with the Federal Court of Canada.

Since the Tax Court of Canada is a purely statutory creation, its jurisdiction is confined to what is expressly conferred upon it by Parliament and what is necessarily implied from what is expressly conferred.[31]

Section 12 of the *Tax Court of Canada Act* gives the court original jurisdiction to hear and determine appeals and matters arising under the *Income Tax Act*. Subsection 171(1) of the *Income Tax Act* regulates how the court my exercise its original jurisdiction.

(e) Disposition of Appeal by Tax Court

The Tax Court can dispose of an appeal in one of four ways. It may:[32]

1. Dismiss the appeal;
2. Vacate the assessment;
3. Vary the assessment; or
4. Refer the assessment back to the Minister for further reconsideration and reassessment.

(f) Appeal to the Federal Court of Appeal

Decisions of the Tax Court of Canada rendered under the General Procedure may be appealed to the Federal Court of Appeal pursuant to the rules of the *Federal Courts Act*.[33]

(i) Procedure

An appeal to the Federal Court of Appeal must be instituted within 30 days from the judgment of the Tax Court. The appeal is commenced by filing a Notice of Appeal with the Federal Court Registry and by serving all parties who are directly affected by the appeal with a true copy of the Notice.

Evidence of service must also be filed with the registry of the court.[34] The Federal Court of Appeal hears appeals with a panel of three judges.[35]

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30 *Kravetsky v. the Queen,* [1999] 1 C.T.C. 2809; 99 D.T.C. 451 (T.C.C.).

31 *Lamash Estate v. M.N.R.* (1990), 2 C.T.C. 2534; 91 D.T.C. 9 (T.C.C.).

32 Ss. 171(1).

33 R.S.C. 1985, c. F-7, s.27(1.1).

34 *Federal Courts Act*, s.27(2), (3).

35 *Federal Courts Act*, s.16(1).

(g) Appeal to the Supreme Court of Canada

A decision of the Federal Court of Appeal may be appealed, but only with leave, to the Supreme Court of Canada. Leave to appeal may be granted either by the Federal Court of Appeal or by the Supreme Court of Canada. There is no automatic right of appeal to the Supreme Court of Canada. Leave to appeal is granted only if the court is satisfied that the question being appealed involves a matter of public importance or is one which, in its opinion, it should hear for any other reason.

The Supreme Court receives approximately 600 applications for leave to appeal each year of which it grants approximately 12 per cent. The probability of having the Supreme Court hear a tax appeal is low – in the order of 0.2 to 0.5 per cent. A panel of three judges usually decides leave applications.

An appeal to the Supreme Court of Canada must usually be brought within 30 days from the pronouncement of the judgment by the Federal Court of Appeal, or within such further time as a judge of the Federal Court of Appeal allows.

A copy of the Notice of Appeal must be filed with the Registrar of the Supreme Court, and all parties directly affected by the appeal must be served with a copy of the Notice. Evidence of service of the Notice must also be filed with the registrar of the Supreme Court.

(h) Timelines

The timeline for adjudicating disputes between tax payers and the CRA depends upon the complexity of the issues, the number of tax payers involved in similar situations, the potential cost of revenues lost to the treasury, and the extent to which the tax payer is prepared to litigate.

Generally speaking, the timeline is long. Administrative discussions with the CRA can extend to 3 or 4 years in complicated situations. Failure to reach an administrative resolution with the CRA will require litigation.

The first step is in the Tax Court of Canada, where litigation from beginning to end can extend to 2 to 3 years. In a case of this type, the process will be long and discoveries will be extensive because of the nature of the factual issues and the number of parties involved in the Gift Program. A litigant can appeal the Tax Court's decision to the Federal Court of Appeal as a matter of right. We can reasonably consider the appeal extending over 1 to 2 years.

Thus, it is quite possible that the litigation in the tax forum will extend between 6 to 9 years.

Yours very truly

Borden Ladner Gervais LLP

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KATHRYN ROBINSON et al.
Plaintiffs

-and-

ROCHESTER FINANCIAL LIMITED et al.
Defendants

Court File No. 08-CV-349792

ONTARIO
SUPERIOR COURT OF JUSTICE

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RCP-E 4D (November 1, 2005)

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