(sub nom. Pustina v. R.), 96 D.T.C. 1594, [1996] 3 C.T.C. 2542

1996 CarswellNat 1631

Whent v. R.

Ken A. Whent v. Her Majesty The Queen

Tax Court of Canada

Mogan J.T.C.C.

Judgment: July 12, 1996
Docket: Court File Nos. 92-423(IT)G, 92-424(IT)G

Counsel: Arthur Drache Q.C., Nikol J. Schultz and Lynda M. Colley for the appellant.

Al Meghji and Jay Humphrey for the respondent.

Subject: Income Tax (Federal)

Income tax --- Capital gains and losses -- Capital gains exemption -- Miscellaneous issues.

Income tax -- Federal -- Income Tax Act, S.C. 1970-71-72, c.63 -- 39(1)(a)(i.1), 69(1)(b), 110(1)(b.1) -- Capital property -- Taxpayers collectively purchased 216 works of art by prominent Canadian artist over two year period -- During next two years, all of works were divided into five batches and donated to four public art galleries or museums in Canada -- Until the taxpayers made a decision with respect to ultimate use or resale, the status of their early purchases as capital or trading property was in limbo -- Once taxpayers decided to donate their early and subsequent purchases to public galleries, that method of disposition crystallized character of art as capital property in their hands -- Appeal was allowed -- Charitable donations -- Taxpayers were entitled to claim exemption under 39(1)(a)(i.1) of Act for any capital gains deemed to have been realized upon donation of works of art and to deduct value of gifts to institutions when computing taxable income -- Valuation of works of art -- Appraisals obtained by both taxpayers and Minister regarding collection of 216 paintings done by prominent Canadian artist were seriously deficient -- Expert appraisals in favour of taxpayers placing fair market value of works at $990,000 and $1,104,795 ignored realities of existing market for artist's new works at time -- Expert appraisal in favour of Minister placing fair market value at $255,155 incorporated 50 per cent block discount on basis that taxpayers were in hurry to sell, premise which was not supported in evidence -- By comparing and adapting some of information used by each of expert witnesses, court arrived at aggregate value of $660,000 for all 216 works.

The taxpayers appealed from the Minister's reassessments for the taxation years 1984, 1985, 1986 and 1987 disallowing exemption for any capital gains they realized upon donation of works of art and deductions of value of gifts to institutions. The three appeals were heard on common evidence. The taxpayers collectively purchased 216 works of art by a prominent Canadian

artist between March 1984 and February 1986 at prices which they honestly thought were lower than the fair market value of those works. During a period commencing December 1984 and ending in December 1986, all of those works of art were divided into five batches and donated to four public art galleries or museums in Canada which met the requirements of paragraph 110(1)(b.1) of the Income Tax Act. All of the works were certified by the Canadian Cultural Property Export Review Board in accordance with subparagraph 39(1)(a)(i.1) and were appraised by the Professional Art Dealers Association of Canada Inc. (PADAC) with respect to fair market value. The PADAC appraised value was communicated to the four public art galleries or museums which then issued to the taxpayers receipts as required by paragraph 110(1)(b.1). The aggregate cost of the works was $130,000 and PADAC appraised them as having a fair market value of $990,000. The Minister reassessed on the basis that the value of the works of art as appraised by PADAC was too high; that the fair market value of the works at the time of donation was equal to their cost to the taxpayers; that the purchase was part of an adventure in the nature of trade; and because the amount of the deemed proceeds of disposition was equal to the actual cost of the works of art, the taxpayers suffered a business loss on the donation of the works of art equal to their appraisal costs.

Held:

Appeal was allowed.

The works of art were capital properties to the taxpayers and they were entitled to deduct charitable donations of $660,000. If the taxpayers had sold the works at the same time and in the same five batches and at the same value as the five actual donations to public galleries, those hypothetical sales would have been adventures in the nature of trade. Without any sales, however, the status of the works as capital or trading property could not be determined in the first few months of ownership by the taxpayers. Until the taxpayers made a decision with respect to ultimate use or resale, the status of their early purchases was in limbo. Once they decided to donate their early and subsequent purchases to public galleries, that method of disposition crystallized the character of the art as capital property in their hands because (i) they had no opportunity for profit from that method of disposition; and (ii) they had no other established use or intended method of disposition before that time. The taxpayers did not receive any consideration from the donee public galleries. The fact that certain financial advantages in the form of income tax reductions accrued to the taxpayers from their donations of the art to prescribed institutions does not by itself impart a profit motive to those donations or cause the art to be regarded as anything but capital property at the times of those donations.

Regarding the fair market value of the works of art, the PADAC appraisal of $990,000 was based on $3.00 per square inch formula as a guideline which was itself based on the assumption that there was a viable private gallery market for new paintings by the artist in 1984, 1986 and 1986. That market had not been proven, leaving the court to conclude that it was very shaky or did not exist. Therefore, the cornerstone of the PADAC appraisal was seriously damaged. Furthermore, the appraisal of the independent expert retained by the taxpayers for trial valuing the works at $1,104,795, also ignored the realities of the market for the artist's new works in 1984, 1985 and 1986, as well as the artist's regrettable down-and-out lifestyle in those years. Any fully informed owner of a retail art gallery would know or should have known in 1984, 1985 and 1986 that the artist's new works were being sold by his friends and relatives on the streets of Thunder Bay at bargain prices. That knowledge would affect the prices which the owner of a retail art gallery could charge for new works in those years. Therefore, the cornerstone of the taxpayer's independent appraisal was also seriously damaged.

The court also rejected the appraisal of the Minister's expert witnesses, who valued the works individually at $510,310 and then applied a block discount of 50 per cent to arrive at a final value of $255,155. The 50 per cent discount was based on the assumption that the taxpayers wanted to sell all 216 works in a very short time span. There was no evidence that the taxpayers were under any pressure to dispose of the works. The fact that they decided to give away all of the works within a two year period did not mean that they would attempt to sell it within the same period if they had decided to follow the sale route.

Having rejected the different values offered by the experts, the court set out to determine the fair market value of the works. The court found that the best first hand evidence of arm's length transactions in 1984, 1985 and 1986 were the 27 purchases by the taxpayers at an aggregate cost of $130,000. Accepting that the taxpayers were purchasing bargains, the fully informed buyers and sellers in the open market where fair value was determined in 1984, 1985 and 1986 would know where the artist was living in those years and that his new works were available at bargain prices on the streets of Thunder Bay. By comparing and

(sub nom. Pustina v. R.), 96 D.T.C. 1594, [1996] 3 C.T.C. 2542

adapting some of the information used by each of the expert witnesses, the court arrived at a value of the works based on $2.00 per square inch, for an aggregate value of $660,000.

Cases cited:

Happy Valley Farms Ltd. v. Minister of National Revenue (sub nom. Happy Valley Farms Ltd. v. R.), [1986] 2 C.T.C. 259, 86 D.T.C. 6421;

First Investors Corp. v. R. (sub nom. First Investors Corp. Ltd. v. The Queen), [1987] 1 C.T.C. 285, 87 D.T.C. 5176;

Loewen v. Minister of National Revenue (sub nom. Loewen v. Canada) (sub nom. Loewen v. R.), [1994] 2 C.T.C. 75, 94 D.T.C. 6265;

Friedberg v. R. (sub nom. Friedberg v. Minister of National Revenue) (sub nom. Friedberg v. Canada) (sub nom. R. v. Friedberg), [1992] 1 C.T.C. 1, 92 D.T.C. 6031, [1993] 4 S.C.R. 285, [1993] 2 C.T.C. 306, 93 D.T.C. 5507;

Bibby v. R. (sub nom. Bibby Estate v. The Queen, [1983] C.T.C. 121, 83 D.T.C. 5148.

Legislation cited:

Income Tax Act, S.C. 1970-71-72, c.63, as amended –

39(1)(a)(i.1)

69(1)(b)

110(1)(b.1)

Mogan J.T.C.C.:

1 The appeals of *Whent v. R.* (July 12, 1996), Docs. 92-423(IT)G, 92- 424(IT)G, 92-425(IT)G (T.C.C.) were heard together on common evidence. At all relevant times, the three Appellants were lawyers who practised law together in partnership in the City of Thunder Bay, Ontario. During a 24-month period from March 1984 to February 1986, the Appellants purchased approximately 215 works of art by Norval Morrisseau (a prominent Canadian artist who is described below) at prices which the Appellants honestly thought were lower than the fair market value of those works. During a period commencing in December 1984 and ending in December 1986, all of those works of art were divided into five batches and donated to four public art galleries or museums in Canada which met the requirements of paragraph 110(1)(b.1) of the *Income Tax Act*.

2 Two other individuals participated with the three Appellants in the purchase of the first 79 works of art from March 1984 to January 1985 and the subsequent donation of those 79 pieces, but those two individuals are not parties to these appeals. Although the participation of those two individuals had an obvious effect on the allocation of the cost and donated value of those first 79 pieces, I shall for convenience in these reasons for judgment ignore their participation because appropriate adjustments for that allocation were made in the reassessments which are under appeal. I shall describe the acquisition and disposition of the 215 works of art as if the three Appellants were the only purchasers and donors.

3 All of the works of art by Norval Morrisseau purchased by the Appellants in the period 1984-86 were certified by the Canadian Cultural Property Export Review Board in accordance with subparagraph 39(1)(a)(i.1) of the *Income Tax Act*, and those same works were appraised by the Professional Art Dealers Association of Canada Inc. (PADAC) with respect to fair market value. The PADAC appraised value was communicated to the four public art galleries or museums which received the

donated works of art. Those galleries and museums then issued to the Appellants receipts as required by paragraph 110(1)(b.1) of the Act for amounts consistent with the PADAC appraised values of the donated art. The amounts involved are significant. The aggregate cost of the 215 works of art to the Appellants was $129,350 which, for convenience, I will state as $130,000. PADAC appraised those same works of art as having a fair market value of $992,900 which I will state as $990,000.

4 When computing income for the years 1984, 1985 and 1986, the Appellants claimed an exemption under subparagraph 39(1)(a)(i.1) of the Act for any capital gains they may be deemed to have realized upon the donation of the works of art. And when computing taxable income, they deducted the value of gifts to institutions described in paragraph 110(1)(b.1) of the Act relying on the receipts which had been issued by the four public art galleries or museums. For 1987, they carried forward and deducted under paragraph 110(1)(b.1) the remainder of the amounts which could not be absorbed by their aggregate taxable income in the three preceding years. The Minister of National Revenue issued reassessments for the taxation years 1984, 1985, 1986 and 1987 in which he made the following assumptions:

(1) the value of the works of art as appraised by PADAC was too high;

(2) the fair market value of the works of art at the time they were donated to the four galleries or museums was equal to their cost to the Appellants;

(3) the purchase of the works of art by the Appellants was part of an adventure in the nature of trade; and

(4) because the amount of the deemed proceeds of disposition was equal to the actual cost of the works of art, the Appellants suffered a business loss on the donation/disposition of the works of art equal to their appraisal costs.

5 The years under appeal are 1984, 1985, 1986 and 1987. There are only three sections of the Act which have a direct bearing on the result of these appeals. Under paragraph 69(1)(b), a person who disposes of any property by gift is deemed to have received proceeds of disposition equal to the fair market value of that property. Under paragraph 39(1)(a), there is an exemption for capital gains resulting from the disposition of certain properties including Canadian cultural property which has been certified and disposed of to a prescribed public institution. The legislation in section 110 with respect to gifts to charities and public institutions changed for 1988 and subsequent years but I shall describe the Act as it applied to 1987 and prior years because those are the years under appeal. Under paragraph 110(1)(b.1), a taxpayer could deduct in computing taxable income the fair market value of any Canadian cultural property donated to a prescribed public institution. The relevant portions of these three sections of the Act are as follows:

69(1) Except as expressly otherwise provided in this Act,

(a) ...

(b) where a taxpayer has disposed of anything

(i) to a person with whom he was not dealing at arm's length for no proceeds or for proceeds less than the fair market value thereof at the time he so disposed of it, or

(ii) to any person by way of gift *inter vivos*,

he shall be deemed to have received proceeds of disposition therefor equal to that fair market value;

39(1) For the purposes of this Act,

(a) a taxpayer's capital gain for a taxation year from the disposition of any property is his gain for the year de-

termined under this subdivision ... from the disposition of any property of the taxpayer other than

(i) ...

(i.1) an object that the Canadian Cultural Property Export Review Board has determined meets all criteria set out in paragraphs 23(3)(b) and (c) of the *Cultural Property Export and Import Act* and that has been disposed of,

(A) ...

(B) in any other case, at any time, to an institution or public authority in Canada that was at the time of the disposition designated under subsection 26(2) of that Act either generally or for a purposes related to that object,

110(1) For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted such of the following amounts as are applicable:

. . . . .

(b.1) the aggregate of gifts of objects that the Canadian Cultural Property Export Review Board has determined meet all of the criteria set out in paragraphs 23(3)(b) and (c) of the *Cultural Property Export and Import Act*, which gifts were not deducted under paragraph (a) or (b) and were made by the taxpayer in the year (and in the 5 immediately preceding taxation years, to the extent of the amount thereof that was not deducted under this Act in computing the taxable income of the taxpayer for any preceding taxation year) to institutions or public authorities in Canada that were, at the time the gifts were made, designated under subsection 26(2) of that Act either generally or for a purpose related to those objects, not exceeding the amount remaining, if any, when the amounts deducted for the year under paragraphs (a) and (b) are deducted from the income of the taxpayer for the year, if payment of the amounts given is proven by filing receipts with the Minister that contain prescribed information;

6 The scheme of the Act with respect to Canadian cultural property is extraordinary because there is a twofold tax advantage for the person who owns Canadian cultural property as capital property and donates it to a prescribed institution. First, the gift triggers the application of paragraph 69(1)(b) which results in deemed proceeds of disposition equal to fair market value and, if that value is greater than the owner's cost, there would be a capital gain which is exempt from tax under subparagraph 39(1)(a)(i.1). And second, the prescribed institution can issue a receipt for an amount equal to the fair market value of the gift and that amount may be deducted in computing taxable income under paragraph 110(1)(b.1). This is the twofold tax advantage which the three Appellants set out to achieve.

7 There is no dispute in these appeals that all of the works of art in question were certified Canadian cultural property and were donated to institutions or public authorities as described in subparagraph 39(1)(a)(i.1) and paragraph 110(1)(b.1) of the Act. Also, the Respondent acknowledged at trial through the evidence of an expert witness that the fair market value of those works of art at the times of the respective donations was greater than their cost to the Appellants. The two primary issues are (i) to determine whether the works of art were capital properties in the hands of the Appellants thereby entitling them to exempt capital gains under subparagraph 39(1)(a)(i.1) of the Act; and (ii) to determine the fair market value of the works of art at the times when they were donated to the respective public galleries or museums. A secondary issue concerns the amounts of interest which were assessed. I will consider first whether the works of art were capital properties in the hands of the Appellants.

First Question: Whether works of art were capital properties to the appellants

8 As already stated, the Appellants purchased approximately 215 works of art by Norval Morrisseau. The donation documents for the public art galleries or museums indicate that there were 216 works but the PADAC appraisals indicate that there

were only 211 works. The list of acquisitions in the Appellants' Exhibit A-152 shows 219 works. These variances are probably caused by the way in which a group of pieces may be described as one or as distinct pieces. In any event, the precise number is not material because the parties are in agreement concerning the aggregate cost ($130,000) and that all of the works were donated to prescribed institutions. For convenience, I shall refer to all of the pieces collectively as the "Morrisseau Art".

9 From the evidence, I conclude that it never crossed the minds of the Appellants in 1984, 1985 and 1986 that the Morrisseau Art was anything but capital property in their hands. It certainly crossed the mind of the Minister of National Revenue when issuing the assessments under appeal. In the Amended Reply to Notice of Appeal filed for each Appellant, the Respondent alleges that when issuing the reassessments which are under appeal, the Minister assumed that:

> In acquiring the works of art which are the subject matter of his appeal, one of the major motivating factors of the Appellant was the possibility of turning the works of art to account through tax savings by means of donations to a designated institution or public authority coupled with a claim for a deduction of fair market value for the purpose of calculating taxable income in the 1984, 1985, 1986 and 1987 taxation years as part of an adventure in the nature of trade or profit-making concern or undertaking and, alternatively, if not acquired and donated with the primary intention to donate for profit at the appropriate time then at least with a dual alternative intention, ab initio, to so do;

10 The Respondent further alleges in a separate paragraph that:

> ... in acquiring the works of art which are the subject matter of this appeal, the Appellant intended to engage in an adventure in the nature of trade, turning the works to account either through tax savings by means of donations to a designated institution or public authority or through their sale.

11 There is a wealth of jurisprudence in Canada concerning "an adventure in the nature of trade" as those words appear in the definition of "business" in section 248 of the Act. The issue invariably is whether certain property which is the subject of the alleged adventure was acquired for the purpose of trading or for some capital purpose like personal enjoyment, an investment to yield income, or a long-term commercial use. Canadian courts have, over the years, developed a number of tests which are used to determine whether a gain resulting from the acquisition and disposition of certain property is a capital gain or income from business as defined to include an adventure in the nature of trade. Those tests were set out by Rouleau J. in *Happy Valley Farms Ltd. v. Minister of National Revenue (sub nom. Happy Valley Farms Ltd. v. R.)*, [1986] 2 C.T.C. 259, 86 D.T.C. 6421 (F.C.T.D.) and also by Heald J.A. in his dissenting judgment in *First Investors Corp. v. R. (sub nom. First Investors Corp. Ltd. v. The Queen)*, [1987] 1 C.T.C. 285, 87 D.T.C. 5176 (F.C.A.); leave to appeal to S.C.C. refused (1987), 79 N.R. 395 (note), 79 N.R. 396 (note). I shall summarize those tests because they are relevant in deciding the first issue in these appeals.

> 1. The nature of the property. Property which does not yield income to its owner or personal enjoyment simply by virtue of ownership is more likely to have been acquired for trading purposes. *Contrast Regal Heights Ltd. v. Minister of National Revenue*, 60 D.T.C. 1270 with *Htwako Investments Ltd. v. R.*, 78 D.T.C. 6281.
>
> 2. The length of period of ownership. Generally, property acquired for trading purposes is sold or exchanged within a short time after its acquisition.
>
> 3. The frequency or number of similar transactions. If there are a number of transactions in the same kind of property over a relatively short period of time, it is easier to conclude that there has been trading in respect of each property.
>
> 4. Work expended to make the property more marketable. When the owner works on the property itself to increase its value or makes special efforts to attract buyers, there is evidence of a trading intent.
>
> 5. The circumstances responsible for sale or other disposition. A sudden emergency or opportunity requiring the owner to raise money on short notice may preclude a finding of any trading intent when property is sold after a short period of ownership.

(sub nom. Pustina v. R.), 96 D.T.C. 1594, [1996] 3 C.T.C. 2542

> 6. Motive. The intention of the owner at the time of acquisition is relevant in all of the so-called trading or adventure cases. This test has become more important in Canada because the Courts have accepted the concept of "secondary intention" as described in *Racine v. Minister of National Revenue*, 65 D.T.C. 5098. See also the decision of the Federal Court of Appeal in *De Salaberry Realties Ltd. v. R.*, 76 D.T.C. 6408.

12 Although the Morrisseau Art was not sold but was donated to public institutions, I will briefly consider the above six tests as they may have applied to a hypothetical sale. (1) The nature of the Morrisseau Art was capable of yielding personal enjoyment simply by virtue of ownership but the Appellants never enjoyed it as art. They did not hang it even briefly in their offices, homes or elsewhere. It was stored, pending disposition, in available space adjacent to the Appellants' offices. (2) The period of ownership was short. All of the pieces were acquired and disposed of within a 33-month period from March 1984 to December 1986. Most of the individual pieces were in fact owned for a much shorter period. (3) There were 27 separate acquisition transactions and five dispositions in bulk. The acquisitions occurred over 24 months and the dispositions occurred over 25 months. (4) The Appellants did nothing to improve the Morrisseau Art or to make it more marketable. (5) The donations of the Morrisseau Art to the public institutions appear to have been timed in order to complete the respective gifts within a taxation year because, according to Exhibit A-153, two donations were made in December 1984, two donations were made in November 1985, and one donation was made in December 1986.

13 The sixth test involving motive or intent had two different phases in the circumstances of these appeals. In phase one, the Appellants looked upon their first few acquisitions as simply a bargain - like buying a loonie for a dime. At that time, they did not know about the income tax advantages of donating Canadian cultural property to prescribed institutions. When they purchased their first pieces, they had no immediate plan for the sale or other disposition of those pieces. In phase two, after they had learned about the income tax advantages of donating Canadian cultural property to prescribed institutions, subsequent acquisitions were for the purpose of donation. Carrying the thought of a hypothetical sale to its logical conclusion, if the Appellants had sold the Morrisseau Art at the same times and in the same five batches and at the same values (i.e. prices) as the five actual donations to public galleries, I am satisfied that such transactions of acquisition and sale would have been adventures in the nature of trade and the Morrisseau Art would not have been capital property to the Appellants.

14 Leaving aside any hypothetical sale, the hard fact is that the Morrisseau Art was not sold but was donated to public institutions. Does the absence of any sale affect the Respondent's argument that the Appellants were engaged in an adventure in the nature of trade? At first blush, it appears that the absence of a sale hurts the Respondent's "adventure" argument because, without a sale, there was no spirit of commerce in what the Appellants were doing. Without a spirit of commerce, could there be an adventure in the nature of trade? Does the absence of any sale necessarily mean that there was no intention for profit or financial gain?

15 Having regard to the evidence of all three Appellants, I find that their gifts of the Morrisseau Art to public institutions were prompted by two principal motives or intentions. First, they intended to reduce the tax on their professional income by using charitable receipts from the public institutions to which the Morrisseau Art was donated; and to avoid tax on any deemed gains which may have resulted from donating the Morrisseau Art. And second, they intended to donate many works of a prominent Canadian artist to certain public galleries where those works could be seen by a wide cross-section of Canadians, and the reputation of the artist could be enhanced. In my opinion, the second philanthropic intention was inextricably linked with the first tax-reducing intention. There was no evidence that the Appellants would have proceeded with their program of donations if the twofold tax advantage had not been available.

16 The financial advantages of the first intention were derived exclusively from the provisions of the Act. The amount of charitable receipts from public institutions could be deducted in computing taxable income under subsection 110(1) for the years under appeal. Also, any deemed gain resulting from donations under subsection 69(1) could be exempt from tax under subsection 39(1) if the subject of the donations was Canadian cultural property and capital property to the donors. The parties are in agreement that the Morrisseau Art was Canadian cultural property. The critical question is whether the Morrisseau Art was capital property to the Appellants. Counsel for the Appellants relied on the decision of the Federal Court of Appeal in *Loewen v. Minister of National Revenue (sub nom. Loewen v. Canada)*, [1994] 2 C.T.C. 75, *(sub nom. Loewen v. R.)*, 94 D.T.C.

(sub nom. Pustina v. R.), 96 D.T.C. 1594, [1996] 3 C.T.C. 2542

6265 and, in particular, the following statements by Hugessen J.A. (writing for the majority) at page 80 (D.T.C. 6269):

> ... it is necessary, in my view, first to ask oneself whether tax considerations, and more particularly an anticipated tax advantage, can properly be determinative of whether or not any given transaction is a trading operation. In my view, they cannot. While the saving of taxes is clearly an important consideration in the conduct of any modern business, I do not think it can properly be said that a transaction whose sole purpose is to reduce the tax otherwise payable by a taxpayer is, for that reason alone, an adventure in the nature of trade ...

and at pages 81-82 (D.T.C.6270):

> ... while, as indicated, an intention to make a profit is not essential in order for a transaction to be characterized as an adventure in the nature of trade, such transaction must be one from which it is possible to derive a profit in a commercial sense.
>
> . . . . .
>
> In all the other cases on the point, however, the Court, in deciding whether a transaction is an adventure in the nature of trade, has clearly assumed that such transaction must be one which could produce a profit. ...

17 The *Loewen* case is unusual and requires special scrutiny. It was concerned with a "deemed" capital gain in the amount of $40,000 realized by Mr. Loewen on the redemption of a debenture which had been issued in connection with a scientific research tax credit ("SRTC"). In July 1984, Loewen entered into an agreement with Dynaflex Inc. whereby he undertook to purchase a debenture in the principal amount of $140,000 for the purchase and issue price of $200,000. Loewen paid for the debenture with a $24,000 cheque and a promissory note for $176,000 payable as to $24,000 by September 30, 1984 and as to $152,000 by December 31, 1984. The Dynaflex debenture was redeemable on demand at $140,000. Dynaflex filed prescribed forms with Revenue Canada in August 1984 designating the amount of $200,000 (full cost to Loewen) with respect to the debenture under subsection 194(4) of the *Income Tax Act*. That designation allowed Loewen to use a tax credit of $102,000 for the 1984 taxation year. Loewen made his two payments on the promissory note so that he was out-of-pocket $200,000 by December 31, 1984 with respect to the cost of the Dynaflex debenture. On January 2, 1985, Loewen demanded redemption of the debenture and the amount of $140,000 was accordingly paid to him.

18 Under subsection 127.3(6) of the Act, the Dynaflex debenture had a deemed cost to Loewen of $100,000 being one-half of the amount designated under subsection 194(4). Upon the redemption of the debenture for $140,000, Loewen realized a deemed gain of $40,000 which the Minister of National Revenue regarded as income from an adventure in the nature of trade. Loewen claimed it was a capital gain. The Federal Court of Appeal allowed Loewen's appeal. When writing the opinion for the majority, Hugessen J.A. referred to the "unreal world of income tax" in which "things are seldom what they seem and are frequently deemed to be quite different from what they are". That was certainly an appropriate description of the SRTC legislation.

19 In my opinion, the decision in *Loewen* is skewed by the fact that the Minister assessed only part of the transaction without recognizing it as a "package deal". The redemption of the Dynaflex debenture in isolation was a red herring because no reasonable person would pay $200,000 for a debenture which would be redeemed for only $140,000. The actual cost of the debenture ($200,000) was reduced to a deemed cost of $100,000 for income tax purposes only because Dynaflex filed prescribed forms with Revenue Canada under subsection 194(4) of the Act designating the full amount of the actual cost and thereby permitting Loewen to obtain a tax credit of $102,000 (combined federal and provincial). Notwithstanding the "deemed cost" of the debenture, the real transaction was a payment of $200,000 by Loewen to Dynaflex for which Loewen received two items of consideration. The first item was a debenture which would be redeemed for $140,000. The second item was a tax credit for $102,000 resulting from the "designation" made by Dynaflex in the prescribed forms filed with Revenue Canada. It was a "package deal" in the sense that Loewen would not have paid the aggregate amount of $200,000 to Dynaflex unless he received both items of consideration.

(sub nom. Pustina v. R.), 96 D.T.C. 1594, [1996] 3 C.T.C. 2542

20 A tax credit is very different from an amount deducted in computing income or taxable income. A tax credit has dollar-for-dollar value because it is applied directly to the amount of tax otherwise owing; whereas a deductible amount will reduce income tax only by the taxpayer's marginal rate of tax as applied to such amount. Therefore, Loewen's real transaction was an outlay of $200,000 for a total consideration of $242,000 (being $140,000 plus $102,000). That transaction was not assessed and so, in my view, the Courts did not have to decide whether Loewen's tax credit of $102,000 was part of his proceeds from a capital transaction or an income transaction. Because the Minister's assessment of Loewen was based on the redemption of the Dynaflex debenture in isolation from the rest of the SRTC transaction, it was easy for the majority in the Federal Court of Appeal to conclude that Loewen's acquisition of the debenture did not have a profit-making capability. Hugessen J.A. stated at page 78 (D.T.C. 6267):

> As previously indicated the appellant did not require redemption of the debenture until January 1985. That redemption was for the stipulated price of $140,000. Since the appellant had paid $200,000 for the debenture, he suffered an actual loss on the redemption in the amount of $60,000. Furthermore, since the debenture was redeemable by either the company or the holder, it is inconceivable that it could ever have a value in excess of $140,000 and it was accordingly impossible that redemption could ever result in a profit to the holder.

and at page 82 (D.T.C. 6270):

> Accordingly, while the appellant's cost of acquisition of the debenture is deemed for tax purposes to be reduced to $100,000, that is a fiction; his real cost remains $200,000 and the fictionally reduced cost cannot be used to attribute to the transaction itself a profit-making capability which it does not have in reality.

21 In these appeals, there are no special provisions of the Act which deem the cost or value of the Morrisseau Art to be different from the cost or value in the transactions actually effected by the three Appellants. I do not regard the *Loewen* case as helpful in determining whether the Morrisseau Art was capital property to the Appellants.

22 A donation of property to any person does not, in itself, determine the character of the property as "capital" or "trading" in the hands of the donor. For example, a car dealer may donate a new car to a local charity to raffle off as part of a fundraising project. The new car was never capital property to the dealer but was always stock-in-trade. If the local charity issued a receipt to the dealer for an amount equal to the dealer's cost (wholesale price), the deemed proceeds of disposition under subsection 69(1) would equal cost; there would be no profit to the dealer; and he would have a charitable receipt to deduct in computing taxable income. If the local charity issued a receipt for an amount equal to the retail price of the new car (an amount which the dealer could expect to receive from a customer), the deemed proceeds of disposition under subsection 69(1) would exceed the dealer's cost; the dealer would include a profit in computing income; but he would have a greater charitable receipt to deduct in computing taxable income.

23 In contrast to the car dealer's donation of a new car to charity, consider the wealthy individual who late in life donates to a public gallery a significant work of art from his or her private collection. The work of art was always capital property to the donor. The donation to the public gallery would trigger deemed proceeds of disposition under subsection 69(1) which (assuming that current value exceeds the donor's cost long ago) would result in a capital gain to the donor. If the work of art qualified as Canadian cultural property, the capital gain may be exempt from tax under subparagraph 39(1)(a)(i.1). Otherwise, the capital gain would be subject to tax but, in either event, the donor would have a receipt from the public gallery to deduct in computing taxable income up to 1988 or to provide a tax credit in subsequent years.

24 Certain property like food or gasoline is never capital property because by its nature it is acquired for consumption. Other property by its nature is capital property to the end user. A house is capital property to the person who uses it for a dwelling although it was inventory to the builder. Heavy machinery is capital property to the person who uses it for industrial production but it was inventory to the Company which manufactured it to sell. An oil painting in the home for personal enjoyment is capital property to the home owner but the same painting was inventory to the art dealer from whom it was purchased. Whether

non-consumable property is capital property depends primarily upon the owner's actual use of it and his or her intended use at the time of acquisition. In order to determine whether a particular non-consumable property has the character of "capital" or "trading" in the hands of a particular owner, the Courts developed the tests set out in *Happy Valley Farms* and *First Investors Corporation* which I have summarized above.

25 The Morrisseau Art was certainly non-consumable property. The Respondent argues that it was trading property to the Appellants because, at the time of acquisition, they saw it as a bargain. They were satisfied that the prices they paid in the 27 acquisitions were well below what they genuinely believed to be the fair market value. Also, they had no immediate intention to hang any of the Morrisseau Art for their personal enjoyment or to decorate their professional offices. The various pieces were stored from time to time in redundant office space or, later, in space adjoining their professional offices. All of the Appellants testified at length and I find their evidence to be credible without qualification. Their evidence is that they did view those acquisitions as bargains.

26 Mr. Zelinski described the first purchase of Morrisseau Art in March 1984. He received a phone call one Sunday afternoon from a man named Gary Lamont who said that he had three paintings by Norval Morrisseau which could be purchased for $3,000. By coincidence, Mr. Zelinski had been listening to "Sunday Morning Magazine" on CBC Radio that very morning and had heard a lengthy report on Norval Morrisseau -- his prominence within Canada - his international reputation -- his founding of the "Woodland School" -- and the acquisition of his works by collectors and galleries. It was in these circumstances that Gary Lamont phoned Mr. Zelinski one Sunday in March 1984.

27 Mr. Zelinski discussed the Lamont offer with his law partners who included the other two Appellants. Mr. Whent was a long-time admirer of Morrisseau's Art and, by 1984, had already acquired about 40 paintings by Morrisseau which were hung in Mr. Whent's home and office. Mr. Pustina enjoyed works of art but had no particular interest in the works of Morrisseau. The partners in the Appellants' law firm decided to accept the Lamont offer. They purchased three Morrisseau paintings on March 16, 1984 for $3,000. From March 16 to June 15, 1984, the Appellants and their partners purchased 20 works of Norval Morrisseau in seven different transactions for an aggregate price of $13,500. See Exhibit A-152. There is no doubt that all of the Appellants saw the purchases as bargains. In cross-examination, Mr. Zelinski gave the following answers:

> Q. Now, sir, if I understand your position in terms of your motivation, isn't it true that at the time you were first acquiring -- at the time you acquired the first batch of Morrisseaus, you did not have in mind the possibility of donating them to institutions?
>
> A. When we first acquired the first, you're correct.
>
> Q. And if I understand your position, it is that your operating motivation at the time of all of these transactions was that they were being offered to you for prices which were substantially lower than what you believed them to be worth?
>
> A. The motivation for the acquisition of all of these paintings was not that specific. I was being motivated to buy these paintings because they were bargains.
>
> Late in the acquisition of these paintings -- when I say late, by the time we were in a position to donate to Glenbow -- I have to honestly say, this sounds -- might sound trite, but we all believed that we were doing what Parliament wanted to have done. I think we all believed that we were acquiring national treasures. We were preserving national treasures. They were going to the public domain. We could have retained them for ourselves. We in fact had acquired 75 per cent of them without even knowing whether they would qualify as national treasures.
>
> And frankly, sir, I think that towards the end, everyone of us -- not even towards the end. When we first heard of this, we were pleased at the concept. At the end, we were dedicated to the concept.
>
> Q. But sir, in terms of the answer to my question of whether an operating motivation was --

A. An operating motivation?

Q. Yes.

A. All right.

Q. The price of these paintings was substantially lower than what you believed them to be worth. Your answer is yes?

A. My answer is yes to that. Your original question was whether that was the sole motivating factor for the acquisition of all the paintings, as I understood the question. It certainly was an important aspect of the acquisition. Acquisitions.

Q. Sir, isn't it your position that in acquiring these paintings, it was like acquiring a loonie for a dime?

A. Yes, sir. That's my expression from the cross-examination (*sic* - examination for discovery).

28 [Transcript pages 139-41.]

29 Mr. Whent during his examination-in-chief gave the following answers:

Q. Did the price at which they were being acquired have anything to do with the opportunity that you are speaking of?

A. No. I have a lot of faith in Bob (*sic* - Zelinski) and he indicated they were a good deal, in his opinion, a fair -- not a fair deal, a good deal, as I recall him saying, and I was prepared to participate in it.

Q. What did you understand "good deal" to mean?

A. The price was right. It was a good buy.

Q. Would "good buy" mean a bargain acquisition?

A. Yes.

30 [Transcript page 11.]

31 I have no hesitation in finding that the Appellants saw the various purchases of the Morrisseau Art as bargains. In other words, the prices which the Appellants paid were always substantially less than what they believed to be the market value of their purchases. From that established fact, the Respondent argues that the character of the Morrisseau Art was trading property to the Appellants and not capital property. Does the simple purchase of some object at a bargain price characterize the object as trading property to the purchaser? If the answer in law is yes, there are thousands of Canadians who spend their weekends cruising garage sales and flea markets in search of bargains and, unwittingly, become traders with respect to their purchases. I do not accept the Respondent's argument even if it is based on the Appellants' many (27) purchase transactions.

32 I am tempted to state that it is human nature to buy objects at prices which the buyer believes are bargain prices even when the buyer does not know at the time how the objects will be used. This was the situation facing the Appellants in their early acquisitions of the Morrisseau Art. They had a good sense that each purchase was a bargain opportunity and they acted upon it. They were confident that they could not lose on each purchase because the value they obtained was greater than their cost. It is worth noting that the Appellants did not purchase all of the works of Morrisseau which were offered to them. They had a certain

sense that some works were superior to others and they purchased only what they regarded as superior. Also, they made no attempt to negotiate a lower price. Either they purchased at the offered price or they did not purchase at all. It was a question of what to do with these bargains as they were assembled.

33 Although Mr. Whent had a personal liking for and had acquired many works of Norval Morrisseau, the Morrisseau Art was not purchased by the Appellants for their personal enjoyment or for its aesthetic value. It was simply stored in or near their office premises pending a decision on its ultimate use. The Appellants stated that they could have retained the Morrisseau Art for an indefinite period of time and I believe them. They were not under any personal financial pressures to recover their costs. Apart from their natural desire to acquire bargains, the Appellants had no specific motive or intention with respect to their early acquisitions. The possibility of selling some of the early acquisitions was considered but not acted upon.

34 Eventually, the Appellants heard about the twofold tax advantage which could be obtained by donating Canadian cultural property to a prescribed institution. Apparently, they were first informed by the accountants who audited the financial statements for their law partnership. They then obtained a brochure from Revenue Canada which described the concept and the conditions which had to be met. They accepted the concept and decided to donate the works of Morrisseau they had already acquired and to acquire additional works for subsequent donations.

35 Like good lawyers, the Appellants obtained the necessary documents and followed the necessary procedures. A bill of sale was signed for each purchase and provincial sales tax was paid. When necessary, Norval Morrisseau himself certified that he was the artist or that a particular third party had authority to sell his works. These are the prudent steps which any purchaser would take and they do not indicate a capital or trading intent. The Canada Cultural Property Export Review Board was asked to determine that the statutory criteria had been met; and PADAC was asked to appraise various batches of paintings. Again, these were necessary steps to satisfy the conditions in paragraphs 39(1)(a) and 110(1)(b.1) of the Act and they do not indicate a capital or trading intent.

36 I have already stated above my opinion that, if the Appellants had sold the Morrisseau Art at the same times and in the same five batches and at the same values as the five actual donations to public galleries, those hypothetical sales would have been adventures in the nature of trade. The concept of "secondary intention" referred to in *Racine* and *De Salaberry Realties (supra)* would have applied to these bargains. Without any sales, however, the status of the Morrisseau Art as capital or trading property could not be determined in the first few months of ownership by the Appellants. Their early purchases as "bargains" were not determinative. They might have divided the Morrisseau Art among themselves with each individual left to retain, sell or gift his portion. They might have consigned it all to private galleries in Toronto, Montreal, Calgary and Vancouver for sale. They might have decided collectively to gift a portion to public galleries; retain a portion for themselves; and sell the remaining portion. There were unlimited possibilities open to the Appellants concerning the ultimate use of their early purchases. Within six or eight months of their first purchase, they had decided upon the gifting program to public galleries and had actually put that program into effect by December 1984 when they made their first gift of 39 paintings to the Thunder Bay National Exhibition Centre and Centre for Indian Art.

37 Until the Appellants made a decision with respect to ultimate use or resale, the status of their early purchases was in limbo. Once they decided to donate their early and subsequent purchases to public galleries, that method of disposition crystallized the character of the Morrisseau Art as capital property in their hands because (i) they had no opportunity for profit from that method of disposition; and (ii) they had no other established use or intended method of disposition before that time. They were not like the car dealer who donates a new car to a local charity or the long time art collector who donates a significant work to a public gallery. In common law, a gift is a voluntary transfer of property without consideration. The Appellants did not receive any consideration from the donee public galleries. The fact that certain financial advantages (i.e. income tax reductions) accrued to the Appellants under the provisions of the *Income Tax Act* from their donations of the Morrisseau Art to prescribed institutions does not by itself impart a profit motive to those donations or cause the Morrisseau Art to be regarded as anything but capital property at the times of those donations. In *Friedberg v. R., (sub nom. Friedberg v. Minister of National Revenue) (sub nom. Friedberg* v. *Canada))*, [1992] 1 C.T.C. 1, *(sub nom. R. v. Friedberg)*, 92 D.T.C. 6031 (F.C.A.); affirmed [1993] 4 S.C.R. 285, [1993] 2 C.T.C. 306, 93 D.T.C. 5507, Linden J.A. delivering judgment for the Federal Court of Appeal stated at page 3 (D.T.C. 6033):

> It is clear that it is possible to make a "profitable" gift in the case of certain cultural property. Where the actual cost of acquiring the gift is low, and the fair market value is high, it is possible that the tax benefits of the gift will be greater than the cost of acquisition. A substantial incentive for giving property of cultural and national importance is thus created through these benefits.

Second Question: Fair market value of the Morrisseau art

38 In this lengthy trial, there were six witnesses who gave evidence with respect to the fair market value of the Morrisseau Art. Four of the witnesses (Walter Moos, Donald C. Robinson, Donald G. Lake and Joseph McLeod) were qualified as experts. Two other witnesses (Edith Yeomans and Geoffrey Joyner) gave material evidence but I regard Mr. Joyner as having expert knowledge on the subject of what kinds of art are best sold at auction. At the commencement of the hearing, according to the pleadings, the parties were far apart in their valuations. The aggregate cost of the Morrisseau Art to the Appellants was $130,000. Upon issuing the reassessments, the Minister assumed that that amount was the fair market value at the times of the respective donations because the Morrisseau Art (acquired in 27 transactions) was all gifted away within two years of its acquisition. The Appellants claimed that the fair market value of the Morrisseau Art at the times of the respective donations was $990,000.

39 In order to qualify for the capital gain exemption in subparagraph 39(1)(a)(i.1) of the Act, either the art itself or good quality colour photographs of the art had to be sent to the Canadian Cultural Property Export Review Board to determine if the art met the criteria set out in certain provisions of the *Cultural Property Export and Import Act*. These steps were taken and the Board determined that the Morrisseau Art met the required criteria. The Appellants sent to the Professional Art Dealers Association of Canada (PADAC) three sets of the same colour photographs which had been sent to the Board. PADAC performed an appraisal of all of the works comprising the Morrisseau Art which resulted in an aggregate value of $990,000. This is the value which was accepted by the four public galleries when they issued their respective receipts to the Appellants for the donated art; and the Appellants used those receipts to deduct in computing taxable income the maximum amounts permitted under paragraph 110(1)(b.1) of the Act.

40 When preparing for the hearing of these appeals, the Appellants assumed that PADAC would produce the individuals who had performed the appraisals back in 1984, 1985 and 1986. Unfortunately, ten years had passed before these appeals came on for hearing in 1995. In 1994, PADAC informed the Appellants that they (PADAC) could not provide an appraisal this long after the event. The Appellants threatened legal action against PADAC and were required to retain Mr. Robinson on their own as an independent appraiser. When these appeals were actually heard, however, the Appellants were able to call Mr. Moos and Edith Yeomans (a former employee of PADAC) who had actually performed the valuations of the Morrisseau Art. One might think that Mr. Moos and Ms. Yeomans appeared under some pressure because of the legal action which the Appellants had threatened against PADAC but I found their evidence to be fair and objective as a description of the method followed by PADAC to determine the fair market value of the Morrisseau Art. I do not necessarily accept their evidence as proving the fair market value of that Art.

41 The Appellants called as expert witnesses, Walter Moos and Donald C. Robinson. Mr. Moos has lengthy experience as a professional art dealer; he is a member of PADAC; and he was chairman of the Appraisal Committee of PADAC from 1967 to 1989 which covered the period (1984-1986) when PADAC was asked to appraise the various batches comprising the Morrisseau Art. He explained how the PADAC appraisal was performed to arrive at an aggregate value of $990,000. Mr. Robinson is also an experienced professional art dealer. He expressed his opinion that the total fair market value of the Morrisseau Art in 1985 and 1987 was $1,104,795. This opinion not only supported but exceeded the aggregate values ($990,000) appraised by PADAC and accepted by the four public galleries which received the Morrisseau Art as donations.

42 The Respondent called two expert witnesses who had worked together to produce a report on fair market value. The Respondent had retained Donald G. Lake who had in turn retained Joseph McLeod to assist him in the valuation. Mr. Lake and Mr. McLeod are both professional art dealers but Mr. Lake does not sell the works of contemporary artists like Morrisseau

whereas Mr. McLeod actually sells some of Morrisseau's works. Mr. Lake and Mr. McLeod both testified. In Mr. Lake's opinion, the fair market value in the relevant years of the Morrisseau Art considering the works individually was $510,310. Mr. Lake had been asked to consider what could be done with the Morrisseau Art on the open market if a single owner had attempted to sell it within a relatively short (24 month) period of time. He applied a block discount of 50 per cent and would value the Morrisseau Art at $255,155 in the hands of such a single owner.

43 The litigation commenced with a spread of approximately $860,000 between the fair market values alleged by the respective parties ($990,000 and $130,000). When the expert witnesses had finished their testimony, the spread was almost the same because Mr. Robinson, the Appellant's primary expert witness, came in with an aggregate value of $1,104,795; and Mr. Lake's value after the block discount was $255,155. Before reviewing in detail the evidence of the expert witnesses, I will summarize certain statements about Norval Morrisseau on which all of the expert witnesses are in agreement.

44 Norval Morrisseau was born and raised in an aboriginal community in northwest Ontario near Thunder Bay. He was "discovered" in the summer of 1962 by Jack Pollock, the owner of a well-known private gallery in Toronto. For many years, Pollock was the principal distributor of Morrisseau's paintings. By 1981, Morrisseau's works were well distributed throughout Canada and he was the subject of more than one book. In the early 1980's, there were two events which had a significant effect on the career of Norval Morrisseau as a professional artist. Jack Pollock ceased to be Morrisseau's principal distributor about 1981/82; the Pollock Gallery declared bankruptcy in 1983; and Mr. Pollock went to live in France. Also, Norval Morrisseau developed an undisciplined lifestyle. He had a serious problem with alcohol. There were references in some of the evidence to situations in which a painting could be obtained from Norval Morrisseau himself on the streets of Thunder Bay or Vancouver for as little as a bottle of wine. Morrisseau's lifestyle was known in Thunder Bay where he spent a good part of his time. In giving their evidence, the four expert witnesses were in agreement that Norval Morrisseau is one of the greatest contemporary artists in Canada in the last half of this century.

45 Norval Morrisseau had a solo exhibition at the Pollock Gallery in each of the years 1962, 1963, 1972, 1974, 1975, 1976, 1977, 1979 and 1981. There is no evidence that he had a solo exhibition at any private gallery in the years 1982 through 1989. He may have been productive in the period 1982-89 but he was operating without the benefit of a sponsoring gallery; there was no private gallery which had the exclusive right to distribute his art. When determining the fair market value of any property at a particular time, the sale of comparable property around the same time is an accepted method of determination. In this case, the expert witnesses did not produce evidence of any sales of Morrisseau paintings by private galleries in the years 1984, 1985 or 1986. All of the evidence indicates that this was a very low period in Morrisseau's personal life.

46 Walter Moos was called as an expert witness for the Appellants because he was chairman of the PADAC Appraisal Committee when the Appellants submitted the Morrisseau Art for appraisal. Mr. Moos has been in business for over 35 years in Toronto as an owner and operator of an art gallery which represents contemporary Canadian and international paintings, sculpture and works on paper. PADAC was established in 1966 and includes the largest representation of private commercial galleries in Canada which in turn represent most of the country's leading artists. The mandate of PADAC includes the promotion of art and artists; PADAC encourages the awareness of the visual arts; and it establishes ethical standards for the operation of commercial galleries. For more than 25 years, PADAC has provided to public galleries and institutions a professional independent appraisal service to assist in determining the fair market value of artistic works for donation, tax and estate purposes.

47 In the period 1984-86, there were two individuals who were responsible for the PADAC appraisal service: Mr. Moos as chairman of the Appraisal Committee and Edith Yeomans as Executive Administrator of PADAC, a full-time paid position. Ms. Yeomans was Executive Administrator for PADAC from 1980 to 1988 and is now engaged as a qualified appraiser of artistic works. Mr. Moos described the general appraisal procedures of PADAC at the relevant time as follows:

> 1. After receiving an appraisal request from a client, Ms. Yeomans would send an acknowledgement letter enclosing appraisal information sheets, a form of agreement and the conditions of appraisal.
>
> 2. The client would return the appraisal information sheets, the agreement and three photographs of each piece of art to

be appraised.

3. Mr. Moos and Ms. Yeomans would consult to select specific specialists to perform the appraisals.

4. Ms. Yeomans would send the selected appraiser (or appraisers) the photographs of the works along with the appraisal information sheets.

5. The selected appraiser would write his opinion of the fair market value on the appraisal information sheets; sign the sheets; and return them to Ms. Yeomans.

6. The appraisal would then be presented to Ms. Moos as Chairman of the Appraisal Committee who, apart from the President, had exclusive signing authority to establish a fair market value based on information in the file. If Mr. Moos concluded that additional information was necessary, Ms. Yeomans would carry out further research and enquiries.

7. When the values had been assigned by Mr. Moos, a certificate was prepared listing all the works in a particular donation, and an invoice was drawn up for each certificate. The client determined who the certificate would be issued to (the donor or the institution) and whether the PADAC appraisal fee would be paid by the donor or the institution accepting the donation.

48 Whenever possible, PADAC would obtain three appraisals from persons with expert knowledge of the art work being appraised. In some circumstances, there may be only one or two persons with expert knowledge of a particular artist's work. Regardless of the number of appraisers involved, the chairman of the Appraisal Committee would be the final arbitrator of the fair market value based on his expertise, experience and judgment. Although Mr. Moos had never sold any works by Norval Morrisseau, he felt confident that he could be the final arbitrator in the appraisals of the various batches comprising the Morrisseau Art because he had followed Morrisseau's career through sales at the Pollock Gallery and he had attended many of Morrisseau's solo exhibits at that Gallery. Also, Mr. Moos had been aware of Morrisseau's rising prominence as a Canadian artist.

49 When PADAC first received a request from the Appellants in the spring of 1984 to appraise 12 works of Norval Morrisseau, Mr. Moos and Ms. Yeomans decided that Jack Pollock was the eminent authority on Morrisseau. Because Jack Pollock was living in France when the appraisals were requested, PADAC contacted Eva Quan who had been Mr. Pollock's gallery assistant for over 15 years. Ms. Quan advised PADAC that an appropriate valuation of Morrisseau's work could be determined on the basis of $3.00 per square inch. This formula for appraisal was supported by the owner of a gallery in Peterborough, Ontario who had experience with Morrisseau's work and by the owner of a gallery in Western Canada. Mr. Moos report was entered as Exhibit A- 156. At page 9 of that report, he described how he went about the PADAC appraisal of the first 12 works submitted by the Appellants.

> Ms. Yeomans presented me with the appraisal file containing the appraisal sheets completed by Ms. Quan and the other valuation information which had been obtained. I assigned a fair market value of the Morrisseau works, taking into account all information in the appraisal file and my own expertise and knowledge as an art dealer. In particular, I was informed on values of work by comparable artists to Morrisseau as I had handled many First Nations artists. A review of the Appraisals clearly indicates that there was no mechanical application of the $3.00 per square inch formula but rather that it was used as a guideline and the final valuation was determined by the overall artistic merits of each art work.

50 Attached to the Moos report are copies of eight certificates issued by PADAC dealing with the works of art by Norval Morrisseau which had been acquired by the Appellants. The dates of the various certificates, the number of works of art valued in each certificate, and the public galleries which received the art are set out in the table below. I have identified the respective public galleries from Exhibit A-153.

(sub nom. Pustina v. R.), 96 D.T.C. 1594, [1996] 3 C.T.C. 2542

PADAC Certificate	Works of Art	Public Gallery Donee
September 25, 1984	12	(duplicated in Jan. 11/85)
January 11, 1985	23	Ontario Heritage Foundation
March 11, 1985	39	Thunder Bay National Exhibition Centre and Centre for Indian Art
April 2, 1985	15	Hamilton Art Gallery
May 30, 1985	3	Hamilton Art Gallery
November 3, 1985	93	Hamilton Art Gallery
November 19, 1985	2	Hamilton Art Gallery
February 5, 1987	36	Glenbow Alberta Institute
Total number of Works	223	

51 There is some duplication in the above certificates because Mr. Moos stated in his report (page 2) that the works included in the first certificate are covered by the second certificate. Excluding those 12 works in the first certificate which are duplicated, the PADAC appraisals in certificates 2 through 8 inclusive covered 211 works (223 minus 12) and assigned them an aggregate value of $992,000 which I state as $990,000.

52 Eva Quan was consulted by PADAC with respect to the first three appraisals. It is the recollection of Mr. Moos and Edith Yeomans that Ms. Quan was not available for consultation with respect to certificates 4, 5, 6, 7 and 8. In concluding his comments on how the Morrisseau works were appraised, Mr. Moos stated at pages 10-11 of his report:

> Evaluation formulas, such as the one developed by Jack Pollock for Morrisseau (height x width x $3.00) are frequently utilized by Art Dealers to determine the base price of an artist's work.
>
> .....
>
> Essentially, a formula provides a dealer with a standardized unit with which to build a price structure. Obviously, art appraisals are not a purely objective endeavour accomplished by the mechanical application of a formula and any formula in an appraisal process is supplemented by an informed awareness of the artist's work and standing in the art community.

53 I will repeat here the last sentence from the paragraph on page 9 of the Moos report quoted above:

> A review of the Appraisals clearly indicates that there was no mechanical application of the $3.00 per square inch formula but rather that it was used as a guideline and the final valuation was determined by the overall artistic merits of each art work.

54 In summary, Mr. Moos superimposed his judgment of artistic merits on the Pollock Gallery guideline of $3.00 per square inch.

55 When Mr. Moos was doing the PADAC appraisals in 1984-85-86, he was not able to find any sales of comparable Morrisseau works through private galleries in those years. He therefore relied on the guideline of $3.00 per square inch which had been developed in the Pollock Gallery and was passed on to PADAC by Eva Quan. That guideline became the basis for all of the PADAC appraisals. Mr. Moos did not rely on any sales by auction because, in his view, the Canadian auction market for art concerns itself mostly with historical art (i.e. the artist is deceased) whereas contemporary art (i.e. the artist is alive and still

productive) is sold mostly in private galleries. This view was supported by Mr. Joyner. Although there are exceptions to that general view, Mr. Moos thought that Morrisseau did not sell well at auctions. (Transcript, Day 3, page 49).

56 The Appellants retained Donald C. Robinson as an expert witness to express his opinion with respect to the fair market value of the Morrisseau Art. Mr. Robinson's report on valuation is Exhibit A- 158. He became interested in art while studying engineering at the University of Toronto. After working as an engineer for a number of years, he went into the business of Canadian art on a full-time basis in the 1970s. He has 20 years experience as an art consultant, a private dealer, and as director of the Kinsman Robinson Galleries at 14 Hazelton Avenue in Toronto. Between 1975 and 1980, he published and edited the *Canadian Art Investor's Guide*, a quarterly publication with subscribers across Canada. Also, he originated the *Canadian Masters Art Index* which tracks the prices at major Canadian auctions of certain works by a selected group of historical artists like A.Y. Jackson, Emily Carr and Cornelius Krieghoff. A description of the Canadian Masters Art Index appears at Tab 14 of Mr. Robinson's supplementary report (Exhibit A-159) commenting on the Lake/McLeod opinion.

57 Mr. Robinson has an extraordinary knowledge of the works of Norval Morrisseau because, in 1990, his gallery became the exclusive distributor of Morrisseau's new works in Canada. Mr. Robinson describes this relationship at page 4 of his report as follows:

> On March 6, 1990, while living in Vancouver, Morrisseau signed a formal written agreement giving Donald Robinson and The Gallery (i.e. Kinsman Robinson Galleries) the exclusive right to market his paintings and drawings for Canada. In 1994, the agreement was changed to allow dealers in provinces other than Ontario to sell the work. The Gallery remains the exclusive dealer for Ontario.

58 Mr. Robinson's gallery first sold Morrisseau paintings in 1987. During the years 1987 and 1988, he sold 18 Morrisseau works which are listed under Tab 6 of his report (Exhibit A-158). These are the actual gallery sales which are closest in time to the years under review (1984-1986). When Mr. Robinson signed his exclusive marketing agreement with Norval Morrisseau in 1990, they established a price list for paintings of all sizes. Because Morrisseau does not always paint in "industry- standard" common sizes, it was necessary to establish a large number of sizes based on length plus width (in inches) to facilitate pricing works of any size. That list appears at Tab 11 immediately following page 16 of the Robinson Report (Exhibit A-158). The price list dated May 1, 1990 begins with a length plus width total of 28 inches priced at $2,000 and increases by 2 inch increments up to 332 inches priced at $15,400.

59 Mr. Robinson stated that the new price list in 1990 was set below the generally accepted resale market prices for Morrisseau paintings at that time as a deliberate marketing strategy to ensure a series of sell-out exhibitions. The strategy seems to have worked because, in 1990, the Kinsman Robinson Galleries presented an exhibit of 40 large Morrisseau paintings with the artist in attendance. All of the 40 paintings were sold at a private clients' preview before the exhibit opened to the public. And in 1991, they presented an exhibit of 45 medium to large paintings with the artist in attendance. This exhibit was opened by Dr. Robert McMichael, founder of the McMichael Canadian Collection. Again, all 45 paintings were sold at a private preview and the exhibit opened sold-out. Mr. Robinson regarded those sold-out exhibits as a vindication of his 1990 price list and I think that they were.

60 On Chart II at Tab 8 in his report, Mr. Robinson plotted his 18 actual sales in 1987/88 against his 1990 price list and the $3.00 per square inch formula of the Pollock Gallery which had been accepted by PADAC. The 10 works which were acrylic on canvas generally sold a little below the 1990 price list and a little above the $3.00 per square inch formula. This was Mr. Robinson's method of checking his 1990 price list against his own actual sales in the years 1987/88 and the Pollock Gallery formula.

61 To perform his actual appraisal of the Morrisseau Art, Mr. Robinson followed a three-step process. First, he examined the colour photographs and information sheets for each of the 211 paintings. He then consulted his 1990 price list (the prices he had negotiated with Norval Morrisseau himself in the spring of 1990 - see Tab 11 of Exhibit A-158) to set the initial price based on size. The initial price was then adjusted in special cases only when the quality, composition or subject matter suggested that the

market value should be higher or lower. I have compared the Robinson appraisals at Tabs 15, 16, 17, 18, 19, 20 and 21 of his report with his 1990 price list at Tab 11 and confirm that a significant number of the paintings were appraised at the same respective amounts as the corresponding sizes in the 1990 price list. In other words, it was only in special cases when the initial price was adjusted for quality, composition or subject matter. The aggregate valuation for the 211 paintings using the 1990 price list and allowing for quality adjustments was $1,227,550.

62 In the second step, Mr. Robinson determined that a portion of the Morrisseau paintings sold by him in the years 1987, 1988 and 1989 were discounted. After eliminating abnormal discounts given in very few special circumstances, he found that the average discount for all three years was approximately 10 per cent. In the third step, he applied the 10 per cent discount to this first step valuation of $1,227,550 and arrived at a final fair market value of $1,104,795.

63 This is a convenient place to comment on the evidence of Mr. Moos and Mr. Robinson before reviewing the evidence of the two expert witnesses who were called by the Respondent. In my opinion, there are fundamental errors in the appraisal processes followed by Mr. Moos and Mr. Robinson which cause me to reject their opinions with respect to fair market value.

64 Mr. Moos, as chairman of the PADAC Appraisal Committee, used the $3.00 per square inch formula as his basic guideline. That formula was provided to PADAC by Eva Quan who had been Jack Pollock's gallery assistant for over 15 years. I assume that the formula was used by the Pollock Gallery in the years up to 1981 when it was the exclusive distributor of Morrisseau's works and in the next two years until it declared bankruptcy in 1983. That formula may have been a very sound basis for pricing Morrisseau's paintings when he had an exclusive distributor like the Pollock Gallery or if he had channelled his new paintings through only a few private galleries. Using that formula to appraise his new paintings in 1984, 1985 and 1986 completely ignores the dramatic circumstances of his personal life in those years and the ways in which those circumstances would affect the value of his new paintings.

65 All of the experts are in agreement that the years 1982 to 1989 were a very low period in Morrisseau's personal life. He had achieved great prominence in the years 1962 to 1981 but he developed serious personal problems. There were suggestions in some of the expert evidence that certain individuals took advantage of Morrisseau's dependencies and virtually held him captive for brief periods in the years 1982 to 1989 in order to accumulate a significant number of his paintings. In those years, there was no private gallery like Pollock in earlier years or like Kinsman Robinson in later years which was the exclusive distributor of his new works. There was no private gallery to stage a solo exhibit of Morrisseau's new paintings with the artist in attendance and with a select list of "best clients" to preview and possibly buy up the entire exhibit before it was open to the public. From the viewpoint of the artist, he did not have the self-discipline to select a few private galleries through which he might have channelled his works and possibly controlled the flow of his new paintings to the market. In a nutshell, Morrisseau did not have a "sponsor gallery" in the years 1982 to 1989. In the years 1984, 1985 and 1986, his new works were peddled on the streets of Thunder Bay and possibly other places.

66 Against that background, how can Mr. Moos start his appraisal using the $3.00 per square inch formula as a guideline? That formula was developed by the Pollock Gallery: a successful, well established, private gallery in Toronto which was the exclusive distributor of Morrisseau paintings for many years and which staged nine solo exhibits of Morrisseau works from 1962 to 1981 (Exhibit A-156, page 7). If any private gallery had attempted to stage a Morrisseau exhibit in the years 1984, 1985 or 1986 and had attempted to have Morrisseau in attendance with his current works priced on the $3.00 per square inch formula, a few inquiries would have disclosed the fact that Morrisseau himself was selling his current works in Thunder Bay at prices which were less than 1/7 of the amounts that would have been charged under the $3.00 per square inch formula.

67 On the evidence, I cannot state that no private gallery attempted to stage a Morrisseau exhibit in the years 1984, 1985 or 1986. I can state, however, that the four expert witnesses did not offer any evidence that a private gallery staged or attempted to stage an exhibit of Morrisseau's new works in those years. Nor did they offer evidence that any private gallery was featuring new Morrisseau works in those years. For me, the absence of this evidence leads to the conclusion that there was a very shaky, possibly non-existent, market in private galleries for new Morrisseau paintings in those years. The assumption of fact made by the Minister of National Revenue that the cost of the Morrisseau Art to the Appellants was equal to its fair market value in the relevant years is not an unreasonable assumption having regard to Morrisseau's undisciplined lifestyle at the time and the fact

that four qualified art experts did not produce any evidence of private galleries selling new Morrisseau works in the relevant years.

68 If I were to assume that the PADAC appraisal is an accurate reflection of fair market value, and if I were to divide both the PADAC appraisal ($990,000) and the Appellants' cost ($130,000) by one thousand in order to work with smaller numbers (i.e. 990 and 130), an enterprising private gallery owner could have gone to Thunder Bay in 1985; purchased a new Morrisseau painting for $130; and sold that same painting in Toronto for $990. That is the commercial consequence of the PADAC appraisal. That hypothetical transaction would produce a retail price of about 7« times cost. To express this thought in a different manner, the Appellants' aggregate cost was only 13.2 per cent of the aggregate PADAC appraisal. Although I am not familiar with the art world, I regard that as a significant mark-up! Why is there no evidence of real transactions in the relevant years like that hypothetical transaction? Does the absence of such evidence support my above conclusion that there was a very shaky, possibly non-existent, market in private galleries for new Morrisseau paintings in the years 1984, 1985 and 1986? The PADAC use of the $3.00 per square inch formula as a guideline was based on the assumption that there was a viable private gallery market for new Morrisseau paintings in 1984, 1985 and 1986. That market has not been proven and I am left to conclude that it was very shaky or did not exist. Therefore, the cornerstone of the PADAC appraisal is seriously damaged.

69 Among the four expert witnesses, Mr. Robinson is the one most closely associated with Norval Morrisseau. He started selling Morrisseau works on a resale basis in 1987 through the Kinsman Robinson Galleries. In 1990, he became the exclusive distributor for new Morrisseau works in Canada. In 1994, the agreement was changed but Robinson remains the exclusive dealer for Morrisseau's new works in Ontario. Mr. Robinson knows Morrisseau well and, in 1990, negotiated a comprehensive price list which established the retail prices for all new works. The 1990 price list was the basis for Mr. Robinson's appraisal as described above.

70 Mr. Robinson's close association with Morrisseau is both an asset and a liability. It is an asset in the sense that he has extensive knowledge of Morrisseau, his paintings and the current market for Morrisseau's works. It is a liability in the sense that he has a hopeless conflict of interest in trying to be objective about the quality or value of Morrisseau's works when he is currently the exclusive distributor for Morrisseau's new works in Ontario. All of the expert witnesses were cross-examined in varying degrees about the quality of certain paintings purchased by the Appellants but Mr. Robinson, in particular, had great difficulty in saying anything truly critical of a particular painting.

71 Mr. Robinson in his appraisal made the same fundamental error that Mr. Moos made when doing the PADAC appraisal. They both ignored the realities of the market for Morrisseau's new works in 1984, 1985 and 1986. Mr. Robinson ignored the fact that Morrisseau had no private gallery sponsor in those years. He also ignored Morrisseau's regrettable but down-and-out lifestyle in those years. This is surprising because Mr. Robinson, in effect, rescued Morrisseau in 1990 when he went to Vancouver; negotiated the exclusive distributorship; and settled the terms of the 1990 price list which provided an orderly market for Morrisseau's new works. Although Mr. Robinson had been selling Morrisseau works since 1987, it was only on a resale basis and he had no direct access to the artist himself or his new works until 1990.

72 Mr. Robinson knows how much effort he put into the marketing of Morrisseau in his new capacity as exclusive distributor. As an experienced and professional art dealer, he knew how to stage a solo exhibit; he knew about advertising; how to attract media attention through art critics; the importance of having the artist in attendance at least on the opening day and at a private soir e for his best customers just before the opening. He also knew the importance of having a solo exhibit "sold out" when it opened to the public. He said there was a pent up demand for new works of Morrisseau and his solo exhibits in 1990 and 1991 were both sold out before they opened to the public. I have no doubt that there was a pent up demand for new works of Morrisseau but there was good reason for that demand. There had been no solo exhibit of new Morrisseau works since the last solo exhibit at the Pollock Gallery in 1981.

73 There was no private gallery sponsor of Morrisseau in the intervening years because his personal lifestyle did not encourage that kind of professional connection. Mr. Robinson was prepared to take the risks of staging and promoting a solo Morrisseau exhibit in 1990 and in 1991 because Morrisseau himself had recovered his personal stability; there was a binding exclusive distributor agreement in place; the price list had been negotiated and settled; and Mr. Robinson could rely on Mor-

risseau's attendance at the opening and the private soire. Those circumstances did not prevail in 1984, 1985 and 1986. There is no evidence of any private gallery which, in those years, was prepared to take the risks, incur the costs and put forth the efforts which Mr. Robinson did from and after 1990.

74 In the introduction to his report (Exhibit A-158), Mr. Robinson makes the following statements with respect to fair market value:

> ... The fair market value is established by determining what a similar work has sold for on the art market. This assumes that both the buyer and the seller are acting at arm's length in a free and open market, are both fully informed, and the art has sufficient exposure to sell.
>
> In the case of Morrisseau, very few paintings have appeared at the established art auctions. Paintings which have appeared occasionally at secondary auctions have been very poor quality and were very often fakes. Therefore it is necessary to use the sales at retail art galleries to establish fair market value.

75 If the market is "retail art galleries", I assume that any "fully informed" owner of such a gallery would know where Morrisseau was in 1984, 1985 and 1986; whether he was producing any new works in those years; whether his new works were being sold; and how they were being sold. In summary, any fully informed owner of a retail art gallery would know or should have known in 1984, 1985 and 1986 that Morrisseau's new works were being sold by his friends and relatives on the streets of Thunder Bay at bargain prices. That knowledge would affect the prices which the owner of a retail art gallery could charge for new Morrisseau works in those years. That same knowledge may explain the dearth of new Morrisseau works in retail art galleries in those years, and the resulting demand for his works when he came back "on stream" through Mr. Robinson in the retail art gallery world of 1990.

76 Mr. Robinson's use of his 1990 price list as his basic tool for appraising fair market value is based on the assumption that there was at least one owner of a retail art gallery who in 1984, 1985 and 1986 would have taken the risks, incurred the costs and put forth the effort which Mr. Robinson did in 1990 in order to sell new Morrisseau works. There is no evidence on which I can find that any such owner of a retail art gallery existed in those years. In fact, the evidence runs in the opposite direction and I am left to conclude that there was no such owner. In other words, the assumption underlying Mr. Robinson's use of his 1990 price list has not been proven. Therefore, the cornerstone of his appraisal is seriously damaged.

77 I have one further concern with the Robinson appraisal. In Exhibit A-159, Mr. Robinson comments on the Lake/McLeod Report used by the Respondent. The following passage appears at pages 5 and 6 of Exhibit A-159:

> The Canadian art market at the time of the donations was in a state of strong recovery from the recession of 1981. The sales results from the major auctions are a good indicator of the overall art market. Sales at my own gallery usually parallel the trends at the major auctions. (I use the results from the *Canadian Masters Art Index* for my own planning purposes.) The art market usually recovers later than other segments of the economy after a recession. After dropping from 1981 to 1984, the average prices achieved at auction rose substantially in 1985. In 1986, the recovery was so dramatic that the market ended at a higher value than the previous all-time high reached in 1980. The market, in general, was in a state of very strong recovery in two out of the three years in question. (See attached information on the *Canadian Masters Art Index*). There is no reason to believe that the Morrisseau market was any different. Indeed, my experience is that it is not. When the *Canadian Masters Art Index* was in decline from 1991-93, the number of Morrisseau's I was able to sell also dropped substantially. In the lowest years of 1992-93, I experienced the lowest prices received in dollars per-square-inch terms.
>
> The capacity of the Canadian art market to absorb the sale of roughly two hundred Morrisseau paintings would be questionable in 1984, as this was a declining market year. However, this would not have been true in 1985 and 1986. The market continued to be strong in 1987 and 1988, until it started another decline in 1989. ...

78 At Tab 14 of Exhibit A-159, Mr. Robinson shows a graph of his *Canadian Masters Art Index* from 1969 (base year equal to 100) to 1993 with an attached table of the index values for each year. There was a steep decline from 622.5 in 1980 to 279.8 in 1984. There was a sharp increase from 279.8 in 1984 to 813.5 in 1989. 1984 was the lowest point in the Index in the whole decade of the 1980s and the two adjoining years (1983 and 1985) were the next two lowest points. According to Exhibit A-153, the Appellants donated the following Morrisseau works in the respective years:

	Donated Works	Percent
1984	62	28.70%
1985	113	52.30%
1986	41	19.00%
Totals	216	100.00%

If the sale of Morrisseau works follows roughly in tandem with the *Canadian Masters Art Index* as indicated by Mr. Robinson in the passage quoted above, I would conclude that 81 per cent of the Morrisseau Art was donated (and should be appraised) in two years (1984 and 1985) when the art market in Canada was at or near its lowest point in the 1980s. Mr. Robinson's appraisal does not appear to take this fact into account. Indeed, his report (Exhibit A-158) states at page 3 that he is expressing his opinion as to fair market value for 1985 and 1987. I do not know whether this reflects a misunderstanding between him and those who retained him or whether he is trying to distance himself from the very low market year of 1984. By any standard, 1984 was not a good year to be a commercial vendor of art in Canada.

79 Donald G. Lake and his wife own and operate an art store in Toronto dealing in rare books, antique maps and prints, paintings, drawings and historical documents. He has been in business since 1978 and has been buying and selling Canadian art since 1981 but he has not dealt in the art of Norval Morrisseau. Mr. Lake was retained by the Respondent to appraise the Morrisseau Art and express his opinion as to its fair market value in the years 1984, 1985 and 1986. Mr. Lake in turn retained Joseph McLeod to advise him with respect to the quality of the 216 paintings comprising the Morrisseau Art.

80 Mr. McLeod started his professional life as a high school teacher in Northern Ontario in 1958 where he met Norval Morrisseau. When he retired from teaching, he became a co-owner of the Toronto gallery known as "Maslak-McLeod Canadian Art". The gallery features the work of Morrisseau, and Mr. McLeod is very knowledgeable of all aspects of Morrisseau's works. Both Mr. Lake and Mr. McLeod testified at the hearing of these appeals.

81 Mr. Lake began his research by reading certain books and excerpts on Morrisseau from the National Gallery of Canada. He consulted with Cosmo Barranca who, as owner of La Parete Gallery in Toronto, has specialized in Morrisseau's works since 1975. He also consulted with Avrom Isaacs who was the PADAC representative on the Cultural Property Review Board at the time of these gifts. Mr. Lake learned that some persons have accumulated large inventories of Morrisseau's works such as Volpe in Toronto and Helmy in Jasper. Mr. Robinson had referred to these large inventories in his evidence and stated that when he opened one of his first solo exhibits of Morrisseau, a competitor opened a gallery nearby with a large inventory of Morrisseau's works. Mr. Lake stated that Morrisseau has been highly productive and informed estimates number his original works from 3,000 to 20,000. There is evidence that some Morrisseau's works were on display in small corner stores in Thunder Bay where Morrisseau had apparently used his works to acquire supplies.

82 Mr. Lake and Mr. McLeod visited the Hamilton Gallery to view the 113 works donated to that Gallery. They used the colour photographs to view the remaining 100 odd paintings. Mr. McLeod is of the opinion that Morrisseau's works after 1985 became generally repetitive and decorative. Mr. Lake stated that their visit to the Hamilton Gallery appeared to support this theory.

83 In order to perform his actual appraisal, Mr. Lake reviewed each painting with Mr. McLeod. Mr. McLeod would dictate

his comments concerning only the quality of each painting; and Mr. Lake would appraise a value using auction records as his primary tool because there was so little information about sales in retail galleries in the years 1984, 1985 and 1986. The Lake/McLeod Report is Exhibit R-10. At page 13 of Exhibit R-10, Mr. Lake describes his appraisal process in the following words:

> ... I have taken auction records back three years and forward one year and average paper and canvas size in order to provide a representative indicator for the period in question. These prices will be used in my determination of the most difficult to sell works, ie., the fair to mediocre Morrisseau's. I have utilized the 100 per cent mark up from auction prices for the better work which could be more easily retailed. The really superb items are evaluated in the $3.00 range. There were some collectors in the 1984 to 1986 period who would purchase quality works. There would have been little demand for the works of lesser quality. The net result of this appraisal approach is I marked up a few items higher than the other appraisers and marked down the rest.

84 Mr. McLeod in his evidence was candid and blunt when commenting on the quality of the various works. In argument, counsel for the Appellants tried to characterize some of Mr. McLeod's answers as "plain silly" (page 75) or "art speak and gobbledegook" (page 83) but I found Mr. McLeod to be more objective and less guarded than Mr. Robinson in his opinions as to the quality of the various works. In answer to one question, Mr. McLeod stated that when he and Mr. Lake were leaving the Hamilton Gallery, the curator asked him which of the 113 donated works he regarded as inferior and might be sold in order to raise funds to frame and display the superior works. That question supports Mr. McLeod's opinion that some of the 216 works were of inferior quality. It was the Appellants' policy to offer a group of works to a particular public gallery on an "all-or-nothing" basis. When one public gallery (I think it was Winnipeg or the National in Ottawa) expressed interest in a donation but wanted to choose and select among a number of offered works, the Appellants said that it had to be all-or-nothing. There was to be no "cherry picking" leaving the Appellants with only the inferior works. And finally, Mr. McLeod said that most public galleries would be pleased to receive as a gift any group of paintings by a prominent artist because the lesser works which were not good enough to frame and display could be stored in the gallery's archives and used by those wanting to do research on the artist.

85 When Mr. Lake had concluded his appraisal and arrived at a fair market value of $510,000, he was asked to consider whether a block discount would be appropriate for a hypothetical owner (like the Appellants) who wanted to sell all 216 works in a very short time span. After considering a number of options, Mr. Lake stated his opinion as follows at page 39 of Exhibit R-10:

> No matter how one considers this assemblage from the standpoint of the real market, it is our considered opinion there is no way that an experienced dealer could sell this material at fair market in a period of less than ten years and then at varying degrees of discounts. Any approach faster then (*sic*) a ten year plan would involve fantastic duscounts (*sic*) up to and including the possibility of a loss. I believe that one would be very pleased to sell this collection for an amount of $255,165. representing a 50 per cent block discount from the individual total fair market value of $510,310. This represents more than a doubling of cost, a margin that would please any professional dealer who would be faced with real and continuing operating costs.

Mr. Lake was under the erroneous impression that the aggregate cost of the Morrisseau Art to the Appellants was $113,000.

86 I do not accept Mr. Lake's block discount of 50 per cent. The hypothetical open market in which fair market value is determined contemplates purchasers and vendors acting without pressures to buy or sell. There was no evidence that these Appellants were under any pressure to dispose of the Morrisseau Art. In fact, their evidence was to the contrary and I believe them. The fact that they decided to give away all of the Morrisseau Art within a 24- month period does not mean that they would attempt to sell it within the same period if they had decided to follow the sale route. And finally, Mr. Robinson was of the view that all 216 works could have been sold at retail within a two-year period if they had been carefully grouped and distributed to selective retail galleries from Montreal and Toronto through to Calgary and Vancouver. I am not sure how Mr. Robinson could reach that conclusion when there is so little evidence of retail galleries selling Morrisseau's works in the years 1984, 1985 and 1986 but the idea appeals to me as a sensible marketing strategy for an owner who decides to sell without any pressure.

(sub nom. Pustina v. R.), 96 D.T.C. 1594, [1996] 3 C.T.C. 2542

87 As indicated above, I do not accept any of the opinions with respect to fair market value offered by PADAC, Mr. Robinson or the team of Messrs. Lake and McLeod. In *Bibby v. R., (sub nom. Bibby Estate v. The Queen)* [1983] C.T.C. 121, 83 D.T.C. 5148 (F.C.T.D.), the issue was the fair market value of certain land as at December 31, 1971. Each party called expert evidence on the question of value but Walsh J., deciding not to accept the opinion of either expert, made the following statement at page 131 (D.T.C. 5157):

> While it has frequently been held that a Court should not, after considering all the expert and other evidence merely adopt a figure somewhere between the figure sought by the contending parties, it has also been held that the Court may, when it does not find the evidence of any expert completely satisfying or conclusive, nor any comparable especially apt, form its own opinion of valuation, provided this is always based on the careful consideration of all the conflicting evidence. The figure so arrived at need not be that suggested by any expert or contended for by the parties.

88 I will follow the *Bibby* decision and determine the fair market value of the Morrisseau Art in 1984, 1985 and 1986 at an amount different from the values offered by the experts.

89 The best first hand evidence of arm's length transactions in 1984, 1985 and 1986 were the 27 purchases by the Appellants at an aggregate cost of $130,000 (See Exhibit A-152). Appellants' counsel cited a number of authorities for the proposition that the cost of property is not relevant in determining its fair market value but, when the property itself is purchased in arm's length transactions close to the valuation dates, cost may become relevant. The gifts to the four donee public galleries were made at the following times:

	Donation Date	Number of Works
Thunder Bay National Exhibition Centre	December 1984	39
Ontario Heritage Foundation	December 1984	23
Hamilton Art Gallery	November 1985	113
Glenbow Museum	December 1986	41

90 The valuation dates are the actual months when the art was donated to the four respective public galleries. The 27 purchase transactions started in March 1984 and continued until February 1986. The last 22 Morrisseau works were purchased by the Appellants in January and February 1986 after their large donation to the Hamilton Gallery. These last 22 works became part of the donation to the Glenbow Museum in December 1986. I therefore conclude that the cost of the Morrisseau Art to the Appellants is a relevant but not determining fact in the question of fair market value.

91 I accept the evidence of the Appellants themselves that they were purchasing bargains in the sense that they were purchasing works of art at prices which were below fair market value. I am satisfied, however, that the availability of those works of art at bargain prices would, of necessity, have an effect on the fair market value of those same works of art. The fully informed buyers and sellers (particularly the professional retail gallery owners like Mr. Robinson and Mr. McLeod) in the hypothetical open market where fair market value is determined for 1984, 1985 and 1986 would know where Morrisseau was living in those years and would know about the new Morrisseau works which were available at bargain prices on the streets of Thunder Bay. For this reason, I shall without hesitation use the cost of the Morrisseau Art to the Appellants as a relevant fact in my quest for fair market value. In doing so, I recognize that not one of the expert witnesses used the Appellants' purchase transactions as a tool in his appraisal process. Those transactions may not have been available to the expert witnesses but they were certainly described in Court.

92 The Respondent's expert witnesses (Messrs. Lake and McLeod) did not support the value ($130,000) assumed by the Minister of National Revenue in the reassessments under appeal. When commenting on the Lake/McLeod Report, I explained why I did not accept the block discount of 50 per cent. Therefore, the Lake/McLeod valuation is $510,000. The other valuations are PADAC at $990,000 and Robinson at $1,105,000.

93 For me, it is helpful to compare the valuation of each expert with the cost of the Morrisseau Art to the Appellants and then express (i) the cost as a percentage of the value; and (ii) the value as a multiple of the cost. The amounts and computations are set out in the table below.

Experts Witness	Valuation	Cost to Appellants	Cost as % of Value	Value as Multiple of Cost
Moos (PADAC)	$ 990,000	$ 130,000	13.2%	7.6
Robinson	1,105,000	130,000	11.8%	8.5
Lake/McLeod	510,000	130,000	25.5%	3.9

94 I have already stated that Mr. Robinson has a conflict of interest because, since 1990, he has been and is the exclusive distributor of new Morrisseau works for Ontario. He is without doubt knowledgable about Morrisseau and the current market value of Morrisseau's works but he has a predisposition to support both the quality and price stability of those same works. When asked to appraise the 216 paintings in these appeals for the years 1984, 1985 and 1986 (before he started to sell Morrisseau's works) Mr. Robinson was hypnotized by his own 1990 price list. When preparing that 1990 price list, he did not have any Morrisseau sales from his own gallery to rely on for the years prior to 1987. Nor did he have sales from any other retail gallery to rely on (Transcript, Day 4, page 211). Notwithstanding those facts, Mr. Robinson used his 1990 price list as the basic tool to appraise fair market value in the years 1984, 1985 and 1986. It is not surprising that his "pre-discount" value of $1,227,550 was more than 20 per cent above the PADAC value and his final opinion of $1,104,795 was more than 10 per cent above PADAC. I will place very little reliance upon Mr. Robinson's appraised value of $1,104,795 but I will refer to his statements about purchasing paintings.

95 Although Mr. Moos superimposed his own judgment concerning quality upon the $3.00 per square inch formula provided by Eva Quan from her Pollock Gallery experience, that $3.00 per square inch formula remained the basic tool in the PADAC appraisal. Mr. Joyner's evidence put a cloud over the $3.00 amount.

96 Geoffrey Philips Joyner is a professional auctioneer who was retained to advise the Minister of National Revenue at the pre- assessment stage in these proceedings. The Minister did not rely on the advice given by Mr. Joyner and so he was not called as a witness for the Respondent. The Appellants learned of the Minister retaining Mr. Joyner during their examination for discovery of the Respondent and they attempted twice to read into the record certain parts of the discovery concerning the Minister's use of or response to Mr. Joyner's advice. The Respondent objected to such reading in. I ruled against the Appellants on both occasions and excluded as irrelevant expert advice sought by the Minister before the assessment. Only the assessments are under appeal and the Appellants did not allege that the Minister had acted capriciously or in bad faith with respect to any advice he may have received from Mr. Joyner or any other person prior to issuing the final reassessments.

97 The Appellants called Mr. Joyner as a material witness. He stated in cross-examination that he had been advised in 1988 by Edith Yeomans (Executive Administrator of PADAC) that in appraising Morrisseau works for the relevant years he should use a formula of $2.50 per square inch for 1984 and $2.25 per square inch for 1985 (Transcript pages 192 and 196). Apparently, Ms. Yeomans was in 1988 backing away from the $3.00 formula which PADAC had used in its appraisal. The hard fact is that, within the research and background information accumulated by PADAC and Mr. Robinson, there were no actual sales of Morrisseau works by retail galleries in the years 1984, 1985 and 1986. Mr. Lake found and relied on real arm's length sales in the auction market for the relevant years but Messrs. Moos, Robinson and Joyner were unanimous in their opinion that the

auction market was not the place where the works of a contemporary artist like Morrisseau would achieve the highest price.

98 I am inclined to accept the unanimous opinion of Messrs. Moos, Robinson and Joyner that the auction market is not the market to obtain the highest price for Morrisseau's works. If my acceptance of that unanimous opinion means that the Lake/McLeod appraisal is too low, by how much is it too low? If the $3.00 per square inch formula is not reliable because it ignored the circumstances of Morrisseau's personal life and assumed that he had a "sponsor retail gallery" in the years 1984, 1985 and 1986 after the Pollock Gallery went bankrupt, by how much is the PADAC appraisal too high?

99 In my opinion, the fair market value of the Morrisseau Art in the years 1984, 1985 and 1986 (the "Valuation Years") was in the range between $650,000 and $680,000. I arrive at this range by comparing and adapting some of the information used by each of the expert witnesses.

100 For reasons already set out above, the $3.00 per square inch formula (the basic tool in the Moos/PADAC appraisal) was not a reliable formula in the Valuation Years: a very low period in Morrisseau's personal life; the absence of a sponsoring gallery; and the absence of any significant sales among retail galleries. Edith Yeomans had recognized that the $3.00 amount was not reliable when she advised Mr. Joyner in 1988 to use as a guideline $2.50 per square inch for 1984 and $2.25 per square inch for 1985. Her advice to Mr. Joyner indicates that she had less confidence in the $3.00 amount as she moved away from the Pollock Gallery years. Eva Quan provided the $3.00 amount to PADAC for its first appraisal in 1984 but, even then, the Pollock Gallery had been closed for a year. I regard the $3.00 amount as always inflated with respect to the Valuation Years. I would discount it by one-third and conclude that $2.00 per square inch was a more realistic formula for the Valuation Years. Although Mr. Moos superimposed his judgment on the $3.00 per square inch formula, if it is adapted from $3.00 to $2.00, then the aggregate PADAC appraisal would come down by one-third from $990,000 to $660,000 because the $3.00 amount was the basis of the PADAC appraisal. I have no doubt that $660,000 is a more realistic estimate of market value in the Valuation Years than the original PADAC appraisal of $990,000.

101 I have stated why I place little reliance on Mr. Robinson's appraised value of $1,105,000. That amount is exactly 8 1/2 times the cost of the Morrisseau Art to the Appellants. Expressed in another way, their cost was only 11.8 per cent of his appraised value. At one point in Mr. Robinson's testimony, he stated that he was reluctant to use bank financing to purchase inventory and, therefore, would not ordinarily purchase paintings unless his cost was about 20 per cent or 25 per cent of his expected realizable selling price. He would, however, take paintings on consignment when his commission might be 15 per cent to 20 per cent of the selling price. In the Valuation Years, Mr. Robinson was operating an established retail gallery selling the works of at least one reputable native artist (A. Shilling); and he knew that Morrisseau did not have a sponsor gallery. If he knew that people were buying new works of Morrisseau on the streets of Thunder Bay at about 12 per cent of the prices which he thought could be obtained in retail galleries, why was he not up in Thunder Bay buying some of these paintings along side the Appellants? Even though he could not possibly have had his 1990 price list in 1984 and 1985, his general knowledge of the retail market should have told him that the "street prices" in Thunder Bay (i.e. at 11.8 per cent) were well below his personal formula of not paying cash at more than 20 per cent or 25 per cent of his expected realizable selling price.

102 If Mr. Robinson had considered selling new Morrisseau works in 1984 and 1985, and if he had known (as he should have known) the prices being paid by people like the Appellants on the streets of Thunder Bay, I think he would have regarded those prices as too close to his personal formula of paying cash at about 20 per cent to 25 per cent of expected realizable selling prices and, therefore, too risky having regard to the low point in Morrisseau's personal life and the ease with which his new works were being distributed. If the Appellants' aggregate cost of $130,000 was 20 per cent of realizable prices in retail galleries in the Valuation Years, then the fair market value of the Morrisseau Art would have been $650,000. If the Appellants' aggregate cost was 25 per cent of those realizable prices, then the fair market value would have been $520,000; very close to the Lake/McLeod appraisal. I regard the $650,000 amount as a more realistic estimate of fair market value in the Valuation Years.

103 Although Mr. Lake relied on real arm's length sales in the auction market to appraise fair market value at $510,000, it is the unanimous opinion of Messrs. Moos, Robinson and Joyner that the auction market is not the best place to find the highest price for new works by a contemporary artist like Morrisseau. I accept this unanimous opinion but must ask: by how much is the Lake appraisal too low? The expert evidence by itself leaves me no guideline by which to raise the Lake appraisal. I am left to

my own instinct prompted by a global view of all the evidence and recognizing that this kind of adjustment is better made with an axe than a scalpel. I will increase the Lake appraisal by one third, the same fraction by which I reduced the Pollock Gallery formula of $3.00 per square inch. Increasing $510,000 by one-third will result in a fair market value of $680,000.

104 In the preceding paragraphs, I have arrived at three adjusted appraisals of $660,000, $650,000 and $680,000. The highest ($680,000) is only 4.4 per cent higher than the lowest ($650,000). For all practical purposes, the margin is negligible. I find that the fair market value of the Morrisseau Art during the years 1984, 1985 and 1986 was $660,000 or very close to that amount. For convenience when issuing the required reassessments, the fair market value may be regarded as two- thirds of the PADAC appraised value and, I assume, two-thirds of the amounts of the charitable receipts issued by the respective public galleries.

105 The original PADAC appraisals and the appraisals by Mr. Robinson and Mr. Lake were performed on a painting-by-painting basis. I have determined fair market value on a global basis looking at all of the 216 works as a group. If either the Appellants or the Respondent conclude that my determination should be on a painting-by-painting basis, I will on motion within 45 days of the date of these reasons for judgment hear further submissions by counsel but I will not hear any further evidence and I will not change the amount ($660,000) of my determination as to aggregate fair market value.

106 Upon reflection, I have four brief comments. Firstly, having regard to all of the evidence concerning Morrisseau's personal life in the Valuation Years, the disappearance of the Pollock Gallery in 1983 and the absence of any "sponsor retail gallery"from 1983 to 1990, the position taken by the Minister in his assessments was reasonable when the assessments were issued. The Appellants appeared to be standing in the real market place when they effected their 27 purchase transactions. Secondly, I am troubled by the fact that the PADAC appraisal was performed in the midst of the Valuation Years without any apparent inquiry as to where Morrisseau was at that time; whether he was producing new works of art; whether the new works were being sold; and if so, where and to whom. Those questions must be relevant when determining the fair market value of paintings by a contemporary artist who appears to have been highly productive in the midst of the Valuation Years.

107 Thirdly, I am impressed by the ease with which a public gallery will accept an opinion of high value for donated art. Would it accept and rely on the same opinion of high value if it were intending to purchase the art? Would the art be donated if the public gallery were more parsimonious in its acceptance of high value? And fourthly, I am disappointed that the evidence of the expert witnesses was not more helpful. They could have been more succinct and more explicit when describing the policies and practices of retail galleries which sell the works of contemporary artists. As a general rule, would a gallery purchase paintings or take them on consignment? If paintings are purchased, what is the policy with respect to a mark-up by the retail gallery? If paintings are taken on consignment, what is the policy with respect to a commission to the retail gallery? Some of this evidence came out tangentially but there could have been more focus to the questions by counsel.

Third Question: Interest assessed under section 161

108 The argument put forward on behalf of the Appellants is that the Minister of National Revenue may not assess interest with respect to any period of time prior to the date when he issues a reassessment which increases the tax owing for a particular year. This argument can be easily illustrated on the facts of these appeals. The Appellants filed their income tax returns for 1984 deducting large amounts as charitable donations based on the PADAC appraisals and the fact that two public galleries accepted those appraisals as fair market value. In 1988, the Minister issued reassessments for 1984 reducing the amounts of charitable donations; increasing the tax owing; and assessing interest from the date of the reassessment back to April 30, 1985 when the 1984 income tax returns were due to be filed. It is this last amount of interest which the Appellants dispute. The relevant section of the *Income Tax Act* states:

> 161(1) Where at any time after the day on or before which a taxpayer is required to pay the remainder of his tax payable under this Part for a taxation year,
>
> (a) the amount of his tax payable for the year under this Part

exceeds

(b) the aggregate of all amounts each of which is an amount paid at or before that time on account of his tax payable and applied as at that time by the Minister against the taxpayer's liability for an amount payable under this Part for the year,

the person liable to pay the tax shall pay to the Receiver General interest at the prescribed rate on the excess computed for the period during which that excess is outstanding.

109 The Appellants claim that there can be no excess amount "outstanding" until there has been a reassessment. There is no merit in the Appellants' argument. Subsection 152(3) of the Act states:

152(3) Liability for the tax under this Part is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made.

110 A notice of reassessment will determine the amount of tax owing for a particular taxation year but the liability for that amount exists from the date when the income tax return was due to be filed for that particular taxation year.

111 The Appellants rely on a 1985 amendment to section 161 which they claim takes away any authority the Minister may have had to assess interest retrospectively. The wording of the 1985 amendment is a little less explicit than the former wording: "the amount paid ... before the expiration of the time allowed for filing the return"but it does not change the time span over which the Minister has authority to assess interest. If the Appellants' argument were well-founded, any reassessment which increases the tax from a prior assessment and which is issued within the "normal reassessment period"(see subsection 152(3.1)) could not assess any interest with respect to the time prior to the date of such reassessment. The Appellants' argument is not well-founded.

Conclusion

112 When issuing the assessments under appeal, the Minister did not regard the Morrisseau Art as capital property in the hands of the Appellants and he permitted charitable deduction of only $130,000 when the Appellants had claimed to deduct $990,000. In accordance with my above reasons, the Morrisseau Art was capital property to the Appellants and they are entitled to deduct charitable donations of $660,000.

113 The appeals are allowed in order to grant this relief to the taxpayers. Because the Appellants have achieved substantial success, they are entitled to costs on the following terms. I would allow one set of costs as if there were only one Appellant plus (i) an arbitrary amount of $1,500 with respect to pleadings and similar documents required for the other two Appellants; and (ii) any amounts required for attendance upon all examinations for discovery if more than one Appellant was examined for discovery.

Appeal allowed.

END OF DOCUMENT

2000 D.T.C. 6001, [2000] 1 C.T.C. 329, 251 N.R. 252

1999 CarswellNat 2562

Whent v. R.

Her Majesty The Queen, Appellant and Robert E. Zelinski, Ken A. Whent and Nicholas J. Pustina, Respondents

Federal Court of Appeal

Stone, Isaac, Sexton JJ.A.

Heard: November 15 and 16, 1999
Judgment: December 10, 1999
Docket: A-742-96, A-743-96, A-744-96

Proceedings: affirming [1996] C.T.C. 2542, 96 D.T.C. 1594 (T.C.C.)

Counsel: *Gordon Bowgard* and *Michelle Farrell*, for Appellant.

Michael Penman, for Respondent.

Subject: Income Tax (Federal)

Income tax --- Capital gains and losses -- Capital gains exemption -- Miscellaneous issues.

Income tax --- Capital gains and losses -- Capital gain vs income -- Adventure or concern in the nature of trade.

Income tax --- Capital gains and losses -- Deemed disposition -- Gifts.

Income tax --- Capital gains -- Dispositions -- Deemed dispositions -- Miscellaneous issues

Lawyers donated paintings of native artist to public art galleries -- Donations made on assumption that they qualified for capital gains exemption -- Section 39(1)(a)(i.1) of Income Tax Act excludes from taxpayer's capital gains any gains that result from disposition of Canadian cultural property to prescribed public institutions -- Lawyers reassessed on basis that proceeds from deemed disposition of paintings constituted business income and did not qualify for exemption -- Lawyers found to have engaged in adventure in nature of trade -- Lawyers appealed to Tax Court of Canada -- Appeal allowed -- Minister appealed to Federal Court of Appeal -- Appeal dismissed -- Lawyers purchased paintings either with no specific intention or with intention to donate -- Since primary intention carried out, any secondary intention immaterial to whether lawyers engaged in adventure in nature of trade -- Tax Court judge did not proceed on wrong principle or make palpable error in assessing fair market value of paintings -- Income Tax

Act, S.C. 1970-71-72, c. 63, s. 39(1)(a)(i.1).

Cases considered by *Sexton J.A.*:

Art Gallery of Ontario v. Canada (Cultural Property Export Review Board), 80 F.T.R. 231, [1994] 3 F.C. 691 (Fed. T.D.) -- referred to

Bibby v. R., [1983] C.T.C. 121, 83 D.T.C. 5148 (Fed. T.D.) -- applied

Connor v. R., [1979] C.T.C. 365, 79 D.T.C. 5256 (Fed. C.A.) -- applied

De Salaberry Realties Ltd. v. Minister of National Revenue, 76 D.T.C. 6408, [1976] C.T.C. 656, 13 N.R. 451, 70 D.L.R. (3d) 706 (Fed. C.A.) -- referred to

Friesen v. R., 95 D.T.C. 5551, (sub nom. *Friesen v. Minister of National Revenue*) 186 N.R. 243, (sub nom. *Friesen v. Minister of National Revenue*) 102 F.T.R. 238 (note), (sub nom. *Friesen v. Canada*) 127 D.L.R. (4th) 193, (sub nom. *Friesen v. Canada*) [1995] 2 C.T.C. 369, [1995] 3 S.C.R. 103 (S.C.C.) -- applied

Loewen v. Minister of National Revenue, (sub nom. *Loewen v. R.*) 94 D.T.C. 6265, 166 N.R. 226, (sub nom. *Canada v. Loewen*) [1994] 3 F.C. 83, (sub nom. *Loewen v. Canada*) [1994] 2 C.T.C. 75, 81 F.T.R. 118 (note) (Fed. C.A.) -- applied

Maloney v. R., 92 D.T.C. 6570, (sub nom. *Maloney v. Minister of National Revenue*) 145 N.R. 258, [1992] 2 C.T.C. 227 (Fed. C.A.) -- applied

R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627, 68 D.L.R. (4th) 568, 106 N.R. 385, 39 O.A.C. 385, 55 C.C.C. (3d) 530, 76 C.R. (3d) 283, 47 C.R.R. 151, (sub nom. *Canada v. McKinlay Transport Ltd.*) [1990] 2 C.T.C. 103, (sub nom. *McKinlay Transport Ltd. v. R.*) 90 D.T.C. 6243, 72 O.R. (2d) 798 (note) (S.C.C.) -- referred to

Racine v. Minister of National Revenue, [1965] 2 Ex. C.R. 338, 65 D.T.C. 5098, [1965] C.T.C. 150 (Can. Ex. Ct.) -- referred to

Statutes considered:

Cultural Property Export and Import Act, S.C. 1974-75-76, c. 50

Generally -- considered

s. 23(3)(b) -- referred to

s. 23(3)(c) -- referred to

Income Tax Act, S.C. 1970-71-72, c. 63

Generally -- considered

s. 39(1)(a)(i.1) [rep. & sub. 1980-81-82-83, c. 48, s. 16(1)] -- considered

2000 D.T.C. 6001, [2000] 1 C.T.C. 329, 251 N.R. 252

s. 39(1)(a)(i.1)(B) [rep. & sub. 1980-81-82-83, c. 48, s. 16(1)] -- referred to

s. 69(1)(b) -- referred to

s. 110(1)(b.1) [en. 1974-75-76, c. 50, s. 50] -- considered

s. 152(3) -- referred to

s. 152(8) -- referred to

s. 161(1) -- considered

Rules considered:

Federal Court Rules, 1998, SOR/98-106

Generally -- referred to

APPEAL from judgment reported at [1996] 3 C.T.C. 2542 (T.C.C.), which allowed taxpayers' appeal from Minister's disallowance of taxpayers' capital gains exemption.

Sexton J.A.:

Introduction

1 When the Government of Canada introduced the *Cultural Property Export and Import Act* to Parliament, it announced that "various tax incentives to encourage gifts and the sale of national treasures to appropriate custodial institutions"[FN1] would be required "in order to encourage the movement of national treasures into those institutions best able to preserve them."[FN2] The Government explained that the tax incentives "are central to the operation of the whole scheme."[FN3] Three lawyers enthusiastically embraced the message. They donated approximately 215 paintings of a famous native artist, Norval Morrisseau, to public art galleries in Ontario. These donations meant that this truly Canadian art would be preserved and be accessible for average Canadians. It also meant that the lawyers would reap large tax savings. Although they had only paid $129,350 for the paintings, they had them appraised for almost $1 million. The lawyers deducted the larger amount from their professional income. The Canadian Government disagreed.

2 The Minister of National Revenue (the "Minister") reassessed the taxpayers' returns. At trial, he argued that they were not exempt from any gain they might have made on the deemed disposition of the paintings, since an exemption contained in the *Income Tax Act* (the "Act") applied only to capital gains, and since the proceeds they were deemed to have received constituted business income. The Minister's theory was that the taxpayers were engaged in an adventure in the nature of trade. The Minister also objected to the $992,000 fair market value for which tax receipts were issued, saying that the fair market value of the paintings was simply $129,350: the actual cost that the taxpayers had paid for the paintings. Alternatively, at trial, the Minister argued that the fair market value of the paintings was only $255,155, a far lower assessment of the fair market value of the paintings than the taxpayers had claimed. Accordingly, the Minister required the taxpayers to pay additional amounts of tax, and imposed interest on those amounts as of the date on which the taxpayers were required to file their tax returns.

3 Broadly speaking, these appeals raise three issues:

1. Whether the taxpayers were engaged in an adventure in the nature of trade;

2. What was the fair market value of the artwork; and

3. Whether the Minister is permitted to assess interest on tax as of the date on which a taxpayer is required to file his or her tax return, or whether the Minister is only permitted to assess interest as of the date of re-assessment of a taxpayer's return.

Background Facts

4 Norval Morrisseau is a prominent Canadian artist who lived in Thunder Bay. Until 1981, he sold his artwork largely through an exclusive arrangement with a private gallery in Toronto called the Pollock Gallery. It continued to sell Mr. Morrisseau's art until it declared bankruptcy in 1983.

5 The Tax Court judge explained that in 1984, Mr. Morrisseau developed "an undisciplined lifestyle" and had "a serious problem with alcohol."[FN4] Since the Pollock Gallery had declared bankruptcy, Mr. Morrisseau no longer exclusively sold his artwork to one dealer. Instead, as the Tax Court judge explained, his new works were "peddled on the streets of Thunder Bay and possibly other places."[FN5] Mr. Zelinksi testified that even one grocery store in Thunder Bay sold Morrisseau paintings.[FN6]

6 In March 1984, the taxpayers began to purchase Mr. Morrisseau's paintings. Over the course of two years, they purchased approximately 215 paintings, for which they paid $129,350. Each painting was certified by the Canadian Cultural Property Export Review Board in accordance with paragraph 23(3)(b) and (c) of the *Cultural Property Export and Import Act*, as required by subparagraph 39(1)(a)(i.1) of the Act. The taxpayers also asked an organization called the Professional Art Dealers Association of Canada Inc. ("PADAC") to provide appraisals of the fair market value of the paintings. PADAC concluded that the fair market value of the paintings was $992,900.

7 With their certifications and appraisals in hand, the taxpayers began to donate the Morrisseau paintings to various public galleries and museums that met the statutory criteria established by subparagraph 39(1)(a)(i.1)(B) of the Act. In return for their donations, the galleries and museums issued tax receipts to the taxpayers pursuant to the former paragraph 110(1)(b.1) of the Act for amounts equal to the fair market value established by PADAC. The taxpayers sought a deduction from their professional income using those tax receipts. In their tax returns, the taxpayers claimed exemptions for any capital gains they might be deemed to have received as a result of their donations to the galleries and museums by reason of paragraph 69(1)(b) of the Act. The exemption, outlined at subparagraph 39(1)(a)(i.1) of the Act, excludes from a taxpayer's capital gains any gains that result from the disposition of Canadian Cultural Property to prescribed public institutions.

8 In his reassessment, the Minister raised two primary concerns with the taxpayers' returns. First, he argued that the taxpayers could not avail themselves of the exemption outlined at subparagraph 39(1)(a)(i.1) of the Act, since the taxpayers' purchases constituted an adventure in the nature of trade. Accordingly, any deemed proceeds of disposition that occurred as a result of the taxpayers' donations to the galleries and museums were on account of income, not capital. Since the exemption outlined at subparagraph 39(1)(a)(i.1) of the Act applies only to a taxpayer's capital gains, it could not apply to the taxpayers' deemed proceeds on account of income.

9 Second, the Minister disputed the tax receipts issued by the galleries and museums to the taxpayers for the fair market value of the paintings. The Minister argued that the fair market value of the paintings was not $992,900, as PADAC had established. Rather, the fair market market value of the paintings at the time they were donated to the galleries and museums was simply the cost the taxpayers had paid for them, or $129,350. Alternatively, at trial, the Minister provided expert evidence to demonstrate that the fair market value of the paintings was merely $255,155.

2000 D.T.C. 6001, [2000] 1 C.T.C. 329, 251 N.R. 252

10 The taxpayers appealed the Minister's reassessment to the Tax Court of Canada.

Relevant Statutory Provisions

Income Tax Act

39 (1) For the purposes of this Act,

(a) a taxpayer's capital gain for a taxation year from the disposition of any property is his gain for the year determined under this subdivision [...] from the disposition of any property of the taxpayer other than [...]

(i.1) an object that the Canadian Cultural Property Export Review Board has determined meets all criteria set out in paragraphs 23(3)(b) and (c) of the *Cultural Property Export and Import Act* and that has been disposed of, [...]

(B) in any other case, at any time, to an institution or public authority in Canada that was at the time of the disposition designated under subsection 26(2) of that Act either generally or for a purposes related to that object, [...]

69 (1) Except as expressly otherwise provided in this Act, [...]

(b) where a taxpayer has disposed of anything

(i) to a person with whom he was not dealing at arm's length for no proceeds or for proceeds less than the fair market value thereof at the time he so disposed of it, or

(ii) to any person by way of gift *inter vivos*,

he shall be deemed to have received proceeds of disposition therefor equal to that fair market value; [...]

110 (1) For the purpose of computing the taxable income of a taxpayer for a taxation year, there may be deducted such of the following amounts as are applicable: [...]

(b.1) the aggregate of gifts of objects that the Canadian Cultural Property Export Review Board has determined meet all of the criteria set out in paragraphs 23(3)(b) and (c) of the Cultural Property Export and Import Act, which gifts were not deducted under paragraph (a) or (b) and were made by the taxpayer in the year (and in the 5 immediately preceding taxation years, to the extent of the amount thereof that was not deducted under this Act in computing the taxable income of the taxpayer for any preceding taxation year) to institutions or public authorities in Canada that were, at the time the gifts were made, designated under subsection 26(2) of that Act either generally or for a purpose related to those objects, not exceeding the amount remaining, if any, when the amounts deducted for the year under paragraphs (a) and (b) are deducted from the income of the taxpayer for the year, if payment of the amounts given is proven by filing receipts with the Minister that contain prescribed information;

152 (8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to re-assessment, be deemed to be valid and binding notwithstanding any error, defect or omission therein or in any proceeding under this Act relating thereto.

2000 D.T.C. 6001, [2000] 1 C.T.C. 329, 251 N.R. 152

Loi de l'impôt sur le revenu

39(1) Aux fins de la présente loi,

(a) un gain en capital d'un contribuable, tiré, pour une année d'imposition, de la disposition d'un bien quelconque, désigné le gain, déterminé conformément aux dispositions de la présente sous-section [...] de la disposition d'un bien lui appartenant, autre [...]

(i.1) qu'un objet dont la conformité aux critères énoncés aux alinéas 23(3)(b) et (c) de la *Loi sur l'exportation et l'importation de biens culturels* a été établie par la Commission canadienne d'examen des exportations de biens culturels et qui a été aliéné [...]

(B) dans tout autre cas, à n'importe quel date, au profit d'un établissement, ou d'une administration, sis au Canada et alors désigné, conformément au paragraphe 26(2) de cette loi, à des fins générales ou liées à cet objet, [...]

69 (1) Sauf dispositions contraires expresses contenues dans la présente loi, [...]

(b) lorsqu'un contribuable a disposé d'un bien en faveur

(i) d'une personne avec laquelle il avait un lien de dépendance sans contrepartie ou moyennant une contrepartie inférieure à la juste valeur marchande de ce bien à la date de la disposition, ou

(ii) d'une personne au moyen d'une donation entre vifs,

il est réputé avoir reçu par suite de la disposition une contrepartie égale à cette juste valeur marchande; [...]

110(1) Pour le calcul du revenu imposable d'un contribuable pour une année d'imposition, il peut être déduit celles des sommes suivantes qui sont appropriées: [...]

(b.1) le total des dons d'objets qui, selon la Commission canadienne d'examen des exportations de biens culturels, satisfont aux critères prévus aux alinéas 23(3)(b) et (c) de la *Loi sur l'exportation et l'importation de biens culturels*, dont le montant n'a pas été déduit en vertu de l'aliéna (a) ou (b) et que le contribuable a faits dans l'année (et dans les cinq années d'imposition précédentes, dans la mesure où le montant de ces dons n'a pas été déduit en vertu de la présente loi dans le calcul de son revenu imposable pour une année d'imposition antérieure), à des établissements ou organismes publics au Canada qui étaient alors désignés, en vertu du paragraphe 26(2) de cette loi, à des fins générales ou à une fin liée à ces objets, jusqu'à concurrence du restant éventuel après que les montants déduits pour l'année en vertu des aliénas (a) et (b) ont été déduits du revenu du contribuable pour l'année, à condition que le versement de ces dons soit prouvé par la production auprès du ministre de reçus où figurent les renseignements prescrits;

152 (8) Sous réserve de modifications qui peuvent y être apportées ou d'annulation qui peut être prononcée lors d'une opposition ou d'un appel fait en vertu de la présente Partie et sous réserve d'une nouvelle cotisation, une cotisation est réputée être valide et exécutoire nonobstant toute erreur, vice de forme ou omission dans cette cotisation ou dans toute procédure s'y rattachant en vertu de la présente loi.

Judgment Below

11 The Tax Court judge analyzed the parties' submissions under the three broad headings outlined in the introduction to this judgment.

12 First, he concluded that the taxpayers' purchases did not constitute an adventure in the nature of trade.

13 Next, he analyzed the parties' submissions on the fair market value of the Morrisseau paintings. He concluded that he did "not accept any of the opinions with respect to fair market value" offered by the parties' experts, and relied on *Bibby v. R* [FN7] for the proposition that where a Court "does not find the evidence of any expert completely satisfying or conclusive," it may "form its own opinion of valuation, provided this is always based on the careful consideration of all the conflicting evidence."[FN8] The Tax Court judge eventually concluded that the fair market value of the Morrisseau paintings was $660,000.

14 Finally, the Tax Court judge rejected the taxpayers' claim that subsection 161(1) of the Act precludes the Minister from assessing interest on taxes prior to the date on which the Minister issues a reassessment. He held that subsection 152(3) establishes that a liability for tax exists "from the date when the income tax return was due to be filed for that particular taxation year,"[FN9] and that consequently, the Minister is able to assess interest on taxes as of the date on which a taxpayer is required to file a tax return.

15 The Minister now appeals the Tax Court judge's determination that the taxpayers were not engaged in an adventure in the nature of trade. The taxpayers have cross-appealed both the Tax Court judge's determination of the fair market value of the paintings, as well as his conclusion that the taxpayers were required to pay interest on taxes owing as of the date their returns were required to be filed.

16 Parenthetically, the Court was informed by counsel for Mr. Pustina and by the Minister that both the Minister's appeal against Mr. Pustina and Mr. Pustina's cross-appeal against the Minister were to be discontinued pursuant to the *Federal Court Rules, 1998*, and that no costs should be awarded against either party in either the appeal or the cross-appeal in Docket A-743-96. After this appeal was heard, counsel for Mr. Pustina and the Minster filed a notice to discontinue the appeal and cross-appeal.

Issues

1. Were the taxpayers engaged in an adventure in the nature of trade?

2. What was the fair market value of the Morrisseau artwork?

3. Does subsection 161(1) of the Act permit the Minister to assess interest on tax as of the date on which a taxpayer is required to file his or her tax return, or does it only permit the Minister to assess interest as of the date on which the Minister reassesses a taxpayer's return?

Analysis

Adventure in the Nature of Trade

The Taxpayers' Bargain Purchases

17 In this appeal, the Minister argued that the Tax Court judge incorrectly determined that the taxpayers did not engage in an adventure in the nature of trade. The Minister argued that to determine whether a taxpayer's purchase constitutes an adventure in the nature of trade, a Court must examine a taxpayer's intention at the time of acquisition,

not at the time of disposition. The Minister submits that the Tax Court judge's findings of fact are inconsistent with this need to focus on a taxpayer's intention at the time of acquisition.

18 To analyze this submission, the Tax Court judge's findings of fact must be reviewed in some depth. All of the Tax Court judge's findings of fact were made with the observation that the taxpayers' evidence was "credible without qualification."[FN10]

19 First, he found that when the taxpayers began to purchase the Morrisseau paintings, they did not initially know of the tax advantages offered by subparagraph 110(1)(b.1) and subparagraph 39(1)(a)(i.1) of the Act. They simply "looked upon their first few acquisitions as simply a bargain -- like buying a loonie for a dime."[FN11] This finding of fact was supported by Mr. Zelinski's testimony, where he testified that he "was being motivated to buy [the] paintings because they were bargains,"[FN12] and by Mr. Whent, where he testified that the taxpayers bought the paintings because they were "a good deal."[FN13] Ultimately, the Tax Court judge concluded that, "apart from their natural desire to acquire bargains,"[FN14] the taxpayers "had no specific motive or intention with respect to their early acquisitions"[FN15] and that "there were unlimited possibilities open to the [taxpayers] concerning the ultimate use of their early purchases."[FN16] However, once the taxpayers learned of the tax advantages potentially available to them, "subsequent acquisitions were for the purpose of donation."[FN17] At that point, donations to the galleries and museums were prompted by two principal intentions: first, to reduce their taxes by virtue of paragraph 110(1)(b.1) and to avoid tax on any deemed gains by virtue of subparagraph 39(1)(a)(i.1) of the Act, and second, to permit Mr. Morrisseau's paintings to "be seen by a wide cross-section of Canadians."[FN18]

20 On appeal, the Minister submitted that since the taxpayers "knew the paintings were bargains, their operating motivation at the outset was to turn to account, in one way or another, the difference between the cost of acquisition and what they believe to be the fair market value of the paintings." I disagree. There is insufficient evidence to demonstrate that the taxpayers purchased the paintings with an intention to sell. The Tax Court judge found that the taxpayers had no specific intention when they made their early acquisition of paintings. I also agree with the Tax Court judge that the mere intention to purchase property on the basis that it is a bargain is not sufficient to establish that a taxpayer is engaged in an adventure in the nature of trade. It is neutral and entirely natural for taxpayers, whether engaged in an adventure in the nature of trade or not, to purchase things merely because they are bargains. Indeed, paragraph 12 of Revenue Canada's Interpretation Bulletin IT-459 confirms this approach:

> A taxpayer's intention to sell at a gain is not sufficient, by itself, to establish that the taxpayer was involved in an adventure or concern in the nature of trade. That intention is almost invariably present even when a true investment has been acquired if circumstances should arise that would make it financially more beneficial to sell the investment than to continue to hold it. [...]

21 The Minister also submitted that the taxpayers' ostensible intention to engage in an adventure in the nature of trade when they made their first few purchases without knowing of the potential tax advantages available to them could somehow colour their subsequent purchases made with the specific intention of donating the paintings. The Minister conceded that this argument depended on the Court accepting the proposition that the taxpayers' various purchases of paintings constituted one single transaction.

22 Since I have already concluded that the taxpayers' intention to obtain a "bargain" is insufficient to constitute an intention to engage in an adventure in the nature of trade, it follows that their first few purchases cannot somehow colour subsequent purchases made with the knowledge of the tax advantages and with the intention to donate the paintings.

23 In any event, I do not accept that the taxpayers purchased the Morrisseau paintings as one single transaction. The Tax Court judge's findings of fact specifically state that once the taxpayers learned of the tax advantages potentially available to them, "subsequent acquisitions were for the purpose of donation." Mr. Zelinski also testified that

he "became aware of the cultural property donation [...] very early in the spring of 1984, if not in the month of March, 1984." By the end of March, 1984, the taxpayers had only purchased eight of their 215 paintings. In fact, the taxpayers purchased the Morrisseau artwork in 27 different batches. Furthermore, the taxpayer refused to buy all the Morrisseau art offered to them, instead deciding on an individual basis whether to buy paintings.

24 Cumulatively, this evidence demonstrates that the taxpayers engaged in a series of transactions, and did not simply engage in one transaction. Therefore, even if I were to accept that the taxpayers' intention to purchase their first few paintings as a "bargain" could constitute an adventure in the nature of trade, which I do not, the vast majority of the taxpayers' purchases were made with a view to donating them.

The Taxpayers' Donation Purchases

25 That said, can property that is purchased solely for the purpose of donation constitute an adventure in the nature of trade? In my view, it cannot.

26 In *Friesen v. R.*,[FN19] Major J. concluded that "[t]he first requirement for an adventure in the nature of trade is that it involve a 'scheme for profit-making'."[FN20] The taxpayer must have a "legitimate intention of gaining a profit from the transaction."[FN21] Later in his judgment, he added that "[s]chemes entered into with the intention of creating a business loss would not qualify as adventures in the nature of trade and would be tantamount to a sham."[FN22] In my view, the paintings purchased by the taxpayers that were purchased with an intention to donate cannot be considered to be purchased with a legitimate intention of gaining a profit. In that sense, the taxpayers' purchases were like schemes entered into with an intention of creating a business loss, which Major J. concluded could not qualify as an adventure in the nature of trade.

27 Similarly, in *Loewen v. Minister of National Revenue*,[FN23] Hugessen J.A. held that "tax considerations" and "an anticipated tax advantage" cannot "properly be determinative of whether or not any given transaction is a trading operation."[FN24] He added that "[w]hile the saving of taxes is clearly an important consideration in the conduct of any modern business, I do not think it can properly be said that a transaction whose sole purpose is to reduce the tax otherwise payable by a taxpayer is, for that reason alone, an adventure in the nature of trade."[FN25] In the same vein, Hugessen J.A. held in *Moloney v. R.*[FN26] that the taxpayer's reduction of tax "cannot by itself be a taxpayer's business for the purpose of the *Income Tax Act*."[FN27] He added:

> To put the matter another way, for an activity to qualify as a "business" the expenses of which are deductible under paragraph 18(1)(a), it must not only be one engaged in by the taxpayer with a reasonable expectation of profit, but that profit must be anticipated to flow from the activity itself rather than exclusively from the provisions of the taxing statute.[FN28]

28 I would also add that the taxpayers' donations are entirely consistent with the joint operation of the Act and of the *Cultural Property Export and Import Act*, and that to forbid the deductions sought by the taxpayers in the circumstances of this appeal would effectively frustrate those objectives. In *Art Gallery of Ontario v. Canada (Cultural Property Export Review Board)*, [FN29] Rothstein J. addressed the objective that Parliament sought to fulfill when it provided the incentives it did:

> The purpose of this legislation [*i.e.* the *Cultural Property Export and Import Act*] is to provide a mechanism to preserve the national heritage of Canada through a combination of export controls, preferential rights of purchase for designated cultural institutions and income tax incentives for those who donate Canadian cultural property to such designated institutions.
>
> The basic scheme of the [*Cultural Property Export and Import Act*] and its companion provisions in the *Income Tax Act* is to combine an incentive -- preferential tax treatment on the gift or sale of Canadian cultural

> property to designated institutions, with certain restrictions on the export of Canadian cultural property [...][FN30]

The Taxpayers' Secondary Intention

29 In his reasons for judgment, the Tax Court judge stated that "if the [taxpayers] had sold the Morrisseau Art at the same times and in the same five batches and at the same values as the five actual donations to public galleries, those hypothetical sales would have been adventures in the nature of trade"[FN31] on the basis of the secondary intention concept developed in *Racine v. Minister of National Revenue*[FN32] and *De Salaberry Realties Ltd. v. Minister of National Revenue*.[FN33]

30 During oral argument, the Minister submitted alternatively that the taxpayers purchased the Morrisseau paintings with a secondary intention to engage in an adventure in the nature of trade. In part, he supported his submissions on the basis of the following portion of the cross-examination of Mr. Zelinski:

> Q. Now, sir, when you participated in this venture -- when you got into it as an investment and you were thinking about the potential appreciation and you were thinking about this built-in gain, isn't it true that the only way that the built-in gain or potential appreciation could be realized or crystallized would be by way of a potential sale of the paintings?
>
> A. Eventually.
>
> Q. So you were saying to yourself, "Eventually, this could be sold for a gain," correct?
>
> A. Correct.

31 In *Racine*, Noël J. held:

> It is not, in fact, sufficient to find merely that if a purchaser had stopped to think at the moment of the purchase, he would be obliged to admit that if at the conclusion of the purchase an attractive offer were made to him he would resell it, for every person buying [...] a painting for his house [...] would be obliged to admit, if this person were honest and if the transaction were not based exclusively on a sentimental attachment, that if he were offered a sufficiently high price a moment after the purchase, he would resell.[FN34]

32 Noël J. added that a "secondary intention" to resell so as to constitute an adventure in the nature of trade only exists where the purchaser has in his or her mind, "at the moment of the purchase, the possibility of reselling as an *operating motivation* for the acquisition."[FN35] Such an operating motivation cannot exist merely because a taxpayer considers that eventually, something could be sold for a gain. More is needed.

33 Moreover, a taxpayer's secondary intention acquires importance only where a taxpayer's primary intention is frustrated or proves impracticable. In *Principles of Canadian Income Tax Law*,[FN36] Peter Hogg and Joanne Magee note that a secondary intention becomes material where "the primary purpose proves impracticable."[FN37] In an article entitled "Adventure or Concern in the Nature of Trade,"[FN38] Robert Beam and Stanley Laiken explain that "[t]he concept of secondary intention was developed by the courts to deal with situations in which there was evidence that a primary intention to hold an asset as a capital investment [...] was frustrated [...]."[FN39] Similarly, in an article entitled "Capital Versus Income,"[FN40] D. Bernard Morris notes that secondary intention is examined "in the event that the primary intent is frustrated."[FN41] And finally, paragraph 5 of Revenue Canada's Interpretation Bulletin IT-218R also confirms that a secondary intention applies only where "the main or primary intention is thwarted."

34 In the circumstances of this appeal, the taxpayers' primary intention was not thwarted: they purchased their paintings either with no specific intention, or with the intention to donate them. Since they carried out that primary intention, any secondary intention they might have had is immaterial to whether they were engaged in an adventure in the nature of trade.

35 Finally, a secondary intention to resell at a profit only acquires importance where a taxpayer follows through on that intention. Again, the authors of *Principles of Canadian Income Tax Law* explain that a "transaction will be held to be on account of income rather than capital [...] if the secondary intention is carried out."[FN42] Paragraph 5 of IT-218R also states that "if this secondary intention is carried out any gain realized on the sale usually will be taxed as business income." Since the taxpayers did not carry out any purported secondary intention they might have had, those intentions cannot transform their *de facto* decision to not follow through on that secondary intention so as to make it appear as if they did do so.

Fair Market Value of the Paintings

36 At trial, six witnesses testified to the fair market value of the Morrisseau artwork. Four of those witnesses were qualified as experts. One of the taxpayers' experts valued the Morrisseau artwork at $1,104,795. The original PADAC appraisal submitted by the taxpayers to the galleries and museums to which the paintings were eventually donated claimed that the fair market value of the artwork was $992,900. By contrast, the Minister's experts valued the Morrisseau art at $255,155.

37 As previously mentioned, the Tax Court judge did not accept any of the experts' conclusions. He then quoted the following passage from *Bibby v. R.*, and concluded that the fair market value of the artwork was $660,000:

> While it has frequently been held that a Court should not, after considering all the expert and other evidence merely adopt a figure somewhere between the figure sought by the contending parties, it has also been held that the Court may, when it does not find the evidence of any expert completely satisfying or conclusive, nor any comparable especially apt, form its own opinion of valuation, provided this is always based on the careful consideration of all the conflicting evidence. The figure so arrived at need not be that suggested by any expert or contended for by the parties.[FN43]

38 Counsel for the taxpayers agreed that the Tax Court judge was entitled to form his own opinion of valuation in accordance with *Bibby*.

39 In my view, the Tax Court judge's determination of valuation was reasonable. *Bibby* is consistent with Urie J.A.'s judgment in *Connor v. R.*, [FN44] where the Court held:

> It is trite to say that the Trial Judge is the trier of fact and he is thus entitled to accept or reject, in whole or in part, any of the evidence adduced before him. In this case he accepted some of the evidence but he rejected in all cases the methods, at least in part, whereby the experts arrived at their valuations. He was entitled to do so and unless it can be said that thereafter he proceeded on a wrong principle or that he made a palpable error in reaching his own conclusions as to value, we ought not to interfere with this findings. We have not been persuaded by the arguments of counsel that he proceeded on a wrong principle or made any such error. Certainly he appears to have adopted parts of the methods used by the witnesses in making their calculations but in using only parts and not the whole of their respective methods we do not believe that he erred in law. Certainly, without the advantage of having seen and heard the witnesses, we are not in the position to say that he wrongly rejected the evidence of any one [...] nor could we [...] substitute our view of value for his.

2000 D.T.C. 6001, [2000] 1 C.T.C. 329, 251 N.R. 252

40 In this case, the Tax Court judge considered each expert's appraisal methods, and concluded that no one method was satisfying. He then arrived at his own opinion of valuation based on the careful consideration of all the conflicting evidence. In so doing, I do not think that he proceeded on a wrong principle or made a palpable error. Accordingly, the taxpayers' cross-appeal of the Tax Court judge's determination of the fair market value of the paintings should be dismissed.

Interest

41 For convenience, I have reproduced the text of subsection 161(1) of the Act below:

> 161(1) Where at any time after the day on or before which a taxpayer is required to pay the remainder of his tax payable under this Part for a taxation year,
>
> (a) the amount of his tax payable for the year under this Part exceeds
>
> (b) the aggregate of all amounts each of which is an amount paid at or before that time on account of his tax payable and applied as at that time by the Minister against the taxpayer's liability for an amount payable under this Part for the year,
>
> the person liable to pay the tax shall pay to the Receiver General interest at the prescribed rate on the excess computed for the period during which that excess is outstanding. [emphasis added]
>
> 161(1) Lorsque, à une date quelconque postérieure à la date où le contribuable était, au plus tard, tenu en vertu de la présente partie de produire sa déclaration de revenu pour une année d'imposition,
>
> (a) le montant de l'impôt payable par le contribuable pour l'année en vertu de la présente partie est supérieur
>
> (b) au total des montants dont chacun représente un montant payé au plus tard à cette date quelconque au titre de son impôt payable et imputé à compter de cette date quelconque par le ministre sur le montant dont le contribuable est redevable en vertu de la présente partie pour l'année,
>
> le personne redevable de l'impôt doit verser au receveur général des intérêts sur l'excédent, calculés au taux prescrit pour la période pendant laquelle cet excédent est impayé. [nos italiques]

42 The taxpayers submit that since the Minister reassessed the taxpayers' returns in 1988, subsection 161(1) of the Act only entitles the Minister to assess interest from the date of that reassessment. Prior to that re-assessment, the taxpayers were issued an assessment. The taxpayers submit that since subsection 152(8) states, *inter alia*, that an assessment is "deemed to be valid and binding," no tax amount can be said to be "outstanding" until the reassessment was made. In other words, subsection 161(1) of the Act is limited by subsection 152(8).

43 In *R. v. McKinlay Transport Ltd.*,[FN45] Wilson J. concluded that the Canadian tax system "is a self-reporting and self-assessing one which depends upon the honesty and integrity of the taxpayers for its success."[FN46] To accept the argument that subsection 161(1) of the Act only permits the Minister to impose interest on taxes as of the date of the Minister's reassessment would encourage taxpayers to underestimate taxes that the Act requires them to pay, while those dishonest taxpayers would rest content with the knowledge that the Minister could only impose interest on taxes owing as of the date of a later reassessment by the Minister.

44 The taxpayers' arguments are also inconsistent with the plain language of subsection 161(1) of the Act, which

permits the Minister to impose interest for the period during which excess taxes are "outstanding." "Outstanding" is broadly defined in the third edition of *The Shorter Oxford Dictionary* as "that stands over; that remains undetermined, unsettled, or unpaid." Simply put, taxes that a taxpayer underestimates from his or her tax return are unpaid and are therefore outstanding, regardless of the date on which the Minister reassesses the taxpayer.

45 Accordingly, I would dismiss the taxpayers' cross-appeal on the interest issue.

Conclusion

46 To summarize, I would dismiss the Minister's appeal on the issue of the deductibility of the donations from taxable income and the related issue of whether the taxpayers were permitted to take advantage of subparagraph 39(1)(a)(i.1) of the Act. I would also dismiss the taxpayers' cross-appeal on both the valuation issue and on the interest issue. As previously mentioned, counsel for both the Minister and for Mr. Pustina agreed to discontinue both the appeal and the cross-appeal in Docket A-743-96 without any cost consequences. I concur. In view of the divided success in the appeal and the cross-appeal, the respondents should have one-half of their costs.

Appeal dismissed.

FN1. *House of Commons Debates* (7 February 1975) at 3025.

FN2. *Ibid.*

FN3. *Ibid.* at 3027.

FN4. See *Wheni v. R.* [1996] 3 F.C. 484 (T.C.C.) at 1603.

FN5. *Wheni*, *supra* at 1607.

FN6. Excerpt of Evidence of Robert E. Zelinsky, Day 1, p. 109, l. 5-11.

FN7. (1983), 83 D.T.C. 5148 (Fed. T.D.).

FN8. *Wheni*, *supra* at 1611.

FN9. *Ibid.* at 1614.

FN10. *Ibid* at 1600.

FN11. *Ibid* at 1597.

FN12. *Ibid.* at 1600.

FN13. *Ibid.* at 1601.

FN14. *Ibid.*

FN15. *Ibid.*

2000 D.T.C. 6001, [2000] 1 C.T.C. 329, 253 N.R. 252

FN16. *Ibid.* at 1602.

FN17. *Ibid.* at 1598.

FN18. *Ibid.*

FN19. (1995), 95 D.T.C. 5551 (S.C.C.)

FN20. *Ibid.* at 5554.

FN21. *Ibid.*

FN22. *Ibid.* at 5563.

FN23. (1994), 94 D.T.C. 6265 (Fed. C.A.)

FN24. *Ibid.* at 6269.

FN25. *Ibid.*

FN26. (1992), 92 D.T.C. 6570 (Fed. C.A.)

FN27. *Ibid.* at 6570.

FN28. *Ibid.*

FN29. [1994] 3 F.C. 691 (Fed. T.D.)

FN30. *Ibid.* at 696.

FN31. *Wheat*, *supra* at 1602.

FN32. (1965), 65 D.T.C. 5098 (Can. Ex. Ct.)

FN33. (1976), 76 D.T.C. 6408 (Fed. C.A.)

FN34. *Racine*, *supra* at 5103.

FN35. *Ibid.* [emphasis added]

FN36. (Scarborough, Ont.: Carswell, 1997)

FN37. *Ibid.* at 332.

FN38. (1996), 44 Can. Tax J. n. 3 888.

FN39. *Ibid.* at 891.

FN40. (1992) CR 26:1.

FN41. *Ibid.* at 15.

FN42. *Supra* at 332.

FN43. *Bibby, supra* at 5157.

FN44. (1979), 79 D.T.C. 5256 (Fed. C.A.)

FN45. [1990] 1 S.C.R. 627 (S.C.C.).

FN46. *Ibid.* at 636.

END OF DOCUMENT