Date: 20091119

Docket: A-464-08

Citation: 2009 FCA 340

CORAM: **EVANS J.A.**
LAYDEN-STEVENSON J.A.
TRUDEL J.A.

BETWEEN:

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Appellant

and

ELLEN REMAI,
AS EXECUTRIX OF THE ESTATE
OF FRANK REMAI

Respondent

Heard at Edmonton, Alberta, on October 8, 2009.

Judgment delivered at Ottawa, Ontario, on November 19, 2009.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: LAYDEN-STEVENSON J.A.
TRUDEL J.A.

Federal Court of Appeal | Cour d'appel fédérale

CANADA

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] This is an appeal by Her Majesty the Queen in Right of Canada from a decision of the Tax Court of Canada in which Associate Chief Justice Rossiter allowed an appeal by Ellen Remai as executrix of the estate of the late Frank Remai ("Frank") from the Minister of National Revenue's reassessment of Frank's tax liability for the taxation year 2001. In that reassessment, the Minister disallowed the charitable tax credit of $2,996,288 claimed by Frank in respect of a donation of two promissory notes to the Frank and Ellen Remai Foundation ("Foundation"), a registered private

charitable foundation. Frank was the Foundation's controlling mind and made its decisions. He died in August 2001.

[2] The issues to be decided in this appeal are whether the Tax Court Judge erred when he found that: (i) the disposition of the notes by the Foundation to a third party was an arm's length transaction, and (ii) the disposition was not a misuse of provisions of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) ("*ITA*") and thus was not caught by the general anti-avoidance rule ("GAAR") in *ITA*, section 245. The provisions of the *ITA* relevant to this appeal are set out in an Appendix to these reasons.

[3] In my view, the Judge committed no reversible error in concluding that the transaction was at arm's length and was not caught by the GAAR. Accordingly, I would dismiss the appeal.

B. FACTUAL BACKGROUND

[4] The evidence before the Tax Court comprised a partial agreed statement of facts, and oral testimony from Ronald Grozell (Frank's accountant and the chief financial officer of Frank's corporate group of approximately 32 companies) and Darrell Remai ("Darrell"), Frank's nephew.

[5] F. R. Management Ltd. ("FRM") was the administrative company of the corporate group and was entirely owned by Frank. The group's businesses included real estate, commercial and residential development, hotels, and oil and gas. FRM received the income from members of the corporate group and flowed it out to Frank.

[6] In 1998 and 1999, FRM issued two interest bearing promissory notes to Frank as payment for management fees that he had earned in those years. The 1998 note was for $4 million, and the 1999 note was for $6.5 million. Frank endorsed the notes to the Foundation on the same day that they were issued to him. The terms of the gift contained a direction that the notes were to be held by the Foundation for a period of no less than ten years and a day. The Foundation issued charitable receipts to Frank for the face value of the notes. FRM paid the Foundation interest on the notes at the prescribed rate. Frank declared the amounts of the notes on his income tax returns for the years in question.

[7] Each year since 1992, Frank had given promissory notes that he had received from FRM to the Foundation with a direction to retain them for ten years. The Foundation had never encroached on its capital and was able to meet its disbursement quota from the 6% interest payable on FRM's notes. By 2004, the Foundation had accumulated capital of more than $27 million, comprised largely of FRM's notes.

[8] Before 1998, Frank had received charitable tax credits for the face value of the notes. However, the Minister disallowed the charitable tax credits claimed by Frank for the taxation years 1998 and 1999, on the ground that the notes were "non-qualifying securities", since they had been issued by a person (FRM) with which the taxpayer, Frank, was not dealing at arm's length. Mr Grozell had been unaware that *ITA*, paragraphs 118.1(13)(*a*) and 118.1(18)(*a*), introduced by the 1997 Budget, had tightened the rules surrounding charitable giving by making gifts of "non-qualifying securities" ineligible for a charitable tax credit.

[9] After realizing that the 1998 and 1999 gifts did not qualify for the credit, Mr Grozell discovered that, by virtue of *ITA*, paragraph 118.1(13)(*c*), a non-qualifying security ceased to be non-qualifying if the charity to which the security had been given disposed of it to a third party with whom the donor dealt at arm's length. In order to take advantage of this provision, Mr Grozell proposed that the Foundation should sell the notes to a third party who was at arm's length to Frank as the original donor.

[10] One possibility considered was that, in order to retire the FRM notes, the Foundation would borrow $15.5 million from the bank with which Frank dealt. However, the bank responded that it would require the Foundation to take out a GIC term deposit with the money that it received from FRM. This was unattractive to FRM because the bank would charge an interest spread on the loan and the GIC, which would cost the Foundation $40,000.

[11] Another possibility considered was that a company, Big Sky (Grozell) Drilling Inc. ("Big Sky"), which was owned by Mr Grozell and his wife, would purchase the notes. However, this idea was not feasible because Big Sky was not regarded as having the financial resources necessary to undertake a transaction of this magnitude.

[12] Mr Grozell and Frank then had an informal meeting with Darrell who was asked if he would be willing to accommodate Frank. The proposal was that Sweet Developments Ltd. ("Sweet"), a company in which Darrell owned 90% of the shares (the remainder were owned by Mr Grozell through Big Sky), and which Darrell controlled, would purchase the notes from the Foundation in

exchange for an identical note from Sweet. Two other notes issued by FRM and held by the Foundation, totalling $5 million, were to be included in the transaction. Darrell asked for time to consider this proposal and to review it with his advisers.

[13] Through Sweet, Darrell had acted as project manager, supplier of labour, and general contractor for some of Frank's real estate developments. Through a partnership with one of Frank's companies, Sweet also had a 25% equity interest in seniors' retirement projects which they had developed and operated.

[14] As a result of his business dealings with Frank, Darrell was aware that FRM had a value that far exceeded Sweet's, as well as a very large cash flow, and would therefore be in a position to honour the notes if Sweet bought them from the Foundation. In fact, Frank's corporate group had a gross revenue of more than $125 million in 2001. As of January 1, 2001, Sweet had assets of $1,236, 691, and a net income of just over one million dollars.

[15] Frank consulted a lawyer, who advised him that the proposed transaction was legal and exposed Sweet to no significant risk because FRM had the financial depth to honour the notes. He also spoke to an accountant who did not appear to have understood the transaction and offered no meaningful advice.

[16] Accordingly, on July 4, 2001, Sweet purchased the 1998 and 1999 notes (together with two other FRM notes) for their face value of $15 million, in exchange for a promissory note of its own

for $15, 971,369.48, which included interest that had accrued on the notes. Frank claimed a charitable tax credit of $2,996,288 in 2001, on the basis that the 1998 and 1999 notes which he had previously given to the Foundation had ceased to be non-qualifying securities as a result of their arm's length sale to Sweet.

[17] The Minister again disallowed the credit, because Frank and Sweet were not dealing at arm's length in the sale of the notes, which therefore remained non-qualifying securities. Ellen Remai appealed this reassessment in her capacity as the executrix of Frank's estate.

[18] After the appeal was filed, the Crown amended its pleadings on consent, in order to defend on the further ground that, even if the sale of the notes was an arm's length transaction, it was a misuse or abuse of the relevant provisions of the *ITA* and, as such, was caught by the GAAR in section 245.

C. DECISION OF THE TAX COURT

[19] In allowing the appeal, the Judge based his decision on three findings. First, subsection 251(1) deemed Frank and Sweet to be dealing at arm's length in the sale of the notes by the Foundation to Sweet. Second, and in the alternative, Frank and Sweet were in fact dealing at arm's length in this transaction. Third, while the sale of the notes by the Foundation to Sweet produced a tax benefit to Frank and was entered into primarily for tax avoidance reasons, it did not constitute a misuse or abuse of provisions of the Act within the meaning of subsection 245(4). The decision is reported as *Ellen Remai v. The Queen*, 2008 TCC 344.

[20] In my opinion, the Judge committed no error warranting the intervention of the Court. I would therefore dismiss the Crown's appeal. However, in my respectful view, and as counsel for the respondent conceded, the Judge misinterpreted paragraph 251(1)(*c*) of the *ITA.* Although this error was not material to the decision, clarification of the issue by this Court may avoid future confusion.

D. ISSUES AND ANALYSIS

ISSUE 1*:* Does *ITA*, paragraph 251(1)(*c*) apply to a relationship that is governed by neither paragraph (*a*) nor paragraph (*b*)?

[21] The subsection provides as follows.

251.(1) For the purposes of this Act,	251.(1) Pour l'application de la présente loi:
(a) related persons shall be deemed not to deal with each other at arm's length;	*a)* des personnes liées sont réputées avoir entre elles un lien de dépendance;
(b) a taxpayer and a personal trust (other than a trust described in any of paragraphs *(a)* to *(e.1)* of the definition "trust" in subsection 108(1)) are deemed not to deal with each other at arm's length if the taxpayer, or any person not dealing at arm's length with the taxpayer, would be beneficially interested in the trust if subsection 248(25) were read without reference to subclauses 248(25)*(b)*(iii)(A)(II) to (IV); and	*b)* un contribuable et une fiducie personnelle (sauf une fiducie visée à l'un des alinéas *a)* à *e.1)* de la définition de « fiducie » au paragraphe 108(1)) sont réputés avoir entre eux un lien de dépendance dans le cas où le contribuable, ou une personne avec laquelle il a un tel lien, aurait un droit de bénéficiaire dans la fiducie si le paragraphe 248(25) s'appliquait compte non tenu de ses subdivisions *b)*(iii)(A)(II) à (IV);
(c) where paragraph *(b)* does not apply, it is a question of fact whether persons not related to each other are at a particular time dealing with each other at arm's length.	*c)* en cas d'inapplication de l'alinéa *(b)*, la question de savoir si des personnes non liées entre elles n'ont aucun lien de dépendance à un moment donné est une question de fait.

[22] Having found that neither paragraph (*a*) nor paragraph (*b*) applied to the facts before him, the Judge concluded that paragraph (*c*) could not apply either. Although the Judge's reasoning on

this point (see paragraphs 25-26) is not easy to follow, he appears to have interpreted paragraph (*c*) as applying when only paragraph (*b*) does not, because it starts by stating "where paragraph (*b*) does not apply …".

[23] The Judge referred to *Bill C-10*, which proposes to amend paragraph (*c*) by deleting the opening words, "where paragraph (*b*) does not apply …", and substituting "in any other case…". As the Judge noted, the purpose of this amendment is to clarify that paragraph (*c*) applies when paragraphs (*a*) and (*b*) do not. In other words, *Bill C-10* would make it clear that paragraph (*c*) is a default provision. The Judge was of the view that it was not the role of the Court to give effect to amendments to the *ITA* prior to their enactment.

[24] I agree with this last observation. The existence of a proposal to amend legislation in order to clarify its meaning is generally of little relevance to a court's interpretation of the existing statutory text. Subsection 251(1) must be interpreted in light of its text, context, and purposes, although in the interpretation of taxing statutes the text may often be given more weight than it is in the interpretation of other statutes: *Placer Dome Canada Ltd. v. Ontario (Minister of Finance),* 2006 SCC 20, [2006] 1 S.C.R. 715 at para. 21. On the basis of this approach, a court may conclude that the statutory provision in dispute already bears the meaning that an amendment seeks to clarify.

[25] As counsel for the respondent conceded, a problem with the Judge's interpretation of subsection 251(1) is that if paragraph (*c*) does not apply when paragraphs (*a*) and (*b*) do not apply, it is difficult to think of situations in which it will apply. Parliament is presumed not to intend

provisions to have no practical application. Further, it is difficult to understand what legislative purpose would be advanced by an interpretation of paragraph (*c*) which in effect deems all persons to be dealing at arm's length who are not deemed by paragraphs (*a*) and (*b*) not to be dealing at arm's length.

[26] The Judge's interpretation thus effectively precludes a court from determining whether persons not covered by paragraphs (*a*) and (*b*) are in fact dealing at arm's length. However, elsewhere in the *ITA*, Parliament directs a factual inquiry as to whether individuals were dealing at arm's length: see, for example, *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79 ("*McLarty*"), a case involving the arm's length provision in *ITA*, paragraph 69(1)(*a*). Writing for the majority of the Court, Justice Rothstein said (at para. 45): "The parties in this case were not related. It is therefore a question of fact whether they were dealing at arm's length". Why Parliament would not intend a similar inquiry to be made under subsection 251(1) eludes me.

[27] The legislative history of subsection 251(1) is also instructive on the meaning of the present paragraph 251(1)(*c*). Before 2001, when the current paragraph 251(1)(*b*) was added, what is now paragraph (c) (then paragraph (*b*)) applied when paragraph (*a*) did not. Thus, whenever parties were not "related persons", as defined in paragraph 251(2)(*a*), who are deemed by paragraph 251(1)(*a*) not to be dealing at arm's length, then paragraph (*b*) provided that it was a question of fact whether they were dealing at arm's length at a particular time. There is no reason to suppose that, by adding the current paragraph (*b*), Parliament intended to preclude a factual inquiry into the arm's length

nature of a transaction between parties who were not in a relationship to which either paragraph (*a*) or (*b*) applies.

[28] Moreover, the text of paragraph (*c*) does not compel the interpretation adopted by the Judge, because it does not say that it applies when paragraph (*b*) alone does not apply. It simply says that if paragraph (*b*) does not apply, which it did not in the present case, paragraph (*c*) does. It is implicit in the scheme of the subsection that paragraph (*c*) applies if neither paragraph (*a*) nor paragraph (*b*) applies. This is because it is only necessary to consider paragraph (*b*) if paragraph (*a*) does not apply, and it is only necessary to consider paragraph (*c*) if paragraph (*b*) does not apply.

[29] While Parliament could have avoided the problem that has arisen here by stating that paragraph (*c*) applies when neither paragraph (*a*) nor paragraph (*b*) applies, the less than perfect drafting of the provision does not warrant an interpretation that makes a nonsense of the subsection and takes no account of its history, purpose or structure.

[30] Nonetheless, as I have already observed, since the Judge proceeded to conduct a factual inquiry as to whether the sale of the notes was at arm's length, his misinterpretation of subsection 251(1) is not material to his decision.

ISSUE 2: Did the Judge err in concluding that the sale of the notes by the Foundation to Sweet was an arms-length transaction?

[31] The Judge applied the analytical framework adopted in *Peter Cundill & Associates Ltd. v. The Queen*, [1991] 1 C.T.C. 197 (Fed. T.D.), aff'd. [1991] 2 C.T.C. 221 (Fed. C.A.) ("*Peter*

Cundill"), and applied in *McLarty* at para. 64 and following, in order to determine if Sweet and Frank were dealing at arm's length when the Foundation sold the notes to Sweet in exchange for Sweet's note of the same value and bearing the same rate of interest.

[32] *Peter Cundill* requires a court to consider if: (i) there was a common mind directing the bargaining for both parties; (ii) they were acting in concert without separate interests; and (iii) one party exercised *de facto* control over the other. As with any multi-factor legal test, not all need be satisfied in every case. Some may assume particular importance in some circumstances, and others less. Nor are the listed factors necessarily exhaustive.

[33] The Crown concedes that *Peter Cundill* is the proper legal test, but argues that the Judge erred in law by failing to ask whether "the terms of the transactions … reflect ordinary commercial dealings between … [parties] acting in their own interests" (*per* Sharlow J.A. in *Petro-Canada v. The Queen*, 2004 FCA 158, 2004 DTC 6329 at para. 55).

[34] In my opinion, this is not an error of law, because whether the terms of a transaction reflect "ordinary commercial dealings between parties acting in their own interests" is not a separate requirement of the legal tests for determining if a transaction is at arm's length. Rather, the phrase is a helpful definition of an arm's length transaction which it is the purpose of the components of the *Peter Cundill* analytical framework to identify. It may also enable a judge to reflect on the soundness of the conclusion to which an application of the individual *Peter Cundill* factors has led.

[35] Absent a readily extricable question of law, which I am not persuaded exists in this case, the application of the law to the facts is a question of mixed fact and law. This Court may thus only interfere with the Judge's conclusion that the transaction was at arm's length if satisfied that he committed a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *McLarty* at paras. 70-73.

[36] The idea expressed by the words "palpable and overriding error", as applied to either purely factual questions or questions of mixed fact and law, is also captured by the words, "plainly wrong" and "unreasonable": see Donald J. M. Brown, *Civil Appeals* (Toronto: Canvasback Publishing Inc., 2009) at 14:4220. However formulated, the standard does not permit an appellate court to reweigh the facts or the evidence that were before the trial court. Intervention is not warranted on the ground that the appellate court would have reached a different conclusion if it had been the trier of fact. That a judge does not refer to every relevant fact constitutes neither palpable and overriding error, nor error of law.

[37] Applying the first of the *Peter Cundill* factors, the Judge concluded that there was no "common mind" directing the bargaining for both parties because Sweet was not controlled by Frank, directly or indirectly, and entered freely into the transaction after considering its own interests. On the other hand, it is clear that the idea of the exchange of notes came solely from Frank and Mr Grozell, the purposes of the transaction were to benefit Frank and the Foundation, and there was no bargaining over the terms of the exchange. While Sweet sought professional opinions on the legality of the transaction and the financial risk involved, there is no doubt that Frank drove the

proposal. Indeed, Darrell testified that, while he assumed that the transaction had a business purpose, he did not know what it was and did not ask (Appeal Book, pp. 246-47).

[38] As part of his finding that there was no common mind and in his consideration of the second factor, namely whether the parties had separate interests, the Judge found that Frank's interest was in solving his tax problem and the Foundation's in not losing the amount of interest that would have had to be paid to the bank for purchasing the notes. I agree.

[39] The transaction did not provide any monetary benefit to Sweet, because the notes involved were for identical amounts and bore the same rate of interest, and Sweet charged no fee fior entering into the transaction. Nonetheless, the Judge identified three separate interests that Sweet had in the transaction.

[40] First, he found that Darrell hoped to further solidify Sweet's business relationship with Frank by accommodating him as requested. This does not appear to have been a significant consideration. The only evidence that Sweet's interest in the transaction was to strengthen its business relationship with Frank came from Mr Grozell, who said, in response to questions from the Judge after he had been examined and cross-examined by counsel, that the transaction would benefit Sweet by "solidifying business relationships" (Appeal Book, p. 181).

[41] However, when giving his evidence, Darrell was twice asked what Sweet expected to get out of the transaction. On neither occasion did he mention solidifying Sweet's business relationship

with Frank, although he did say that he had heard his uncle say to others, but not to him, “You scratch my back, and I’ll scratch yours” (Appeal Book, p. 234). Further, no offer of more business was made by Frank, and the transaction contained no term to that effect. Indeed, there is no evidence that the possibility of further business dealings as a result of Sweet’s purchasing the notes was ever discussed.

[42] Second, Darrell testified that he thought that Sweet’s bank would be impressed by the amounts of the notes and, as a result, would be more disposed to increase its credit. It is not clear, however, that a bank would be impressed by the in-and-out flow of more than $15 million in Sweet’s account when the notes were called in. This is not a weighty consideration either way.

[43] Third, and more significant, since Sweet was potentially liable on its note, Darrell needed to be assured that FRM would be able to honour the notes which it had issued to Frank and which Sweet had purchased from the Foundation. Darrell testified that he knew enough about Frank’s businesses to be confident that this was not a problem, and had received professional advice to this effect. Nonetheless, this is not to say that he would have agreed to the transaction regardless of the amounts involved: Sweet was at risk to the extent that FRM could not honour its notes.

[44] In my opinion, this is a particularly important indicator that Sweet had a separate interest in the transaction in the context of the *ITA* provisions relevant to this case. The principal concern underlying the “non-qualifying security” provision was the Minister’s difficulty of valuing a share in a private company or an obligation issued to a non-arm’s length donor by someone other than a

financial institution: William I. Innes & Patrick J. Boyle, “Shaky Foundations? A Defence of Special Rules for Private Foundations” (2005), 53 *Can. Tax J.* 739.

[45] Whatever its facial amount, a note’s value depends ultimately on the ability of the issuer to honour it. If the donee of the note (that is, the charity) disposes of it to a third person in an arm’s length transaction, the problem is largely solved. It can be assumed that the third person will have investigated the financial position of the issuer in order to ensure that it can honour the note at its face value. Accordingly, if the third person purchases the note for its face value, the Minister can assume that this is what it is worth, and give the donor a tax credit for the amount.

[46] Applying the third *Peter Cundill* factor, the Judge found that Frank did not exercise *de facto* control over Sweet, although their business history and the much larger size of Frank’s companies, indicated that Frank would have some influence over it. This, in my view, is a fair description of the relationship. While Frank no doubt exercised a degree of influence over Darrell by virtue of their family relationship and business connections, it is also clear that their business dealings had been mutually beneficial. Nor was Sweet entirely dependent on Frank for its business.

[47] It is true that, having addressed the *Peter Cundill* factors one at a time, the Judge did not stand back and ask whether, when considered in its complete factual context, the transaction constituted an ordinary commercial transaction between parties who were acting in their own interests. As I indicated earlier, he was not required as a matter of law to ask this question, although

it can be helpful in enabling the judge to review the conclusion reached on the basis of the *Peter Cundill* factors as to whether the transaction was at arm's length.

[48] I would only say that "ordinary commercial transactions" come in a variety of shapes and sizes, and the fact that it may seem that a transaction has been entered into largely as a favour by one party to the other does not necessarily mean that it cannot also be at arm's length. It all depends on the particular facts. On basis of those before him, it was not a palpable and overriding error, unreasonable, or plainly wrong for the Judge to characterize Sweet's purchase of the FRM notes from the Foundation as an arm's length transaction. Nor did the Judge err in law by not expressly addressing in his reasons every aspect of either the relationship between Frank and Darrell or the transaction itself.

[49] Having found that the Judge committed no reversible error in concluding that the transaction fell within the "redemptive" provision, *ITA*, paragraph 118.1(13)(*c*), I must now consider the Judge's conclusion that, since the Foundation's disposition of the notes to Sweet was not a misuse of the relevant provisions of section 118.1, the GAAR could not deprive Frank's estate of the charitable tax credit to which it was otherwise entitled by virtue of paragraph 118.1(13)(*c*).

ISSUE 3: Did the sale of the notes by the Foundation to Sweet constitute a misuse or abuse of section 118.1(13) within the meaning of section 245?

[50] For the purposes of this appeal, the parties are agreed on the following.

[51] First, the sale of FRM's notes by the Foundation to Sweet produced a tax benefit to Frank and was an "avoidance transaction" because it was entered into primarily for tax avoidance reasons. Hence, the only GAAR issue now in dispute is whether the transaction was a misuse or abuse of the provisions of the *ITA* dealing with "non-qualifying security".

[52] Second, in order to answer this question, it is necessary to determine the legislative object, spirit, and purpose underlying those provisions and whether it would frustrate them to allow the tax benefit claimed by the taxpayer.

[53] Third, identifying the purposes of statutory provisions is a question of law involving the interpretation of the Act, and the Judge's determination of this question is reviewable on a standard of correctness.

[54] Fourth, whether the transaction under scrutiny constitutes a misuse or abuse of those provisions is a question of mixed fact and law and is reviewable for palpable and overriding error. Authority for these last two propositions is provided by *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paras. 44, 65-66.

[55] The Judge found that the purpose of paragraph 118.1(13)(*c*) was to enable a taxpayer to "redeem" an intended charitable gift, which did not take effect because it was a "non-qualifying security", by causing the donee to dispose of the note to an arm's length third party. The Judge held that since the sale of the FRM notes to Sweet was consistent with this purpose, it was not a misuse

or abuse of the provision. He rejected as unfounded in the evidence the Minister's argument that the provisions were aimed at preventing a person from obtaining a charitable tax credit while retaining control of the funds underlying the gift.

[56] I agree with the Judge's conclusion, although I would explain it a little differently. As I have already stated, a purpose of subsection 118.1(18) in disqualifying certain gifts from a charitable tax credit is because of the practical difficulty of assessing their fair market value. Paragraph 118.1(13)(*c*) permits taxpayers to claim the credit if, within the prescribed time, the charity disposes of the "non-qualifying security" to a third party in an arm's length transaction. The price paid by the third party for the security can be taken to be its fair market value. Thus, the arm's length sale to Sweet by the Foundation of FRM's notes, in exchange for a note from Sweet for the same amount, provides a reliable basis for the Minister to treat the face value of FRM's notes as their fair market value, and to allow the charitable tax credit claimed in respect of this amount.

[57] The Crown argues that the 1997 amendments to the *ITA* were intended to prevent donors from claiming a charitable tax credit for the capital value of a gift when they still retained control of the funds from which the obligation would be satisfied. Counsel says that the sale of the notes really changed nothing: the Foundation held only promissory notes, and FRM retained the use the capital amount owing on them. Consequently, it was said, the transaction must have been a misuse or abuse of subsection 118.1(13)(*c*).

[58] I do not agree. Nothing in the text of the provision supports this purpose. On the other hand, the 1997 Budget statement provides that the new measure will deal with loan-backs, which have been used to enable taxpayers to claim tax credits for charitable gifts without having to forego use of the funds: David M. Sherman ed., *Income Tax Act Technical Notes* 10th edn. (Toronto: Carswell, 1998), p. 885. Indeed, the problem of the retention of the use of the capital in respect of loan-back transactions is specifically dealt with by subsections 118.1(16) and (17). The retention of the use of funds after a charitable tax credit was claimed had been identified as a problem in relation to loan-backs: see M. Elena Hoffstein, "Private Foundations and Charitable Foundations", *Report of Proceedings of Fifty-Ninth Tax Conference*, 2007 Tax Conference (Toronto: Canadian Tax Foundation, 2008), 32:1-35.

[59] The transaction in question in the present case is not a loan-back. On the basis of the submissions made by the Crown, I am not persuaded that a significant purpose of the more general provisions of subsections 118.1(13) and (18) was to deal with the issue of taxpayers' retention of the use of funds for which they have received a charitable tax credit.

[60] In any event, the arm's length sale of the note to Sweet removed from Frank's control the time at which FRM could be called on to honour its notes. In addition, the fact that selling the notes to the bank seems, but for the price involved, to have been the first option considered for solving Frank's tax problem suggests that the retention of control of the funds was not the motivating consideration for the sale.

[61] Hence, the Judge made no reversible error in concluding that the sale of the notes was not a misuse or abuse of subsection 18.1(13) and therefore section 245 did not remove the charitable tax credit to which paragraph 118.1(13)(*c*) entitled the taxpayer.

E. CONCLUSIONS

[62] For these reasons, I would dismiss the appeal with costs.

"John M. Evans"
J.A.

"I agree
Carolyn Layden-Stevenson J.A."

"I agree
Johanne Trudel J.A."

APPENDIX

Income Tax Act R.S.C. 1985, c.1 (5th Supp.)

118.1.(13) For the purpose of this section (other than this subsection), where at any particular time an individual makes a gift (including a gift that, but for this subsection and subsection 118.1(4), would be deemed by subsection 118.1(5) to be made at the particular time) of a non-qualifying security of the individual and the gift is not an excepted gift,

(a) except for the purpose of applying subsection 118.1(6) to determine the individual's proceeds of disposition of the security, the gift is deemed not to have been made;

(b) if the security ceases to be a non-qualifying security of the individual at a subsequent time that is within 60 months after the particular time and the donee has not disposed of the security at or before the subsequent time, the individual is deemed to have made a gift to the donee of property at the subsequent time and the fair market value of that gift is deemed to be the lesser of the fair market value of the security at the subsequent time and the amount of the gift made at the particular time that would, but for this subsection, have been included in the individual's total charitable gifts or total Crown gifts for a taxation year;

(c) if the security is disposed of by the donee within 60 months after the particular time and paragraph *(b)* does not apply to the security, the individual is deemed to

118.1(13) Lorsqu'un particulier fait don de son titre non admissible à un moment donné (y compris un don qui, si ce n'était le présent paragraphe et le paragraphe (4), serait réputé par le paragraphe (5) être fait au moment donné) et que le don n'est pas un don exclu, les règles suivantes s'appliquent dans le cadre du présent article, à l'exception du présent paragraphe :

a) sauf pour l'application du paragraphe (6) aux fins du calcul du produit de disposition du titre pour le particulier, le don est réputé ne pas avoir été fait;

b) si le titre cesse d'être un titre non admissible du particulier à un moment ultérieur au cours des 60 mois suivant le moment donné et si le donataire ne dispose pas du titre au moment ultérieur ou antérieurement, le particulier est réputé avoir fait un don de bien au donataire au moment ultérieur, et la juste valeur marchande de ce don est réputée égale à la juste valeur marchande du titre au moment ultérieur ou, s'il est inférieur, au montant du don fait au moment donné qui, n'eût été le présent paragraphe, aurait été inclus dans le total des dons de bienfaisance ou le total des dons à l'État du particulier pour une année d'imposition;

c) si le donataire dispose du titre dans les 60 mois suivant le moment donné et si l'alinéa *b)* ne s'applique pas au titre, le particulier est réputé avoir fait un don de

have made a gift to the donee of property at the time of the disposition and the fair market value of that gift is deemed to be the lesser of the fair market value of any consideration (other than a non-qualifying security of the individual or a property that would be a non-qualifying security of the individual if the individual were alive at that time) received by the donee for the disposition and the amount of the gift made at the particular time that would, but for this subsection, have been included in the individual's total charitable gifts or total Crown gifts for a taxation year; and

bien au donataire au moment de la disposition, et la juste valeur marchande de ce don est réputée égale à la juste valeur marchande de toute contrepartie (sauf un titre non admissible du particulier ou un bien qui serait un titre non admissible du particulier si celui-ci était vivant à ce moment) reçue par le donataire pour la disposition ou, s'il est inférieur, au montant du don fait au moment donné qui, n'eût été le présent paragraphe, aurait été inclus dans le total des dons de bienfaisance ou le total des dons à l'État du particulier pour une année d'imposition;

(d) a designation under subsection 118.1(6) or 110.1(3) in respect of the gift made at the particular time may be made in the individual's return of income for the year that includes the subsequent time referred to in paragraph 118.1(13)*(b)* or the time of the disposition referred to in paragraph 118.1(13)*(c)* (emphasis added).

d) le don fait au moment donné peut être indiqué, aux termes des paragraphes (6) ou 110.1(3), dans la déclaration de revenu du particulier pour l'année qui comprend le moment ultérieur visé à l'alinéa *b)* ou le moment de la disposition visé à l'alinéa *c)*.

118.1.(18) For the purposes of this section, "non-qualifying security" of an individual at any time means

118.1(18) Pour l'application du présent article, est un titre non admissible d'un particulier à un moment donné :

(a) an obligation (other than an obligation of a financial institution to repay an amount deposited with the institution or an obligation listed on a designated stock exchange) of the individual or the individual's estate or of any person or partnership with which the individual or the estate does not deal at arm's length immediately after that time;

a) une créance (à l'exception de l'obligation d'une institution financière de rembourser un montant déposé auprès d'elle et d'une créance cotée à une bourse de valeurs désignée) dont est débiteur le particulier, sa succession ou une personne ou société de personnes avec laquelle le particulier ou sa succession a un lien de dépendance immédiatement après ce moment;

(b) a share (other than a share listed on a designated stock exchange) of the capital stock of a corporation with which the individual or the estate or, where the individual is a trust, a person affiliated with the trust, does not deal at arm's length immediately after that time;

b) une action (à l'exception d'une action cotée à une bourse de valeurs désignée) du capital-actions d'une société avec laquelle le particulier, sa succession ou, si le particulier est une fiducie, toute personne qui lui est affiliée a un lien de dépendance immédiatement après ce moment;

(b.1) a beneficial interest of the individual or the estate in a trust that

(i) immediately after that time is affiliated with the individual or the estate, or
(ii) holds, immediately after that time, a non-qualifying security of the individual or estate, or held, at or before that time, a share described in paragraph (b) that is, after that time, held by the donee; or

b.1) un droit de bénéficiaire du particulier ou de sa succession dans une fiducie qui, selon le cas :

(i) est affiliée au particulier ou la succession immédiatement après ce moment,
(ii) détient, immédiatement après ce moment, un titre non admissible du particulier ou de la succession ou détenait, à ce moment ou antérieurement, une action visée à l'alinéa *b)* qui est détenue par le donataire après ce moment;

(c) any other security (other than a security listed on a designated stock exchange) issued by the individual or the estate or by any person or partnership with which the individual or the estate does not deal at arm's length (or, in the case where the person is a trust, with which the individual or estate is affiliated) immediately after that time.

c) tout autre titre (à l'exception d'un titre coté à une bourse de valeurs désignée) émis par le particulier, par sa succession ou par toute personne ou société de personnes avec laquelle le particulier ou sa succession a un lien de dépendance (ou, dans le cas où la personne est une fiducie, avec laquelle le particulier ou sa succession est affiliée) immédiatement après ce moment.

245.(2) Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax

245.(2) En cas d'opération d'évitement, les attributs fiscaux d'une personne doivent être déterminés de façon raisonnable dans les circonstances de façon à supprimer un avantage fiscal qui, sans le présent article,

benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.

découlerait, directement ou indirectement, de cette opération ou d'une série d'opérations dont cette opération fait partie.

245.(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction

245.(4) Le paragraphe (2) ne s'applique qu'à l'opération dont il est raisonnable de considérer, selon le cas :

(a) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of

(i) this Act,
(ii) the Income Tax Regulations,
(iii) the Income Tax Application Rules,
(iv) a tax treaty, or
(v) any other enactment that is relevant in computing tax or any other amount payable by or refundable to a person under this Act or in determining any amount that is relevant for the purposes of that computation; or

a) qu'elle entraînerait, directement ou indirectement, s'il n'était pas tenu compte du présent article, un abus dans l'application des dispositions d'un ou de plusieurs des textes suivants :

(i) la présente loi,
(ii) le *Règlement de l'impôt sur le revenu*,
(iii) les *Règles concernant l'application de l'impôt sur le revenu*,
(iv) un traité fiscal,
(v) tout autre texte législatif qui est utile soit pour le calcul d'un impôt ou de toute autre somme exigible ou remboursable sous le régime de la présente loi, soit pour la détermination de toute somme à prendre en compte dans ce calcul;

(b) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.

b) qu'elle entraînerait, directement ou indirectement, un abus dans l'application de ces dispositions compte non tenu du présent article lues dans leur ensemble.

251.(1) For the purposes of this Act,	251.(1) Pour l'application de la présente loi:
(a) related persons shall be deemed not to deal with each other at arm's length;	*a)* des personnes liées sont réputées avoir entre elles un lien de dépendance;
(b) a taxpayer and a personal trust (other than a trust described in any of paragraphs *(a)* to *(e.1)* of the definition "trust" in subsection 108(1)) are deemed not to deal with each other at arm's length if the taxpayer, or any person not dealing at arm's length with the taxpayer, would be beneficially interested in the trust if subsection 248(25) were read without reference to subclauses 248(25)*(b)*(iii)(A)(II) to (IV); and	*b)* un contribuable et une fiducie personnelle (sauf une fiducie visée à l'un des alinéas *a)* à *e.1)* de la définition de « fiducie » au paragraphe 108(1)) sont réputés avoir entre eux un lien de dépendance dans le cas où le contribuable, ou une personne avec laquelle il a un tel lien, aurait un droit de bénéficiaire dans la fiducie si le paragraphe 248(25) s'appliquait compte non tenu de ses subdivisions *b)*(iii)(A)(II) à (IV);
(c) where paragraph *(b)* does not apply, it is a question of fact whether persons not related to each other are at a particular time dealing with each other at arm's length (emphasis added).	*c)* en cas d'inapplication de l'alinéa *b)*, la question de savoir si des personnes non liées entre elles n'ont aucun lien de dépendance à un moment donné est une question de fait.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-464-08
(APPEAL FROM A JUDGMENT OF THE HONOURABLE E.P. ROSSITER DATED AUGUST 19, 2008, DOCKET: 2007-1132(IT)G)	
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA and ELLEN REMAI, AS EXECUTRIX OF THE ESTATE OF FRANK REMAI
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	October 8, 2009
REASONS FOR JUDGMENT BY:	Evans J.A.
CONCURRED IN BY:	Layden-Stevenson J.A. Trudel J.A.
DATED:	November 19, 2009

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